

JUSTICE ON THE BENCH?

Trial and Adjudication in Criminal Court

In our courts, when it's a white man's word against a black man's, the white man always wins. They're ugly but those are the facts of life. The one place where a man ought to get a square deal is a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box.

—HARPER LEE, *TO KILL A MOCKINGBIRD*¹

LEARNING OBJECTIVES

In this chapter, we focus on trial and adjudication in criminal court. We begin with an examination of race and the jury selection process. We focus on both the procedures used to select the jury pool and the process of selecting the jurors for a particular case. We also discuss the role that race plays in exonerations in rape cases and the issue of “playing the race card” in a criminal trial. We end the chapter by summarizing the scholarly debate surrounding the issue of racially based jury nullification.

After you have read this chapter:

1. You should be able to discuss the role of the jury and explain how the U.S. Supreme Court has interpreted the requirement that jurors be chosen from a random cross-section of the population.
2. You should be able to explain how race and ethnicity continue to be taken into consideration during the jury selection process.

3. You should be able to evaluate competing arguments regarding the peremptory challenge and whether it should be eliminated.
4. You should be able to explain the concept of jury nullification and assess competing arguments regarding the legitimacy of race-based nullification.
5. You should be able to clarify why Randall Kennedy asserts that playing the race card in a criminal trial is “virtually always morally and legally wrong.”

RACE/ETHNICITY AND THE CRIMINAL TRIAL

In 1997, Orange County (California) Superior Court Judge Everett Dickey reversed Geronimo Pratt's 1972 conviction for first-degree murder, assault with intent to commit murder, and robbery.² Pratt, a decorated Vietnam War veteran and a leader in the Black Panther Party, was accused of killing Caroline Olsen and shooting her ex-husband Kenneth Olsen on the Lincoln Park tennis court in Santa Monica. Pratt, who claimed he had been in Oakland on Black Panther business at the time of the crime, was convicted based in large part on the testimony of another member of the Black Panther Party, Julius Butler. It was later revealed that Butler had been a paid police informant and that police and prosecutors in Los Angeles conspired to keep this information from the jury hearing Pratt's case.

Over the next 25 years, Pratt's lawyers filed a series of appeals, arguing that Pratt's conviction “was based on false testimony knowingly presented by the prosecution.”³ Their requests for a rehearing were repeatedly denied by California courts, and the Los Angeles District Attorney's Office refused to reopen the case. Then, in May 1997, Judge Dickey granted Pratt's petition for a writ of habeas corpus and reversed his conviction. Citing errors by the district attorney who tried the case, Judge Dickey stated, “The evidence which was withheld at the trial, Julius Butler and his activities could have put the whole case in a different light and failure to timely disclose it undermines confidence in the verdict.”⁴

Pratt—who spent 25 years in prison, including 8 years in solitary confinement—was released on June 10, 1997. In April 2000, Pratt's lawsuit for false imprisonment and violation of his civil rights was settled out of court: the City of Los Angeles agreed to pay Pratt \$2.75 million, and the federal government agreed to pay him \$1.75 million. Pratt's attorney, Johnnie Cochran, Jr., described the settlement as “unprecedented” and praised Pratt for “the relentless pursuit of justice.” Cochran also stated that the settlement puts “to rest a matter that has dragged on for more than three decades.”⁵

Trial and Adjudication in the Twenty-First Century

We began the previous chapter with a discussion of the Scottsboro case, a case involving nine young African-American males who were convicted of raping white girls in the early 1930s. We noted that the defendants were tried by white juries and that the Supreme Court overturned their convictions because of the systematic exclusion of African Americans from the jury pool.

However, the Scottsboro Boys were tried in the 1930s, and much has changed since then. Race relations have improved, and decisions handed down by the Supreme Court have made it increasingly difficult for court systems to exclude African Americans from jury service. Nevertheless, "racial prejudice still sometimes seems to sit as a 'thirteenth juror.'"⁶ As the Geronimo Pratt case reveals, the court system is not racially neutral. All-white juries continue to convict African-American defendants on less-than-convincing evidence. All-white juries continue to acquit whites who victimize African Americans despite persuasive evidence of guilt. And police and law enforcement officials sometimes bend the law in their zeal to obtain a conviction. Consider the following cases:

1991: Four white Los Angeles police officers were charged in the beating of Rodney King, an African-American man stopped for a traffic violation. A videotape of the incident, which showed the officers hitting King with their batons and kicking him in the head as he lay on the ground, was introduced as evidence at the trial. Los Angeles exploded in riots after a jury composed of 10 whites, 1 Asian American, and 1 Hispanic American acquitted the officers on all charges. A poll conducted in the aftermath of the jury verdict revealed that 45 percent of African Americans but only 12 percent of whites attributed the not-guilty verdicts to racism and lack of African-American participation on the juries rather than to errors by the prosecutor or inadequate evidence of the officers' guilt.⁷

2005: Walter Rideau, a 62-year-old African American whom *Life* magazine once called "the most rehabilitated prisoner in America," walked out of a Calcasieu (Louisiana) Parish jail a free man after a jury that included four African Americans found him guilty of manslaughter rather than murder. Rideau, who had previously been sentenced to death three times by all-white, all-male juries, spent 44 years in prison for the 1961 murder of a white female bank teller, a crime he did not deny. Each of his convictions and death sentences were overturned by federal courts. His first conviction was overturned by the U.S. Supreme Court, which referred to his trial as "kangaroo court proceedings." A federal appellate court overturned his second conviction and death sentence because the prosecutor removed potential jurors who said they would be hesitant, but not completely unwilling, to sentence Rideau to death. In 2000, a federal appellate court overturned his third conviction because of racial discrimination in the selection of the grand jury. Following this decision, the state of Louisiana decided to retry Rideau a fourth time, despite the fact that many of the prosecution witnesses were dead or otherwise unable to testify. The Calcasieu Parish district attorney (with the approval of the judge in the case) had the testimony of the state's witnesses in the earlier trial read to the new jury. The jury found him guilty of manslaughter, which under Louisiana law carried a maximum penalty of 21 years in prison. Theodore M. Shaw, president of the NAACP Legal Defense and Educational Fund, which represented Rideau in the most recent

case, stated, "This was not a case about innocence. It was about fairness and redemption—fairness, because even the guilty are entitled to a trial untainted by racial discrimination and misconduct, and redemption, because in a real sense the teenager who committed the tragic crime died while incarcerated for 44 years and was reborn as the man who paid the price and struggled for redemption."⁸

2010: Johannes Mehserle, a white former Bay Area Rapid Transit (BART) police officer, was convicted of involuntary manslaughter for killing Oscar Grant, a 22-year-old African American who was unarmed and lying face down on an outdoor train platform in Oakland (California) on New Year's Day of 2009. Mehserle, who was charged with second-degree murder, maintained that he shot Grant by mistake when he pulled his gun, rather than his Taser, from its holster. The jury's verdict meant that the jury did not believe that Mehserle intended to shoot Grant but instead believed that his behavior was so negligent as to constitute a crime. After the jury's verdict was revealed, the U.S. Department of Justice's Civil Rights Division announced that it was launching an investigation into whether Mehserle violated Grant's civil rights. In a letter to U.S. Attorney General Eric Holder urging him to open the investigation, U.S. Representative Barbara Lee wrote, "While I understand this is a state criminal matter, certain issues surrounding this case seem to invite further examination by the Civil Rights Division of the Department of Justice. Given the ongoing tensions between African-American communities, communities of color and law enforcement, care must be taken to ensure that civil rights statutes are properly enforced and positive relationships between these communities and law enforcement are forged."⁹

2014–2015: In three high-profile cases, grand juries refused to indict white police officers in the deaths of African-American suspects. In November 2014, the St. Louis County (Missouri) grand jury refused to indict a white police officer who fatally shot an unarmed 18-year-old African-American man, Michael Brown, in Ferguson, Missouri. Brown's killing and the grand jury's decision not to indict the officer sparked days of violent protests. In November 2015, a white police officer in Memphis, Tennessee, was cleared by a grand jury in the shooting death of a 19-year-old African-American man, Darrius Stewart, in spite of the fact that the district attorney recommended that the officer be indicted for voluntary manslaughter. In December 2015, a grand jury in Cuyahoga County (Ohio) refused to indict two white Cleveland police officers for killing Tamir Rice, a 12-year-old African-American boy who was playing with a toy gun. The prosecutor who presented the case to the grand jury reported that he did not recommend that the grand jury bring charges because he concluded that the officers reasonably believed that Tamir had a real weapon and was about to pull it from his waistband when he was shot.

SELECTION OF THE JURY POOL

Three facts about jury discrimination are largely undisputed. First, the all-white jury has been a staple of the American criminal justice system for most of our history. Second, the Supreme Court has long condemned discrimination in jury selection. And third, race discrimination in jury selection remains a pervasive feature of our justice system to this day. The interesting question is how all of these facts can be true at the same time.

—DAVID COLE, *NO EQUAL JUSTICE*¹⁰

The jury plays a critically important role in the criminal justice system. Indeed, “the jury is the heart of the criminal justice system.”¹¹ Although it is true that most cases are settled by plea and not by trial, many of the cases that do go to trial involve serious crimes in which defendants are facing long prison terms or even the death penalty. In these serious—and highly publicized—cases, the jury serves as the conscience of the community and, in the words of the U.S. Supreme Court, as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”¹² As the Court has repeatedly emphasized, the jury also serves as “the criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice.’”¹³

Racial Discrimination in Selection of the Jury Pool

The process of selecting a jury for a criminal case involves two stages: the selection of the jury pool—that is, the pool of eligible individuals from whom the jurors for a particular case will be chosen—and the selection of the jurors who will actually decide the case. The jury pool is selected from eligible members of the community, who are selected at random, usually from voting records, automobile registrations, or other lists of community residents. Prospective jurors for criminal cases on the court’s docket are then randomly selected from the jury pool. These potential jurors are examined by the judge and/or the attorneys for the prosecution and the defense to determine whether they have any bias, prejudice, or interests that would prevent them from deciding the case in a fair and impartial way. Those who are biased or who have a conflict of interest can be challenged for cause. These challenges, which must be approved by the judge, are unlimited. Attorneys for each side also can remove potential jurors through the use of peremptory challenges, which are limited in number and which do not require the attorney challenging the juror to provide the reason for the challenge. We begin our discussion of race and the jury selection process by focusing on the selection of the jury pool.

The Fourteenth Amendment to the U.S. Constitution, which went into effect in 1868, provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Enacted in the wake of the Civil War, the Fourteenth Amendment was designed to protect the rights of the newly freed slaves. As Congressman Stevens, one of the amendment’s sponsors, stated,

"Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man."¹⁴

The interpretation of the equal protection clause—who was protected and what types of actions violated the equal protection mandate—was left to the U.S. Supreme Court. One of the first cases in which the Court was asked to apply the Equal Protection Clause was an 1880 case involving jury selection. At issue was the murder conviction of a black man, Taylor Strauder, by an all-white jury. In *Strauder v. West Virginia*,¹⁵ the Court ruled that a West Virginia statute limiting jury service to white males violated the Equal Protection Clause of the Fourteenth Amendment and therefore was unconstitutional. The Court concluded that the statute, which prohibited African Americans and other nonwhites—no matter how well qualified—from serving on juries, inflicted two distinct harms. The first was a harm that affected the entire African-American population. According to the Court:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.¹⁶

The Court stated that the West Virginia statute inflicted a second harm that primarily hurt African-American defendants, who were denied even the *chance* to have people of their own race on their juries. "How can it be maintained," the Justices asked, "that compelling a man to submit to trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of his color alone, however well qualified in other respects, is not a denial to him of equal legal protection?"¹⁷ The Court added that this was precisely the type of discrimination the Equal Protection Clause was designed to prevent.

After *Strauder v. West Virginia*, it was clear that states could not pass laws excluding African Americans from jury service. This ruling, however, did not prevent states, and particularly southern states, from developing techniques designed to preserve the all-white jury. In Delaware, for example, local jurisdictions used lists of taxpayers to select "sober and judicious" persons for jury service. Under this system, African-American taxpayers were eligible for jury service but were seldom, if ever, selected for the jury pool. The state explained this result by noting that few of the African Americans in Delaware were intelligent, experienced, or moral enough to serve as jurors. As the chief justice of the Delaware Supreme Court concluded, "That none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries."¹⁸

The U.S. Supreme Court refused to accept this explanation. In *Neal v. Delaware*, decided two years after *Strauder*, the court ruled that the practice had

systematically excluded African Americans from jury service and was therefore a case of purposeful—and unconstitutional—racial discrimination.¹⁹ Justice Harlan, writing for the Court, stated that it was implausible “that such uniform exclusion of [Negroes] from juries, during a period of many years, was solely because . . . the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity.”²⁰

These early court decisions did not eliminate racial discrimination in jury selection, particularly in the South. Gunnar Myrdal’s analysis of the “Negro problem” in the United States in the late 1930s and early 1940s concluded that the typical jury in the South was composed entirely of whites.²¹ He noted that some courts had taken steps “to have Negroes on the jury list and call them in occasionally for service.”²² He added, however, that many southern courts, and particularly those in rural areas, had either ignored the constitutional requirement or developed techniques “to fulfill legal requirements without using Negro jurors.”²³ As a result, as Seymour Wishman noted, “For our first hundred years, blacks were explicitly denied the right to be jurors, which meant that if a black defendant was not lynched on the spot, an all-white jury would later decide what to do with him.”²⁴

Since the mid-1930s, the Supreme Court has made it increasingly difficult for court systems to exclude African Americans from the jury pool. It consistently has struck down the techniques used to circumvent the requirement of racial neutrality in the selection of the jury pool. The Court, for example, ruled that it was unconstitutional for a Georgia county to put the names of white potential jurors on white cards, the names of African-American potential jurors on yellow cards, and then “randomly” draw cards to determine who would be summoned.²⁵ Similarly, the Court struck down the “random” selection of jurors from tax books in which the names of white taxpayers were in one section and the names of African-American taxpayers were in another.²⁶ As the justices stated in *Avery v. Georgia*, “The State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process.”²⁷

The states’ response to the Supreme Court’s increasingly vigilant oversight of the jury selection process was not always positive.²⁸ The response in some southern jurisdictions “was a new round of tokenism aimed at maintaining as much of the white supremacist status quo as possible while avoiding judicial intervention.”²⁹ These jurisdictions, in other words, included a token number of racial minorities in the jury pool in an attempt to head off charges of racial discrimination. The Supreme Court addressed this issue as late as 1988.³⁰ The Court reversed the conviction of Tony Amadeo, who was sentenced to death for murder in Putnam County, Georgia, after it was revealed that the Putnam County district attorney asked the jury commissioner to limit the number of African Americans and women on the master lists from which potential jurors were chosen.

The Exclusion of Mexican Americans from Jury Service

The cases discussed thus far focus on *racial discrimination* in the selection of the jury pool. The issue of whether Hispanics—or, in the case of Texas, Mexican

Americans—were similarly protected by the Equal Protection Clause. The Fourteenth Amendment proved more contentious and was not passed until a full 74 years after the Court ruled in *Strauder* that states could not exclude Americans from jury service by statute.

In a series of cases challenging the exclusion of Mexicans from jury service, Texas appellate courts consistently ruled against the exclusion system.³¹ In early cases, the Texas courts ruled that the lack of Mexican jurors did not reflect purposeful discrimination but, rather, the limited qualifications of the jurors. For example, in *Lugo v. Texas*,³² which was decided by the Texas Criminal Appeals heard testimony from the sheriff of San Antonio that only two Mexican Americans had been summoned for jury service (and only one of them served) in his 15 years as sheriff. However, the court ruled that this did not constitute evidence of intentional discrimination, nor did it. The sheriff testified that “most of the Mexican population of this county do not speak intelligently in English and are unable to read and write the English language.”

In later cases, the appellate courts in Texas shifted gears and ruled against no discrimination against the “Mexican race” because, first, the Equal Protection Clause recognized only two races or “classes” of people—whites and non-whites; second, Mexican Americans were part of the white race. In *Hernandez v. State*, the court stated that Mexican Americans were discriminated against when juries were made up entirely of whites. The court stated in *Hernandez v. State*, “Mexican people . . . are not a separate race from the white people of Spanish descent. In contemplation of the law, Mexicans are therefore members of and within the white race, as distinguished from the members of the Negro race.”

The Texas courts insisted that Mexican Americans were not a nationality group, and, as such, the Equal Protection Clause did not apply to them. As Clare Sheridan has pointed out, “The irony of the Texas courts’ placing Mexican Americans into the category ‘white’ was that it denied them the protection of the Fourteenth Amendment.”³⁴

The U.S. Supreme Court weighed in on these issues in 1950 in *Hernandez v. State*. The case involved Pete Hernandez, who was indicted for murder in Jackson County, Texas; he was convicted and sentenced to life in prison. Hernandez’s lawyers challenged the composition of both the grand jury that indicted him and the petit jury that was selected for his trial. They argued that the selection process, which systematically excluded persons of Mexican descent from jury service, violated the Fourteenth Amendment. The Supreme Court ruled that no Mexican Americans had been on a jury in Jackson County for over a quarter century, despite the fact that there were Mexican Americans qualified to serve.

Lawyers for the state of Texas argued that Mexican Americans were “a race of Spanish descent” and that Hernandez therefore had no right to be tried by members of his own race (in other words, whites). The Texas Criminal Appeals agreed, concluding that Mexican Americans were a nationality, not a race, and that the Equal Protection Clause was not violated by denying equal rights to those of different nationalities. The court stated that the state was seeking “special privileges” that other whites did not have.

court's ruling, "It is apparent, therefore, that appellant seeks to have this court recognize and classify Mexicans as a special class within the white race and to recognize that special class as entitled to special privileges in the organization of grand and petit juries in this state."³⁵

The U.S. Supreme Court disagreed with the Texas Court of Criminal Appeals' analysis. Writing for the majority, Chief Justice Earl Warren said, "The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court do not support that view."³⁶ According to the Court's decision:

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.³⁷

The Supreme Court overturned Hernandez's conviction and, in doing so, stated that the fact that there were no Mexican Americans on juries for over 25 years could not be due to chance. As the majority stated, "It taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."³⁸

Techniques for Increasing Racial Diversity of the Jury Pool

Although the Supreme Court decisions discussed in the previous two sections have made it more difficult for states to discriminate overtly on the basis of race or ethnicity, the procedures used to select the jury pool are not racially neutral. Many states obtain the names of potential jurors from lists of registered voters, automobile registrations, or property tax rolls. The problem with this seemingly objective method is that in some jurisdictions racial minorities are less likely than whites to register to vote or to own automobiles or taxable property. As a result, racial minorities are less likely than whites to receive a jury summons. Further compounding the problem is the fact that "for a number of reasons, from skepticism and alienation to the inability to take time off from their jobs, minorities and the poor are also less likely to respond to those summonses they receive."³⁹ The result is a jury pool that overrepresents white middle- and upper-class persons and underrepresents racial minorities and those who are poor. (See Box 6.1 for the requirements for serving on a jury in Massachusetts.)

Box 6.1 Excerpts from Massachusetts Jury Selection Statute**Juror Service**

Juror service in the participating counties shall be a duty which every person who qualifies under this chapter shall perform when selected. All persons selected for juror service on grand and trial juries shall be selected at random from the population of the judicial district in which they reside. All persons shall have equal opportunity to be considered for juror service. All persons shall serve as jurors when selected and summoned for that purpose except as hereinafter provided. No person shall be exempted or excluded from serving as a grand or trial juror because of race, color, religion, sex, national origin, economic status, or occupation. Physically handicapped persons shall serve except where the court finds such service is not feasible. This court shall strictly enforce the provisions of this section.

Disqualification from Juror Service

As of the date of receipt of the juror summons, any citizen of the United States, who is a resident of the judicial district or who lives within the judicial district more than fifty per cent of the time, whether or not he is registered to vote in any state or federal election, shall be qualified to serve as a grand or trial juror in such judicial district unless one of the following grounds for disqualification applies:

1. Such person is under the age of eighteen years.
2. Such person is seventy years of age or older and indicates on the juror confirmation form an election not to perform juror service.
3. Such person is not able to speak and understand the English language.
4. Such person is incapable by reason of a physical or mental disability of rendering satisfactory juror service.
5. Such person is solely responsible for the daily care of a permanently disabled person living in the same household and the performance of juror service would cause a substantial risk of injury to the health of the disabled person.
6. Such person is outside the judicial district and does not intend to return to the judicial district at any time during the following year.
7. Such person has been convicted of a felony within the past seven years or is defendant in pending felony cases or is in the custody of a correctional institution.
8. Such person has served as a grand or trial juror in any state or federal court within the previous three calendar years or the person is currently scheduled to perform such service.

SOURCE: 234A M.G.L.A. 5 et seq.

State and federal jurisdictions have experimented with a number of techniques for increasing the racial diversity of the jury pool. When officials in Hennepin County (St. Paul), Minnesota, which is 9 percent nonwhite, discovered that most grand juries were all white, they instituted a number of reforms designed to make jury service less burdensome. They doubled the pay for serving, provided

Box 6.2 The Advantages of "Jurymandering"

In advocating for race-conscious jury selection, Hiroshi Furukai and Darryl Davies state: . . . jury studies show that a number of legal and non-legal factors operate together to cause the under-representation of racial minorities on the jury. Relying on current color-blind jury selection procedures—in effect leaving the racial composition of the jury to chance—almost always leads to racially disproportionate representation. One way to guarantee a mixed jury is through a race-conscious selection policy, or its equivalent, the 'jurymandering' method. Jurymandering is the use of an affirmative mechanism, such as a racial quota, to engineer mixed juries that may not occur under current jury selection procedures.

SOURCE: Hiroshi Furukai and Darryl Davies, "Affirmative Action in Jury Selection," *Virginia Journal of Social Policy & the Law* 4 (1996), p. 653.

funding to pay jurors' day care expenses, and included a round-trip bus pass with each jury summons.⁴⁰ As a result of these measures, the number of racial minorities selected for grand juries increased.

A more controversial approach involves "race-conscious jury selection"⁴¹ or "jurymandering."⁴² (See Box 6.2 for an argument in favor of jurymandering.) Some jurisdictions, for example, send a disproportionate number of summonses to geographic areas with large populations of racial minorities. Others attempt to select a more representative jury pool by subtracting the names of white prospective jurors until the proportion of racial minorities in the pool matches the proportion in the population. A more direct effort to ensure racial diversity involves setting aside a certain number of seats for racial minorities. Although no jurisdiction has applied this approach to the selection of trial jurors, judges in Hennepin County are required to select two minority grand jurors for every grand jury.⁴³

A somewhat different approach was tried in a U.S. district court. In 2005, a federal district court judge in Boston ordered court administrators to send a new summons to another person in the same zip code if a summons was returned as undeliverable.⁴⁴ Judge Nancy Gertner took this step in an attempt to increase the pool of African-American jurors available for a federal death penalty case involving two African-American men. Massachusetts pioneered the use of resident lists rather than lists of registered voters in an attempt to increase the racial diversity of the jury pool. However, defense attorneys in the case argued that resident lists are more likely to be inaccurate in areas with the highest percentage of African-Americans, resulting in a large number of summonses returned as undeliverable. According to Patricia Garin, one of the defense attorneys, Gertner's remedy, although unlikely to make juries truly representative of the community, was "a step in the right direction" and would increase the chances that people of color would serve on juries.⁴⁵

Opinions regarding these techniques are divided. Randall Kennedy argued that "officials should reject proposals for race-dependent jury reforms."⁴⁶ Although he acknowledged that these proposals are well intentioned, Kennedy

maintained that they would have unintended consequences (e.g., jurors select because of their race might believe they are expected to act as representatives of their race during deliberations) and would be difficult to administer (e.g., officials would be required to determine the race of potential jurors and defendants, which would inevitably result in controversies over racial identification). Kennedy also suggested that the more direct techniques may be unconstitutional. As he noted, "Over the past decade, the U.S. Supreme Court has become increasingly hostile to race-dependent public policies, even when they have been defended as efforts to include historically oppressed racial minorities in networks of economic opportunity and self-government."⁴⁷

Although the Supreme Court has not yet addressed this issue, in 1998 the U.S. Court of Appeals for the Sixth Circuit ruled that subtracting whites from jury panels so that all panels matched the racial makeup of the community violated the equal protection rights of white jurors.⁴⁸ Four years later, the U.S. Court of Appeals for the Second Circuit handed down a similar ruling. This case involved the prosecution of an African American charged with the death of an Orthodox Jewish student. The judge in the case believed that it was important to seat a jury that was racially and religiously diverse. When one of the empaneled jurors was excused as a result of illness, the judge removed a second white juror from the panel and filled the two slots with an African-American and a Jewish juror, neither of whom was next in line on the list of alternate jurors. In *United States v. Nelson*,⁴⁹ the court recognized the motivations that led to the judge's decision, noting that they were "undoubtedly meant to be tolerant and inclusive rather than bigoted and exclusionary," but nonetheless ruled that "the fact cannot justify the district court's race-conscious actions. The significance of a jury in our polity as a body chosen apart from racial and religious manipulations is too great to permit categorization by race or religion even from the best of intentions."⁵⁰

Those who disagree with these court rulings contend that race-conscious plans that create representative jury pools should be allowed because they reduce the likelihood that people of color will be tried by all-white juries. Albee Alschuler, an outspoken advocate of racial quotas for juries, asserted that "few statements are more likely to evoke disturbing images of American criminal justice than this one: 'the defendant was tried by an all-white jury.'"⁵¹ He and other critics of jury selection procedures contend that lack of participation by racial minorities on juries that convict the African Americans and Hispanics who are on court dockets in many jurisdictions leads to questions regarding the legitimacy of their verdicts. (See Box 6.3 for anecdotal evidence of racial bias during jury deliberations.) Advocates of race-conscious plans also argue that the inclusion of greater numbers of racial minorities will counteract the cynicism and distrust that minorities feel toward their government. As David Cole, a professor at Georgetown University Law Center, wrote, "If the criminal justice system is to be accepted by the black community, the black community must be represented on juries. The long history of excluding blacks from juries is one important reason why blacks as a class are more skeptical than whites about the fairness of the criminal justice system."⁵²

Box 6.3 Racial Bias and Jury Selection: A Juror's Perspective

In an article on "Unconscious Bias and the Impartial Jury" that appeared in the *Connecticut Law Review*, Janet Bond Arterton, a U.S. District Court judge for the District of Connecticut, discussed a note that she received from a juror at the conclusion of a case involving an all-white jury and three African-American plaintiffs. The juror wrote:

I would like to convey to you, in confidence, a few thoughts about my experience. I recall walking into the Jury Assembly room last Thursday, and being stunned by the singular 'whiteness' of the crowd. Out of almost 120 people reporting, one—yes, one—was a person of color. While it is my feeling that concern for quotas along racial lines can sometimes be excessive these days, no one could argue that the juries formed that day were a fair representation of our society. Couple that with the fact that the case involved three principals who are African-American, and the selection process seems all the more problematic.

Personally, I have no qualms with our decision in the case. We were able to size up the credibility of witnesses and their testimony without a great deal of soul-searching or in-depth deliberation. I believe this was fortunate, considering the makeup and predisposition of the jury. During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about 'those people' rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. . . . Had just one African-American been sitting in that room, the content of the discussion would have been quite different. And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.

SOURCE: Honorable Janet Bond Arterton, "Unconscious Bias and the Impartial Jury," *Connecticut Law Review* 40 (2008), pp. 1023–1033.

THE PEREMPTORY CHALLENGE: RACIAL PROFILING IN THE COURTROOM?

The Supreme Court consistently has ruled that the jury should be drawn from a representative cross-section of the community and that race is not a valid qualification for jury service. These requirements, however, apply only to the selection of the *jury pool*. They do not apply to the selection of *individual jurors* for a particular case. In fact, the Court has repeatedly stated that a defendant is not entitled to a jury "composed in whole or in part of persons of his own race."⁵³ Thus, prosecutors and defense attorneys can use their peremptory challenges—"challenges without cause, without explanation, and without judicial scrutiny"⁵⁴—as they see fit (for evidence of this, see Box 6.4). They can use their peremptory challenges in a racially discriminatory manner.

It is clear that lawyers do take the race of the juror into consideration during the jury selection process. Prosecutors assume that racial minorities will side with minority defendants, and defense attorneys assume that racial minorities will be more inclined than whites to convict white defendants. As a result of these assumptions, both prosecutors and defense attorneys have used their peremptory

Box 6.4 Selecting a Jury: Stereotypes and Prejudice

A 1973 Texas prosecutor's manual for jury selection provided the following advice:

- You are not looking for a fair juror, but rather a strong, biased, and sometimes hypocritical individual who believes that defendants are different from them in kind, rather than degree. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused. You are not looking for free thinkers or flower children.
- Observation is worthwhile. . . . Look for physical afflictions. These people usually sympathize with the accused.
- I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children.
- Extremely overweight people, especially women and young men, indicates a lack of self-discipline and often times instability. I like the lean and hungry look.
- If the veniremen have not lived in the county long, ask where they were born and reared. People from small towns and rural areas generally make good State's jurors. People from the east or west coasts often make bad jurors.
- Intellectuals such as teachers, etc. generally are too liberal and contemplative to make good State's jurors.
- Ask veniremen their religious preference. Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused. Lutherans and Church of Christ veniremen usually make good State's jurors.

SOURCE: Albert W. Alschuler, "The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts," *University of Chicago Law Review* 56 (1989), p. 153. [Online].

challenges to strike racial minorities from the jury pool. Kennedy, in fact, characterized the peremptory challenge as "a creature of unbridled discretion in the hands of white prosecutors and white defendants, has often been used to sustain racial subordination in the courthouse."⁵⁵

Dramatic evidence of this surfaced during an electoral campaign in Philadelphia. In April 1997, Lynne Abraham, Philadelphia's district attorney, released a 1986 videotape made by Jack McMahon, a former assistant district attorney, her electoral opponent. In the hour-long training video, McMahon advised low prosecutors that "young black women are very bad for juries" and that "blacks from the low-income areas are less likely to convict." He also stated, "There's a resentment for law enforcement. There's a resentment for authority. And as a result, you don't want *those people* on your jury"⁵⁶ (emphasis added). A Philadelphia defense attorney characterized the videotape as "an abuse of the office," saying, "It was unconstitutional then, and it's unconstitutional now. You don't tell young attorneys to exclude poor people, or black people or Hispanic people."

These comments notwithstanding, there is compelling evidence that prosecutors do use their peremptory challenges to strike racial minorities from the