Plain Progress in achieving juries that fairly reflect the community & Next steps

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February 14, 2019

BLSA Black History Month Webinar

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Jury Duty, Serve With Pride

Plain Progress

- State v. Plain, Iowa Supreme Court 2017
- Foster v. Chatman, SCOTUS 2016
- People v. Gutierrez, California Supreme Court 2017
- Pena-Rodriguez v. Colorado, SCOTUS 2017
- Enactment of amendments to Iowa Code 607A, 2017
- Iowa Supreme Court Advisory Committee on Jury Selection, 2017
- Washington Supreme Court, General Rule 37 (April 2018)

NAACP Advocacy as Catalyst for Jury Reform

- 6th Amendment Impartial Jury requirement and Iowa Code 607A require juries truly representative of the community.
- Front end & Back end component: In Jury pool & in Petit Jury after peremptory or discretionary strikes
- NAACP initial concern was ineffectiveness of *Batson* procedure seeking to protect against racially discriminatory strikes of minority jurors. A license for implicit bias.
- *State v. Tyrone Washington* case confirmed systemic problems in securing jury pools that reflected the community.
- Though jury trials occur in fewer than 5% of all cases, the fair cross section right impacts EVERY settled case as well.

Developing the jury pool

- Jurors must be 18 years of age, U.S. citizens, and residents.
- The established tradition is that the jury is to be a body truly representative of the community.
- Goal is to select prospective jurors at random. Court officials primarily use voter and drivers' license lists to develop a Jury Source Pool. But not everyone drives and not everyone votes.
- Iowa Code 607A embraces fair cross section requirement and authorizes jury officials to obtain additional names from other comprehensive lists, such as utility customers
- 2017 607A amendment requires inclusion of persons holding non-operators ID card from the State Motor Vehicle office.

12 PERSON JURY

Constitution Goal:

Juries that represent a fair cross section of community.

Governor's Criminal Justice Working Group

- Governor Branstad 2015 Governor's Criminal Justice Working Group. Iowa-Nebraska NAACP Pres. Betty Andrews was appointed to the CJWG .
- CJWG embraced many of NAACP recommended reforms.
- New software needed so Iowa Courts can include lists in addition to Voter Roles and Drivers Licenses to ensure greater diversity
- Judicial Branch should begin collecting statistics re racial composition of jury pools. Jury pool lists updated at least annually.
- Oversight and accountability should be restored to jury selection process.
- Responsibility of Judicial Branch and each Judicial District "to take affirmative steps to ensure fair cross section of juries "will require ongoing monitoring and coordination."

Duren v. Missouri: SCOTUS 6th Amendment Test

- A defendant can establish a prima facie violation of the 6th Amendment's fair cross-section requirement by showing:
  - (1) that the group alleged to be excluded is a 'distinctive' group in the community
  - (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
  - (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."
- The "burden shifts to the state to justify the disproportionate representation by proving 'a significant state interest' is 'manifestly and primarily advanced' by the causes of the disproportionate exclusion."

Duren 3d Prong: Systematic Exclusion

"Finally, in order to establish a prima facie case, it was necessary for petitioner to show that the underrepresentation of women, generally and on his venire, was due to their systematic exclusion in the jury selection process. Petitioner's proof met this requirement. His undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized."

State v. Jones (Iowa 1992)

- Iowa Supreme Court held fair cross section claims must be evaluated using the Absolute Disparity test.
- Citing U.S. Supreme Court decisions in cases from Deep South it held an Absolute Disparity of at least 10% of a specific minority group must be shown and that racial minority groups could not be aggregated to make this showing.
- Defense attorneys concluded it was futile to raise fair cross section claims in Iowa because there was no County in which African Americans comprised 10% of the population.

State v. Plain (Iowa 2017):LANDMARK RULING

- A FCS claim is based on 6th A rather than 14th A; racial impact alone is enough, proof of discriminatory intent is NOT required
- Overruled State v Jones & 10% Absolute Disparity test
- D has constitutional right to access to jury data to prove claim without prior showing of underrepresentation or adverse impact
- Implicit bias exists and is real. District Court Judges are encouraged to be pro-active in addressing it. Trial Judge has discretion to give Implicit Bias Jury Instruction, but is NOT required to do so. Study.

Plain & Jonas, Chatman & Pena-Rodriguez Require More Active Role of Iowa Trial Judge

- Plain: Good jury management practices can significantly mitigate socio-economic factors affecting diversity of jury pool
- Plain: Trial judge cannot rely solely on parties to ferret out racial or implicit bias, but must be prepared to be pro-active. Contend Plain requires reconsideration and modification of State v Mootz
- Foster v. Chatman (2016) SCOTUS engaged in a searching examination of the race neutral reasons the prosecution gave for its strike of the African American jurors from the panel. Then did a comparative juror analysis that concluded the reason given were not even-handedly applied to white and black jurors alike.
- State v. Miller (Ia. Ct. App. 2017). See Washington S.Ct. Rule 37.

Pena-Rodriguez v. Colorado (SCOTUS 2017)

- Held racially biased comments by jurors during deliberations can be the basis for impeaching a jury verdict. Race bias unique in USA.
- Where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, 6th A requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the impartial jury trial guarantee.
- Constitutional rule that racial bias in the justice system must be addressed, even after a jury verdict has been entered, as it is necessary to prevent a systemic loss of confidence in jury verdicts.

State v. Jonas: Easy Rehabilitation of Jurors Who Express Bias Insufficient Protection

- State v. Jonas (2017): trial judge's easy rehabilitation of juror who expressed anti-gay bias provided insufficient protection of D's right to an impartial jury. Pena-Rodriguez (6 months earlier) further support.
- Denial of challenge for cause would have been reversible error except D counsel, in striking biased juror with peremptory strike, did not advise judge as to which additional juror would have been struck had biased juror been removed for cause.
- NAACP: Appropriate appellate review standard of trial judge's rejection of cause challenge alleging racial bias can no longer be extremely deferential abuse of discretion standard.
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State v. Plain: 6th Amend. Fair Cross-Section Claim Does NOT Require Proof of Discriminatory Intent

- Recognized the 6th & 14th Amendments "both protect the impartiality of a jury" but made important distinction
- Landmark: While the 14th Amendment's Equal Protection Clause bars the intentional exclusion of protected minority groups, the 6th Amendment guarantees minority groups will not be systematically excluded, even if there is no evidence of intentional discrimination." fn. 9.
- "To establish systematic exclusion, a D must establish the exclusion is 'inherent in the particular jury-selection process utilized' but need not show intent."

State v. Plain (Iowa 2017)

- Iowa Supreme Court unanimously O/R State v Jones exclusive reliance on Absolute Disparity test.
- Implicitly O/R 10% threshold if Absolute Disparity test is one of models used. It recognized there is not a single county in Iowa in which African Americans constitute 10% of the population, and therefore could never demonstrate a 10% Absolute Disparity even if every African American had been excluded from jury service forever.
- Held district courts may use all 3 analytical models of analysis to measure representativeness of jury pool: Absolute Disparity, Comparative Disparity, and Standard Deviation

Plain follows lead of *Berghuis* allowing trial court to consider all 3 models of analysis

- Berghuis v Smith, 559 U.S. 314 (SCOTUS 2010) identified 3 tests that have been used to measure underrepresentation in jury pools: absolute disparity, comparative disparity, and standard deviation. SCOTUS concluded "Each test is imperfect."
- Absolute disparity and comparative disparity measurements are simple arithmetic, but can provide misleading results when the minority group is only a small % of those eligible for jury service.
- "Standard deviation analysis seeks to determine the probability that the disparity between a group's jury-eligible population and the group's % in the qualified jury pool is attributable to random chance."

Representative Juries Critical to Public's Perception of Fairness & Actual Fairness

- Expressly recognized studies that all-white juries 15% more likely than racially diverse juries to convict African American Ds
- Impact of racially unrepresentative juries on case outcomes especially "troubling" given:
- (a) African Americans in Iowa are 10 times more likely to be arrested than persons of other races and
- (b) Iowa's worst in nation rank for disproportionality of its prison population: 25% African American v. 3.3% of State population

The Prima facie case: Duren Prong 2 How bad must underrepresentation be?

- 1 African American out of 56 potential jurors (1.8%). Focus D's own venire.
- African Americans: 9.0% of Black Hawk County General opulation
- 2d Prong: Proving % of Group members in Jury Pool is under-representative
- Absolute Disparity Test. Subtract % of Group in jury panel from % of Group in population: 9.0% - 1.8% = 7.2%
- Comparative Disparity: Divide Absolute Disparity by % of Group in population. 7.2% /9.0% = .80. The higher the comparative disparity %, the less representative the jury pool.
- Standard Deviation test. Only 3.3% (.033) chance of observing 1 African American in a jury pool of 56 (when expected 5=56 x .09). Statistically sound and administratively feasible w/training on Excel spread sheet.

U.S. v. Rogers, 73 F.3d 774 (8th Cir. 1996): 31% Comparative Disparity = prima facie case

- Fair-cross section challenge to jury selection for Southern District of Iowa Federal Court. 8th Circuit concluded Comparative Disparity and Standard Deviatiion test results made out prima facie case.
- Comparative disparity of 31% (0.579/1.87 = .3096) demonstrates "a black was 30% less likely to be called to serve on a jury than if the composition of the source lists perfectly mirrored the community."
- Standard deviation analysis showed probability of "calling only 70 African Americans out of 5,424 potential jurors is less than 0.1%.
- Held precedent that required proof of intentional discrimination was binding , though panel thought (correctly) this precedent was wrong.

State v. Plain Remand: Left Side of Equation

6 Month Jury Pool Data

Total jury pool:	14034	14034
Caucasian	7267	=6767
African Amer.	510	=6257
Asian	182	=6075
Other	140	=5935
Hispanic	130	=5805
Native Amer.	40	=5765
Unidentified	5765	=0

6 Month Jury Panel Data

Total jury panel:	2395	2395
Caucasian	1537	858
African Amer.	83	775
Asian	28	747
Other	27	720
Hispanic	21	699
Native Amer.	0	699
Unknown/Unmarked	9	690
Unidentified	690	0

Left Side: Black Hawk County Pool/Panel Data obtained from District Court or SCA Office

Jury Pool Data (6-months)

- Blacks comprise 6.17% of the jurors in jury pool whose race can be identified (510/8,269)
- Blacks comprise 3.6% of the total jury pool (510/14,034)
- 41% of jury pool is not identified as to race (5,765/14,034)

Jury Panel Data (6-months)

- Blacks comprise 4.9% of all jurors at jury panel stage whose race can be identified (83/1696)
- Blacks comprise 3.5% of all jurors at jury panel stage (83/2395)
- 29% of jury panel is not identified as to race (699/2395)

Court System Failure: Jurors Who Do Not Identify Race/Ethnicity on Juror Questionnaire

- United States v. Hernandez-Estrada, 749 F.3d 1154, 1161 (9th Cir. 2014) (en banc) holds: "In determining the percentage of a distinctive group in the qualified jury wheel, the absolute disparity analysis excludes those jurors who did not identify their race or ethnicity on their jury questionnaire."
- It would distort the numbers if it were assumed that none of the jurors not reporting their ethnicity were Hispanic.
- Thus, 9th Circuit concludes FCS calcs are to be based only on those individuals who responded to the race question on questionnaire.

Hannaford-Agor contends calcs not reliable when nonresponses as to race are 41%

- Paula Hannaford-Agor: 41% of the 6-month jury pool did not respond to the race question on juror questionnaires in Black Hawk County (State v. Plain remand). PHA: such a high nonresponse rate makes the jury records "worthless" in determining underrepresentation.
- Judge Bradley Harris denied FCS claim in State v. Rollins et al (Black Hawk County Jan. 2018), holding D failed to produce DOT of voting records showing systematic exclusion, and also relied upon the PHA quote, in part, stating he could not make accurate analysis from the records.
- PHA contends that geocoding modeling permits a reliable projection as to the race of jurors who did not respond, and has done such a study as court expert on the remand of State v. Plain.

Rose & Abramson: Over 38% nonresponse problematic, 20% nonresponse OK

- The other possibility is to exclude the unknowns and calculate what percentage those identifying themselves as African Americans or Hispanic are of those who answered the race and/or Hispanic question. The Hernandez-Estrada 9th Circuit approach.
- But when over 38% of the sample (see Table 2) does not provide an answer to the Hispanic question, we have little basis for treating those who did answer as a representative sample of the whole. On the other hand, the response rate to the race question--almost 80%---does make it far more reasonable to treat those who answered as a representative sample of the whole.
- Plain data: Jury pools, 41% unknown; Jury panels, 29% unknown

No bright line rule, but the problem has been caused by the Court System's Inattention

- Although there is no simple "cut-oft' number that signals with certainty that a given response rate is problematic, one scholar has described "80% or higher" as an example of a "high" response that would likely not raise concerns about bias. Shari Seidman Diamond, Reference Guide on Survey Research, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359, 384 (3d ed. 2011). Vol. 2011:911..
- Rose & Abramson, at 924 n.62.
- It must be remembered: Fault for the current high nonresponse rates must be squarely placed on the Court System, certainly not the D. Questionnaire stated answering Race questions was "OPTIONAL."

Prima Facie Case Based on Jurors Who Self Report Race (or Jury Manager Trained Observation)

- There are sound administrative and policy reasons for following the Ninth Circuit procedure that determines the racial composition of the jury pool based on the self-identification of the jurors who respond to the juror questionnaire.
- The fault for the high nonresponse rate lies with the Court System: Answering Race question was "OPTIONAL." D should be able to prove the prima facie case based on the known responses. It is readily understandable and involves simple arithmetic. It does not require the expense and delay of retaining an expert in every case. ,
- If the State wants to rebut using geocoding, that is its prerogative but it must carry burden of proof. Otherwise, there is no incentive for the court system to take necessary steps so that the number of persons whose race or ethnicity is not known is minimal.

Geocoding involves numerous and complex calcs that increase the likelihood of error

In jurisdictions lacking such a database [that reliably identifies the race of a substantial majority of the jury pool], defendants would have to

resort to far more onerous-and error-prone--means of estimating juror race, such as "geocoding" the juror's address to see if the person lives in, for example, a predominantly African American neighborhood. To the extent that an area continues to experience housing segregation by race or ethnicity, an address would be an available, yet imperfect, proxy for the types of people who skip the ethnicity question, as well as the race question.

Mary Rose and Jeffrey Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 Mich. St. L. Rev. 911, 955 n.282.

Right Side of Equation: General Population vs. Juror-Eligible Population Data

- Although the Juror-Eligible Population is the relevant comparator, Courts have historically allowed Defendants to prove the prima facie case using General Population Census data.
- Courts have been pragmatic, recognizing that obtaining data for U.S. Citizens, 18 years of age and older, would be difficult and expensive
- Of course Courts allow the State to rebut the prima facie case with more specific Census data
- Hannaford-Agor points out that the Census Reports are more comprehensive now, making Juror Eligible Data accessible and feasible for Courts to use in the future

Much Lower Prima Facie Thresholds When FCS Determinations Are Based on Jury-Eligible Data

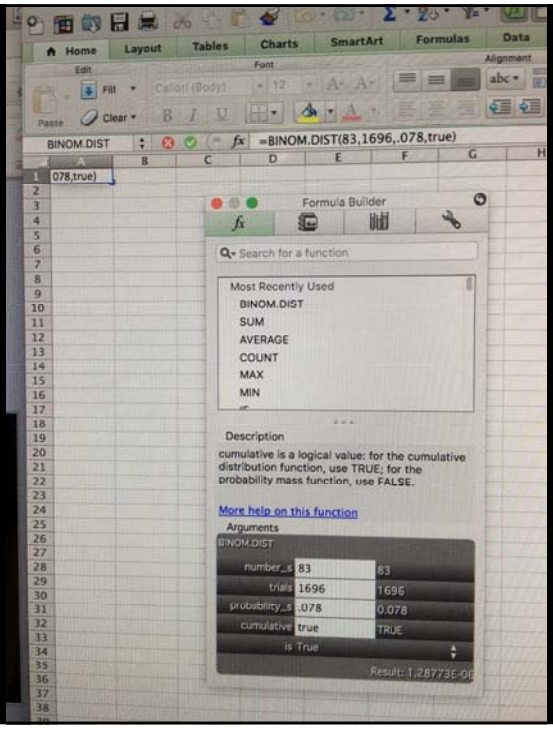
- When Courts base their determinations of whether Defendant has proven a prima facie FCS case of underrepresentation based on jury-eligible population data, the threshold showing of Comparative Disparity must accordingly be adjusted considerably lower than the 30-50% thresholds Courts currently use when their determinations are based on over-inclusive general population data.
- Important!!!! When J-E data is used, only minor underrepresentation should be permissible, sufficient to allow some play in the joints.
- Research: Unaware of any Court decisions that have established thresholds based on J-E data.

Hear ye! Hear ye! Hear ye! Important!!!!

- When jury-eligible data is used, only minor underrepresentation should be permissible, enough to allow some play in the joints.
- There is a clean slate. The thresholds that Courts have established, and there is considerable disagreement, have been based on general population data.

Duren Prong 3: Sytematic Exclusion (J-E Data) Focus on Jury Panels as Lowest Black %

- 83 African American out of 1,696 on Jury Panels (4.9%). 6-month jury data.
- African Americans: 7.8% of Jury Eligible Black Hawk County population
- Absolute Disparity Test. Subtract % of African American Group in jury panel from African American % of Group in jury-eligible population:
- 7.8 % - 4.9% = 2.9% Absolute Disparity
- Comparative Disparity: Divide Absolute Disparity by % of Group in jury-eligible population. 2.9 % /7.8% = .372 Comparative Disparity. The higher the comparative disparity %, the less representative the jury pool.
- Standard Deviation test. Infinitesimal chance (1.29E-06) of observing 83 African American in jury panels totaling 1,696 when expected approximately 132 African Americans (132.3 = 1696 x .078).
- Statistically sound and administratively feasible w/training on Excel.



Most Favorable to D, but Unlikely as Based on Entire Pool, including Nonrespondents on race

- A. 6-month Jury Pool (incl. Unid.): 510/14,034 = 3.6% measured against:
- .092 General Population: AbD=.056; CD=.608; SD=5.748E-146
- .078 Juror Eligible Pop.= AbD=.042; CD=.538; SD=1.312E-92
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- B. 6-month Jury Panel (incl. Unid.): 83/2395 = 3.5% measured against:
- .092 General Population: AbD=.057; CD=.619; SD=3.460E-28
- .078 Juror Eligible Pop.= AbD=.043; CD=.551; SD=1.001E-18
-

Calcs based Only on those who reported race

Prong 2: Plain v. State Jury Pool Alone 1/56=1.8% measured against:
- .092 General Population: AbD=.074; CD=.804; SD=.03
- .078 Juror Eligible Poulation: AbD=.06; CD=.769; SD=.061

Prong 3: 6-month Jury Pool (excl. Unid.): 510/8,269 = 6.2% measured against:
- .092 General Population: AbD=.03; CD=.326; SD=3.865E-24
- .078 Juror Eligible Population: AbD=.016; CD=.205; SD=5.925E-09

Prong 3: 6-month Jury Panel (excl. Unid.): 83/1,696 = 4.9% measured against:
- .092 General Population: AbD=.043; CD=.467; SD=1.776E-11
- .078 Juror Eligible Population: AbD=.029; CD=.371; SD=1.288E-06

Threshold standards for Comparative Disparity and Standard Deviation tests in Flux

- There is disagreement in the courts as to threshold showing for Comparative Disparity. Rogers, 30%; some, as high as 50%.
- These tests all assume calcs based on over-inclusive General Population data. D argue much lower threshold appropriate when more refined Jury-Eligible Population data is used.

Appropriate threshold when Standard Deviation test is in dispute: AG argued 95% certainty in Veal case. However, SCOTUS has held that 95% probability measure traditional for scientific research is too high for use in court of law where preponderance of evidence is proper measure. Bazemore v. Friday, 478 U.S. 385 (1986).

Plain: Proving Systematic Exclusion

- The third prong "distinguishes between situations where a particular jury venire is nonrepresentative and those situations where the jury venires in a district are continuously nonrepresentative of the community." To establish systematic exclusion, a defendant must establish the exclusion is "inherent in the particular jury-selection process utilized" but need not show intent. In other words, the defendant must show evidence of a statistical disparity over time that is attributable to the system for compiling jury pools. "If there is a pattern of underrepresentation of certain groups on jury venires, it stands to reason that some aspect of the jury selection procedure is causing that underrepresentation."

Standard Deviation & Duren/Plain 3d Prong

- Plain concluded Standard Deviation, like Absolute & Comparative tests, is an imperfect tool for assessing proportional representation as it presumes randomness, stating that "the chances of drawing a particular jury composition are not random, in part because the 'characteristics of the general population differ from a pool of qualified jurors.'" Slip Op. at 29.
- This criticism should be reconsidered as Census data tools now enable more accurate Standard Deviation analysis that compares a court system's jury data w/ juror-eligible population (rather than general population).
- Technology advances have simplified the standard deviation calculation on Excel Spread sheet, w/o necessity of expert witness testimony, making it administratively feasible for use by jury managers.

State's Burden If Prima Facie Case Satisfied

- The "burden shifts to the state to justify the disproportionate representation by proving 'a significant state interest' is 'manifestly and primarily advanced' by the causes of the disproportionate exclusion." Duren.
- Plain makes clear that Defendant need not prove Court System was at fault—need not provide intentional discrimination or negligence.
- RL suggests that Courts will examine whether the Court System's procedure and practice satisfied Jury Management Best Practices, or, at a minimum, demonstrated it was not negligent.

Negligent Jury Management = Systematic Exclusion

- Paula Hannaford-Agor (PHA), Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761 (2011)
- PHA, Director, Center for Jury Studies Nat'l Center for State Courts
- 40 years of good faith efforts have produced "a number of effective practices that greatly mitigate the impact of the socioeconomic factors" that adversely impact minority representation
- "[L]ong past time the fair cross section requirement recognize ineffective jury system management that contributes to minority underrepresentation is a form of systematic exclusion per 6th A."

Iowa Supreme Court Jury Committee Report

- State Court Administrator (SCA) should seek additional sources lists
- Court should define roles and responsibilities of local District Court Jury Managers, including relationship with the SCA
- Court/SCA should produce an Annual Plan with policies and procedures that all Iowa Counties must follow
- Review Rules governing challenges for cause and train judges
- Reduce the number of peremptory strikes and train judges on Batson challenges and rehabilitation of jurors. Comment recognizes national consensus that Batson protections have been ineffective.

Jury Selection Committee Report (cont.)

- Develop new process for notifying jurors and create jury portal on website with E-Juror Questionnaire and information about jury duty
- Ensure trial judges have ability to move venue of a trial on their own accord in exceptional cases
- Ensure as much comprehensive jury data as possible—from pools to panels to tracking strikes in voir dire—is maintained and available to public, as necessary, while ensuring protection of personal information and safety of jurors
- Develop uniform policies and procedures for failure to appear and standard practice of Undeliverables

Drawing Names from Multiple Source Lists Can Ensure More Representative Jury Pools

- Multiple sources lists. In past computer software only permitted inclusion of DMV licenses and non-operator IDs and voter registration data. Inconsistency in responses warrants careful examination as to third party vendor implementation to ensure non-operators IDs were included in past.
- Glitches in software in other jurisdictions have resulted in exclusion of minority jurors. See numerous examples in Chernoff, No Records, No Rights: Discovery & the Fair Cross-Section Guarantee, 101 Iowa L. Rev. 1719 (2016), cited extensively in Plain.
- Iowa Code 607A authorizes use of additional lists, and Governor's Working Group supported software upgrade that would permit this advance
- Nebraska: Inclusion of non-operator IDs diversified Master Jury Pool

Other Jury Management Tools that will help ensure more representative jury pools

- Increasing renewal frequency of Master Lists. Iowa 607A: update addresses at least every year. Use Postal Service NCOA updates to reduce impact of undeliverable summonses. SCA is seeking current addresses from state income tax records. May need legislation.
- Improving jury summons response through effective enforcement. Sending 2d summons to nonresponders and FTAs (failure to appear)
- Clarifying qualification status of ex-felons whose civil rights have been restored by Governor. Gov. Reynolds' proposed Constitutional Amd.
- Shortening length of service. Polk County: 1 week or 1 trial. Such steps reduce excusal rate for hardship, especially for financial reasons

Plain: D's Right to Jury Data Is Critical to Prove Systematic Exclusion & Transparency

- Iowa Code 607A requires selection authorities to maintain such records and make them available for public inspection.
- *Plain* holds D is entitled to information on racial composition of the jury venires—as a matter of constitutional law--recognizing the fair cross section requirement w/o meaning if D were denied this data. To be effective, D needs to request records pre-trial in anticipation of FCS challenge. State v. Stevenson (Iowa County).
- Federal Jury Selection and Service Act, 28 U.S.C. §§1861-1878, provides detailed procedures on access of counsel to jury demographic data and can serve as model for Iowa to consider.

NAACP: Jury pool & Census data should be posted and maintained on Court's web site

- Reality is the current development of jury pool is entirely an internal court operation and invisible to public and parties. Lack of transparency precludes mid-course correction by Court and jury manager and inhibits defense counsel from knowing whether the jury pools reflect a fair cross section.
- How can D or community know if jury pool reflects fair cross section without data publicly available? Plain makes clear D is entitled to obtain jury data. Chernoff proposes Courts go further in transparency: Courts should post and maintain jury demographic data & Census data on web pages. Research: Federal AO-12, U.S. Judicial Conf. 2014 Annual Report; New York.

State v. Cody Stevenson (Iowa County)

- Well in advance of trial D needs to obtain jury data from prior 6 months so can alert trial judge pre-trial that a FCS challenge will be forthcoming if D's jury venire is not representative. Don't wait until the morning of trial when you see the jury venire for your case to seek the 6-month jury data. Judge may rule your Motion is untimely; for certain it will be more difficult for you to evaluate 6 months of data and for trial court to make correction if there is FCS problem.
- Good practice: State v. Cody Stevenson: FECR011831: D filed pre-trial Notice of Anticipated FCS Challenge "so that the Court [can] order measures in advance of jury selection to ensure fair and reasonable representation of African Americans jurors, Hispanic jurors, and non-White jurors on defendant's jury venire."

NAACP: Court system must monitor and report demographic jury pool data

- As recommended by Governor's Working Group, State Court Administration (SCA) and local jury managers must monitor and report cumulative/aggregate demographic data at each step of the jury selection process, including exercise of discretionary strikes.
- Juror questionnaire should better explain purpose of reporting race and ethnicity to further goal of representative juries.
- Recommend legislation authorizing Department of Motor Vehicles to ask applicants for drivers licenses and nonoperator IDs to self report race and ethnicity. Such information will enable SCA to know race makeup at front end of selection process and enable early correction of any apparent underrepresentation.

Training of court personnel so they can monitor and report race and ethnicity

- So they can report as to individuals who do not report race and ethnicity on Juror Questionnaire, court personnel will need to be trained to identify race and ethnicity of prospective jurors.
- Enlist assistance of Iowa Civil Rights Commission or Federal EEOC or HUD to provide necessary training. Human resources personnel and mortgage lending personnel have been trained and have been observing, determining, and reporting race and ethnicity of applicants for over 50 years, as required by Federal law.
- Such monitoring and reporting enables identification of any steps in the jury selection process that may be having a disparate impact.

Judge Sackett: biases are counter-balanced when decision makers are racially diverse

- "Our justice system is fairer when we include in the decision making a wide cross-section of our population. There is substantial support for the proposition that decision makers are fairer when the persons making the decisions come from different corners. Counter-balancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case. * * * I feel it is extremely important that a nonwhite defendant has persons on his or her jury panel that are nonwhite and that the juror panel will be fairer and there will be less chance that the decision makers intentionally or unintentionally employ racial bias in the decision making process." State v. Watkins, 494 N.W.2d 438 (1992)

Judge Sackett: 6-person juries much more likely to be all-white than 12-person juries

- "If a minority viewpoint is shared by 10 percent of the community, 28.2 percent of 12-member juries may be expected to have no minority representation, but 53.1 percent of 6-member juries would have none. 34 percent of 12-member panels could be expected to have two minority members, while only 11 percent of 6-member panels would have two." State v. Watkins (Conc. Op.)
- Given the very small number of jury trials in Iowa each year, the NAACP submits the important justice values that are furthered by racially diverse juries outweigh the slight burden of jury service that 12-person juries would impose on a small number of citizens.

State v. Plain: District courts encouraged to be proactive to address implicit bias

- "While there is general agreement that courts should address the problem of implicit bias in the courtroom, courts have broad discretion about how to do so. One way is to give implicit bias jury instructions. We strongly encourage district courts to be proactive about addressing implicit bias; however, we do not mandate a singular method of doing so."
- C.J. Cady Concurs: "It is as important to address implicit bias in jury instructions as it is to address racial diversity in jury selection.
- NAACP believes Court's concern re implicit bias should be basis to strengthen procedural protections against peremptory challenges removing minority jurors.

Plain Conc. Opinion cites Judge Bennett re Implicit bias and Batson ineffectiveness

- Federal Judge Mark Bennett has demonstrated that implicit bias is very insidious because a person can be influenced by unconscious racism even though she believes she is committed to equality and nondiscrimination. Harvard has a long-time study of Implicit Bias from race to gender to color, etc.
- If you go to Project Implicit web site, you can take anonymous test: https://implicit.harvard.edu/implicit/selectatest.html.
- Judge Bennett's Harvard Journal article: http://hlpronline.com/wp-content/uploads/2010/02/bennett_batson.pdf.

A proactive response to implicit bias requires reconsideration of trial judge role

- NAACP submits that Plain's mandate that trial judges be proactive in addressing implicit bias has major implications for challenges for cause based on bias and to the exercise of peremptory/discretionary strikes.
- NAACP: reconsideration by the Iowa Court of limited role it set for trial judges when they consider allegedly discriminatory strikes is warranted.
- State v. Mootz, 808 N.W.2d 207 (Iowa 2012) reversed trial judge ruling that denied a discretionary strike by D, cautioning judge should raise Batson sua sponte only when she has observed "an abundantly clear" prima facie case of discrimination: "neutral role of trial judge" must be maintained.
- Compare: "The trial judge, as the presiding officer of the court, should take the necessary steps to ensure that discrimination will not mar the proceedings in his courtroom." State v. Evans, 998P.2d 373 (Wash. 2000).

Lawyers Exercising Peremptory Challenges/Strikes

Discretionary strikes of potential jurors.

The lawyer does not have to give a reason for striking a person from the jury.

Challenges for Cause & Discretionary Strikes

- Challenges for Cause. Cause challenges are directed to an individual juror concerning some fact that would disqualify that person from serving on this particular case—close relationship with counsel or parties, having formed opinion on case, etc.
- If a challenge for cause is successful, the juror is excused and another prospective juror is seated and questioned until all challenges are exhausted.
- Peremptory Challenges/Discretionary Strikes. Each side is required to make discretionary strikes to excuse prospective jurors without stating a reason. The number of strikes is set by statute, with more challenges allowed for most serious charges.

Felony conviction is basis for life time disqualification from Iowa jury service

- Iowa, 1 of 8 states, to authorize challenge for cause to disqualify felons from jury service for life. Iowa R. Criminal Procedure 2.18(5)(a).
- 28 U.S.C.§1865(b)(5) disqualifies a felon from jury service as long as "his civil rights have not been restored."
- Governors Vilsack and Culver issued Executive Orders restoring the civil rights of persons convicted of crimes once they had fully discharged their sentences, specifically stating the persons could vote and run for public office. They were silent as to jury service but surely if one can run for public office, he or she can sit on a jury.
- Inconsistency among Judges and Jury Managers across the State, with many Judges striking ex-offenders without checking whether they have had their civil rights restored by the Vilsack-Culver Executive Orders.

Iowa Supreme Court Should Rescind/Amend Rule 2.18(5)(a)

- The current lifetime disqualification is extraordinarily harsh. It takes no account of when a person committed a crime, how many years have passed since that time, rehabilitation and citizenship since the person was discharged, and whether the crime has any real relationship to the person's veracity and impartiality at the time of jury selection.
- ABA Principles for Juries and Jury Trials, 2(A)(5) disqualifies a felon from jury service while confined or under court supervision, but allows service on juries once a felon has been completed his or her sentence.
- Kalt, The Exclusion of Felons from Jury Service, 52 American U. L.Rev. 65-189 (2003). Racially disparate impact of felon jury exclusion due to striking racial disparities in Iowa. In State v. Veal, 2 of the 3 African Americans (out of 34 Jurors) were struck for cause due to past felonies.

Discretionary Strikes/Peremptory Challenges: How It Works in Iowa criminal cases

- Each side gets 4 strikes in misdemeanor cases, 6 strikes in most felony cases, 10 strikes in Class A felony cases.
- In a murder case (Class A), jury clerk will assign at least 40 persons to the jury venire, and, usually many more (if there has been publicity on the case) to be sure there will be, after cause and discretionary strikes, 12 jurors + 1 alternate.
- Hypo in Class A Felony case: Assume 7 jurors are likely to be excused for Cause and 20 jurors will be struck with discretionary strikes (10 per side). Court would need at least 40 jurors assigned: 40 – 7 (struck for cause) – 20 (peremptory strikes) = 13 (12 Jurors + 1 Alternate Juror)

Racially Discriminatory Peremptory Challenges Are Barred

- Batson v. Kentucky, 476 U.S. 79 (1986) that 14th A's Equal Protection Clause prohibits racially discriminatory peremptory challenges by the Prosecutor: a Prosecutor is prohibited from excluding "potential jurors solely on account of their race or the assumption that black jurors as a group will be unable impartially to consider the State's cases against a black defendant."
- SCOTUS held such discrimination violated the EP rights of both the African American defendant and the African American juror who was struck.
- SCOTUS held proof of pattern of discrimination was not necessary and that prima facie case of purposeful discrimination can be made solely on evidence concerning the prosecutor's exercise of peremptory challenges at D's trial.

Scope of Batson protections

- SCOTUS stated it was not sufficient for Prosecutor to assert good faith or deny discriminatory intent, or his belief black jurors would be partial to the D because of his shared race.
- SCOTUS stated P must provide legitimate reasons "related to the particular case to be tried." Id. at 98 n.20.

Batson protections

- have been extended to bar gender discrimination
- Found applicable to both Prosecutors and defense lawyers.
- Applicable in both criminal and civil cases.

A *Batson* violation requires proving pretext

Batson embraced a 3-step proof model drawn from McDonnell Douglas v. Green, 411 U.S. 792 (1973), an employment discrimination case:

1. Party objecting to the challenge must show facts that raise inference a juror was excluded "on account of their race."
2. Then, the party seeking to strike the juror (usually the Prosecutor) must provide a "race neutral explanation."
3. D must carry the burden of proving purposeful discrimination, typically by proving the reason given by the Prosecutor was pretextual or was not applied to white jurors.

Batson wholly ineffective: high evidentiary burden and total failure to address implicit bias

- SCOTUS Purkett v. Elem (1995): "silly or superstitious" reasons given by P, if race neutral, are sufficient. P's Reason doesn't have to have anything to do with the case.
- Very difficult for D to prove the explanation given by P is not the real reason. Because only 5-10 minutes to make this proof showing, purposeful discrimination rarely proven
- Willingness of SCOTUS to accept intuition and stereotypes as justification has effectively licensed Implicit Bias in jury selection, as Justice Thurgood Marshall predicted in Batson Concurrence.
- Marshall advocated for ending peremptory challenges in order to eliminate bias.

Major differences between juror selection and employment discrimination case

- SCOTUS failed to appreciate major differences in context between the employment discrimination setting in McDonnell Douglas and the jury trial setting in Batson.
- McDonnell Douglas requires the plaintiff to prove "that he applied and was qualified for a job for which the employer was seeking applicants" to establish a prima facie case.
- No similar requirement for jurors. All prospective jurors who have been included in a jury pool that was randomly selected and then passed for cause are qualified and impartial; no juror is required to prove that she is impartial or unbiased in order to serve.

McD procedure is difficult burden in Title VII cases, virtually impossible in Batson setting

- The great lesson of McDonnell Douglas was that civil rights laws require careful examination of even race neutral justifications of misconduct as basis for discharge of an employee.
- No question former employee Green had engaged in misconduct against McD, but SCOTUS REV'D to make sure the employer's reason was not pretextual or discriminatorily applied—that white employees who had engaged in similar misconduct against McDonnell Douglas had not received discipline that was less harsh (comparative analysis).
- P has EEOC or ICRC investigation report; years to investigate and prove pretext/comparative. D atty has 5-10 minutes in Batson setting.

Foster v. Chatman, SCOTUS 2016

- P struck all 4 black prospective jurors qualified to serve on the jury.
- D's Open Records request obtained P's file that contained numerous notations and highlights indicating the black jurors were to be struck
- Chief Justice Roberts, 7-1, found the race neutral explanations were contradicted by the record and by comparative juror analysis.
- Comparative juror analysis showed P's willingness to accept white jurors with the same characteristics. P claimed Garrett was struck because she was divorced and, at age 34, too young, but 3 of 4 divorced white jurors and 8 white jurors under age 36 were allowed to serve.

Foster v. Chatman

- Comparative Juror Analysis. Evidence that a P's reasons for striking a black juror apply equally to a similar nonblack juror who is allowed to serve tends to suggest purposeful discrimination.
- SCOTUS: Such evidence is compelling here. But that is not all. There were also P's shifting explanations, misrepresentations of the record, and persistent focus on race in the P's file. All of this circumstantial evidence leads to conclusion the striking of the black jurors was motivated in substantial part by discriminatory intent.

Predicting impact of *Foster*

- Many commentators have criticized Foster as a lost opportunity for SCOTUS to modify the Batson procedures to address the 21st century of Implicit Bias. Brayer, Foster v Chatman and the Failings of Batson, 102 Iowa L. Rev. Online 53 (2016). No mention of implicit bias is made in Foster; there were no concurring opinions.
- Has Foster decision, especially its emphasis on comparative juror analysis, reinvigorated the Batson protection?
- California Supreme Court's decision in State v. Gutierrez cites Foster and appears to have engaged in more searching Batson analysis.

State v. Saintcalle, 309 P.3d 326, 338 (Wash. 2013)

- "More troubling for Batson is research showing that people will act on unconscious bias far more often if reasons exist giving plausible deniability (e.g., an opportunity to present a race-neutral reasons). * * * The main problem is that Batson's third step requires a finding of 'purposeful discrimination,' which trial courts may often interpret to require conscious discrimination. This is problematic because discrimination is often unconscious. A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a Batson challenge."

Saintcalle (cont.)

- "As a first step, we should abandon and replace Batson's 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a Batson challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory or where the judge finds it is more likely than not that, but for the defendant's race, the peremptory would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a Batson challenge."

Saintcalle: More robust procedures needed

- Washington Supreme Court consensus that "more robust" procedures were necessary to implement Batson prohibition.
- However, since arguments based on Washington Constitution had not been made below or briefed on appeal, this was not an appropriate case to make a decision on Batson reforms.
- Court suggested the issues may be better suited for Rule-Making by the Court, where it could obtain views of the many constituencies that are interested in the issue.
- Washington Rule 37 (Adopted effective April 24, 2018). Rule 37 was adopted AFTER Iowa Supreme Court Jury Selection Committee filed its Report and was NOT considered by the Committee.

State v. Mootz (Iowa Supreme Court)

- Reverse-Batson case, w/D seeking to strike 2 Hispanic jurors
- D was convicted of assault on police officer. Police officer was Hispanic and the assault was outside a bar.
- Prior to peremptories, DCt advised parties that only 1 of the Hispanic jurors was strikeable due to relationship with law enforcement. When D struck a 2d Hispanic (Garcia), DCt sua sponte held hearing and asked State if it objected, which it did. D said he struck Garcia because Garcia was a former bartender who claimed he knew about intoxication and because Garcia stated he had been previously arrested and thought he deserved it.

Mootz analyzed per Batson 6th A standards

- DCt concluded the D's reasons were insufficient and did not allow the strike, but made no findings as to pretext or D counsel's demeanor.
- Iowa Supreme Court reversed DCt because it did not make findings re pretext. Compare Saintcalle Court: Batson proof burden fails to appreciate the reality that trial judge will hesitate to make a finding that an attorney engaged in intentional discrimination or lied.
- NAACP concern Mootz sends wrong signal to trial judge: if judge denies peremptory strike of minority juror, as in this case, real risk of reversal.
- Rarely will judge be reversed if you allow peremptory strike of minority juror. Mootz was not analyzed under Jury Trial or Equality clauses of Iowa Constitution. NAACP argues DCt had proper approach, extending the FCS principle to the trial jury (not just the jury pool).

People v. Gutierrez (Cal.S.Ct. 2017)

- 1st time in 16 years, 2d time in 25 years, a unanimous California Supreme Court found a Batson violation and reversed
- P exercised 16 strikes, 10 against Hispanic jurors. Trial Judge reviewed 8 of 10 strikes individually, finding them neutral and nonpretextual.
- While appellate courts generally accord great deference to the trial court's ruling that a reason is genuine, "we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror.
- Providing an adequate record may prove onerous. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one.

Trial Judge must make more searching inquiry

- A prosecutor's decision to strike a juror must "stand or fall" on the plausibility of the race neutral reasons he gives. The trial or appellate court cannot substitute or "imagine a reason that might not have been shown up as false."
- At the pretext stage, courts must consider all relevant circumstances in determining whether a strike was improperly motivated, requiring a careful review of the entire record and a sensitive inquiry into circumstantial and direct evidence of intent.
- Comparative juror analysis is an important tool and courts must undertake comparative juror analysis even if it is raised for the 1st time on appeal.

Overview of *Gutierrez* fact-specific analysis

- California Supreme Court insists on a much more searching inquiry of P's stated reasons by the trial judge:
- Trial judge never clarified why it accepted P's reason as honest.
- While the Trial Judge may have made a sincere attempt to assess P's rationale, the judge "never explained why it decided this justification was not a pretext for a discriminatory purpose."
- Did California Supreme Court strengthen Batson by shifting the burden of proof to P justify his strike was not pretextual?

Pena-Rodriguez v. Colorado (SCOTUS 2017)

- Where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, 6th A requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the impartial jury trial guarantee.
- Constitutional rule that racial bias in the justice system must be addressed, even after a jury verdict has been entered, as it is necessary to prevent a systemic loss of confidence in jury verdicts.

Pena-Rodriguez procedural facts

A Colorado jury convicted Peña-Rodriguez of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H. C. had expressed anti-Hispanic bias toward defendant and defendant's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H. C. The court acknowledged H. C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict.

H. C. told the other jurors that he "believed the defendant was guilty because, in [H. C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." The jurors reported that H. C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "'I think he did it because he's Mexican and Mexican men take whatever they want.'" According to the jurors, H. C. further explained that, in his experience," nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Finally, the jurors recounted that Juror H. C. said that he did not find defendant's alibi witness credible because, among other things, the witness was " 'an illegal.'" (In fact, the witness testified during trial that he was a legal resident of the United States.)

Discrimination on the basis of race is especially pernicious in the administration of justice

- The unmistakable principle underlying these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U. S. 545, 555 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 310 (1987) (quoting *Strauder*, *supra*, at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State."

General Rule against impeachment of jury verdicts remains unchanged

"Racial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*. The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course. Jurors are presumed to follow their oath, neither history nor common experience show that the jury system is rife with mischief of these or similar kinds. To attempt to rid the jury of every irregularity of this sort would be to expose it to unrelenting scrutiny. "It is not at all clear . . . that the jury system could survive such efforts to perfect it."

Racial Bias IS Different

. . . [R]acial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Reforms short of abolition of peremptories

- Expand Batson's protections to bar implicit bias
- Implicit bias focus: Trial Judge need not find intentional race discrimination to deny proposed strike of minority juror.
- Require proactive Trial Judges, a sincere and reasoned effort, to ensure implicit bias does not infect jury selection process.
- Shift burden of proof so party proposing strike must show by clear & convincing evidence race-neutral reason was in fact the real reason, not a pretext, and not based on implicit bias.
- Reduce the number of peremptory challenges to 2 or 3.

Voir Dire Safeguards to protect right to impartial jury often have proven inadequate

- In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *Voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at *voir dire*. . . . Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it."

Constitutional Rule Racial Bias in Justice System Must Be Addressed Is Necessary to Prevent Loss of Confidence in Jury Verdicts

- The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accusea fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot.
- The recognition that certain of the *Tanner* safeguards may be less effective in rooting out racial bias than other kinds of bias is not dispositive. All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

Other reforms short of abolition

- Trial Judges discuss implicit bias w/jurors and give written jury instruction that educate jurors and reduce risk of bias.
- Require regular implicit bias training as CLE for all lawyers. Court sponsors free webinars for CLE credit.
- State Court Administrator support study to determine effectiveness of Jury Instructions and other technology on reducing implicit bias
- Saintcalle did not suggest shift in burden of proof to party making strike but rather a "motivating factor" test: Deny strike if there is reasonable probability race was a factor, or if it is more likely than not that, but for D's race, strike would not have been exercised.

Race-neutral questions that have racially disproportionate impact on minorities

- Iowa SCt in Mootz did not explain why reason for strike was "clearly" legitimate except to note precedent that *a juror's interaction with police is "valid, race-neutral reason" for peremptory strike*.
- But see Brayer, Foster v. Chatman and the Failing of Batson, 102 Iowa L. Rev. 53 (2016): "Today's Batson violation is shrouded in a cloak of rationalization . . . evidenced when prosecutors ask questions in voir dire targeting the heart of the black experience in this country. Prosecutors may ask potential black jurors if they have had negative experiences with law enforcement because of their race. Exclusions based on such questions mark the continued victimization of a black juror simply because they were victimized by their government in the past." Can court ignore huge disparate impact of pretextual stops?

Racial disparities in stops, arrests, and convictions pose vexing problem

- What does fair cross section at front end accomplish if black jurors can be readily struck because they had a negative experience with police or have a prior felony conviction? Such race-neutral questions, when coupled with huge racial disparate impact evident in Iowa criminal justice system, provide basis for striking most black males from the jury.
- State v. Mootz upheld strike based on Hispanic juror's interaction with law enforcement without any consideration of its racial impact or explanation as to why juror's prior arrest "that he deserved" would bias him against D.
- Unclear that any remedy short of abolition of discretionary strikes can accomplish justice system goal of juries that reflect the community.

State v. Miller, 899 N.W.2d 741 (Ia. Ct. App. 2017), finds Batson violation and reverses

- The prosecutor exercised 2 of his 6 peremptories against African American jurors. The reason given for the strike of the final black juror was he had negative feelings about law enforcement.
- Miller emphasized the trial judge's obligation to examine the "relevant circumstances" to the motivation behind the prosecutor's strike, including the judge's evaluation of the the P's demeanor and whether the stricken juror's demeanor credibly exhibited the basis for strike attributed to the juror by the P.
- "First, we have concerns about parties using 'feelings about law enforcement' as a proxy for race . . . 'due to the disproportionate number of stops, searches, and arrests of people of color.'" * * * 'Black jurors are more likely than White jurors to have friends and family who have been arrested' [and are] more likely to have negative views of law enforcement."

Court of Appeals Comparative Juror Analysis

- "Second, two other nonblack jurors responded with just as negative—if not more negative—responses to the question about law enforcement, and they were not struck. * * * Additionally, while other jurors were asked if they had negative experiences with law enforcement, the prosecutor failed to ask the second juror any additional questions to gain insight into the juror's reason for her statement about 'room for improvement. ([T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.')"
- The District Court in Miller did not do a comparative juror analysis but the Iowa Court of Appeals did. The Court concluded that the reason given by the prosecution for the strike had not been applied even-handedly.

UK abolished Peremptory/Discretionary Strikes

- Peremptory challenges or strikes have been part of the English common law system dating back to the 13th century.
- England abolished peremptory challenges in 1988, Criminal Justice Act, 1988, c.33, § 118 (Eng.), as did Scotland, Wales, and Northern Ireland in 2007. Justice & Security Act,ch.6, § 13.
- Rationale for abolition was exercise of peremptory challenges derogated randomness of jury selection that is essence of system.
- Experience suggests this change has reduced costs and length of trials w/o causing increase in challenges for cause and w/o causing jurors to suffer embarassment.

Marder, Batson Revisited, 97 Iowa L. Rev. 1585 (2012): Eliminate Peremptory Strikes

- Thoroughly researched, very thoughtful article comparing U.S. and U.K. jury selection systems. It describes the many ways that U.K.'s elimination of discretionary strikes not only greatly improved the perception of fairness when trial jury reflects the community but also enhanced quality of jurors' deliberations due to jury's diversity.
- One of principle reasons for eliminating peremptories in England was so the juries would reflect more closely the heterogeneity of English society: "A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of that community."

Washington Supreme Court Rule 37 (2018)

- Rule governing Batson challenges applicable to all jury trials
- Objection can be made by party or trial judge w/o preliminary proof
- Upon objection the party exercising the peremptory challenge shall articulate the reasons it has been exercised
- Court need not find purposeful discrimination to deny peremptory, only that an "objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."
- "An objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in unfair exclusion of potential jurors in Washington State.."

Rule 37 Requires Comparative Juror Analysis

- (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contract to other jurors;
- (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
- (iv) whether a reason might be disproportionately associated with a race or ethnicity, and
- (v) if the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or past cases."

Presumptively Invalid Reasons

- The following reasons "because historically have been associated with improper discrimination in jury selection" "are presumptively invalid reasons for a peremptory strike:
- (i) having prior contact with law enforcement officers;
- (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (iv) living in a high-crime neighborhood;
- (v) having a child outside of marriage;
- (VI) receiving state benefits; and
- (vii) not being a native English speaker."

Procedure When Party Exercising Peremptory Relies on Juror Conduct as Justification

- ”Allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers” have been associated w/ improper discrimination
- “If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.”

Washington General Rule 37 JURY SELECTION

- (a) Policy and Purpose.
- The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.
- (b) Scope. This rule applies in all jury trials.
- (c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.
- (d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

Court need not find purposeful discrimination, implicit, institutional, and unconscious bias enuf.

- (e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

- (f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

Circumstances Considered

- (g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:
- (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
- (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
- (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
- (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
- (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

Reasons Presumptively Invalid.

- (h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:
- (i) having prior contact with law enforcement officers;
- (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
- (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
- (iv) living in a high-crime neighborhood;
- (v) having a child outside of marriage;
- (vi) receiving state benefits; and
- (vii) not being a native English speaker.

Reliance on Conduct.

- (i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

THOMAS JEFFERSON

Author of Declaration of Independence and 3d President of USA