OF THE PEOPLE, BY THE PEOPLE, FOR THE PEOPLE?

A Consideration of Juries and Discrimination

Wauwatosa All-City Read

Just Mercy

February 13, 2020
Among the abuses of the justice system Bryan Stevenson discusses in *Just Mercy* is the systemic exclusion of African-Americans from service on juries.

One of the results of those practices is the presence in the narratives in *Just Mercy* on death row of African-Americans who, though from counties with significant African-American populations, were convicted by all-white juries.
FOCUS

Throughout the history of our nation, jury service – though valued as a service and duty – has been a privilege reserved for *parts* of the citizenry.

- Persons of color have often been purposefully excluded from jury service
- Women were also excluded from jury service for a significant portion of the nation’s past
THE COMMON VIEW…

For most citizens, jury **duty** and **service** involves

- Going to the particular seat for the courts – federal or state (county or municipal) Courthouse
- Acting as a “person” – no special preparation for the service
- Setting aside any role or identity outside of the task presented at that particular time and place
At the time our nation was founded, jurors were not mere \textbf{fact-finders}, but equal participants in a constitutional structure of shared power...

- Jury trials pre-dated the Constitution
- There was almost universal acceptance of jury trials in the colonies and then in newly-formed states
- Juries served as reminders that citizens were the ultimate decision-makers in a democratic society
IN COLONIAL AMERICA…

Juries were seen as local, citizen-based institutions that were

• Participatory
• Predicated on equality and due process
• Devoted to protecting accountability and liberty

Jury service in the colonies – and later the states – had restrictive qualifications, limited by

• Race
• Gender
• Class
THE ZENGER TRIAL

One of the significant legal proceedings in the lead-up to the Revolutionary War began in 1734 when the New York Weekly Journal published a column that criticized Royal Governor William Crosby for, among other actions, removing Justice Lewis Morris from the bench. Governor Crosby, as a response to the criticism, had the publisher, John Peter Zenger arrested and imprisoned for seditious libel.
In 1733, New York Chief Justice Lewis Morris was a prominent critic of Governor Cosby and presided over a case involving the Chief Justice, *Cosby v. Van Dam*. The case was one involving an accounting and, through legal maneuvers, the Governor arranged a favorable trial venue and result.

Chief Justice Morris wrote a minority opinion, angering Governor Cosby, who demanded the written opinion from Justice Morris.
Chief Justice Morris complied with the order of the Governor for the opinion, but also

- Had the opinion printed for public distribution
- Attached an explanatory letter that included:

‘If judges are to be intimidated so as not to dare to give any opinion, but what is pleasing to the Governor, and agreeable to his private views, the people of this province who are very much concerned both with respect to their lives and fortunes in the freedom and independency of those who are to judge them, may possibly not think themselves so secure in either of them as the laws of his Majesty intended they should be.”
Governor Cosby was even angrier and removed Justice Morris – who had served for over twenty years - from the court. When the *New York Gazette*, the only newspaper in the Province, published articles supporting Governor Cosby, two eminent lawyers – James Alexander and William Smith – founded an independent newspaper, the *New York Weekly Journal*.

Alexander and Smith hired a skilled printer, John Peter Zenger – to print the paper. Alexander became editor and led opposition to Governor Cosby in cartoons, satire and article.
Governor Cosby was alarmed by the *Weekly Journal’s* accusations of tyranny and rights violations and tried to shut the paper down in order to "crush the egg out of which might spring the serpent of sedition and revolution."

Zenger, the paper’s printer, was arrested on November 17, 1734 and charged with *seditious libel*. Zenger remained in jail until his trial began on August 4, 1735.
WHAT WAS THE “SEDITIOUS LIBEL”…?

At the time of the Zenger trial, it was *libel* to publish information that was opposed to the government. Truth or falsity were irrelevant.

In addition to criticizing the removal of Justice Morris, through his publication, Zenger published stories by anonymous authors he would not name that had accused Governor Cosby of a number of crimes and his government of rigging elections and allowing the French enemy to explore New York harbor.
THE VERDICT …

During the trial, Zenger never denied printing the pieces. The judge felt the verdict was never in question. However…

• During the trial, Attorney Andrew Hamilton of Philadelphia stepped up to defend Zenger
• Hamilton admitted Zenger had printed the articles and demanded that the prosecution prove the articles false
• Hamilton called for Zenger’s release saying “It is not the cause of one poor printer but the cause of liberty.”
• The judge ordered the jury to convict Zenger if they believed he printed the stories
• In less than ten minutes, the jury returned a verdict of Not Guilty
The verdict in the Zenger trial is seen as one of the early guarantees of freedom of the press.

- Colonial newspapers began to feel free to openly criticize the British crown
- Revolutionary fervor grew in the decades following the Zenger trial

"The trial of Zenger in 1735 was the germ of American Freedom, the morning star of liberty that subsequently revolutionized America."

Gouverneur Morris
Author of Constitution Preamble
ONE INDICATION OF IMPORTANCE...

Among the “Train of Abuses and Usurpations” enumerated in the Declaration of Independence was that “…the present King of Great Britain…

...has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

...For depriving us, in many Cases, of the Benefits of Trial by Jury:

In Congress, July 4, 1776
Even before the Declaration of Independence, the First Continental Congress's Declaration of Rights of 1774 had proclaimed the right to jury trial.

Twelve states had enacted written constitutions prior to the Constitutional Convention, and the only right that these twelve constitutions declared unanimously was the right of a criminal defendant to jury trial.
At the Constitutional Convention, the desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists.

“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. “

Alexander Hamilton
Federalist 83
An another indicator…

One indicator of the prominence attributed to rights related to juries is the fact it is the only right referenced in both the body of the Constitution and the Bill of Rights. References to juries are found in

- Article III, Sec. 2
- Fifth Amendment (right to indictment by Grand Jury)
- Sixth Amendment (right to criminal jury trial)
- Seventh Amendment (right to civil jury trial)
The right to a jury is guaranteed

- In the constitutions of each of the original 13 states
- In the body of the Constitution
- In the 5th, 6th and 7th Amendments
- In one form or another in the constitution of every state admitted to the Union after the original thirteen
Sec. 5 The right of trial by jury shall remain inviolate; and shall extend to all cases at law; without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases, in the manner prescribed by law.
FOURTEENTH AMENDMENT

AMENDMENT XIV - Passed by Congress June 13, 1866. Ratified July 9, 1868.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
CIVIL RIGHTS ACT OF 1875

In 1870, Massachusetts Senator Charles Sumner introduced a Civil Rights act as an amendment to a general amnesty bill for former Confederates. The bill guaranteed all citizens access to

- Accommodations
- Theaters
- Public schools
- Churches
- Cemeteries

The bill further forbade the barring of any person from jury service on account of race.

Sen. Charles Sumner
THE LANGUAGE OF THE BILL...

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,...

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.
In March 1874, Charles Sumner died after having suffered a heart attack. The Senate brought his Civil Rights bill to the floor in late February 1875. It became law on March 1, 1875.

- President Grant never commented on the law.
- The Department of Justice did not send copies to its attorneys or take any steps to enforce it.

In 1883, in what came to be known as the **Civil Rights Cases**, the U.S. Supreme Court declared the Civil Rights Act of 1875 unconstitutional, holding the 4th amendment granted Congress the right to regulate the behavior of states, not individuals.
Among the provisions of a West Virginia state statute adopted March 12, 1873 was language that read

“All white male persons who are twenty-one year of age and who are citizens of this State shall be liable to serve as jurors…”

In January 1875, the retrial of Taylor Strauder, a former slave alleged to have bludgeoned an unfaithful wife to death, took place before an all-white jury. Strauder was convicted and sentenced to be hung.

From the first trial of Taylor Strauder
Among the issues Strauder raised in appeals that reached the Supreme Court was the constitutionality of a statute that disqualified a person for jury service solely on the basis of race.

In Strauder v. West Virginia (1880), the U.S. Supreme Court, in reversing the conviction, asked

“how can it be maintained that compelling a colored man to submit to a 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 color alone, however well qualified in other respects, is not a denial to him of equal legal protection?”
The Nineteenth Amendment

Passed by Congress June 4, 1919. Ratified August 18, 1920

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Despite the voting rights accorded women by the ratification of the Nineteenth Amendment, jury service didn’t necessarily follow...
From 1923 Alabama Statutes Chapter 311, Article 3, *Jurors and Juries*, the following description of who could/ could not be on a jury:

The jury commission shall place on the jury roll and in the jury box the names of all the male citizens of the county
- Who are generally reputed to be honest and intelligent men and
- Are esteemed in the community for their integrity, good character and sound judgment….
...AND ON THE OTHER HAND...

...but no person must be selected who
- Is under twenty-one or over sixty-five years of age.
- Is an habitual drunkard
- Being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror
- Cannot read English
- Has ever been convicted of any offense involving moral turpitude.

(In May 2017, the Alabama legislature identified crimes, conviction of which constituted *moral turpitude*).
THE SCOTTSBORO BOYS

One of the cases mentioned by Stevenson in *Just Mercy* is that of the Scottsboro Boys, a case that began March 25, 1931 on a freight train traveling in Jackson County, AL. A fight broke out between whites and blacks who were “hoboing” on the train.

The white youth jumped off the train and reported they had been attacked by a group of black teenagers. At Point Rock, AL, nine of the black youth on the train were arrested.
Initially the nine youth – ages 13 – 19 – were charged with minor offenses, but when two white women (Ruby Bates and Victoria Price) were interviewed, they accused the boys of raping them while onboard the train. The nine youth were transferred to the county seat, Scottsboro, to await trial.

Dr. M. H. Lynch, County Health Physician and Dr. H.H. Bridges of Scottsboro, were summoned to examine Price and Bates for signs of rape.
LEAD-UP TO THE TRIAL

As word of the events from the train and the reported rape spread, a mob gathered at the Scottsboro jail and demanded that the boys who’d been arrested be surrendered to them.

Sheriff Matt Wann addressed the mob, stated he would kill the first person to come through the door. Wann then walked through the crowd to the Courthouse and telephoned Alabama Governor Benjamin Miller who mobilized the Alabama National Guard to protect the jail.

Sheriff Matt Wann
Here is shown a part of the crowd of 10,000 persons who jammed the courthouse square in the little town of Scottsboro, Alabama, April 6, 1933, on the opening of the trials of nine black youths accused of attacking two white girls.
A SIDENOTE OF LIFE AT THE TIME...

There was considerable ill-will towards Sheriff Wann after the standoff at the jail.

Sheriff Matt Wann
Jackson County Sheriff's Office, Alabama
End of Watch: Tuesday, May 3, 1932

Above is the entry on the Officer Down Memorial Page in tribute to Sheriff Wann who was killed while on duty fourteen months after the standoff. No one was ever charged with any offense related to his death.

http://www.odmp.org/officer/13823-sheriff-matt-wann
THE FIRST TRIAL...

For the first trial, the State of Alabama chose to try Clarence Norris and Charlie Weems. The State did not provide an attorney for the defendants, so the families raised money to hire an attorney willing to try the case.

Chattanooga real estate attorney Stephen Roddy and 70-year-old attorney Milo Moody – who had not tried a defense case in decades – appeared for the defense.

Clarence Norris

Charlie Weems
The legal representation of Weems and Norris was questionable from the beginning:

- At the very beginning of the proceedings, Steven Roddy asked not to be noted as an attorney of record but to be allowed to appear purely in an advisory capacity to Moody.
- Although the arraignment of Norris and Weems had taken place six days earlier, neither Roddy nor Moody had significant contact with the defendants before the morning of the trial.
- Both Roddy and Moody informed the judge they had barely met or spoken with Norris or Weems before the trial.
- **Roddy’s petition of the court for a change of venue and argument that the crowds outside the courtroom created a mob atmosphere were overruled by the judge who decided the crowd was “merely curious.”**
Once the trial began, the State called as witnesses

- Victoria Price and Ruby Bates
- Orvil Gilley – a youth who had remained on the train with the two ladies when the other white males were thrown off
- Dr. Lynch and Dr. Bridges – who testified both girls had recently engaged in intercourse but there were no lacerations, tears, or signs of rough handling
- Luther Morris – a farmer who testified he’d seen Price and Bates with ”the Negroes” from his hayloft as the train passed and he “had seen a plenty”
- Lee Adams – who said he saw the fight “between the white and colored boys” on the train
- Charles Latham – the Deputy who captured the defendants at Paint Rock
- Both Weems and Norris testified
During the trial, Roddy declined to cross-examine the witnesses and, at 3:00pm on Tuesday afternoon, the case went to the jury.

- In less than two hours, a verdict of guilty and call for the death penalty was returned by an all-white, all male jury.
- The courtroom broke into loud applause
- The mass of people outside the Courthouse “cheered wildly”
The Second Trial…

On Wednesday, April 8, 1931, the trial of Haywood Patterson (age 18) took place. Haywood Patterson
• Left school after the third grade, working as a delivery boy
• Began riding the rails, looking for work, at age 14
• Was the person whose hand was stepped on, starting the fight that eventually led to the arrest of the Scottsboro Boys
• Was tried alone. The jury deliberated three hours with a death penalty verdict. (The courtroom was silent).

Haywood Patterson
The third trial on Wednesday, April 8, was of five of the defendants:

- Olin Montgomery, nearly-blind 17 year old (Monroe, GA)
- Andy Wright, an 18 year old (Chattanooga, TN)
- Eugene Williams, age 15 (Chattanooga, TN)
- Willie Robeson, age 17 (Atlanta, GA)
- Ozie Powell, age 16 (Atlanta, GA)

The case went to the jury at 4 pm on Wednesday and early Thursday morning, the jury returned a verdict calling for the death penalty.

Judge A.E. Hawkins pronounced the death penalty for all eight defendants and set July 10 – the first possible date - as the date for their execution.
On Thursday, April 9, the trial of Roy Wright, the 12-year-old brother of Andy Wright, took place. The witness presentations were the same, but the State requested life imprisonment instead of the death penalty based on Ry Wright’s youth.

At two o’clock on Thursday, the jury announced it was deadlocked and couldn’t agree on a verdict. Eleven jurors stood for the death penalty and one for life imprisonment.

Judge Hawkins declared a mistrial.
INTERVENTION

At the time the Scottsboro Boys were convicted, the American Communist Party was at the height of its efforts to organize, seeking to exploit racism and economic exploitation to recruit members – the Scottsboro Boys trial provided a huge opening.

The Communist Party brought in its legal arm, the International Labor Defense (ILD) and eventually teamed with the National Association for the Advancement of Colored People (NAACP) to form the Scottsboro Defense Committee.

On April 9, the ILD and NAACP notified Judge Hawkins and Alabama Governor Ben Miller of its intent to investigate and prepare for a new trial or appeal. The team of attorneys was joined by the American Civil Liberties Union (ACLU).

Seventy-two hours before the scheduled executions, Scottsboro Boys were notified of a stay of execution.
APPEALS AND SUCCESS

In January 1932, the ILD presented arguments to the Alabama Supreme Court and argued the Scottsboro Boys

- Were denied a fair trial
- Had inadequate representation
- Had a jury that was influenced by a jeering mob.

In March 1932, the Alabama Supreme Court upheld the convictions of seven of the defendants; it granted Williams a new trial, as he was a minor at the time of his conviction.

ACLU attorney Walter Pollak made a due process argument on appeal to the U.S. Supreme Court.
In November 1932, the Supreme Court ruled that the Scottsboro Boys had been denied the right to counsel and overturned the verdicts. The case was remanded to lower courts…

“In the light of the ... ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process…”

Powell v. Alabama, 287 U.S. 45, (1932)
A SECOND ROUND...

The second trial (of defendant Haywood Patterson) took place in Decatur, AL before Judge James Edwin Horton. During the second trial, Ruby Bates recanted her initial testimony and stated none of the Scottsboro Boys touched her or Price.

Additional evidence from the initial medical examination of the women also refuted the rape charge.

An all-white jury convicted Patterson and recommended the death penalty.

Haywood Patterson
THE JUDGE’S REMARKS ON THE MOTION TO SET ASIDE THE VERDICT...

“History, sacred and profane, and the common experience of mankind teach us that women of the character shown in this case are prone for selfish reasons to make false accusations both of rape and of insult upon the slightest provocation for ulterior purposes. These women are shown, by the great weight of the evidence, on this very day before leaving Chattanooga, to have falsely accused two negroes of insulting them, and of almost precipitating a fight between one of the white boys they were in company with and these two negroes. This tendency on the part of the women shows that they are predisposed to make false accusations upon any occasion whereby their selfish ends may be gained.

The testimony of the prosecutrix in this case is not only uncorroborated, but it also bears on its face indications of improbability and is contradicted by other evidence, and in addition thereto the evidence greatly preponderates in favor of the defendant. It therefore becomes the duty of the Court under the law to grant the motion made in this case.”
THE JUDGE’S ORDER...

“The testimony of the prosecutrix in this case is not only uncorroborated, but it also bears on its face indications of improbability and is contradicted by other evidence, and in addition thereto the evidence greatly preponderates in favor of the defendant. It therefore becomes the duty of the Court under the law to grant the motion made in this case.

It is therefore ordered and adjudged by the Court that the motion be granted; that the verdict of the jury in this case and the judgment of the Court sentencing this defendant to death be set aside and that a new trial be and the same is hereby ordered.”

James E. Horton, Circuit Judge
AS TO JUDGE HORTON…

Prior to the Scottsboro Boys trial, James Horton, after receiving his law degree from Cumberland University in 1899,

- Privately practiced law until 1910
- Served in the Alabama legislature for six years
- Was elected judge in 1922 and ran unopposed for reelection in 1928

Following his ruling in the Patterson trial, Judge Horton was defeated in his reelection bid. He left politics, returning to private practice and running a plantation. (His father, an Alabama probate judge, was a former planter and slave owner. His maternal grandfather was a Confederate general).
In November 1933, the next trial began with Judge William Callahan presiding. Judge Callahan had a stated goal: to “debunk” the Scottsboro trial and to take it off the front pages of America’s newspapers. Callahan

- Imposed strict time limits on the trials
- Persuaded the Governor not to provide National Guard protection for the defense team
- Made it difficult for reporters to cover the trial.
- Denied a motion for change of venue
- Denied a defense motion to quash the indictments because African-Americans were excluded from jury rolls. (A handwriting expert testified someone tampered with jury rolls).
Following his denial of a defense request to delay the trial for one day to allow a defense medical witness to testify, the proceeding was conducted. Judge Callahan

- Instructed the jury in what was described as a “point-by-point refutation of the defense case”
- Told the jury it should very strongly presume that no white woman would voluntarily have sex with a black.
- Neglected to give the jury a form for acquittal until the prosecution, fearing reversible error, asked him to do so.

The jury returned a verdict of guilty – another appeal ensued.
The information on which the Court based its decision included that, in Jackson County

- "in a long number of years, no negro had been called for jury service in that county."
- It appeared that no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives.
- Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. Their testimony was uncontradicted. It was supported by the testimony of officials.
- The clerk of the jury commission and the clerk of the circuit court had never known of a negro serving on a grand jury in Jackson County.
- The court reporter, who had not missed a session in that county in twenty-four years, and two jury commissioners testified to the same effect.
THE COURT FOUND...

“the evidence that, for a generation or longer, no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service, that, according to the practice of the jury commission, their names would normally appear on the preliminary list of male citizens of the requisite age, but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes established the discrimination which the Constitution forbids. The motion to quash the indictment upon that ground should have been granted.”
The Supreme Court unanimously overturned the conviction, finding that the systematic exclusion of African-Americans from jury pools violated

- The Sixth Amendment right to a fair trial
- The Fourteenth Amendment right to equal protection under the law.
In February 1984, James Batson was tried in Jefferson County, Kentucky based on allegations of second degree burglary and receipt of stolen goods.

- The judge conducted *voir dire* examination and excused some jurors “for cause.”
- The prosecutor used his preemptory challenges to strike all four of the African-American members of the venire. A jury of all-white members was selected.
- Batson’s counsel raised Sixth and Fourteenth Amendment challenges to the jury. The challenge was denied and the jury convicted Batson on both counts.
ON APPEAL...

The Kentucky Supreme Court upheld Batson’s conviction, but when the case was appealed to the U.S. Supreme Court, in a 7-2 decision, the Court reversed and set the case back to the trial court in Kentucky to determine if the prosecutor had race-neutral reasons for striking the four African-Americans.

Justice Powell wrote “dismissing African American jurors because of their race suggests that African Americans are incapable of being jurors or deciding a case fairly.”
THE BATSON CHALLENGE

In Batson, the U.S. Supreme Court outlined a three-step approach for analyzing preemptory strikes:

• First, the party objecting to the strike must present facts that “raise an inference” that the strike was racially based.

• Second, the party that made the strike must present a “neutral explanation.”

• Finally, the trial court must determine whether the party objecting has established “purposeful discrimination.”
WHY THE EMPHASIS ON INCLUSION…?

“…research has demonstrated that juries with two or more members of color
• deliberate longer
• discuss a wider range of evidence
• collectively are more accurate in their statements about cases, regardless of the race of the defendant”

“The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond (June 2018)”
WHY IT MATTERS…

“The presence of racial bias in the justice system is central to the concerns of people of color precisely because our society defines itself by a commitment to law and fairness.”

- Bryan E. Stevenson and Ruth E. Friedman
ANOTHER VIEW…

From *Powers v. Ohio*, 499 U.S. 400, 407 (1991), …with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

“Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people…”

*It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one would hope, a respect for the law.”*
In the early 1990s, an Alabama woman brought a complaint for financial support against a man (J.E.B.) she claimed was the father of her child. When J.E.B.’s trial began, the state of Alabama believed that women would make more sympathetic jurors and used preemptory challenges to remove nine of ten potential male jurors from the jury pool. As a result, J.E.B. faced an all-female jury. (J.E.B.’s attorney struck a potential male juror. The jury returned a verdict for the mother. J.E.B. challenged the systematic exclusion of males from his jury and his case eventually went to the Supreme Court.
THE HOLDING...

In *J.E.B. v. Alabama ex rel. T.B.*, (1994), the Supreme Court extended the holdings of *Batson* to prohibit the striking of potential jurors based on gender as violating the Equal Protection Clause.

“Parties still may remove jurors whom they feel might be less acceptable than others on the panel; **gender simply may not serve as a proxy for bias.** … Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. … When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.”
Wis. Stats. Sec. 765.001 State Policy on jury service; opportunity and obligation to serve as juror.

(1) Trial by jury is a cherished constitutional right.

(2) Jury service is a civic duty.

(3) No person who is qualified and able to serve as a juror may be excluded from that service on the basis of sex, race, color, sexual orientation… disability, religion, national origin, marital status, family status, lawful source of income, age or ancestry or because of a physical condition.

(4) All persons selected for jury service shall be selected at random from the population of the area served by the circuit court. **All qualified persons shall have an equal opportunity to be considered for jury service in this state…**
Sec. 756.02 Juror Qualifications
Every resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen and able to understand the English language is qualified to serve as a juror in that circuit court unless that resident has been convicted of a felony and has not had his or her civil rights restored.

Sec. 6.03 Disqualification of electors
(1) The following persons shall not be allowed to vote in any election and any attempt to vote shall be rejected:

(b) Any person convicted of treason, felony or bribery, unless the person’s right to vote is restored through a pardon or under s. 304.078(3)
Sec. 304.78 Restoration of civil rights of convicted persons

(2) …(E)very person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her term of imprisonment or otherwise satisfying his or her sentence…

(3) If a person who is disqualified from voting under s. 6.03(1)(b), his or her right to vote is restored when he or she completes the term of imprisonment or probation for the crime that led to the disqualification. The department…shall inform the person in writing at the time his or her right to vote is restored…
FROM THE WISCONSIN ELECTIONS COMMISSION WEBSITE...

I’m a convicted felon or in jail

• You are not eligible to vote in Wisconsin if you have been convicted of a felony and you are currently serving any portion of your sentence (including extended supervision, probation, or parole, also known as being “on paper”).

• Once you successfully complete your sentence and are no longer under the supervision of the Department of Corrections (“off paper”) your voting rights are restored, and you regain your eligibility to vote. **You must re-register to vote.**

• If you are in jail serving a misdemeanor sentence or awaiting trial, you are still eligible to vote -- usually by absentee ballot.
HOW MIGHT FELONY DISENFRANCHISEMENT HAVE A DISPARATE IMPACT?

Wis. Stats. Sec 961.41(3g)(e) Tetrahydrocannabinols. If a person possesses or attempts to possess tetrahydrocannabinols included under s. 961.14(1)(t) or a controlled substance analog of tetrahydrocannabinols, the person

- may be fined not more than $1,000 or imprisoned for not more than 6 months or both upon a first conviction and
- is guilty of a Class I felony for a 2nd or subsequent offense.
WHAT ISSUES MIGHT STILL EXIST…?

• Do citizens regard jury service as a priority? Does lack of interest in and willingness to serve on a jury undercut arguments that populations are the victims of discrimination?

• Have lower courts been consistent in enforcing Supreme Court rulings regarding jury representation?

• Are there steps that represent “overreaches” in an effort to provide “balanced” representation?
CURRENT VIEWS OF JURY DUTY...

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Note: Whites and blacks include only those who are not Hispanic; Hispanics are of any race. Source: Survey conducted April 19-23, 2017. PEW RESEARCH CENTER
SOME PERCEPTIONS DIE HARD…

("But we heard that you folks didn’t really like the water.")
US Supreme Court holds racial bias in jury selection unconstitutional
JUNE 21, 2019  Carrie Thompson
The US Supreme Court ruled on Friday that a Mississippi prosecutor unconstitutionally excluded black jurors from the murder trial of Curtis Flowers. The conviction will be set aside and Curtis Flowers retried.

Flowers has been tried six times for the murder of four people in 1996; two of the trials ended in mistrials and, in the other four, Flowers was convicted and sentenced to death. The Mississippi Supreme Court repeatedly found that prosecutors had acted intentionally to exclude black jurors and that these trials were thus unconstitutional under *Batson v. Kentucky*, which bars the state from excluding prospective jurors “on account of race or on the false assumption that members of [the defendant’s] race as a group are not qualified to serve as jurors.”
THE COURT FOUND…

Justice Kavanaugh penned the 7-2 majority opinion in *Flowers v. Mississippi*. The opinion reviewed Flowers’ six trials and provides a thorough history of racial discrimination in jury selection in the US, leading to the *Batson* decision. Kavanaugh identified four factual reasons for overturning Flowers’ conviction under *Batson*.

• First, he noted that across Flowers’ six trials, the State had used peremptory challenges to strike 41 of 42 prospective black jurors.

• Kavanaugh turned to the most recent trial and noted that the state had exercised peremptory strikes against five of the six prospective black jurors.

• Kavanaugh noted that on average the State asked 29 questions to each struck black prospective juror and one question to each seated white juror.

• The state did not supply adequate reasoning for its striking of one particular prospective black juror.
LEGAL CHALLENGES CONTINUE (WISCONSIN)...

Court: Removing Blacks From Jury Pool Wasn't Discrimination

By Associated Press, Wire Service Content  Aug. 7, 2019

MADISON, Wis. (AP) — A Wisconsin prosecutor's decision to strike the only two black people from a jury pool in a drug case involving a black defendant wasn't racially motivated because they said they had had bad experiences with the police, a divided state appellate court ruled Wednesday.

According to court documents, the prosecutor during jury selection struck the only two black people from the jury pool after they both said police had racially profiled them. The prosecutor told the trial judge that she felt that based upon their experiences, they didn't trust the police and would regard police witnesses with more skepticism than other witnesses.
RACE AS AN ISSUE IN A MILWAUKEE COUNTY JURY

“Judge raises questions by picking alternate juror from among only the whites on jury panel”
Milwaukee Journal Sentinel, Dec. 27, 2019, Bruce Vielmetti

“Recently, a Milwaukee County judge put an unusual twist on the process and selected the alternate juror from among only the eight white members of the 13 who heard the case.

It was meant to eliminate the chance that the ultimate jury would become less diverse and that at least five minorities would help decide the guilt or innocence of the African American defendant.”
THANK YOU!

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• Robin Luther
• All of you for attending and participating