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Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012

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Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012

Ann M. Eisenberg*

Abstract

The Supreme Court's May 2016 decision in Foster v. Chatman involved smoking-gun evidence that the state of Georgia discriminated against prospective black jurors during jury selection in Foster's 1987 capital trial. Foster was decided on the thirtieth anniversary of Batson v. Kentucky, the first in the line of cases to prohibit striking prospective jurors on the basis of their race or gender. But the evidence of discrimination for Batson challenges is rarely so obvious and available as it was in Foster.

While litigants have struggled to produce evidence of discrimination in individual cases, empirical studies have been able to assess jury selection practices through a broader lens. This Article uses original data gathered from trial transcripts to examine race- and gender-related exclusion of potential jurors during several stages of jury selection in a set of thirty-five South Carolina cases that resulted in death sentences from 1997 to 2012. It includes observations for over 3,000 venire members for gender and observations for over 1,000 venire members for race. This is one of few studies to examine the use of peremptory strikes in actual trials; no previous studies of this magnitude have examined this topic in South Carolina.

Consistent with comparable studies, this study's results — although limited in their generalizability due to data limitations — revealed that white and black potential jurors had substantially different experiences on their path to the jury box, while gender played a subtler role. Some of the findings included that prosecutors used peremptory strikes against 35% of eligible black venire

* Assistant Professor, University of South Carolina School of Law. This Article is dedicated to my father, the late Professor Theodore Eisenberg, who also offered input and provided assistance with data analysis for an earlier draft. I am grateful to the Office of Appellate Defense, a division of the South Carolina Office of Indigent Defense, for providing the trial transcripts observed in this study; to John Blume and Sheri Johnson for their feedback and for the opportunity to conduct this study; to Valerie Hans for feedback and guidance on earlier drafts; to Colin Miller and Italia Patti for their helpful comments; to Tokunbo Fadahunsi, Ph.D. Candidate, West Virginia University Department of Statistics, for data analysis support on the final version of the Article; and to Cornell Law School clinic students, including Mahats Miller, who contributed to data entry.

members in the data set, compared to 12% of eligible white venire members, and that the death-qualification process impeded a substantial number of black venire members from serving. These disparities contributed to overrepresentation of whites on the juries. The study's findings call into question the fairness of some of South Carolina's current death row inmates' trials, and buttress the argument that capital conviction and sentencing procedures are incompatible with the need for representative and impartial juries.

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I. Introduction

The Supreme Court's May 2016 decision in *Foster v. Chatman*¹ involved smoking-gun evidence that the state of Georgia discriminated against black prospective jurors during jury selection in Foster's 1987 capital trial. Prosecutors' files included a list of black venire members' names highlighted in green with "B" next to them, and the handwritten note, "NO Black Church," among other things.² Prosecutors struck all four black prospective jurors who had been qualified to serve, resulting in an all-white jury.³ The Court found, in contrast to the Georgia Supreme Court's holding, that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."⁴

Foster was decided on the thirtieth anniversary of *Batson v. Kentucky*,⁵ the first in the line of cases to prohibit striking prospective jurors on the basis of their race or gender.⁶ But, *Foster* notwithstanding, this line of cases is known for its impotence.⁷ The main difficulty arises when litigants seek to pursue *Batson* and related challenges, which they begin by making a prima facie showing that a peremptory strike was exercised on a prohibited basis — the first

1 136 S. Ct. 1737 (2016).

2 *Id.* at 1744. Additional evidence included a note from an investigator who worked with the prosecution, stating, "[I]f we had to pick a black juror I recommend that [this juror] be one of the jurors"; a list titled "definite NO's," which included six names, five of which were black prospective jurors (one of whom was disqualified for connection to the case prior to the strike stage); and the jurors' questionnaires, where their responses indicating their race had been circled. *Id.*

3 *Id.* at 1743.

4 *Id.* at 1755.

5 476 U.S. 79 (1986).

6 *Id. J.E.B. v. Alabama* extended *Batson*'s prohibition on discrimination to gender. 511 U.S. 127, 129 (1994).

7 See, e.g., BARBARA O'BRIEN & CATHERINE M. GROSSO, REPORT ON JURY SELECTION STUDY 11-13 (2011), <http://digitalcommons.law.msu.edu/facpubs/331/>; EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (Aug. 2010), <http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> ("Today in America, there is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries."); Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks?*, 78 CHI.-KENT L. REV. 1179 (2003); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 61-62, 83 (2009).

step in a three-step process to evaluate the claim.⁸ Under the second step, the striking party need only respond to the prima facie showing with a race- or gender-neutral basis for the strike.⁹ Under the third step, the court determines whether to accept the rationale as non-discriminatory.¹⁰ The neutral bases put forth in the second step have been called an “unbounded collection of justifications” that “run the gamut.”¹¹ But, the Supreme Court has directed courts to accept even “silly or superstitious” explanations if they appear race- and gender-neutral.¹² Rarely is the evidence of discrimination as compelling and available as it was in *Foster*, and rarely do defendants succeed in their *Batson* challenges.¹³

While litigants have struggled to produce evidence of discrimination in individual cases, empirical studies have been able to assess jury selection practices through a broader lens.¹⁴ This Article adds original data from the state of South Carolina to the empirical literature examining discrimination in jury selection in capital cases. The Article assesses whether the processes of venire selection, voir dire, and the peremptory striking of the jury resulted in disproportionate removal of women and African Americans on juries in a set of thirty-five South Carolina jury trials resulting in death sentences from 1997 to 2012.¹⁵ It is one of “only a handful of published studies” to examine these issues in actual trials rather than simulated experiments.¹⁶ All cases were used to observe

8 Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008).

9 *Id.* at 477.

10 *Id.*

11 Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 (2011).

12 *Id.* at 1096 (discussing Purkett v. Elem, 514 U.S. 765, 768 (1995)).

13 Cf. Jessica Gabel Cino, *Gabel on Foster v. Chatman: Stating the Obvious While Setting an Impossible Precedent*, GA. STATE UNIV. COLL. OF LAW (May 26, 2016), <http://law.gsu.edu/2016/05/26/gabel-on-foster-v-chatman-stating-the-obvious-while-setting-an-impossible-precedent/>.

14 Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012).

15 The limitations of this study are addressed in more detail below, but it is notable that the thirty-five cases are a sample of an estimated sixty-three death sentences imposed after jury trials in South Carolina for the period of 1997 to 2012. The cases were chosen based on the availability of trial transcripts that included relevant data. See *infra* Part (IV)(A). Other cases were not included because of inaccessibility to the author or inconsistent reporting among courts.

16 Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming*

gender as a factor in removal, including observations for 3,031 venire persons, while a subset of twenty-three cases was used to observe prospective jurors' race, including observations for 1,088 individuals. The Article assesses whether certain jury pools at the outset were racially representative of the defendants' respective communities; whether, and if so, why women and African Americans were removed disproportionately during voir dire; and how defense and prosecution exercised their peremptory strikes among whites versus blacks and men versus women.

Because the question of support for the death penalty tends to differ across race and gender lines,¹⁷ this study focuses in particular on removal for cause for opposition to, or support for, the death penalty. Capital juries are typically "death-qualified," or put through a questioning process to ensure they are willing to impose a death sentence upon the defendant.¹⁸ Although the Supreme Court has stated that capital juries have the mandate to "express the conscience of the community,"¹⁹ the death-qualification process means that judges in capital trials remove prospective jurors who oppose the death penalty due to a presupposed inability to apply the law impartially.²⁰ As a result, approximately one-third of the population, most of whom are women or African Americans, is likely

Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 IOWA L. REV. 1531, 1538 (2012).

17 *Id.* at 1534, 1550.

18 See John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 Nw. J. L. & SOC. POL'Y 195, 245 n.353 (2009); Richard Salgado, *Tribunals Organized to Convict: Searching for A Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green*, 2005 B.Y.U. L. REV. 519, 521 (2005) ("Despite arguments that the voir dire practice of death-qualifying a jury creates a predisposition toward finding guilt, the Supreme Court has held the practice constitutional. While the Court has affirmed that the prosecution is entitled to death-qualify the sentencing jury, and that death-qualifying a jury does not violate a defendant's rights per se, the Court has not mandated that a jury be death-qualified before the initial guilt phase of the trial or that the same, unitary jury hear both phases. Thus, courts are given the discretion to death-qualify the jury—with an eye towards the sentencing phase—before the guilt phase has been conducted, or to seek some other alternative such as a bifurcated jury instead.") (internal citations omitted) (emphasis omitted); *State v. Spann*, 308 S.E.2d 518, 519-20 (1983) ("When a potential juror is prevented from rendering an impartial decision or voting for the death penalty, the trial court can exclude him because of his inability to carry out his duty under the law.").

19 *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

20 See *Lockhart v. McCree*, 476 U.S. 162, 172 (1986).

to be removed from capital juries because of such beliefs.²¹

The results of this study show that prospective jurors' race played a critical role during the jury selection process, resulting in disproportionate representation of whites, whereas prospective jurors' gender told a slightly subtler story.²² These findings merit attention for several reasons. At the broadest level, discriminatory jury selection practices implicate the legitimacy of the legal system. Juries' purpose is to "guard against the exercise of arbitrary power."²³ But, unrepresentative juries may do just the opposite, leading to unpredictable and discriminatory outcomes.²⁴ Arbitrariness in the administration of justice undermines society's trust in the rule of law and violates the Eighth Amendment's prohibition on cruel and unusual punishment.²⁵

Unrepresentative juries are also particularly problematic in capital cases. Most critically, death-qualified juries are more inclined to return convictions and death sentences, undermining defendants'

21 See Joseph Carroll, *Who Supports the Death Penalty?*, DEATH PENALTY INFO. CTR. (Nov. 16, 2004), <http://www.deathpenaltyinfo.org/gallup-poll-who-supports-death-penalty>. As discussed in more detail below, *see infra* Part II(A), the Court has upheld death-qualification's effects on jury representativeness because "fair cross section" jurisprudence does not apply to petit juries and even if it did, those who oppose capital punishment do not themselves form a distinctive group. *Buchanan v. Kentucky*, 483 U.S. 402, 415 (1987). Another third of the population is ineligible to serve as capital jurors because they would vote for death automatically if the defendant were found guilty of murder. John Blume, *An Overview of Significant Findings from the Capital Jury Project and Other Empirical Studies of the Death Penalty Relevant to Jury Selection, Presentation of Evidence and Jury Instructions in Capital Cases 5* (Spring 2010) (unpublished manuscript) (<http://www.lawschool.cornell.edu/research/death-penalty-project/upload/empirical-studies-summaries-revised-spring-2010.docx>).

22 The causal effect of these characteristics cannot be proven with certainty because of the absence of controls or the use of regression analysis. However, some causal effect can reasonably be inferred based on the data's consistency with previous studies that did use such controls and methods. *See infra* Parts III-V.

23 See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

24 See *id.* at 531; David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 103-08, 124-25 (2001); Janell Ross, *How big of a difference does an all-white jury make? A leading expert explains.*, WASH. POST (May 30, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/30/how-big-a-difference-does-an-all-white-jury-make-a-leading-expert-explains/?utm_term=.fe62be75a8e2 (discussing research illustrating relationships between jury racial composition and arbitrary trial outcomes).

25 *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

rights to an impartial jury.²⁶ Processes that siphon women and black venire members off of juries undermine juries' fairness and effectiveness in numerous other ways as well: more diverse juries are likelier to "engage in wider-ranging deliberations," to address issues of race in their deliberations, and to counterbalance other jurors' biases.²⁷ Because South Carolina jury selection has many similarities with jury selection in other states, the findings discussed here likely reflect issues with capital jury representativeness and fairness that arise throughout the justice system.²⁸

Most immediately, the data discussed here have implications for the thirty-eight South Carolina inmates on death row as of this writing.²⁹ The most compelling racial disparity revealed by this study is comparable to that revealed in a study of the same topic in North Carolina by Catherine Grosso and Barbara O'Brien.³⁰ Their study has been the subject of ongoing litigation over the validity of certain North Carolina inmates' capital sentences.³¹ Twenty-nine of

26 Jill M. Cochran, Note, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1444 (2004); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC'Y REV. 69, 73 (2011).

27 Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC'Y REV. 667, 668-69 (2011).

28 See Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 282 (2001). Aspects of South Carolina's history stand out, however. As of 2002, "[o]nly six states ha[d] executed more death-sentenced inmates," making South Carolina's execution rate relatively high compared to its murder rate. John Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 292-93, 297 (2002). Further, although this may be the case in other states, race continues to play a substantial role in South Carolina's capital punishment scheme. For instance, "substantial variation exists in South Carolina's death sentencing rates when the race of the defendant and the race of the victim are taken into account. African-Americans who kill whites are sentenced to death at approximately three times the rate of whites who kill whites . . . [A] person charged with killing someone who is white is more than seven times more likely to be sentenced to death than a person charged with killing an African-American." *Id.* at 298.

29 S.C. DEP'T OF CORR., DEATH ROW LIST (2017), <http://www.doc.sc.gov/pubweb/news/death-row-report.pdf> (last visited Jan. 31, 2017).

30 See O'BRIEN & GROSSO, *supra* note 7.

31 *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015), *cert. denied*, 137 S.Ct. 67 (2016). Grosso's and O'Brien's study was used pursuant to a provision of North Carolina's now-repealed Racial Justice Act, which created a cause

South Carolina's current death row inmates had sentences imposed from 1997 to 2012.³² This study includes twelve of their trials, with information on juror race available for eight.³³ Although the limited generalizability of the data is addressed in more depth below, the fairness of South Carolina's jury selection processes for these trials is of interest in and of itself.

The Article proceeds as follows. Part II.A explains the significance of jurors' race and gender in the context of capital punishment. Part II.B describes the relationship between race and gender and specific pre-trial procedures for jury empanelment, as well as relevant Supreme Court jurisprudence, including *Taylor v. Louisiana*,³⁴ *Witherspoon v. Illinois*,³⁵ and *Batson v. Kentucky*³⁶ and related judgments.³⁷ Part III surveys literature and empirical studies examining race and gender in capital punishment. Part IV.A explains the methodology of the instant study and addresses its limitations, such as the limited availability of trial transcripts and the absence of controls for race- and gender-neutral bases for removal. Part IV.B provides the results of the empirical analysis of the data. Part V discusses the data's implications, including the difficulty of reconciling jury representativeness with capital conviction and sentencing procedures.

of action for death row inmates to use statistical evidence revealing racial discrimination in their trials. *See infra* Part III.

32 *See* S.C. DEPT OF CORR., *supra* note 29.

33 The trials included in this study where the inmates are currently on death row are *State v. Aleksey*, 538 S.E.2d 248 (S.C. 2000), *State v. Bixby*, 698 S.E.2d 572 (S.C. 2010), *State v. Bryant*, 642 S.E.2d 582 (S.C. 2007), *State v. Finklea*, 697 S.E.2d 543 (S.C. 2010), *State v. Lindsey*, 642 S.E.2d 557 (S.C. 2007), *State v. Owens*, 664 S.E.2d 80 (S.C. 2008), *State v. Sigmon*, 623 S.E.2d 648 (S.C. 2005), *State v. Starnes*, 531 S.E.2d 907 (S.C. 2000) ("Starnes I"), *State v. Starnes*, 698 S.E.2d 604 (S.C. 2010) ("Starnes II"), *State v. Williams*, 690 S.E.2d 62 (S.C. 2010), *State v. Winkler*, 698 S.E.2d 596 (S.C. 2010), *State v. Woods*, 676 S.E.2d 128 (S.C. 2009). The cases among these with information containing juror race are *Aleksey*, *Bryant*, *Finklea*, *Lindsey*, *Sigmon*, *Starnes I*, *Williams*, and *Woods*.

34 419 U.S. 522 (1975).

35 391 U.S. 510 (1968).

36 476 U.S. 79 (1986).

37 *E.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

II. The Significance of Jurors' Race and Gender

A. *Jury Composition Influences Case Outcomes, Particularly in Capital Cases*

Jurors' traits are not generally outcome-determinative.³⁸ Rather, "verdicts usually depend more on the facts of the case and less on the personal characteristics of the jurors."³⁹ Thus, "[d]etermining whether race, sex, or other juror characteristics influence how capital case jurors vote is difficult. Jurors tend to vote for death in more egregious cases and for life in less egregious cases no matter what their own characteristics."⁴⁰

Nevertheless, juror characteristics do influence jury deliberations and verdicts in capital cases.⁴¹ Capital cases differ from other trials in the gravity of the potential penalty, the amount of discretion given to the jury, and the bifurcation of the trial between the verdict and penalty phases.⁴² For instance, in the sentencing phase in South Carolina, jurors are given a list of aggravating and mitigating circumstances and are told only that they may choose a life sentence instead of death for "any reason or no reason at all."⁴³ "[C]ompared to most jury decisions," Theodore Eisenberg and colleagues argue, "[b]ecause capital sentencing is so discretionary, considerable room exists for a juror's personal characteristics to influence her judgment."⁴⁴

Various studies have shown that the racial composition of a jury influences the likelihood of the jury imposing a death sentence.⁴⁵

38 See Eisenberg et al., *supra* note 28.

39 *Id.*

40 *Id.* at 277.

41 See *id.* at 283, 285-86, 308 (noting influence of jurors' race and religion on juror voting).

42 See *id.* at 282.

43 *Id.* at 283.

44 *Id.*; see also David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1643 (1998) ("The potential influence of race in the administration of the death penalty takes root in the broad exercise of discretion that state laws grant prosecutors and juries."); Lynch & Haney, *supra* note 26, at 69 (discussing the additional potential for reliance on racial stereotypes in capital cases).

45 E.g., William J. Bowers, Benjamin D. Steiner, & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 195 (2001); Mustafa El-Farra, *Race*

In particular, white jurors are more likely to vote for death than black jurors,⁴⁶ men are more likely to vote for death than women,⁴⁷ and “support for the death penalty among whites is highly correlated with measures of anti-black racial prejudice and stereotyping.”⁴⁸ Further, “the more a juror supports the death penalty, the more likely she is to find a criminal defendant (capital and noncapital alike) guilty in the first place,” and more likely to ultimately vote for death.⁴⁹ Other juror characteristics, such as religion, influence outcomes as well.⁵⁰

The Supreme Court and Congress have acknowledged an interest in having proportional representation of the community on juries.⁵¹ Indeed, “[a]s early as the twelfth century, English law recognized the danger that inhered in allowing members of a minority community to be tried entirely by . . . majority jurors.”⁵² Not only does a representative jury seem and act more neutral, better reflect the judgment of the community, promote public confidence in the judicial process, and keep the justice system from becoming “the organ of any special group or class,”⁵³ it also eases the potential blow of the “minority effect,” where a minority faction of less than three on a particular jury tends to be overwhelmed by the stance of the majority.⁵⁴ Diversity also allows a jury to serve its democratic and political functions more effectively, acting as a “check on government functionaries,”⁵⁵ “guard[ing] against the exercise of arbitrary power,”⁵⁶ and counteracting the biases or zealotry of judges

and the Jury: Racial Influences on Jury Decision-Making in Death Penalty Cases, 4 HASTINGS RACE & POVERTY L.J. 219, 226 (2006); Lynch & Haney, *supra* note 26, at 84 (“[T]here were differences in final case outcomes as a function of defendant race and ratio of white men on the jury.”).

46 Eisenberg et al., *supra* note 28, at 298.

47 Lynch & Haney, *supra* note 26, at 69.

48 *Id.* at 73.

49 Eisenberg et al., *supra* note 28, at 283-84.

50 *See id.* at 285-86.

51 28 U.S.C. § 1861 (1993); e.g., *Smith v. Texas*, 311 U.S. 128, 130-31 (1940); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972); *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

52 Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, in *THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP* 169-70 (Valerie Hans ed., 2006).

53 *Glasser v. United States*, 315 U.S. 60, 86 (1942); Fukurai, *supra* note 52, at 170, 172.

54 Fukurai, *supra* note 52, at 170.

55 *Id.* at 172.

56 *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

and prosecutors.⁵⁷

Thus, the composition of the jury is central to a trial, with the stakes higher and the effects stronger in capital cases. As is the case in South Carolina,⁵⁸ “the typical jury exercises virtually complete discretion on the life or death decision once it finds a statutory aggravating circumstance present in the case.”⁵⁹ Given the nearly 1,000-year-old common law value in having a representative jury render such grave decisions, the mechanisms for filling the jury box represent much more than simple administrative procedure.

B. The Centrality of Jury Composition Underscores the Importance of Empanelment Procedures, Each of Which Interacts with Prospective Jurors’ Race and Gender

In light of the impact that the composition of juries can have in capital cases, the pre-trial processes of venire selection, voir dire, and the use of peremptory strikes wield significant influence over each case as a whole. The discussion below addresses how each phase uniquely interacts with the empanelment or removal of women and black venire members.

1. The Venire Selection Process

The venire selection process typically involves two steps. “First, a list of names from which the venire can be drawn must be compiled . . . Second, names from the source list are [randomly] selected to form the jury venire.”⁶⁰ Defendants are not entitled to a jury composed in whole or in part of members of their race.⁶¹ However, in *Taylor v. Louisiana*, the Supreme Court required venire selection to draw from a “fair cross section of the community” as a fundamental aspect of the right to a jury trial guaranteed by the Sixth Amendment.⁶² *Taylor* also held that the Equal Protection Clause

57 Fukurai, *supra* note 52, at 172 (quoting *Taylor*, 419 U.S. at 530-31 and *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

58 Eisenberg et al., *supra* note 28, at 282-83.

59 Baldus et al., *supra* note 44, at 1644.

60 Mark McGillis, *Jury Venires: Eliminating the Discrimination Factor by Using a Statistical Approach*, 3 HOW. SCROLL: SOC. JUST. L. REV. 17, 17 (1995).

61 *Taylor*, 419 U.S. at 538.

62 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”); *Taylor*, 419 U.S. at 528.

of the Fourteenth Amendment prohibits systematic exclusion of particular racial (or gender) groups from jury service.”⁶³

Taylor’s mandate is often not the practice in reality, however. *Taylor v. Louisiana* and its progeny “offer[] no specific mechanism to guarantee the cross-sectional representation on the jury itself,”⁶⁴ and venirees continue to demonstrate disproportionate representation.⁶⁵ As Hiroshi Fukurai explains:

One recurrent problem with this method is that randomly selected jury panels are not always fully or regularly representative of all segments of the relevant community. More specifically, racial and ethnic minorities, as well as the young, old, and the poor, are consistently underrepresented in most federal and state court jury pools and venirees.⁶⁶

Voter and driver registration lists are the most commonly used sources and are perhaps the most comprehensive lists of citizens available.⁶⁷ But “each has significant deficiencies with regard to inclusiveness and representativeness.”⁶⁸ Voter lists may exclude as much as one third of the adult population, neglecting racial minorities in particular, while driver registration lists underrepresent women and the elderly.⁶⁹ The actual impact of the fair cross-section doctrine has itself never been critically assessed.⁷⁰

63 *Taylor*, 419 U.S. at 526-33; see also Duncan, *supra* note 57, at 149 (applying Sixth Amendment to states); Heather Davenport, Note, *Blinking Reality: Race and Criminal Jury Selection in Light of Ovalle, Miller-El, and Johnson*, 58 BAYLOR L. REV. 949, 955 (2006).

64 Fukurai, *supra* note 52, at 171 (emphasis added).

65 E.g., Valerie P. Hans, *Jury Representativeness: It’s No Joke in the State of New York*, CORNELL J.L. & PUB. POL’Y BLOG (Jan. 20, 2012), <http://jlp.org/blogzine/jury-representativeness-its-no-joke-in-the-state-of-new-york/>.

66 Fukurai, *supra* note 52, at 144 (explaining four reasons behind these lacunae: underrepresentation on voter registration lists, exclusionary screening questions (such as inquiries about economic hardship), subjective selection criteria focusing on integrity and character, and failure to examine the rights of excluded jurors).

67 *Id.* at 146-47.

68 *Id.* at 146.

69 *Id.* at 146-47.

70 *Id.* at 148.

2. *Removals for Cause during Voir Dire*

After venire members arrive to court, the voir dire stage poses a second hurdle on their path to the jury box. During voir dire, which is usually lengthier for capital cases, the court deems jurors to be “qualified” or “unqualified” after their views have been vetted through questioning and cross-examination.⁷¹ Members of the venire may be removed for bias or strong feelings; familiarity with the case, parties, or witnesses; or any other experience or view that may undermine impartiality in rendering a decision — including, in capital cases, views on the death penalty.⁷²

But, commentators note flaws inherent in the voir dire process.⁷³ Primarily, it is a subjective process that depends on self-reporting. Jurors may not disclose their biases because they are unaware of them, uncooperative, resentful of the court, or apprehensive of being evaluated, among other reasons.⁷⁴ Jurors may also demonstrate inconsistency in self-assessments of their own biases.⁷⁵ Subjective standards for removals combined with substantial judicial discretion might facilitate pretextual removals based on discriminatory motivations, whether conscious or not.⁷⁶

The South Carolina Supreme Court has affirmed that in capital cases, “[a] prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror.”⁷⁷ The United States Supreme Court affirmed the constitutionality of this practice in *Lockett v. Ohio*.⁷⁸ The parties may challenge venire members they find biased or otherwise unqualified based on voir dire questioning,⁷⁹ but the decision as to whether to remove them is within the sole discretion of the trial judge.⁸⁰ Thus, in capital cases

71 *Id.* at 149-50; see also NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES: THE VERDICT* 89, 93 (2007).

72 See VIDMAR & HANS, *supra* note 71, at 93-94.

73 See, e.g., Hans & Jehle, *supra* note 7, at 1182.

74 Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, in *THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP* 198-200 (Valerie Hans ed., 2006).

75 *Id.* at 200-05.

76 See Lee Smith, Note, *Voir Dire in New Hampshire: A Flawed Process*, 25 VT. L. REV. 575, 592 (2001).

77 *State v. Lindsey*, 642 S.E.2d 557, 561 (S.C. 2007).

78 438 U.S. 586, 596 (1978).

79 See, e.g., *State v. Bixby*, 388 S.C. 528, 541 (2010).

80 *Lindsey*, 642 S.E.2d at 561.

in South Carolina, judges frequently remove prospective jurors for cause when the prospective jurors express strong reservations about the death penalty, with the rationale that “[t]he state as well as the accused [should] enjoy[] a right to an impartial jury.”⁸¹

An excerpt from the transcript of a 2007 South Carolina capital trial⁸² illustrates the nature of questions posed to jurors and the types of personal moral qualms that may preclude them from serving on a capital jury:

Judge: I understand you’re . . . a pastor? . . .

Potential Juror: No, I am not a pastor, my wife is.

. . . .

Judge: Could you as a juror in a sentencing phase, depending upon the facts . . . and the law . . . render a sentence of life imprisonment?

A: Judge, as I afore stated, my belief and my belief biblically and also personally I feel that anyone can be rehabilitated and I don’t feel that always life in confinement is rehabilitation.

Judge: I see. . . . [A]s a juror in a sentencing phase, . . . could you render a sentence of death? I think I know but I do have to ask the question.

A: No, I do not feel that I could render a sentence of death.

. . . .

[M]y church and church family do take a stand against the death penalty. And I do believe in the scripture and the scripture teaches me . . . that the word of God says that vengeance is mine saith

81 Bruce J. Winick, *Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in which the Judge Makes the Sentencing Decision*, 37 U. MIAMI L. REV. 825, 825-26 (1983).

82 Transcript of Record (on file with author).

the Lord. And . . . thou shalt not kill. . . . I'm truly against the death penalty.

Defense Attorney: . . . I think you also wrote [in your questionnaire] that, my church teaches its members to abide by state laws.

A: . . . [N]ot only my church, my bible also teaches me, you know, that we should obey the rules of the land as well as obey the rules of God. But in my case, . . . I don't think the laws of the land would also let me do anything to go against what I believe in.

. . . .

Defense Attorney: Please don't think I'm trying to — this is my situation, okay. I need a jury. The justice system needs a jury full of people that have a bunch of different backgrounds and views, okay.

. . . .

A: . . . [I]f I don't believe it in [sic] I just don't feel that I could give a honest, moral — I just don't feel that I could sit there and pass judgment

. . . .

Judge: . . . As I say, the law does not require somebody to do something they cannot in good conscience do. And so that's why we have these things, to find out how people feel.

I, under the examination of this juror, I think I'm going to excuse him from serving on the trial of this case.⁸³

83 *Id.* at 712-28.

In a 2009 capital trial,⁸⁴ another juror expressed similar concerns:

Potential Juror: I guess I would say — you know, you guys are seeking the death penalty, and although I don't think this gentleman . . . deserves to live I think my religious beliefs would stop me from penning something saying that he got the death penalty

I'm just going to say, you know, I think he deserves to be shot, I mean, I really do, but when it comes down to it, I was raised Catholic . . . you know, Jesus died for everybody Not just me, not just you, but even the most heinous person out there he died for —

Judge: Yes sir.

Potential Juror: — He died for, and who am I to say that someone deserves to be put to death. That is not my responsibility.

Judge: Yes sir.⁸⁵

The dialogues above among judge, attorney, and venire member demonstrate the probing inquiry in which counsel and the court engage with each potential juror in capital cases. These excerpts also illustrate the effect of a juror's religion on his or her potential exposure to removal.⁸⁶

The influence of race and gender on individuals' attitudes and opinions toward capital punishment may be subtler than the influence of religion. But the extended, highly personal quality of these inquiries shows the room for jurors' backgrounds and experiences to affect their responses and likelihood of removal. Although the prospective jurors above established relatively clear

84 Transcript of Record (on file with author).

85 *Id.* at 1157-58.

86 Grosso and O'Brien note that "some lower courts have prohibited strikes based on religious affiliation." Grosso & O'Brien, *supra* note 16, at 1534 (citing *United States v. Brown*, 352 F.3d 654 (2d Cir. 2003); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 957 (1998)).

reasons for their removal — their staunch opposition to the death penalty — the nature of the questioning above also suggests an element of subjectivity. Venire members could potentially be removed for vaguer conscientious scruples. The subjectivity of the process also illustrates the potential for pretextual challenges made by attorneys with discriminatory motivations.

The Court has held constitutional the fact that removal for opposition to the death penalty may have a disparate impact on certain groups.⁸⁷ In *Lockhart v. McCree*, the Court held that death qualification does not violate *Taylor* or the right to an impartial jury because people who object to the death penalty do not themselves form a distinctive group.⁸⁸ The following year, in *Buchanan v. Kentucky*, the Court upheld death qualification's disparate impacts on certain groups because *Taylor's* fair cross-section requirement applies only to veniremen.⁸⁹ The Court also reasoned that death qualification did not involve excluding prospective jurors on the basis of race or gender, but rather, "related to the [State's] legitimate interest in obtaining a jury that does not contain members who are unable to follow the law with respect to a particular issue in a capital case."⁹⁰

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- 87 *Buchanan v. Kentucky*, 483 U.S. 402, 415 (1987). The death qualification process itself has undergone various changes in the past several decades. In *Witherspoon v. Illinois*, 391 U.S. 510, 514 (1968), the Court narrowed the pre-1968 standard of removing prospective jurors for having any "conscientious scruples" against the death penalty, holding that to allow "removal for cause of jurors based merely on their general scruples against capital punishment" was to deny a defendant his due process right to an impartial jury. John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 *Nw. J. L. & Soc. Policy* 195, 319 n.901 (2009); *Witherspoon*, 391 U.S. at 519-23; Winick, *supra* note 81, at 831-32. *Witherspoon* thus restricted removal on this basis to venire persons who make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment . . . , or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at 522 n.21 (emphasis added). Seventeen years later, the Court expanded permissible removals on this basis with *Wainwright v. Witt*, 469 U.S. 412 (1985), which reinstated some of the judge's discretion.
- 88 *Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986). In *Lockhart*, the Court overruled the lower courts' determination that the death qualification process violated the Sixth and Fourteenth Amendment requirements of a fair-cross-section representation and jury impartiality because the process resulted in "conviction-prone" juries. *Id.* at 167-73 (questioning the reliability of petitioner's social science evidence on the matter).
- 89 483 U.S. at 402, 415 (1987); *see also* *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (holding that intentional discrimination is unconstitutional but laws' or policies' racially disparate impacts are not).
- 90 *Buchanan*, 483 U.S. at 416.

Although death qualification's constitutionality has been upheld, the process still stands to undermine juries' ability to serve their function fairly and indiscriminately. Valerie Hans and Alayna Jehle observe that exclusions based on death penalty attitudes "may have a deleterious impact on the representativeness and impartiality of the capital jury."⁹¹ In one example, researchers in a California study of 1,275 community residents found that the "jury qualification requirements tend[ed] to disrupt the representative composition of the general population," skewing the composition towards white men.⁹² Others have also noted that women and black prospective jurors are more likely to be removed during voir dire for their opposition to capital punishment.⁹³

3. *Peremptory Strikes*

After voir dire, the parties may choose to exercise a number of peremptory strikes, also known as peremptory challenges, which are vetoes that parties may use against individual jurors without stating a reason for the veto.⁹⁴ In South Carolina, defendants charged with serious crimes are allowed ten strikes and the state is allowed five.⁹⁵ Peremptory strikes are controversial: no constitutional right protects their use, and while some consider them to be essential to the jury system,⁹⁶ others forcefully advocate their elimination.⁹⁷ One commentator called peremptory challenges "the last best tool of Jim Crow."⁹⁸

91 Hans & Jehle, *supra* note 7, at 1181.

92 Fukurai, *supra* note 52, at 151, 162, 165-66.

93 Jill M. Cochran, Note, *Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399, 1444 (2004).

94 Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 447 (1996).

95 S.C. CODE ANN. § 14-7-1110 (1976).

96 Melilli, *supra* note 94.

97 *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring) (noting that when *Batson* was decided, Justice Thurgood Marshall predicted that the decision would not achieve its goal, and opining that Miller-El reinforced the reality that "[t]he only way to 'end the racial discrimination that peremptories inject into the jury-selection process' . . . [is] to 'eliminat[e] peremptory challenges entirely.'" (third alteration in original).

98 Mary Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 696 (1999) (internal citation omitted).

Batson v. Kentucky and its progeny prohibited peremptory strikes motivated by prospective jurors' race or gender, holding that they violate the Equal Protection Clause of the Fourteenth Amendment.⁹⁹ The *Batson* test now requires a party seeking to challenge a strike to establish a prima facie case that his or her opponent exercised a strike on the basis of race,¹⁰⁰ or, per *J.E.B. v. Alabama ex rel. T.B.*, gender.¹⁰¹ The burden then shifts to the non-moving party to provide a race- or gender-neutral explanation for the strike.¹⁰² The court then determines whether purposeful discrimination motivated the strike.¹⁰³

Although the subject of ample litigation, *Batson* and related decisions are known for their lack of impact.¹⁰⁴ This apparent inefficacy itself is cited as a potential indication that peremptory challenges should be eliminated altogether.¹⁰⁵ As mentioned above, the central weakness is the fact that, when the non-moving party in a *Batson* or *J.E.B.* motion must provide a reason for the strike in question other than race or gender, attorneys are easily able to provide neutral-sounding rationales.¹⁰⁶ "These perfunctory hearings fail to meaningfully interrogate the reasons prosecutors offer as

99 *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Powers v. Ohio*, 499 U.S. 400 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); see also Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands*, 5 OHIO ST. J. CRIM. L. 131, 131 (2007). *Batson* overruled *Swain v. Alabama*, 380 U.S. 202 (1965), where the Court had held that equal protection under the Fourteenth Amendment would only be violated if "the defendant could prove that the prosecutor struck African American jurors in every case." Johnson, *infra* at 133. The decision in *Swain* "set the bar so high for proving discriminatory intent that no litigant won a *Swain* claim for [twenty] years." EQUAL JUSTICE INITIATIVE, *supra* note 7, at 12. This means the window for winning claims based on racial discrimination has only relatively recently been opened. See *id.* Practice suggests that it has not been opened very far, however. Some have argued that other distinctive groups, such as people with religious beliefs, should also be protected from discriminatory peremptory challenges. See Anthony D. Foti, Note, *Could Jesus Serve on a Jury? Not in the Third Circuit: Religion-Based Peremptory Challenges in United States v. Dejesus and Bronshtein v. Horn*, 51 VILL. L. REV. 1057, 1057-58 (2006).

100 *Batson*, 476 U.S. at 96-97.

101 *J.E.B.*, 511 U.S. at 129.

102 *Batson*, 476 U.S. at 96-97.

103 *Id.* at 98.

104 Fukurai, *supra* note 52, at 167.

105 Melilli, *supra* note 94, at 483 (noting Justice Marshall's argument that *Batson*'s goals could only be achieved by eliminating peremptory challenges).

106 See Rose, *supra* note 98, at 696.

race neutral motivations for peremptorily striking Black jurors.”¹⁰⁷ Consequently, defendants “monopolize the making of *Batson* claims,” yet, “the success rate of such claims by criminal defendants is manifestly unimpressive.”¹⁰⁸ Although anecdotal, it is telling that despite the rather blatant evidence in *Foster*, the pursuit of *Foster*’s *Batson* claim took thirty years of litigation.

The role of race and gender in the exercise of peremptory strikes has spurred discussion as tense as that surrounding the existence of the strikes themselves. In a study of challenges based on *Batson* from 1986 to 1993, Kenneth Melilli found that 87.38% of challenges during the period challenged the striking of black jurors.¹⁰⁹ He argued:

Because peremptory challenges are exercised after the challenges for cause, any prospective juror who is peremptorily struck is presumably an individual who is not subject to a valid challenge for cause. For this reason . . . peremptory challenges are frequently exercised on the basis of group affiliations rather than individual characteristics. Indeed, evaluating people on the basis of stereotypes is an inherent aspect of the peremptory challenge system. The peremptory challenge system allows lawyers and litigants to impose these stereotypes upon the jury selection process without articulating these potentially offensive and divisive prejudices.¹¹⁰

Consistent with Melilli’s concerns, commentators continue to observe parties’ disproportionate strikes of certain groups, with strike rates depending on the race of the defendant.¹¹¹

107 Price, *supra* note 7, at 57.

108 Melilli, *supra* note 94, at 459.

109 *Id.* at 462.

110 *Id.* at 447 (internal citations omitted). Lawyers’ motivations for exercising peremptory challenges on the basis of race or gender are not necessarily based solely upon derogatory stereotypes. For instance, a defense attorney may take race into account for her choices of strikes if she feels that an attempt to comply with *Batson* would force her to ignore, to her client’s detriment, her knowledge of the statistical evidence of how jurors’ attitudes are influenced by their race. *E.g.*, RICHARD C. DIETER, DEATH PENALTY INFO. CTR., BLIND JUSTICE: JURIES DECIDING LIFE AND DEATH WITH ONLY HALF THE TRUTH 4 (2005), <http://www.deathpenaltyinfo.org/BlindJusticeReport.pdf>.

111 Hans & Jehle, *supra* note 7, at 1190-91; Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM.

A repeated concern in Supreme Court jurisprudence on discrimination in capital trials is preventing the arbitrary application of the law, which potentially violates the Eighth Amendment's prohibition on cruel and unusual punishment.¹¹² The Court explained in *Taylor* and reaffirmed in *Batson* that “[t]he purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor.”¹¹³ Yet, in the 1987 decision *McCleskey v. Kemp*,¹¹⁴ which has been called “the *Dred Scott* decision of our time,”¹¹⁵ the Court concluded that “apparent disparities in sentencing are an inevitable part of our criminal justice system.”¹¹⁶ A discriminatory purpose, as opposed to a disparate impact, must be shown to establish a violation of the Equal Protection Clause.¹¹⁷ This high burden explains, in part, the impotence of *Batson*.

The decision in *Foster* in 2016 did not appear to alter the *Batson* playing field substantially. The evidence, discussed above, prompted Justice Kagan to query during oral arguments, “Isn’t this as clear a *Batson* violation as a court is ever going to see?”¹¹⁸ Commentators agree that the decision was limited in scope at best, and at worst, “create[d] an artificial and impossibly high burden of proof for future cases.”¹¹⁹

CRIM. L. REV. 1099, 1100, 1100 n.6 (1994); see Rose, *supra* note 98, at 697-99 (observing that black venire members were peremptorily struck by the prosecution in a sample that consisted primarily of black defendants).

112 See e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

113 Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (emphasis added); Batson v. Kentucky, 476 U.S. 79, 86 (1986).

114 481 U.S. 279 (1987).

115 Diann Rust-Tierney, *A Personal Reflection on McCleskey v. Kemp*, ACLU: SPEAK FREELY (Apr. 23, 2012, 5:58 PM), <http://www.aclu.org/blog/capital-punishment-racial-justice/personal-reflection-mccleskey-v-kemp>.

116 McCleskey, 481 U.S. at 312.

117 *Id.* at 292.

118 Dahlia Lithwick, *Peremptory Prejudice*, SLATE (May 23, 2016, 2:26 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/john_roberts_s_court_sees_racism_in_foster_v_chatman.html; see also Cino, *supra* note 13 (noting Justice Alito’s concurrence “hint[ing] that you basically have to have a slam dunk to win a *Batson* challenge. Foster’s case is a standout from what is usually a subtler and more discreet form [sic] racial bias that permeates and infects other cases.”).

119 See Cino, *supra* note 13.

III. Survey of Studies Addressing Race and Gender in Capital Punishment

Studies on racial disparities in capital sentencing emerged as a substantial body of scholarship in the 1980s and 1990s in the wake of *Furman v. Georgia*,¹²⁰ which for a short time effectively abolished capital punishment because the Court found that juries exercised unfettered discretion and could impose death discriminatorily.¹²¹ *Furman* was soon followed by *Gregg v. Georgia*,¹²² which upheld state death penalty schemes that incorporated “channeled discretion.”¹²³

These early studies tended to focus on the race of the victim or defendant.¹²⁴ In a 1990 study using data from Georgia, David Baldus and colleagues examined whether legal developments post-*Furman* had “achieved their promise to end arbitrariness and discrimination in death sentencing in this country.”¹²⁵ The study found a strong race-of-victim effect, where “the average defendant with a white victim faced a statistically significant 7- to 9- percentage-point higher risk of a death sentence than did a similarly situated defendant whose victim was black.”¹²⁶ Baldus attributed this effect to prosecutorial discretion.¹²⁷ Generally, the researchers concluded that jury decisions

120 408 U.S. 238 (1972). *Furman* had no controlling opinion, but held that arbitrariness and racial disparities in death sentencing violated the Eighth Amendment. *Id.* at 242, 249-51 (Douglas, J. concurring); *id.* at 274, 277, 294-95 (Marshall, J. concurring); *id.* at 310 (Stewart, J. concurring); *id.* at 313 (White, J. concurring); *id.* at 365 (Marshall, J. concurring). *Furman* imposed a de facto moratorium on the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 168-69 (1976).

121 Chaka M. Patterson, *Race and the Death Penalty: The Tension Between Individualized Justice and Racially Neutral Standards*, 2 TEX. WESLEYAN L. REV. 45, 46 (1995).

122 428 U.S. 153 (1976).

123 *Id.* at 206-07. The death penalty was reinstated in South Carolina post-*Furman* on July 2, 1974. DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/south-carolina-1> (last visited Aug. 4, 2016).

124 See Hemant Sharma et al., *Race and the Death Penalty: An Empirical Assessment of First Degree Murder Convictions in Tennessee After Gregg v. Georgia*, 2 TENN. J. RACE, GENDER, & SOC. JUST. 1, 5 (2013) (discussing 1980s race-of-victim studies); Ogletree, *supra* note 111 (noting 1970s race-of-defendant findings); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 762, 783 (1983) (examining victim, defendant, and geography).

125 DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 394 (1990).

126 *Id.* at 401.

127 *Id.* at 403.

in Georgia were highly unpredictable,¹²⁸ and “that the problems with fairness and equal justice in Georgia’s death-sentencing system [were] widespread.”¹²⁹ The study established a landmark for the examination of the role of race in the administration of capital punishment.

Until the last fifteen years or so, most social science on race or gender and the justice system continued to focus on questions other than jury representativeness.¹³⁰ More recent studies focused on jury representativeness have often been experimental, i.e., conducted in simulated scenarios.¹³¹ Few published studies have examined the use of peremptory challenges in real trials.¹³² Both before and after *Batson*, a variety of experimental and other laboratory studies demonstrated the importance of race in jury selection.¹³³

In 1999, Mary Rose aimed to fill the dearth of data on peremptory challenges by observing trials in a North Carolina court in order to “investigate how prosecutors and defense attorneys use[d] . . . peremptory challenge[s] and how characteristics of seated jury panels compare[d] to those of the venire.”¹³⁴ She observed thirteen felony criminal jury trials with a total of eighteen defendants, seventeen of whom were black and two of whom were women, in addition to 348 venire members questioned during voir dire.¹³⁵ Rose concluded that, although blacks and whites had the same likelihood of being excused from the jury via peremptory challenge, black prospective jurors had a greater likelihood of being dismissed by the state — 71% of black prospective jurors dismissed — whereas 81% of whites dismissed were excused by the defense.¹³⁶ She found that women and men had roughly equal likelihood of being excused through peremptory challenges, and equal likelihood of being excused by one side or the other.¹³⁷ She noted her results’ limited generalizability, but concluded they “suggest the need for a more informed debate about the [use of the] peremptory challenge[] . . . in modern criminal trials.”¹³⁸

128 *Id.* at 403-04.

129 *Id.* at 409.

130 Rose, *supra* note 98, at 697.

131 Grosso & O’Brien, *supra* note 16, at 1536-38.

132 *Id.* at 1538.

133 *Id.* at 1536.

134 Rose, *supra* note 98, at 697.

135 *Id.* at 697-98.

136 *Id.* at 698-99.

137 *Id.* at 699.

138 *Id.* at 695.

In 2001, Baldus and colleagues focused specifically on peremptory challenges in capital murder trials.¹³⁹ In a study of Philadelphia cases from the 1980s and 1990s, they concluded that race was the predominant factor in prosecutorial use of peremptory challenges, with gender also playing a significant role.¹⁴⁰ Race and gender were also significant factors for defense counsel, with the defense particularly disfavoring men.¹⁴¹ The researchers found that death-sentencing rates were “higher . . . when the prosecutorial strike [rate against] black venire members was high.”¹⁴² By contrast, “[t]he results indicated that a highly discriminatory defense counsel effort against non-black venire members was associated with a five percentage point lower overall death-sentencing rate.”¹⁴³ These findings illustrate how jury selection and the use of peremptory challenges can shape capital trial outcomes. They also highlight the ethical dilemmas faced by defense attorneys, where the duty of zealous advocacy might be perceived to compel targeting white, male jurors for removal due to their higher tendency to be conviction- and death-prone.¹⁴⁴

In 2010-2011, informed in part by the Baldus Philadelphia study and several others with similar findings,¹⁴⁵ Barbara O’Brien and Catherine Grosso examined peremptory strikes in North Carolina by investigating jury selection processes for the trials of all defendants on the state’s death row as of July 1, 2010, in order to assess whether venire members’ race had been a factor in prosecutors’ use of peremptory challenges.¹⁴⁶ They studied 173 proceedings with a total of 7,421 venire members, gathering data from court documents and jury selection transcripts.¹⁴⁷ Their study used detailed, descriptive information about one sample of venire members in order to control

139 Baldus et al., *supra* note 24.

140 *Id.* at 60.

141 *Id.*

142 *Id.* at 107 n.234.

143 *Id.*

144 See Hans & Jehle, *supra* note 7, at 1191 (discussing defense attorney’s belief that “it is unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny.”).

145 For a summary of studies conducted by Billy Turner and colleagues in Louisiana, John Clark and colleagues in a southeastern state, and Richard Bourke and Joe Hingston in Louisiana, in addition to others, see Grosso & O’Brien, *supra* note 16, at 1538-39.

146 O’BRIEN & GROSSO, *supra* note 7, at 2.

147 *Id.* at 2-3.

for factors other than race that may have accounted for the decision to strike.¹⁴⁸

O'Brien and Grosso concluded that “[p]rosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members.”¹⁴⁹ Specifically, the prosecution struck 52.6% of eligible black venire members and 25.7% of all other eligible venire members.¹⁵⁰ They found this disparity to be even greater in cases where defendants were black.¹⁵¹ The differences persisted when the data were adjusted to rule out possible race-neutral causes for removals, such as opposition to the death penalty, so that racial disparities in strike patterns “could not be attributable to the possibility that relevant attitudes vary along racial lines.”¹⁵²

O'Brien and Grosso's study has been central to litigation over four North Carolina death row inmates' sentences.¹⁵³ The North Carolina Racial Justice Act (RJA) of 2009 “explicitly authorized the use of statistical evidence in determining whether racial discrimination was a significant factor in death sentences.”¹⁵⁴ Robert Mosteller explains that in *State v. Robinson*, the first decision under the Act:

[T]he RJA demonstrated its potential as an important new tool to eliminate the use of race-based peremptory challenges. . . . [T]he trial court, relying heavily on statistical evidence . . . ruled that race was a significant factor in the prosecution's use of peremptory challenges, vacated the death sentence, and sentenced the defendant to life imprisonment without the possibility of parole.¹⁵⁵

148 *Id.* at 8.

149 *Id.* at 11.

150 *Id.*

151 *Id.* at 12. In these cases, “the average strike rate was 60% against black venire members and 23.1% against other venire members.” *Id.*

152 O'BRIEN & GROSSO, *supra* note 7, at 13.

153 *State v. Robinson*, 780 S.E.2d 151, 152 (N.C. 2015); *State v. Augustine*, 780 S.E.2d 552 (N.C. 2015); Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation*, 97 IOWA L. REV. 1969, 1971, 1971 n.9 (2012) (discussing use of the O'Brien and Grosso study in litigation over Robinson's sentence and others).

154 Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012).

155 *Id.* at 105.

Three additional death sentences were subsequently vacated as well.¹⁵⁶ However, in 2012, “a very different legislative majority than the one that passed the RJA rewrote the law . . . [and] significantly reduce[d] in importance but [did] not eliminate the use of statistical evidence”¹⁵⁷ In 2015, the North Carolina Supreme Court reversed and remanded the vacated sentences on procedural grounds.¹⁵⁸ The inmates’ petition for certiorari with the United States Supreme Court was denied in October 2016.¹⁵⁹ The short-lived RJA may have been ineffectual in this instance, and unique in general — South Carolina lacks any comparable law. However, this litigation shows empirical studies’ potential for use in actual cases to compensate for evidentiary difficulties in individual *Batson* claims.

Several studies have considered the role of race and gender in South Carolina capital cases,¹⁶⁰ although none have paralleled O’Brien and Grosso’s study of peremptory challenges and none have delved deeply into issues of jury representativeness. Michael Songer and Isaac Unah examined the role of race in South Carolina

156 Campbell Robertson, *Bias Law Used to Move a Man Off Death Row*, N.Y. TIMES (Apr. 20, 2012), <http://www.nytimes.com/2012/04/21/us/north-carolina-law-used-to-set-aside-a-death-sentence.html?pagewanted=2&r=3>; Order Granting Motions for Appropriate Relief, *State v. Golphin*, No. 97 CRS 47314-15 (Sup. Ct. N.C. Dec. 13, 2012), https://www.aclu.org/files/assets/rja_order_12-13-12.pdf. The inmates are Marcus Robinson, Tilmon Golphin, Christina Walters, and Quintel Augustine. As mentioned above, North Carolina’s 2012 Racial Justice Act (RJA) was an important factor in these vacatur. The RJA provided that “[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.” N.C. GEN. STAT. § 15A-2010 (2009), *repealed* by S.L. 2013-154 § 5(a) (June 19, 2013). In 2013, the North Carolina legislature repealed the RJA. In 2015, the North Carolina Supreme Court vacated the lower court’s decision and remanded the cases to give prosecutors more time to respond in the “unusual and complex” case involving statistical data. *Robinson*, 780 S.E.2d at 152; *Augustine*, 780 S.E.2d 552. In May 2016, the inmates filed their petition for certiorari with the Supreme Court of the United States. The petition cites O’Brien’s and Grosso’s study. *Robinson*, 780 S.E.2d 151, *petition for cert.* (U.S. May 13, 2016) (No. 15-1397), <http://www.scotusblog.com/wp-content/uploads/2016/05/15-1397-Marcus-Robinson-v-State-of-North-Carolina-Petition-for-a-Writ-of-Certiorari.pdf>.

157 Mosteller, *supra* note 154, at 105-06.

158 *Robinson*, 780 S.E.2d 151 at 151-52.

159 *Robinson*, 780 S.E.2d 151, *cert denied*, 137 S. Ct. 67 (2016) (mem.).

160 E.g., Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306 (2003); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

prosecutorial decisions to seek the death penalty in their study, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*.¹⁶¹ They concluded:

Legally impermissible . . . victim and defendant characteristics . . . affect capital case selection. . . . Perhaps most distressingly, the study confirms that insidious racial disparities still haunt South Carolina's death penalty system. South Carolina prosecutors are [three] times more likely to seek the death penalty in white victim cases than in black victim cases.¹⁶²

As to death qualification, the practice of removing jurors who oppose the death penalty in capital cases has been widely criticized as resulting in biased and unrepresentative juries, as discussed above.¹⁶³ Scholars have observed in particular the process's disparate impact on potential women and African American jurors.¹⁶⁴ Robert Fitzgerald and Phoebe Ellsworth, among the first to study the issue in the early 1980s, found that death-qualified jurors were not representative of the general population. Rather, they found that approximately 15% of whites were excluded compared to 25% of blacks, and that capital juries were more biased towards the prosecution and a guilty verdict.¹⁶⁵ The Capital Jury Project recently produced similar findings, concluding that certain distinctive groups (including racial minorities, women, and Catholics) were less likely to be able to serve on capital juries and that death-qualified juries were more likely to convict and impose a death sentence.¹⁶⁶

IV. South Carolina Data

This study attempts to build upon projects such as O'Brien

161 Songer & Unah, *supra* note 160.

162 *Id.* at 205-06.

163 See Lynch & Haney, *supra* note 26; Winick, *supra* note 81.

164 *E.g.*, Lynch & Haney, *supra* note 26.

165 *Death Qualification*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/resources/deathqualification> (last visited Aug. 4, 2016); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984) (concluding that death-qualified juries are more likely to exclude women and African American men).

166 *Death Qualification*, *supra* note 165.

and Grosso's by investigating whether race and gender interacted with the likelihood and manner of prospective jurors' removal from a set of cases resulting in death sentences in South Carolina from 1997 to 2012. The inquiry here is focused additionally on whether removal for opposition to the death penalty had a disparate impact on women and black venire members.¹⁶⁷

A. Methodology

One coding instrument was used to enter all data on prospective jurors' characteristics and manner of removal, which were determined almost entirely from transcripts of voir dire questioning. Trial transcripts were acquired from the Office of Appellate Defense, a division of the South Carolina Office of Indigent Defense. The gender of potential jurors tended to be apparent from their names or the judges' or attorneys' use of the terms, "sir," "ma'am," "Mr.," or "Ms." Potential jurors' race was discernible only where transcripts explicitly stated such information (for instance, by indicating, "Juror 33, a White Female, entered the room.>").

Because data on potential jurors' gender was more easily discernible, the set of workable trial transcripts was smaller for examining race than it was for gender. Thus, the analysis of gender as a factor in removal was based on thirty-five trials from the period of 1997 to 2012 that resulted in death sentences,¹⁶⁸ including

167 For an overview of capital punishment jurisprudence and statistics in South Carolina, see John H. Blume & Lindsey S. Vann, *Forty Years of Death: the Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years)*, 11 DUKE J. CONST. L. & PUB. POL'Y 183 (2016).

168 *State v. Aleksey*, 538 S.E.2d 248 (S.C. 2000) *aff'g* *State v. Aleksey*, No. E784245 (S.C. Ct. Gen. Sess. Sept. 1, 1998); *State v. Barnes*, 753 S.E.2d 546 (S.C. 2013) *rev'g* *State v. Barnes*, No. H870420 (S.C. Ct. Gen. Sess. Jan. 6, 2011); *State v. Binney*, 608 S.E.2d 418 (S.C. 2005) *aff'g* *State v. Binney*, No. F981513 (S.C. Ct. Gen. Sess. Nov. 14, 2002); *State v. Bixby*, 698 S.E.2d 572 (S.C. 2010) *aff'g* *State v. Bixby*, Nos. 2004GS0100321A, 2004GS0100321C (S.C. Ct. Gen. Sess. Feb. 21, 2007); *State v. Bryant*, 642 S.E.2d 582 (S.C. 2007) *aff'g* *State v. Bryant*, No. G515142 (S.C. Ct. Gen. Sess. Oct. 9, 2004); *State v. Burkhart*, 640 S.E.2d 450 (S.C. 2007) *rev'g in part* *State v. Burkhart*, Nos. E698460-62 (S.C. Ct. Gen. Sess. Mar. 2004); *State v. Cottrell*, 657 S.E.2d 451 (S.C. 2008) *rev'g* *State v. Cottrell*, No. I265178 (S.C. Ct. Gen. Sess. Apr. 6, 2005); *State v. Evans*, 637 S.E.2d 313 (S.C. 2006) *aff'g* *State v. Evans*, No. H359051-52 (S.C. Ct. Gen. Sess. Sept. 22, 2004); *State v. Evins*, 645 S.E.2d 904 (S.C. 2007) *aff'g* *State v. Evins*, No. 2003GS4202533A (S.C. Ct. Gen. Sess. Nov. 19, 2004); *State v. Finklea*, 697 S.E.2d 543 (S.C. 2010) *aff'g* *State v. Finklea*, No. G501546 (S.C. Ct. Gen. Sess. Sept. 6, 2007); *State v. Haselden*,

observations for 3,031 venire members. The analysis of race as a factor was based on a subset of 23 cases that had data for venire members' race available among those 35 (including 19 with data on venire members' race at the voir dire and peremptory strike stages

577 S.E.2d 445 (S.C. 2003) *rev'g in part* State v. Haselden, No. F851854 (S.C. Ct. Gen. Sess. Feb. 10, 2001); State v. Hill, 604 S.E.2d 696 (S.C. 2009) *aff'g in part* State v. Hill, No. F185132 (S.C. Ct. Gen. Sess. Feb. 8, 2000); State v. Jones, 681 S.E.2d 580 (S.C. 2009) *rev'g* State v. Jones, No. E640538 (S.C. Ct. Gen. Sess. Mar. 14, 2007); State v. Kelly, 502 S.E.2d 99 (S.C. 1998) *aff'g* State v. Kelly, No. D931318 (S.C. Ct. Gen. Sess. Aug. 14, 1995); State v. Laney, 627 S.E.2d 726 (S.C. 2006) *rev'g* State v. Laney, No. G099682 (S.C. Ct. Gen. Sess. Oct. 19, 2001); State v. Lindsey, 642 S.E.2d 557 (S.C. 2007) *aff'g* State v. Lindsey, No. H252531 (S.C. Ct. Gen. Sess. May 24, 2004); State v. Locklair, 535 S.E.2d 420 (S.C. 2000) *aff'g* State v. Locklair, No. E231434 (S.C. Ct. Gen. Sess. Sept. 22, 1998); State v. Mercer, 672 S.E.2d 556 (S.C. 2009) *aff'g* State v. Mercer, No. H128342 (S.C. Ct. Gen. Sess. Apr. 22, 2006); State v. Morgan, 626 S.E.2d 888 (S.C. 2006) *vacating* State v. Morgan, No. G487949 (S.C. Ct. Gen. Sess. Mar. 9, 2004); State v. Motts, 707 S.E.2d 804 (S.C. 2011) *aff'g* State v. Motts, No. I359760 (S.C. Ct. Gen. Sess. Dec. 2, 2007); State v. Owens, 664 S.E.2d 80 (S.C. 2008) *aff'g* State v. Owens, No. E658835 (S.C. Ct. Gen. Sess. Feb. 14, 2003); State v. Quattlebaum, 527 S.E.2d 105 (S.C. 2000) *rev'g* State v. Quattlebaum, No. E499159 (S.C. Ct. Gen. Sess. Mar. 4, 1998); State v. Rivera, No. 2011-UP-138, 2011 WL 11733625 (S.C. Ct. App. 2011) *aff'g* State v. Rivera, No. I715656 (S.C. Ct. Gen. Sess. Feb. 13, 2008); State v. Sapp, 621 S.E.2d 883 (S.C. 2005) *aff'g* State v. Sapp, No. G040321 (S.C. Ct. Gen. Sess. May 19, 2003); State v. Sigmon, 623 S.E.2d 648 (S.C. 2005) *aff'g* State v. Sigmon, No. G556370 (S.C. Ct. Gen. Sess. July 18, 2002); State v. Stanko, 741 S.E.2d 708 (S.C. 2013) *aff'g* State v. Stanko, No. I742833 (S.C. Ct. Gen. Sess. Nov. 19, 2009); State v. Starnes, 531 S.E.2d 907 (S.C. 2000) ("*Starnes I*") *rev'g* State v. Starnes, No. E682636 (S.C. Ct. Gen. Sess. Apr. 25, 1997); State v. Starnes, 698 S.E.2d 604 (S.C. 2010) ("*Starnes II*") *aff'g* State v. Starnes, No. E682636 (S.C. Ct. Gen. Sess. Nov. 17, 2007); State v. Tench, 579 S.E.2d 314 (S.C. 2003) *aff'g* State v. Tench, No. F862590 (S.C. Ct. Gen. Sess. May 8, 2000); State v. Vazquez, 613 S.E.2d 359 (S.C. 2005) *aff'g* State v. Vazquez, No. 2002GS2602786B (S.C. Ct. Gen. Sess. Oct. 5, 2003); State v. Weik, 587 S.E.2d 683 (S.C. 2002) *aff'g* State v. Weik, No. E091046 (S.C. Ct. Gen. Sess. May 29, 1999); State v. Williams, 690 S.E.2d 62 (S.C. 2010) *aff'g* State v. Williams, No. H360518 (S.C. Ct. Gen. Sess. Feb. 19, 2005); State v. Winkler, 698 S.E.2d 596 (S.C. 2010) *aff'g* State v. Winkler, No. I252573 (S.C. Ct. Gen. Sess. Feb. 8, 2008); State v. Wise, 596 S.E.2d 475 (S.C. 2001) *aff'g* State v. Wise, Nos. F034429-31, F497161 (S.C. Ct. Gen. Sess. Feb. 1, 2001); State v. Woods, 676 S.E.2d 128 (S.C. 2009) *aff'g* State v. Woods, No. H055517 (S.C. Ct. Gen. Sess. Dec. 8, 2006).

Of these thirty-five cases, nineteen cases had information concerning race, gender, voir dire, and peremptory strikes; twelve cases in addition to those had information on gender, voir dire, and strikes; and four cases had information on gender and voir dire only.

and four with data on venire members' race during voir dire only),¹⁶⁹ including observations for 1,088 venire members. These cases were selected based on availability to the author, and it is hoped that more data can be entered for this project.

The research presented here thus has several limitations. First, it is neither a simple random sample of South Carolina capital punishment cases, nor inclusive of all cases for a given period. Records on file with the author indicate that between 1997 and 2012, the state of South Carolina imposed 63 death sentences using juries, including five re-sentencings of repeat defendants. The conclusions here must therefore be taken with a grain of salt: they are limited in their generalizability, and future research with more comprehensive data may help confirm or refute these findings. Further, because this set of trials resulted in death sentences, juror characteristics or pre-trial procedures may already have been skewed toward death. The data are therefore less representative than a sample including jurors who had acquitted or chosen life sentences. The statistical analysis here also provides only summaries and correlations and does not control for factors other than race and gender, such as prior convictions or strike eligibility,¹⁷⁰ which may have contributed to the results. Observations made for race may be less generalizable than observations made for gender due to the smaller sample size.

Nevertheless, the findings presented here are not trivial. Several characteristics of the data suggest elements of normalcy to these trials, including that (1) the rates of excusals for cause in this study also reflect the rates of excusals for cause in other studies;¹⁷¹

169 Aleksey, 538 S.E.2d 248; Barnes, 753 S.E.2d 546; Binney, 608 S.E.2d 418; Bryant, 642 S.E.2d 582; Burkhart, 640 S.E.2d 450; Evins, 645 S.E.2d 904; Finklea, 697 S.E.2d 543; Haselden, 577 S.E.2d 445; Hill, 604 S.E.2d 696; Jones, 681 S.E.2d 580; Kelly, 502 S.E.2d 99; Laney, 627 S.E.2d 726; Locklair, 535 S.E.2d 420; Mercer, 672 S.E.2d 556; Quattlebaum, 527 S.E.2d 105; Sapp, 621 S.E.2d 883; Sigmon, 623 S.E.2d 648; Stanko, 658 S.E.2d 94; Starnes I, 531 S.E.2d 907; Vasquez, 613 S.E.2d 359; Williams, 690 S.E.2d 62; Wise, 596 S.E.2d 475; Woods, 382 S.C. 153, 676 S.E.2d 128. Four among the cases with race information available had data for voir dire only and not peremptory strikes. Thus, the case set for race and peremptory strikes included 19 cases. The case set for race and voir dire included 23 cases.

170 See O'BRIEN & GROSSO, *supra* note 7, at 4 (“‘Strike eligibility’ refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only.”).

171 Cf. tbl.1; Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size*

(2) the juries in these cases were selected from venire pools that were relatively representative of their counties in cases for which that information was available (see **Table 1** below); and (3) the findings here are consistent with findings in previous studies. This analysis thus provides meaningful insight into how race and gender interact with South Carolina capital jury selection processes, and, potentially, elsewhere.

B. Empirical Findings

1. Venire Representativeness

TABLE 1:

Comparison of Black/White Composition in Venires and Trial Counties

Case	Venire % Black/White ¹⁷²	County % Black/White ¹⁷³	Venire Representative? ¹⁷⁴	Statistically Significant?
Anthony Woods	47% Black 53% White	52% Black 48% White (Clarendon)	YES [(Absolute disparity 5%) divided by (52% population) = 1% less than expected]	NO ($p = .57$, 2-tail Fisher exact)
Charles Williams	17% Black 83% White	20% Black 80% White (Greenville)	MAYBE [(Absolute disparity 3%) divided by (20% population) = 15% less than expected]	NO ($p = .72$, 2-tail Fisher exact)
James Bryant	13% Black 87% White	14% Black 86% White (Horry)	YES [(Absolute disparity 1%) divided by (14% population) = 1% less than expected]	NO ($p > .99$, 2-tail Fisher exact)

and the Peremptory Challenge, 6 J. EMPIRICAL LEGAL STUD. 425, 436 (2009).

172 Calculated based on trial transcripts from which this data could be reasonably discerned.

173 Community demographics were calculated using government census data and excluded residents who were neither white nor black. See *United States Census 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/> (follow “Population Finder” hyperlink by selecting “South Carolina; then follow “Areas Within” hyperlink after selecting “South Carolina”; then follow “Search” hyperlink after selecting “Counties / Municipios”; then follow “Areas Within” after selecting the desired county) (last visited Feb. 9, 2017).

TABLE 1:
Comparison of Black/White Composition in Venires and Trial Counties

Case	Venire % Black/White ¹⁷²	County % Black/White ¹⁷³	Venire Representative? ¹⁷⁴	Statistically Significant?
Jonathan Binney	32% Black 68% White	21% Black 79% White (Cherokee)	MAYBE (under-rep- resents Whites) [(Absolute disparity 11%) divided by (79% population) = 14% less than expected]	NO ($p = .11$, 2-tail Fisher exact)
Kevin Mercer	6% Black 94% White	15% Black 85% White (Lexington)	NO [(Absolute disparity 9%) divided by (15% population) = 60% less than expected]	NO ($p = .06$, 2-tail Fisher exact)
Ron Finklea	8% Black 92% White	15% Black 85% White (Lexington)	NO [(Absolute disparity 7%) divided by (15% population) = 47% less than expected]	NO ($p = .18$, 2-tail Fisher exact)
Jeffrey Jones	7% Black 93% White	15% Black 85% White (Lexington)	NO [(Absolute disparity 8%) divided by (15% population) = 53% less than expected]	NO ($p = .11$, 2-tail Fisher exact)

174 Determined using the comparative disparity test articulated in *Duren v. Missouri*, 439 U.S. 357 (1979), and *Berghuis v. Smith*, 559 U.S. 314, 327 (2010). The test has three prongs for showing a violation of *Taylor's* requirement that venires be drawn from a fair-cross section of the community: "(1) the group alleged to be excluded is a 'distinctive' group . . . ; (2) the group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population; and (3) the under-representation of the group results from systematic exclusion of the group in the jury selection process." *Jury Managers' Toolbox: A Primer on Fair Cross Section Jurisprudence*, NAT'L CTR. FOR STATE CTS. (2010), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/What%20We%20Do/A%20Primer%20on%20Fair%20Cross%20Section.ashx>. The second prong is based solely on those eligible for jury service who are also available. *Id.* at 3. "Absolute disparity describes the proportional difference in the representation of the distinctive group Comparative disparity measures the percentage by which the number of distinctive group members in the jury pool falls short of their number in the community." *Id.* To calculate comparative disparity, divide the absolute disparity percentage by the percentage of the jury-eligible population, to indicate the percentage less of the group that is present than would normally be expected. *Id.*

Table 1 represents the racial composition of the venires of seven cases for which the data were available, juxtaposed alongside the composition of the counties where the trials took place. For instance, the first row and second column show that the trial of Anthony Woods involved a venire comprised of 47% black prospective jurors and 53% white prospective jurors. The third column provides the racial composition of Clarendon County (52% black and 48% white), where Woods' trial took place. The column entitled "Venire Representativeness" indicates the determination that, according to the Supreme Court's "comparative disparity" test, Woods' venire pool represented a fair cross-section of the community in terms of its racial composition. The final column includes the conclusion as to whether any difference between the county and the venire was statistically significant, which shows that even where a venire might fail the doctrinal test for representativeness, the venire may not be unrepresentative according to other measures.

The data in **Table 1** establish a general idea of how representative the venire pools were in these seven cases, providing some context for the significance of the subsequent selection procedures (*i.e.*, knowing if there were zero black venire members represented at the beginning might theoretically help explain low strike rates of black prospective jurors). One weakness is that the comparative disparity test is meant to be calculated based on the available, jury-eligible element of the population,¹⁷⁵ which Table 1 does not include. The information presented in Table 1 should thus be treated as an approximation.

Based on this approximation, Clarendon, Greenville, Horry, and Cherokee Counties appear to have provided adequately racially representative venire pools for the respective trials held there, with Cherokee County the only one under-representing whites. The "maybes" account for the fact that the Supreme Court has not embraced a bright-line rule of what it means to pass the various fair cross-section tests.¹⁷⁶ Lexington was the only county that appeared to underrepresent blacks in its venire pools. Although the disparity was not statistically significant, the Mercer, Finklea, and Jones trials would clearly fail the comparative disparity test.

¹⁷⁵ Berghuis v. Smith, 559 U.S. 314, 328-29 (2010).

¹⁷⁶ *Id.* at 329-30, 330 n.5.

2. Men versus Women in Set of 35 Cases, 1997-2012

a. Status throughout Entire Selection Process

TABLE 2:
Summary of All Removals, by Gender[†]

	Men	Women	Row Total
Did Not Reach Voir Dire	167 Individuals (11% of men)	171 Individuals (11% of women)	338 Individuals (11%)
Excused for Cause	819 Individuals (53%)	800 Individuals (53%)	1,619 Individuals (53%)
Struck	243 Individuals (16%)	216 Individuals (14%)	459 Individuals (15%)
Qualified, Not Reached for Strikes	84 Individuals (5%)	91 Individuals (6%)	175 Individuals (6%)
Seated on Jury	187 Individuals (12%)	182 Individuals (12%)	369 Individuals (12%)
Alternate	33 Individuals (2%)	38 Individuals (3%)	71 Individuals (2%)
Column Total	1,533 Individuals	1,498 Individuals	3,031 Individuals (100%)

[†] $\chi^2(5, N = 3,031) = 2.155, p = 0.8274$. P-values were calculated using the tools at www.openepi.com with the confidence level set at 99.99%.

The results shown in **Table 2** compare the means by which the men and women among the 3,031 venire members observed were removed during pre-trial procedures, if at all. For example, the first row shows that 167 male venire members were brought to court without reaching voir dire questioning because the court had filled its requirements for qualified jurors from whom to select the jury. These 167 men constituted 11% of all male jurors who went through the selection process. Similarly, 171 women, or 11% of all female venire members, were brought to court and sent away without questioning.¹⁷⁷

¹⁷⁷ This number and proportion are likely substantially higher. However, trial transcripts reported this information inconsistently. Some involved a mass questioning pre-voir dire, where many jurors of an indeterminate number were turned away because of age, prior convictions, hardship, and other statutory bases for excuse from jury service. Other transcripts reported a list of jurors who did not reach voir dire questioning. Thus, the first row of this table should be viewed as a placeholder, with the actual proportion not

The data show no significant difference between men and women at any stage ($p = .8274$, χ^2). A total of 1,533 men and 1,498 women went through the jury selection process, and roughly the same percentages of each were excused without being questioned (11%), excused for cause (53%), and qualified without being reached for peremptory challenges (5-6%). Rates of 14-16% of each gender were struck by parties, 12% of each gender were seated on a jury, and 2-3% of each gender served as alternates.

b. Removals for Cause Based on Pro- or Anti-Death Stance

TABLE 3:
Removals for Views on Death, by Gender[†]

	Pro-Death Removal	Anti-Death Removal	Row Total
Women	54 Individuals (21% of women removed for views on death penalty) (30% of pro-death removals)	205 Individuals (79% of women removed for views on death penalty) (58% of anti-death removals)	259 Individuals (100%)
Men	125 Individuals (46% of men removed for views on death penalty) (70% of pro-death removals)	149 Individuals (54% of men removed for views on death penalty) (42% of anti-death removals)	274 Individuals (100%)
Column Total	179 Individuals (34% of death view-based removals)	354 Individuals (66% of death view-based removals)	533 Individuals (100%)

[†] 2-tail Fisher exact, $p < .001$.

The data in **Table 3** indicate who the court removed, among men and women, for expressing views too pro- or anti-capital punishment (jurors who were removed for other reasons, such as medical excuses and financial hardship, were omitted from the data set for this analysis). For instance, the first cell in the first row shows that 54 women were removed for indicating that they would automatically apply the death penalty if the defendant were found guilty of murder. The next cell to the right shows that 205 women were removed for indicating that they would be unable to impose

particularly significant to the issues being discussed here.

the death penalty. Both cells show that, of women removed for their views on capital punishment, 21% were removed for favoring the death penalty too strongly, while 79% were removed for opposing the death penalty.

The difference between men and women in **Table 3** is significant at the .001 level using a 2-tail Fisher exact test. Men were removed more than women for favoring the death penalty too strongly (constituting 70% of pro-death removals), whereas women were removed more than men for opposing the death penalty too strongly (constituting 58% of anti-death removals). However, like women, a majority of men removed for their views on death sentencing were removed for opposition (54% of men removed for death views) rather than for their pro-death views (46%).

c. Peremptory Strikes: Defense and Prosecution Impacts According to Gender

TABLE 4:
Proportion of State and Defense Peremptory Strikes, by Gender[†]

	Men	Women	Row Total
Defense Strikes	192 Individuals (59 % of D Strikes)	134 Individuals (41% of D Strikes)	326 Individuals
Prosecution Strikes	67 Individuals (41% of State Strikes)	96 Individuals (59% of State Strikes)	163 Individuals
Column Total	259 (49% of Total Strikes)	230 (51% of Total Strikes)	489 Individuals

[†] 2-tail Fisher exact, $p = 0.0002909$

The data in **Table 4** indicate prosecutor and defense use of peremptory strikes broken down by gender. The first row shows that the defense struck 192 men and 134 women, and that the defense thus used 59% of its strikes on men and 41% of its strikes on women. The next row down indicates that the prosecution struck 67 men and 96 women (with the lower numbers resulting from the prosecution having half as many strikes as the defense), using 41% of its strikes on men and 59% of its strikes on women.

The differences between the strikes used on each gender shown in **Table 4** are significant at the .001 level using a 2-tail Fisher exact test. Namely, the defense struck men at a higher rate while the prosecution struck women at a higher rate. However, the comparable

rates resulted in roughly equal proportions of each gender being struck overall.

3. Whites versus Blacks in Subset of 23 Cases, 1997-2012

a. Status Throughout the Entire Selection Process¹⁷⁸

TABLE 5:
Summary of Removals/Placements throughout Selection Process, by Race[†]

	Whites	Blacks	Row Total
Excused for Cause	284 Individuals (33% of whites removed)	130 Individuals (56% of blacks removed)	414 Individuals (38% of removals)
Struck	268 Individuals (31%)	39 Individuals (16%)	305 Individuals (28%)
Qualified, Not Reached for Strikes	57 Individuals (7%)	18 Individuals (8%)	75 Individuals (7%)
Seated on Jury	204 Individuals (24%)	40 Individuals (17%)	244 Individuals (22%)
Alternate	42 Individuals (5%)	8 Individuals (3%)	50 Individuals (5%)
Column Total	854 Individuals	234 Individuals	1,088 Individuals

[†] $\chi^2(4, N = 1,088) = 43.75, p < .001$. Data for individuals who arrived at the courthouse but did not reach voir dire were removed because of inconsistency among the transcripts and the lack of race data available at that stage.

The data in **Table 5** indicate the manners in which whites and blacks among the 1,088 assessed were removed during pre-trial procedures, if at all. For example, the first cell in the first row shows that 284 whites were excused for cause, or roughly 33% of all white potential jurors. The next cell shows that 130 black potential jurors were excused for cause, constituting approximately 56% of black venire members.

The differences illustrated in **Table 5** are significant at the .001 level with a chi square test. Blacks were excused for cause at a higher rate than their white counterparts. The overall percentage of blacks struck by peremptory challenge was lower than the overall percentage of whites struck, although this result is discussed in greater detail in Section IV.C in light of the need to account for the

¹⁷⁸ A very small number of venire members were neither white nor black, and they were removed from the data set in order to simplify the analysis.

high rate of for-cause removals of blacks. Blacks were seated on juries at a lower rate than white venire members, at 17% and 24% of the respective venire groups.

b. Removals for Cause Based on Pro- or Anti-Death Views

TABLE 6:
Removals for Views on Death, by Race[†]

	Pro-Death Removal	Anti-Death Removal	Row Total
Blacks	2 Individuals (3% of blacks removed for views on death penalty) (3% of pro-death removals)	75 Individuals (97% of blacks removed for views on death penalty) (51% of anti-death removals)	77 Individuals
Whites	63 Individuals (47% of whites removed for views on death penalty) (97% of pro-death removals)	72 Individuals (53% of whites removed for views on death penalty) (49% of anti-death removals)	135 Individuals
Column Total	65 Individuals (31% of removals based on views on death penalty)	147 Individuals (69% of removals based on views on death penalty)	212 Individuals

[†] 2-tail Fisher exact, $p < .001$.

The data in **Table 6** show the percentages of blacks and whites who were removed for being either pro- or anti-death among those jurors removed for their views on the death penalty (as with gender, jurors who were removed for other reasons, such as medical excuses and financial hardship, were omitted from the data set for this analysis). For instance, the first cell in the first row shows that two African Americans were removed for cause because of their indication that they would automatically impose the death penalty if the defendant were found guilty. These two individuals were three percent of those black prospective jurors removed for their views on death. The next cell to the right shows that 75 blacks were removed for being unable to impose the death penalty, or 97% of black prospective jurors removed for their views on capital punishment.

The differences presented in **Table 6** are statistically

significant at the .001 level with a 2-tail Fisher exact test. White venire members were removed at a much higher rate than their black counterparts for favoring the death penalty too strongly to sit as impartial members of the jury. More whites were excused for favoring the death penalty than for opposing it. By contrast, the vast majority of blacks who were excused for their views on death were excused for opposing capital punishment. Blacks constituted a disproportionately high percentage (75 of 147 individuals, or 51%) of prospective jurors removed for anti-death views.

c. Peremptory Strikes: Defense and Prosecution Impacts According to Race

TABLE 7:

Percentage of State and Defense Peremptory Strikes, by Race[†]

	Whites	Blacks	Row Total
Defense Strikes	200 Individuals (99% of D Strikes)	3 Individuals (1% of D Strikes)	203 Individuals
Prosecution Strikes	68 Individuals (65% of State Strikes)	36 Individuals (35% of State Strikes)	104 Individuals
Column Total	268 Individuals (87% of Total Strikes)	39 Individuals (13% of Total Strikes)	307 Individuals

[†] 2-tail Fisher exact, $p < .001$.

The data in **Table 7** illustrate defense and prosecutorial peremptory strikes broken down by race. The first row and first column show, for instance, that the defense used 200 of its strikes on white individuals, or 99% of its peremptory strikes exercised. The next column shows that the defense struck three black individuals, constituting one percent of its total strikes. The differences in **Table 7** are significant at the .001 level with a 2-tail Fisher exact test. While the defense struck virtually no black prospective jurors, the prosecution used 65% of its strikes on whites and 35% of its strikes on blacks.

Blume and Vann have observed that Lexington and Horry Counties in South Carolina have dramatically higher death sentencing rates than other counties.¹⁷⁹ A death sentence that was vacated in

¹⁷⁹ Blume & Vann, *supra* note 167, at 205-06. Five of the cases used to analyze race in this study were from Lexington County. See *State v. Finklea*, 697 S.E.2d 543 (S.C. 2010); *State v. Jones*, 681 S.E.2d 580 (S.C. 2009); *State v. Kelly*, 502 S.E.2d 99 (S.C. 1998); *State v. Quattlebaum*, 527 S.E.2d 105 (S.C. 2000);

2016 for various racial bias issues came from Lexington County and prosecutor Donald Myers, who has been nicknamed “Death Penalty Donnie” for his aggressive pursuit of the death penalty.¹⁸⁰ Thus, the table below shows peremptory strike patterns based on race with Lexington and Horry removed in case they skewed the data in **Table 7**.

TABLE 7.1:
Percentage of State and Defense Peremptory Strikes by Race with Lexington and Horry Counties Removed[†]

	Whites	Blacks	Row Total
Defense Strikes	115 Individuals (97% of D Strikes)	3 Individuals (3% of D Strikes)	118 Individuals
Prosecution Strikes	33 Individuals (56% of State Strikes)	26 Individuals (44% of State Strikes)	59 Individuals
Column Total	148 Individuals (84% of Total Strikes)	29 Individuals (16% of Total Strikes)	177 Individuals

[†] 2-tail Fisher exact, $p < .001$.

Table 7.1 shows that the differences in the parties’ use of strikes remained at the same proportions and statistically significant at the .001 level, even with the removal of the two notable counties.

To illustrate the relationship between the peremptory strike stage and the overall empanelment process, **Table 8** combines the data in **Table 7** with the overall race data found in **Table 5**.

TABLE 8:
Summary of Removals/Placements throughout Selection Process by Race, with Parties’ Use of Peremptory Strikes[†]

	Whites	Blacks	Row Total
Excused for Cause	284 Individuals	130 Individuals	414 Individuals
Remaining after Voir Dire	570 Individuals	104 Individuals	674 Individuals
Total Struck	268 Individuals	39 Individuals	305 Individuals

Starnes I, 531 S.E.2d 907 (S.C. 2000); Blume & Vann, *supra* note 167, at 229-30. Donald Myers was prosecutor for all of them. Three of the cases were from Horry County. See State v. Bryant, 642 S.E.2d 582 (S.C. 2007); State v. Stanko, 741 S.E.2d 708 (S.C. 2013); State v. Vasquez, 613 S.E.2d 359 (S.C. 2005); Blume & Vann, *supra* note 168, at 230.

180 John Monk, *Avenging Angel? A look at 5 of Donnie Myers’ more memorable death penalty cases*, THE STATE (Mar. 19, 2016), <http://www.thestate.com/news/local/article67122927.html>.

TABLE 8:
Summary of Removals/Placements throughout Selection Process by Race, with Parties' Use of Peremptory Strikes[†]

	Whites	Blacks	Row Total
Struck by Prosecution	68 Individuals	36 Individuals	104 Individuals
Struck by Defense	200 Individuals	3 Individuals	203 Individuals
Percentage of Post-Voir Dire Eligible Venire Members Struck by Prosecution	68/570 = 12%	36/104 = 35%	
Percentage of Post-Voir Dire Eligible Venire Members Struck by Defense	200/570 = 35%	3/104 = 3%	

[†] χ^2 (4, N = 114.5) $p < .001$ (calculated first five rows and first two columns of chart).

Table 8 combines data from Tables 5 and 7 to illustrate that the prosecution's strikes accounted for eliminating 12% of whites who were qualified during voir dire and 35% of blacks who were qualified. It shows that the defense's strikes eliminated 35% of whites who were not removed during voir dire and three percent of blacks. The differences are statistically significant at the .001 level.

V. Discussion of Results

A. Venire Stage and Lexington County

In light of the discussion of *Taylor's* questionable implementation in practice, the mixed data in Table 1 show surprisingly successful jury pool representativeness. However, given the differences among counties, the results suggest ample room for variability according to locale.¹⁸¹ Each of the three Lexington County trial venires, for instance, underrepresented blacks according to the approximation of the comparative disparity test. As mentioned above, Lexington County also stands out because of its high rates of death sentencing — “approximately five times greater [than] the national average and seven times [greater than] the South Carolina average.”¹⁸² Although far from conclusive, it would seem reasonable

¹⁸¹ John H. Blume, *supra* note 28, at 305.

¹⁸² *Id.* at 305 n.121.

to infer that Lexington County's issues with representativeness are not unrelated to its high death sentencing rates.

B. Findings on Gender: Voir Dire and Peremptory Strikes

A comparison of **Table 2** (Summary of All Removals According to Gender) with **Table 3** (Removals for Views on Death by Gender) and **Table 4** (Proportion of State and Defense Peremptory Strikes by Gender) illuminates the influence of gender in the jury selection processes studied. A superficial assessment of men's and women's removals, shown in **Table 2**, suggests that men and women were treated equally during the selection process because their outcomes are virtually the same ($p = 0.8274$, χ^2). For instance, men and women were excused for cause at the same rate (both 53%), struck at around the same rate (16% and 14%, respectively), and seated on the jury at the same rate (12% each).

Yet, **Tables 3** and **4** show that **Table 2's** summary does not tell the whole story. Rather, **Table 3** ($p < .001$, 2-tail Fisher exact) shows that men and women were treated differently by the court, while **Table 4** ($p = 0.0002909$, 2-tail Fisher exact), shows that men and women were treated differently by the parties. Specifically, **Table 3** shows that more men than women were removed for their excessive support for the death penalty, whereas more women than men were removed for their inability to impose death. The data in **Table 4** indicate that the defense exercised peremptory strikes on significantly more men than women (59% of defense strikes), and that the prosecution exercised peremptory strikes on significantly more women than men (59% of prosecution strikes).

Interestingly, echoing similar findings by others such as Mary Rose (in the context of race), the opposing parties' disproportionate use of peremptory strikes according to gender "cancelled each other out."¹⁸³ Namely, the defense used 41% of its strikes on women and 59% of its strikes on men whereas the prosecution used 59% of its strikes on women and 41% of its strikes on men, a difference which is statistically significant ($p < 0.0002909$, 2-tail Fisher exact) — suggesting that gender may have been a factor in strike choices. It is possible that controlling for gender-neutral bases for strikes would eliminate this disparity. However, this finding is consistent with

183 Cf. Rose, *supra* note 98, at 698, 700; Diamond et al., *supra* note 171, at 425.

prior conclusions, such as in Baldus's Philadelphia study,¹⁸⁴ that gender was a factor in parties' choices of whom to strike.

The same "cancelling out" effect occurred with excuses for cause: because women tended to oppose death and men favored it more, they were removed during voir dire in roughly equivalent numbers. But do the equal numbers in removals in the end justify the means? It may appear that the extreme ends of the spectrum on death views are innocuously correlated with gender: men, on one end, are shaved off for favoring death too strongly, whereas women, on the other end, are shaved off for opposing death, resulting in a jury pool in the middle with equal representation of the genders. It is possible that such a "middle of the road" jury was the result here; since women and men ended up seated on juries in equal numbers, the juries at least appear representative. However, the death-qualification process is known to skew the jury pool toward a pro-prosecution bias.¹⁸⁵ Although the genders were equally represented, it is unclear whether conviction-proneness and pro-death biases also evened out.

In any case, the disparate impact on women as 58% of anti-death removals reflects the concerns raised above about death qualification's disproportionate effects on some groups over others. In light of this impact's potential to affect jury impartiality and representativeness, and the jury's supposed protective functions, this effect on women should be of concern, notwithstanding the even gender outcomes.

C. Findings on Race: Voir Dire and Peremptory Strikes

The findings on race are consistent with previous studies' conclusions. Race as a factor in venire members' removals in the 23-case subset observed revealed strong statistically significant differences at both the voir dire stage and in parties' use of peremptory strikes. Although removal for opposition to the death penalty is nominally a race-neutral reason for removal, the data here at least demonstrate the overwhelming disparate impact such removals had on black prospective jurors.

Unlike with gender, discrimination by opposing sides did not cancel itself out for race. Rather, the data here show that it was

¹⁸⁴ David C. Baldus et al., *supra* note 24, at 96-97.

¹⁸⁵ Lynch & Haney, *supra* note 26, at 73.

more difficult for black jurors to be seated on the jury than for white jurors. A rate of 20% of black prospective jurors ended up on juries or as alternates while 29% of whites did — with black jurors seated at roughly 2/3 the rate of white jurors.

The data in **Tables 5** (Summary of Removals throughout the Selection Process, by Race), **6** (Removals for Views on Death, by Race), and **7** (Percentage of State and Defense Peremptory Strikes by Race) illustrate the different experiences of a white venire member and an African American venire member in the set of cases studied. Black potential jurors were excused for cause at a higher rate than whites (56% and 33%, respectively) ($p < .001$, χ^2). The results in **Table 6** indicate that a majority of those black individuals removed for cause were excused because of their opposition to the death penalty. Of the 234 total black venire members, 130 blacks were removed for cause, including 75 individuals removed for anti-death penalty views — representing 58% of blacks removed for cause and 32% of the overall black venire group. By contrast, 72 of 284 whites removed for cause (constituting 25% of whites removed for cause and eight percent of the overall white venire group) were excused because of their opposition to the death penalty. While only two blacks were excused for favoring the death penalty, approximately 22% of whites excused for cause (63 of 284) were removed for pro-death views.

Although these findings might not remain as strong with comprehensive data, they illustrate the problematic nature of removals for cause on the basis of opposition to the death penalty. Not only did such removals have a disparate impact on women and African Americans, but it virtually precluded a significant portion of black prospective jurors from serving on the jury at all. This tension illustrates the basic catch-22 of “fair cross section” jurisprudence and jury representativeness in capital cases: it is impossible to reconcile representativeness with the need for impartiality in capital punishment cases, since particular groups are more likely to have strong feelings in opposition.¹⁸⁶

Although the overall percentage of blacks removed via peremptory strike was lower than the overall percentage of whites removed via peremptory strike (16% and 31%, respectively), the proportions listed in the second row of **Table 5** are misleading. First, they do not take into account the smaller number of blacks available

186 Price, *supra* note 7, at 103-04.

to strike, since such a high proportion was removed at the for-cause stage. After removing the first row in **Table 5** (reducing the pool to those who were available to be struck), the data show that 37% of black prospective jurors were struck (thirty-nine out of 104 black individuals remaining after for-cause removals), whereas 47% of whites remaining were struck (268 out of 570 white individuals remaining after for-cause removals). This difference in strikes calculated using these proportions is not statistically significant ($p = 0.3053$, 2-tail fisher exact) and thus shows that whites and blacks were struck at comparable rates, rather than the twice-higher rate reflected for whites in **Table 5**.

But more critically, as illustrated in **Table 8**, the prosecution struck 35% of blacks who made it through the voir dire process, compared to 12% of whites.¹⁸⁷ The prosecution used 36 of its 104 strikes on black individuals (36% of its strikes), even though blacks constituted only 15% of individuals available to be struck.¹⁸⁸

The crux of these numbers is that the prosecution struck

187 The racial disparities in the parties' use of their peremptory challenges were significant ($p < .001$, 2-tail Fisher exact).

188 South Carolina procedure appears to dictate that the prosecution goes first in the parties' alternating use of their strikes. See *Juror Information*, S.C. JUDICIAL DEPT., <http://www.judicial.state.sc.us/jurorinfo/jurorSelection.cfm> (last visited Jan. 31, 2017) ("In criminal cases . . . [t]he clerk calls out the name of the juror. This juror comes forward and stands in front of the jury box. The clerk says, 'What sayeth the State?' The Solicitor, representing the State, will say either (1) 'Excuse the juror,' in which event the juror takes his or her seat back in the courtroom; or (2) 'Present the juror,' or 'Swear the juror.' The clerk will then ask, 'What sayeth the defendant?' The defendant's attorney may say (1) 'Excuse the juror,' in which event the juror takes his or her seat back in the courtroom; or (2) 'Swear the juror,' in which event the juror takes a seat in the jury box as directed by the clerk."). If the prosecution used a strike on a potential juror, the pool available for the defense to strike becomes smaller. It might be a concern that if the defense used its strikes first in each trial, the pool that was available for the prosecution to strike would have had different racial proportions than the one that includes the overall numbers. The trends observed above weaken somewhat but persist even if it is assumed that all 200 white venire persons that the defense struck were not available to the prosecution. If that were the case, the prosecution struck 68 out of 370 whites available to be struck or 18% of them — still substantially lower than the 36% of blacks struck by the prosecution, which persists after adjusting for the only three black venire persons struck by defense. The adjusted numbers would also mean that African Americans were 21% of the pool available to be struck by the prosecution, but the prosecution used 35% of their strikes on them. These adjusted numbers remain statistically significant at the .05 level ($p = 0.007949$) using a 2-tail Fisher exact test.

blacks at a rate higher than they were represented and removed one-third of eligible black jurors. A comparable disparity emerged in O'Brien and Grosso's study, where the prosecution struck 52.6% of eligible black venire members and 25.7% of all other eligible venire members.¹⁸⁹ Of course, the defense had even more dramatically differing numbers for each race, using only one percent of its strikes on blacks. But again, where the concerns are jury representativeness, the jury's protective function for the defendant, and non-arbitrary imposition of death sentences, it is easier to forgive the defense's discrimination and its countervailing ethical obligations than it is the prosecution's discrimination.

The present study unfortunately did not control for race-neutral explanations for the use of strikes, unlike in O'Brien and Grosso's study. Potentially, these disparities would not persist or would weaken with such controls. But, such an outcome seems unlikely. O'Brien and Gross's study revealed little difference in outcomes when they controlled for race-neutral factors.¹⁹⁰ Other studies have shown similar trends.¹⁹¹ It is reasonable to infer here that the defense was targeting whites and that the prosecution was targeting blacks.¹⁹²

Finally, the combined effects of anti-death removals and prosecutorial strikes had dramatically disparate impacts according to race. Seventy-five African Americans were removed for anti-death views and 36 were struck by the prosecution. Combined, this excluded group constitutes 47% of the 234-person black venire pool. Compare this with 72 whites removed for anti-death views and 68 whites struck by the prosecution — constituting 16% of the 854-person white venire pool. While this is not formally a scheme to systematically exclude a particular racial group from jury service, it would seem to be a *de facto* one.

189 Grosso & O'Brien, *supra* note 16, at 1548.

190 O'BRIEN & GROSSO, *supra* note 7, at 13.

191 Grosso & O'Brien, *supra* note 16, at 1536-40 (discussing other studies).

192 It appeared from the majority of the trial transcripts that litigants did not raise a significant number of *Batson* challenges. One challenge by the prosecution was observed, where the prosecution alleged discrimination against a white juror. Since only portions of some transcripts were available, however, it is possible that *Batson* challenges were made and not observed.

VI. Conclusion

The data here illustrate capital punishment's persistent problems with jury representativeness and show trends unlikely to be unique to South Carolina, given their consistency with the literature on race- and gender-related exclusion during jury selection. First, although limited in their generalizability and statistical perfection, disparities related to race and gender in the jury selection process were pervasive in this study. Most significantly, race apparently motivated the parties' use of peremptory strikes, and gender likely did as well. These data contribute to the knowledge of the ineffectual impact that *Batson* and progeny have had in state courts. They also raise questions about the fairness and constitutionality of the trials of certain South Carolina inmates currently on death row.

Further, removal of prospective jurors for their opposition to the death penalty stands in tension with a defendant's Sixth and Fourteenth Amendment rights and Supreme Court jurisprudence. The death-qualification process functioned as a substantial impediment to jury service by African Americans in this study. A process with such a dramatic disparate impact on black jurors flies in the face of *Taylor's* holding that "no one racial group may be systematically excluded from jury service" — particularly when viewed in tandem with the effects of prosecutorial strikes. This tension, combined with death qualification's disparate impact on women, suggests that states maintaining capital punishment schemes have embraced a fiction: that it is possible to reconcile death qualification with society's interest in, and defendants' rights to, impartial, representative juries.

