RACIAL EXCLUSION AND DEATH PENALTY JURIES: CAN DEATH PENALTY JURIES EVER BE REPRESENTATIVE?

*By Noelle Nasif, Shyam K. Sriram & Eric R.A.N. Smith**

I. INTRODUCTION

In 1987, Timothy Foster, an African American man, was sentenced to death for homicide.[1] He had broken into the home of Queen Madge White, a 79-year old Caucasian woman, and killed her during the commission of that burglary.[2] He was 18 at the time.[3] During voir dire, every single black juror was struck from the jury, leaving Foster to face an all-white jury.[4] During the appeals process, it was revealed that the prosecutors had marked down the race of the jurors, singling out the black jurors for exclusion.[5] They highlighted the name of black jurors, marking them with a "B," ranking them in case they had to choose a black juror.[6] White jurors were not similarly ranked.[7] Prosecutors cited reasons for excluding these jurors including age and marital status, despite keeping white jurors of the same age and status.[8] A handwritten list of six jurors, five of them the only black prospective members remaining in the jury pool, was labeled "Definite No's."[9] During his appeal to the Supreme Court, Foster argued that he was denied a fair trial due to the exclusion of these jurors.[10] He was

* Noelle Nasif is a Ph.D. student, Political Science, University of California, Santa Barbara and received her JD from Stetson University College of Law. Shyam K. Sriram is a Ph.D. candidate, Political Science, University of California, Santa Barbara. Eric R.A.N. Smith is a Professor of Political Science, University of California, Santa Barbara. Please address all correspondence to nnasif@umail.ucsb.edu. The authors wish to thank the editorial staff of the *Kansas Journal of Law and Public Policy* for their help in preparing this article for publication and the Academic Senate of the University of California for funding this project.

1. Adam Liptak, *Supreme Court Finds Racial Bias in Jury Selection in Death Penalty Case*, N.Y. TIMES (May 23, 2016), https://www.nytimes.com/2016/05/24/us/supreme-court-black-jurors-death-penalty-georgia.html [https://perma.cc/KDJ9-54TP].

2. Foster v. State, 374 S.E.2d 188, 188 (Ga. 1988).

3. *Id.*

4. Foster v. Chatman, 136 S. Ct. 1737, 1743 (2016).

5. *Id.* at 1744.

6. *Id.*

7. *See id.*

8. *Id.* at 1750–51.

9. *Id.* at 1744.

10. *See Chatman*, 136 S. Ct. at 1742. Foster argued that the State's use of preemptory strikes against all four black prospective jurors qualified to serve on the jury violated *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id.* In *Batson*, the Supreme Court reaffirmed that purposeful discrimination

successful; however, Foster is the exception as opposed to the rule. As this paper will demonstrate, a defendant faces an uphill battle in showing that her non-representative jury was a biased one.

Over time, we as a people and the Court have realized that juries can only be fair if we attempt to make them reflective of society as a whole.[11] Because of this realization, individuals can no longer be excluded from juries based on gender[12] or race,[13] theoretically making today's juries far more reflective of actual population demographics than past juries.[14]

Convening a jury that is non-representative of the country's population has growing implications for death penalty trials. Study after study suggests that death penalty supporters are far more likely to be white, male, and conservative.[15] This knowledge may be useful to prosecutors and defense attorneys during jury selection; prosecutors likely prefer jurors who are more comfortable with harsh punishment, and defense attorneys likely prefer jurors with a reticence to convict.[16]

Death-penalty juries, however, are special. These jurors do not end their service once they pass sentences.[17] As a result, sentencing concerns become relevant to voir dire in a way that they simply do not in non-capital cases.[18] Further complicating voir dire, prosecutors can also inquire if potential jurors have any reservations about the death penalty[19] to ensure prospective jurors are

---

in jury selection violates a defendant's right to equal protection by denying the protection that a trial by jury is intended to secure. *Batson*, 476 U.S. at 86.

11. The Court sees a jury as fair under the Sixth and Fourteenth Amendments if the jury is chosen from a representative cross-section of the population. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (ruling defendants have a fundamental interest in being tried by a jury chosen from a representative cross-section of the community); Duren v. Missouri, 439 U.S. 357, 363–64 (1979) (holding that systemic exclusion of jurors from a distinctive group that results in underrepresentation compared to the population as a whole violates a defendant's Sixth Amendment right to a fair trial); *Batson*, 476 U.S. at 86 (1986) (holding that discriminatory jury selection practices violate the Sixth Amendment right of defendants to a fair trial and undermines public confidence in the jury system).

12. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994).

13. *Batson*, 476 U.S. at 86.

14. This closeness to population statistics is not meant to indicate that the authors believe juries are perfectly reflective.

15. Eric P. Baumer et al., *Explaining Spatial Variation in Support for Capital Punishment: A Multilevel Analysis*, 108 AM. J. SOC. 844, 853 (2003); Samuel R. Gross & Phoebe C. Ellsworth, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 21 (1994).

16. Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 181 (2005).

17. *Overview of the Capital Trial Process*, CAP. PUNISHMENT CONTEXT, https://capitalpunishmentincontext.org/resources/trialprocess [https://perma.cc/2C9H-Y9TG] (providing a general overview of the death penalty conviction and sentencing process).

18. Richard Salgado, Note, *Tribunals Organized To Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 BYU L. REV. 519, 520 (2005).

19. Uttecht v. Brown, 551 U.S. 1, 3 (2007).

death qualified.[20] In *Uttecht v. Brown*, the Court gave prosecutors the right to challenge the seating of jurors who express any doubt about the death penalty, even if they profess that they will be willing to impose the death sentence.[21] This change from the 1968 ruling in *Witherspoon v. Illinois*,[22] which allowed for challenges to jurors who do not support the death penalty, opened the door for the exclusion of anyone with any reservations about the death penalty.[23] After *Uttecht*, only those who stridently support the death penalty and are most comfortable imposing it are likely to end up on death-penalty juries.[24] As discussed in Part III of this paper, those jurors tend to be overwhelmingly white, greatly limiting the eligibility of potential jurors of color. This limited eligibility worsens the problem because many defendants are people of color.

Uttecht and its predecessors have contributed to the fact that death-penalty juries typically include more Whites, men, Republicans, and conservatives than juries in other criminal prosecutions.[25] As the country continues on the path toward becoming a minority-majority country,[26] the problem of jury exclusion will likely only worsen. Juries will become increasingly non-representative as a shrinking segment of the population is most likely to be eligible for death penalty juries.

The increased ability to exclude minority jurors may create inherently unconstitutional juries in death penalty cases. In *Furman v. Georgia*, Justice Douglas stated, "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."[27] By creating increasingly non-representative juries, the chance that a person is convicted and sentenced to death because of race, wealth, or religion rises dramatically.[28] If juries are making decisions based on racial bias, then they are imposing an 'unusual' sentence according to Douglas.[29] However, the Court has routinely

---

20. A death qualification evaluation assesses whether jurors are fit to serve on a capital jury by asking jurors about their beliefs on the death penalty to ensure they are willing to impose the death penalty. *See* Brooke Butler, *Caveats of the Death–Qualified Jury: Ways Capital Defense Attorneys Can Use Psychological Research to Their Advantage*, 20 JURY EXPERT, no. 1, May 2008, at 10–11, http://thejuryexpert.com/wp-content/uploads/TJEVol20Num1_May2008.pdf [https://perma.cc/X6ND-FHPV].

21. *Brown*, 551 U.S. at 11–12.

22. Witherspoon v. Illinois, 391 U.S. 510, 518 (1968).

23. Richard Klein, *An Analysis of Death Penalty Decisions from the October 2006 Supreme Court Term*, 23 TOURO L. REV. 793, 801 (2008).

24. *Id.* at 799.

25. J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1133–34 (2014).

26. Kendra Yoshinaga, *Babies of Color Are Now the Majority, Census Says*, NPR (July 1, 2016, 12:49 PM), http://www.npr.org/sections/ed/2016/07/01/484325664/babies-of-color-are-now-the-majority-census-says [https://perma.cc/M7AR-RUYQ].

27. Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring).

28. *See* Mark Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 L. & HUM. BEHAV. 715, 718–19 (1998).

29. *Furman*, 408 U.S. at 242.

ignored this growing problem within death-penalty juries, recognizing that death-penalty juries generally are likely biased and potentially impose unusual punishments, but at the same time not acknowledging that any particular jury is biased.[30]

Even if such juries are held to be constitutional, they undermine the larger cause of justice. Juries with low or no minority representation are more likely to convict and impose longer and harsher sentences on minority defendants.[31] This tendency to convict and impose harsher sentences is particularly dire in death penalty cases, where minority defendants literally have their lives on the line.

This paper examines the question of how representative the U.S. pool of potential death-penalty jurors is of the U.S. population, how this representativeness has changed over time and is likely to change in the future, and the resulting implications. Part II of this article reviews recent Court decisions regarding the grounds for dismissal of potential death-penalty jurors. Part III looks at changes in public approval of the death penalty over time and assesses the extent to which death-penalty-eligible jurors are representative of the general public. Part IV examines the consequences of racially-imbalanced juries. Part V argues that despite strong evidence of disparity in jury selection—a problem that will continue to worsen—and the negative consequences of racially-imbalanced juries, the Court has failed and will likely continue to fail to address the problem.

II. PROSECUTORIAL DISCRETION, SUPPORT FOR THE DEATH PENALTY, AND RACIAL EXCLUSION

The rejection of jurors who harbor any doubts about the death penalty is a relatively new phenomenon.[32] In *Witherspoon v. Illinois* (1968), the Court rejected the idea that prosecutors could eliminate jurors who, while saying they could impose the death penalty, possessed reservations about doing so.[33] Justice

30. *See generally* Holland v. Illinois, 493 U.S. 474, 483 (1990) (finding that juries may be impartial even if non-representative, and impartiality fulfills Sixth Amendment right to a fair trial); Batson v. Kentucky, 476 U.S. 79, 94 (1986) (holding that jurors cannot be stricken for race, but such jurors may be stricken if prosecutors have legitimate grounds for exclusion); Wainwright v. Witt, 469 U.S. 412, 431 (1985) (holding that deference was owed to the trial court in evaluating claims of racial discrimination by prosecutors); Lockhart v. McCree, 476 U.S. 162, 178–83 (1968) (holding that the Constitution does not prohibit removal of jurors who would not impose the death penalty even where social science evidence presented shows such juries are more conviction prone); Swain v. Alabama, 380 U.S. 202, 226 (1965) (holding petitioner had the burden of proof to show racial bias as cause for striking of prospective jurors).

31. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1019, 1032 (2012); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 60, 142 (2014); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 208–11 (2001).

32. This principle was not officially codified until Uttecht v. Brown, 551 U.S. 1 (2007).

33. Witherspoon v. Illinois, 391 U.S. 510, 520 (1968).

Stewart, delivering the majority opinion, stated:

> [W]hen it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.[34]

Although a prosecutor could reject a potential juror for being unwilling to impose the death penalty, she could not reject a prospective juror for simply feeling uneasy about the application of the death penalty.[35] The Court, at the time, feared juries that were too willing to convict.[36] The Court reaffirmed this belief twenty years later in *Lockhart v. McCree*:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.[37]

However, even before the *Lockhart* ruling, the Court was inching towards a stricter standard in *Wainwright v. Witt* in 1985.[38] *Witt* was heavily relied upon, along with *Darden v. Wainwright*, in the majority opinion for *Uttecht v. Brown*.[39] *Witt* established a balancing test, weighing the state's desire to create a jury that would be able to impose the death penalty against the defendant's right to a jury that was not biased towards conviction or imposition of the death penalty.[40] The Court in *Witt* concluded that jurors could be excluded if their views on capital punishment would prevent or "substantially impair" them from following the law.[41]

In *Uttecht*, the Court veered even more sharply away from the reasoning of *Witherspoon*.[42] Citing *Darden*, the Court found that trial courts should be given deference in determining what would be a substantial impairment.[43] A defendant would have to object to the dismissal of a juror at trial, and the trial court would have to agree with the defendant that the prosecutor was incorrectly seeking to challenge a juror for cause in regards to the potential juror's ability to

---

34. *Id.* at 520–21.

35. *See id.*

36. *Id.* at 522–23.

37. Lockhart v. McCree, 476 U.S. 162, 176 (1986).

38. Wainwright v. Witt, 469 U.S. 412, 422–25 (1986).

39. Uttecht v. Brown, 551 U.S. 1, 6–8 (2007) (citing *Witt*, 469 U.S. at 412, then citing Darden v. Wainwright, 477 U.S. 168 (1986)).

40. *See Witt*, 469 U.S. at 424, 424 n.5. Concerns about jury nullification are often cited for the need to eliminate jurors who espouse lack of support for the death penalty. For an in-depth discussion of death penalty juries and concerns about jury nullification, *see* Allen et al., *supra* note 28.

41. *Witt*, 469 U.S. at 424.

42. *Uttecht*, 551 U.S. at 5–8 ("When considering the controlling precedents, *Witherspoon* is not the final word, but it is a necessary starting point.").

43. *Id.* at 9.

impose the death penalty.[44] If the prosecutor could have reasonably believed the prospective juror was substantially impaired in his or her ability to impose the death penalty, then the decision of the trial court should be upheld.[45] Moreover, if the statements of the prospective juror were ambiguous, then a later appeals court would likely find in favor of the original trial court's ruling allowing the challenge.[46]

What this means for potential death-penalty jurors is that almost any expressed reservation about the application of the death penalty could be grounds for excusal for cause. Justice Stevens dissented:

> When asked whether he was "a little more comfortable that it is being used some of the time," Juror Z responded in the affirmative. While such testimony might justify a prosecutor's peremptory challenge, until today not one of the many cases decided in the wake of *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968), has suggested that such a view would support a challenge for cause.[47]

This broad approach to prosecutorial discretion makes it far easier for prosecutors to create a jury that is "uncommonly willing to condemn a man to die."[48]

These changes to jury selection in capital cases create a voir dire process ever more concerned with not only a juror's ability to apply the death penalty, but with his or her perceived likelihood to impose it. Therefore, when an individual juror is a member of a group not likely to impose the death penalty, that juror is likely to face increased scrutiny from prosecutors. As demographics within the U.S. change, an updated understanding of public opinion of the death penalty becomes increasingly important.

III. DEMOGRAPHICS, PUBLIC OPINION, AND DEATH PENALTY EXCLUSIONS

To understand the scope of the potential problem created by the *Witt* and *Uttecht* decisions, one must understand the large racial, partisan, and ideological gaps in support of the death penalty especially in light of expected US demographics. This section will trace recent trends in multi-group support for the death penalty. While some studies indicate large differences in support of the death penalty among various demographic groups, the research thus far is mostly before the 2007 *Uttecht* decision and examines only a few demographic groups. To that end, this section includes both a review of existing studies and a new analysis of death penalty support over the last 40 years.

Many studies discuss different aspects of public opinion about the death penalty. For example, researchers have examined how much people know about the frequency with which capital punishment is used, the alternatives available

---

44. *Id.* at 14–17.

45. *Id.*

46. *Id.* at 6.

47. *Id.* at 37 (Stevens, J., dissenting).

48. *Uttecht*, 551 U.S. at 6 (majority opinion) (citing Witherspoon v. Illinois, 391 U.S. 510, 521 (1968)).

to jurors, and how support for the death penalty changes when people learn that a perpetrator is a juvenile or mentally disabled.[49] Studies have also found that men, whites, Republicans, conservatives, fundamentalists, and people with higher incomes and fewer years of education support the death penalty more strongly than others.[50] These jurors tend to be more prone to convict.[51] In light of *Uttecht*, which makes it easier to strike jurors who do not unequivocally support the the death penalty, understanding who supports the death penalty is necessary for understanding who will be on death penalty juries.

The following is an updated analysis of death penalty support that goes beyond the authors previously cited to include more recent data, namely, the General Social Survey (GSS) for the years 1972 to 2014.[52] This cumulative dataset consists of a series of public opinion surveys conducted from 1973 to 2014 with 59,599 cases.[53] The data and analysis were conducted primarily through the Survey Documentation and Analysis (SDA) site through the Computer-assisted Survey Methods program (CSM) at the University of California, Berkeley.[54]

49. *See, e.g.*, FRANK R. BAUMGARTNER ET AL., THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE (2008) (explaining the 1990s decline in the application of capital punishment in relation to historic trends, and a prediction of the future in light of innocence projects and changing public opinion); Robert M. Bohm et al., *Knowledge and Death Penalty Opinion: A Test of the Marshall Hypothesis*, 28 J. RES. CRIME & DELINQ. 360, 379–81 (1991); Alexis M. Durham et al., *Public Support for the Death Penalty: Beyond Gallup*, 13 JUST. Q. 705, 707–09 (1996); Gross & Ellsworth, *supra* note 15, at 19–52 (evaluating a number of demographic variables and their effects on beliefs about the death penalty).

50. Gross & Ellsworth, *supra* note 15; Harold G. Grasmick & Ann McGill, *Religion, Attribution Style, and Punitiveness Toward Juvenile Offenders*, 32 CRIMINOLOGY 23, 25–26 (1994); Samuel R. Gross, *Update: American Public Opinion on the Death Penalty–It's Getting Personal*, 83 CORNELL L. REV. 1448, 1451–52 (1998); Shaheen Halim & Beverly L. Stiles, *Differential Support for Police Use of Force, the Death Penalty, and Perceived Harshness of the Courts*, 28 CRIM. JUST. & BEHAV. 3, 17–20 (2001); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 31 J. FOR SCI. STUDY RELIGION 76, 82–84 (1992).

51. Allen et al., *supra* note 28, at 718; Robert L. Young, *Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment*, 25 DEVIANT BEHAV. 151, 155–56, 161–63 (2004).

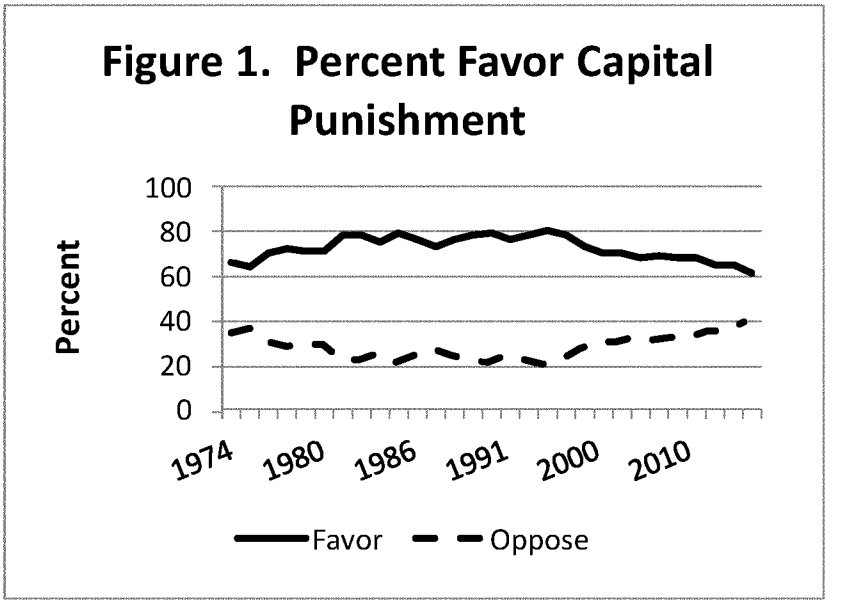
52. The GSS is an annual, national survey of Americans coordinated by the NORC at the University of Chicago. The GSS can be accessed at *SDA: Survey Documentation and Analysis*, U.C. BERKLEY, https://sda.berkeley.edu/archive.htm [https://perma.cc/G4T6-A6VA]. GSS dataset and codebook can be accessed at *Get the Data*, NORC, http://gss.norc.org/Get-The-Data [https://perma.cc/2LLQ-XL9C].

53. *Id.*

54. *Id.*

A. Public Support for the Death Penalty over Time

For many years, support for the death penalty was considered fairly stable.[55] Both Gross and Baumgartner commented on its long-term stability.[56] But as Figure 1 shows, at the time that Gross wrote about the GSS data in 1998, support for the death penalty began to drop.[57] It declined from 80% in 1994 to 65% in our most recent survey year, 2014.[58] This decline suggests an increased likelihood of racially imbalanced juries over time.



We now turn to an examination of groups of potential jurors. Specifically, we evaluated an important question: how representative of the adult population are death-penalty-eligible jurors? We measured representativeness of each group using a simple ratio: the number of respondents who are death-penalty eligible to the number who are in the entire sample.[59] For example, in 1974 (the first year for which we have data), 88.4% of the sample was white, while 93% of death-penalty-eligible jurors were white.[60] The ratio of 93 to 88.4 equals 1.05, which means that whites were about five percent over-represented. If whites had been included among death-penalty-eligible jurors in equal

55. *Supra* note 53.

56. Gross, *supra* note 50, at 1448; BAUMGARTNER ET AL., *supra* note 49, at 179, 182.

57. *See* Figure 1.

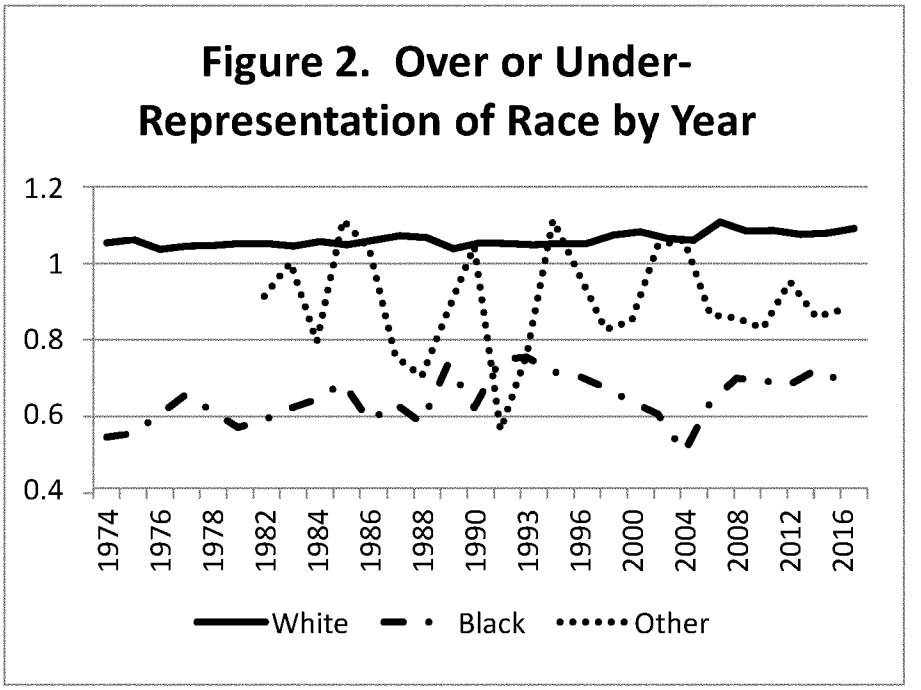
58. *See id.*

59. A ratio greater than 1.0 means over-representation and a ratio less than 1.0 means under-representation.

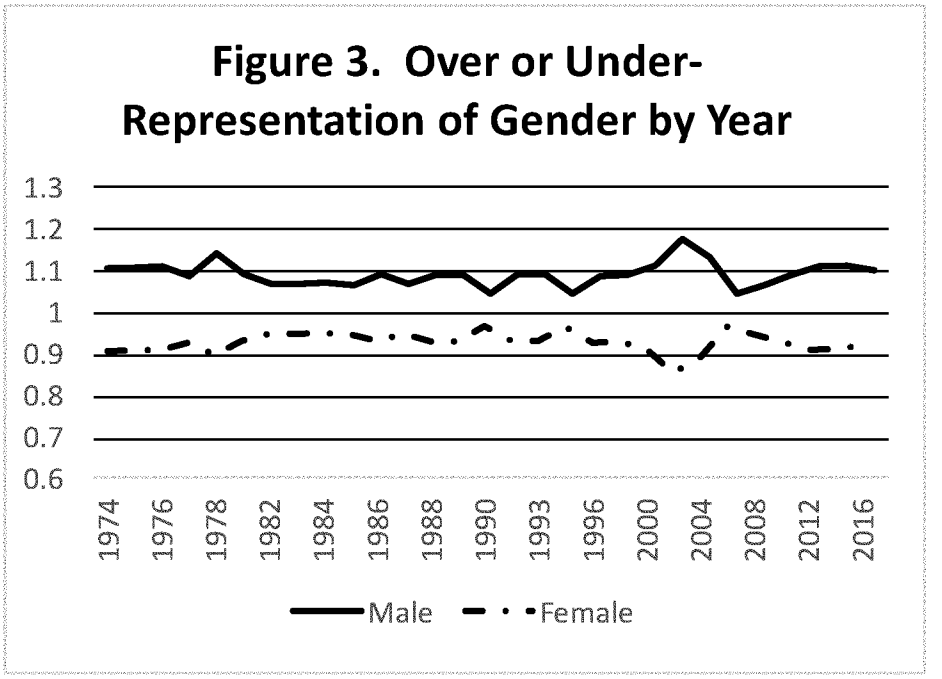
60. For source data see *supra* note 52.

proportion to their numbers in the entire population (that is, 88.4 percent of both), the ratio would have been 1.0.

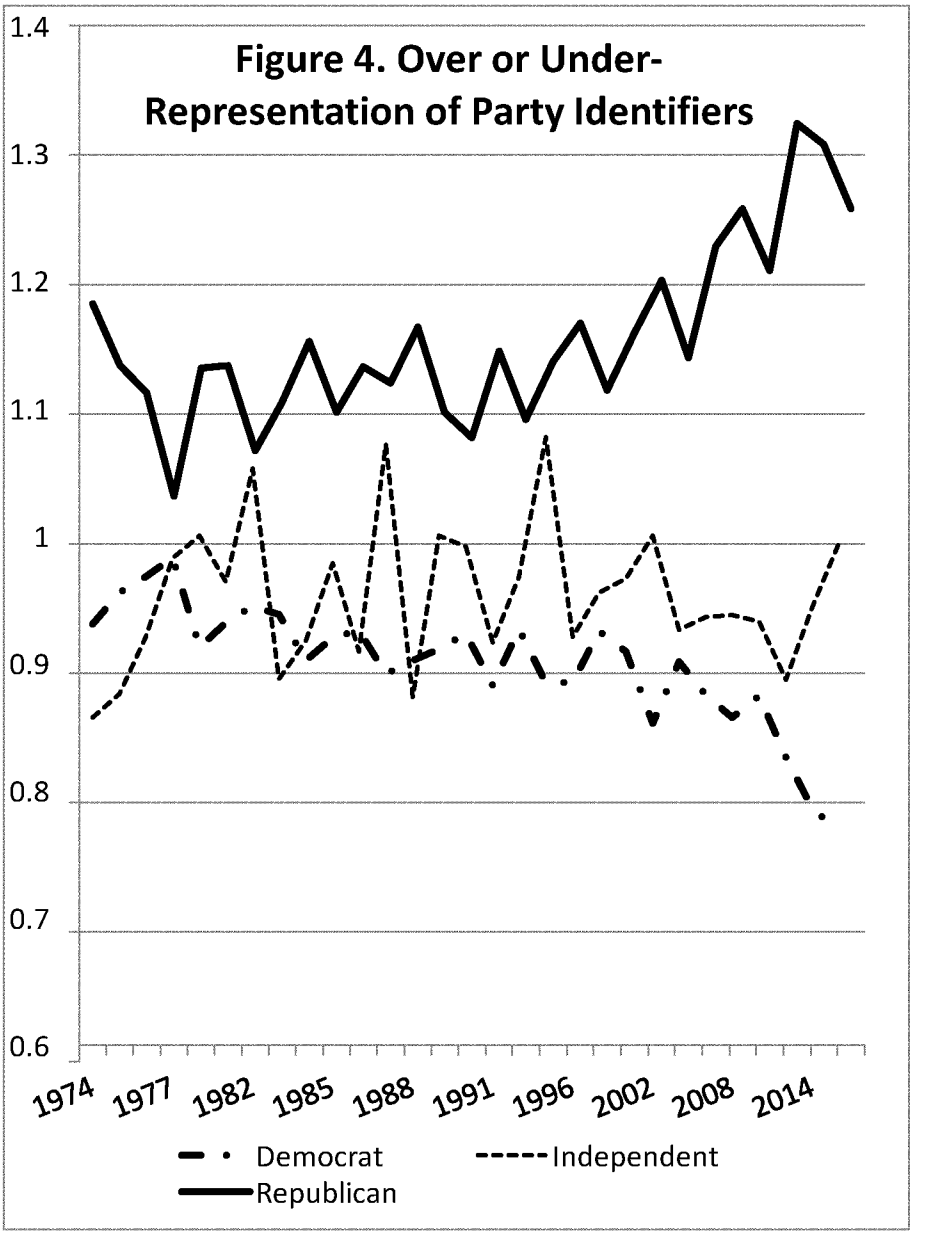
We begin with racial groups. The data are shown in Figure 2. For the entire 38-year span of our data, whites have always been over-represented. The low point came in 1976 when they were 4% over-represented. The high point occurred in 2006, when they were 11% over-represented, and in our most recent sample year, they were 8% over-represented. The dotted line showing Latino, Asian, and Native Americans moves wildly up and down because of the relatively small size of the sample. In contrast, African American representation among death-penalty-eligible jurors started from only 54% in 1974 and reached just 71% of equal representation in 2014. There was a substantial drop in death-penalty eligibility among African Americans starting in 1994, but the number rebounded after 2004. We note that the drop started with the year of the O.J. Simpson trial, but the cause of the decline is beyond the scope of this paper. The key conclusion we can draw is that the black population is substantially under-represented among potential death-penalty jurors.



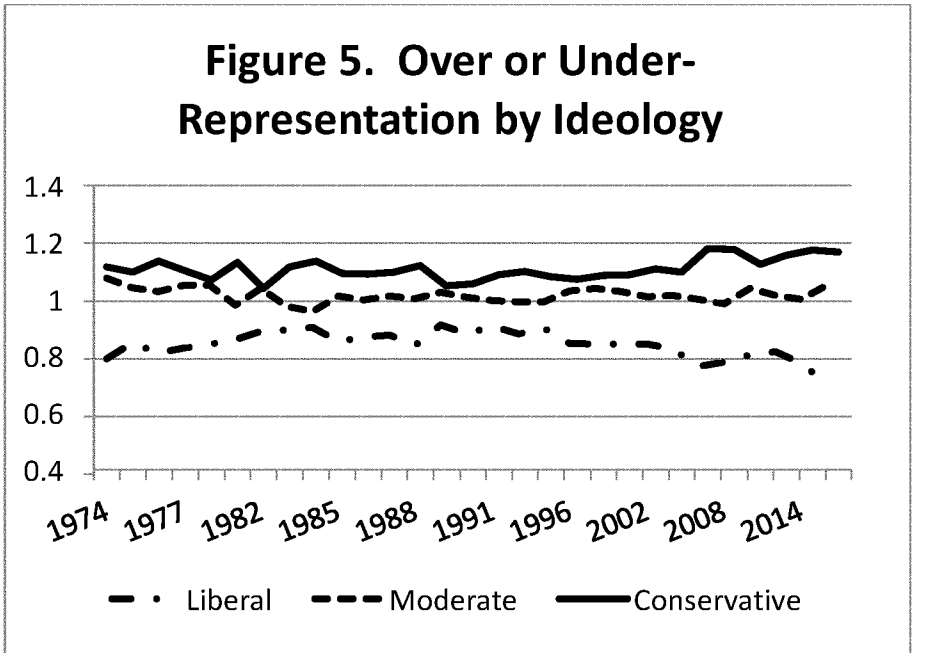
We next look at representativeness of men and women, shown in Figure 3. Men are clearly over-represented among death-penalty eligible jurors and women are under-represented. Although there is some variation from year to year, there is no overall trend. Men average about 9% more than equal representation and women about 9% less.



The data on partisan representation tell a different story. From 1974 through 2000, Republicans were over-represented by 10-15%, as Figure 4 shows. Democrats were typically about 10% under-represented and the numbers for independents fluctuated, although they were usually under-represented. Starting in about 2000, however, Republican over-representation grew, reaching over 30% by 2012. Democrat representation fell as well, dropping to only 78% of equal representation by 2014.



Finally, we examine ideological groups in Figure 5. As should be expected from our data on partisanship, conservatives are over-represented among potential death-penalty jurors and liberals are under-represented. Moreover, there seems to be a trend of increasing over-representation among conservatives, and the reverse among liberals, in recent years.



We can summarize our findings simply. Whites, men, Republicans, and conservatives are over-represented among death-penalty-eligible adults. Moreover, while support for the death penalty fell starting in the mid-1990s, the over-representation of Republicans and conservatives among death-penalty-eligible adults grew. Selecting a jury that is representative of one's peers has thus become increasingly difficult.

Looking to the future, observers expect the decline in support for the death penalty to continue because of several trends. First, there has been a steady rise in the role played by nationwide efforts like that of the Innocence Project to repeal laws and overturn convictions.[61] Second, the U.S. Census Bureau estimates that the country will become a majority-minority nation by 2044 because of existing patterns in immigration, as well as birth and death rates.[62] In 2014, the minority population was 38%, which the Bureau predicts will increase to 56% by 2060.[63] The literature has already confirmed that Latinos *and* Asian Pacific Americans are less likely to support the death penalty as compared to Whites, but not less likely than African Americans. As Latino and Asian American populations grow, it can be inferred that these groups are also

61. *See* BAUMGARTNER ET AL., *supra* note 49, at 59–61, 228; Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 594–95 (2005).

62. *New Census Bureau Report Analyzes U.S. Population Projections* U.S. CENSUS BUREAU (Mar. 3, 2015), http://www.census.gov/newsroom/press-releases/2015/cb15-tps16.html [https://perma.cc/KH8W-QAKK].

63. *Id.*

likely to be targets for removal from juries by prosecutors.[64] However, as they become increasingly larger percentages of prospective jury pools, it is likely that their views on the death penalty, regardless of their actual or perceived likelihood to convict, will cause them to be excluded from death qualified juries.

Taken together, these trends suggest what we have argued in this paper: death-penalty juries in the United States will continue to be more white, more male, more identified with the Republican Party, and more conservative. If unambiguous support for the death penalty is the new standard for inclusion on death-penalty juries, then *who* supports the death penalty becomes profoundly significant. Death-penalty juries have routinely been found to be far less representative and less-diverse than the populations from which they are selected.[65] A common explanation for these outcomes is that minorities and women are less likely to indicate support for the death penalty, making them far more likely to be excluded from capitol juries. As the percentage of minority citizens increases, more and more potential jurors will be excluded from death-penalty juries, continuing and likely exacerbating the problem of non-representative juries.

B. Further Implications of Deference to Trial Court Discretion—Easing the Way for Prosecutors to Hide Bias

While the state has a responsibility to avoid creating juries that are "uncommonly willing" to sentence a man to death, it also has an interest in preventing jury nullification.[66] To address that interest, prosecutors need to be able to exclude potential jurors who might refuse to impose the death penalty, deadlocking the jury in either the guilt or penalty stage of the trial.[67] Therefore, prosecutors arguably must be able to exclude jurors who would not support the death penalty if imposing the death penalty is going to be possible in the first place.

In theory, *Uttecht* does not necessarily say that prosecutors have complete and unfettered discretion in challenging jurors. Rather, that case requires deference to trial courts' decisions about death-qualified challenges.[68] If an

64. *See* Figure 2. For source data see *supra* note 52.

65. Robert Fitzgerald & Phoebe Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31, 46 (1984) ("[Our research] demonstrates that the practice of death qualification threatens the representativeness of the jury by discriminating more heavily against some demographic groups than others: a fifth of the women and a quarter of the black jurors are forbidden to serve."); *see also* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2011), https://int.nyt.com/data/int-shared/nytdocs/docs/368/368.pdf [https://perma.cc/H834-EF27] (finding evidence of racial discrimination in jury selection across the eight southern states surveyed).

66. Wainwright v. Witt, 469 U.S. 412, 418 (1985).

67. *See id.* at 423.

68. *See* Uttecht v. Brown, 551 U.S. 1, 9 (2007).

attorney suspects that his or her opponent is using challenges for cause, the attorney can object and request a *Batson* hearing.[69]

However, a 2010 case suggests that this protection is likely no protection at all.[70] In *Lizcano v. State*, the accused Lizcano argued that the prosecution had unfairly used concerns about potential jurors' support for the death penalty as a way to eliminate African Americans from the jury pool.[71] The Texas Appeals Court ruled:

> The primary reason asserted by the State for striking five of the six black venire members . . . was that they were among eight venire members who circled a specific answer to a specific question on the jury questionnaire. The answer indicated that, although they did not believe that the death penalty ever ought to be invoked, as long as the law provides for it they could assess it under the proper circumstances . . . [b]ecause the State struck all eight venire members who shared the characteristic of circling this answer, including three non-black venire members, the appellant has not demonstrated that the State's reason for striking those five black venire members was a pretext for discrimination.[72]

The deference shown to the trial court ruling in *Lizcano* suggests a disturbing reality: as long as there is any plausible reason for the exclusion of the potential juror, then the juror can be excluded, essentially circumventing *Batson.*

Even the recent decision in *Foster v Chatman* seems unlikely to actually reverse the movement towards prosecutorial discretion.[73] At Foster's 1987 trial, prosecutors used preemptory challenges to exclude all five potential African American jurors.[74] Documents presented by prosecutors included voir dire lists where only the names of African American jurors were highlighted in green. There were also notes on the jury questionnaires about race, the challenged jurors membership at a historically Black church, and others suggesting racially motivated bias.[75] The Court relied heavily on *Snyder*, finding that the prosecutors' challenges were "motivated in substantial part by discriminatory intent."[76] However, *Foster* is a potentially narrow decision, heavily dependent

69. *Batson* hearings allow for prosecutors and defenders to challenge the opposing parties use of pre-emptory challenges if they believe the opposing party is striking juries for prohibited purposes such as race, gender, minority status, etc. *See generally* Batson v. Kentucky, 476 U.S. 79 (1985). For a more extensive overview of *Batson* hearings and procedure see ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES 7–10 to 7–36 (2014).

70. *See* Lizcano v. State, No. AP-75879, 2010 WL 18177772 (Tex. Crim. App. May 5, 2010) (unpublished opinion).

71. *Id.* at *2.

72. *Id.* at *4.

73. *See generally* Foster v. Chatman 136 S. Ct. 1737 (2016) (finding prosecutors lacked a non-racially motivated reason for excluding black jurors as prosecution accepted white jurors with similar backgrounds and demographic backgrounds as excluded jurors).

74. *Id.* at 1743.

75. *Id.* at 1744.

76. Snyder v. Louisiana, 552 U.S. 472, 485 (2008).

on the specific facts of the particular case.[77] Even as the Court reiterated the Constitutional prohibition on discriminatory challenges, the majority was concerned mainly with the overwhelming evidence of racial bias in the prosecutors' voir dire notes.[78]

The deference given to prosecutors is further complicated by the fact that minority populations already make up a smaller proportion of the jury pool.[79] Jury pools are selected from venire lists compiled by the relevant court.[80] Those lists typically consist of names pulled from voter registration lists.[81] Because of a variety of factors, minorities are more likely to have felony convictions that result in the loss of the civil rights, including the right to vote, and therefore are more likely to be excluded from potential jury pools or barred from jury service.[82] Most gain these rights back after serving their sentences or completing parole or probation.[83] But in twelve states, felons do not have their civil rights restored even after their parole or probationary periods have ended, unless their record is expunged.[84] One in every thirteen black men is ineligible to vote because of their felon status.[85] In some states, as much as 10% of the African American population are ineligible to serve on a jury.[86] In Florida, Virginia, and Kentucky as many as one in five African American men is ineligible to vote because of a felony conviction.[87] If prosecutors are also allowed to adhere to a very narrow view of what constitutes support for the death penalty, then, based on the data and studies presented, the jury pool for death penalty cases becomes one unrepresentative of the true U.S. population.

---

77. *See generally* Nancy S. Marder, Foster v. Chatman: *A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137 (2016) (discussing the unique circumstances of *Foster* and the limitations of *Batson* challenges under current precedent).

78. *Foster*, 136 S. Ct. at 1754–55.

79. Stephanie Adamakos, *Race and the Jury: How the Law is Keeping Minorities off the Jury*, 1 WASH. U. UNDERGRADUATE L. REV. 1, 5–8 (2016).

80. *How Courts Work: Steps of a Trial: The Jury Pool*, A.B.A., https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jurypool.html [https://perma.cc/L2NT-3LXM].

81. *Id.*

82. Darren Wheelock, *A Jury of One's Peers: The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 336 (2011).

83. *Id.*

84. *Id.*

85. Nina Liss-Schultz, *The Obama Administration Wants 6 Million Americans to Get Back Their Right to Vote: Here's How*, MOTHER JONES (Feb. 13, 2014), http://www.motherjones.com/crime-justice/2014/02/felony-convictions-voting-rights-black-american-african-disenfranchisement/ [https://perma.cc/P2V2-YFQ7].

86. Sophia Kirby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States: A Look at the Racial Disparities Inherent in Our Nation's Criminal-Justice System*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/ [https://perma.cc/XEG4-MGWW].

87. Liss-Schultz, *supra* note 85.

Because African Americans make up a smaller portion of the potential jury population, it becomes even easier to exclude them.[88] As Shari Seidman Diamond, Professor of Law and Psychology at Harvard University, put it, "[s]tupid reasons [for jury exclusions] are ok."[89] When minority jurors make up a smaller portion of the jury pool, it becomes even easier to strike them from the jury pool for "other reasons" and hide the actual motive of racial bias.[90] Lack of support for the death penalty and the increased ability to exclude jurors over lack of support for the death penalty has a trickle-down effect, allowing for even more exclusion in the already diminished stock of minority jurors.

As Latinos and Asian Americans express even stronger levels of opposition to the death penalty, it can be predicted that these groups will also likely become targets for removal from juries by prosecutors (although Asian American opposition is not as strong as that of Latinos)[91] More research would need to be done to understand the propensity of these groups to acquit a death penalty eligible defendant. Studies that investigate differences in both the likelihood to acquit and beliefs on likelihood to acquit have not traditionally included Latinos and Asian American in their analyses.[92] However, as these groups become increasingly larger percentages of prospective jury pools, it is likely that their views on the death penalty, regardless of their actual or perceived likelihood to convict, will lead to their exclusion from death-qualified juries.

IV. CONSEQUENCES OF DEFERENCE TO TRIAL COURT DISCRETION IN RACIAL EXCLUSION ON CAPITAL CONVICTIONS

The combination of the low levels of support for the death penalty among minorities and Supreme Court decisions that strongly favor prosecutorial discretion in jury selection has resulted in significant implications. Most of the prisoners sentenced to death were convicted by white or nearly all-white juries.[93] All-white juries are far more likely to convict an African American defendant than a jury that has at least one or two African American jurors.[94] All-white juries are also less likely to convict white defendants than more representative

88. *See* Adamakos, *supra* note 79. *See generally* Samuel Sommers, *On the Obstacles to Jury Diversity*, JURY EXPERT (2009), http://www.thejuryexpert.com/2009/01/on-the-obstacles-to-jury-diversity/ [https://perma.cc/9QJR-F762].

89. Adam Liptak, *Exclusions of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2005), https://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html [https://perma.cc/2DHW-XSJW].

90. *See id.*

91. KARTHICK RAMAKRISHNAN & TAEKU LEE, NAT'L ASIAN AM. SURV., THE 2012 GENERAL ELECTION: PUBLIC OPINION OF ASIAN AMERICANS IN CALIFORNIA (2012), http://naasurvey.com/wp-content/uploads/2016/10/NAAS12-oct2-CA-election.pdf [https://perma.cc/Q5MZ-J3MB]; John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. CRIM. JUST. 85, 95 (2006).

92. *See infra* Part III.

93. STEVENSON, *supra* note 31, at 60.

94. Anwar et al., *supra* note 31, at 1019–20.

juries.[95] The outcomes of this conviction disparity seems particularly stark in death-penalty cases. African Americans make up almost 42% of prisoners currently sitting on death row, which is more that three times the rate that African Americans appear in the general population.[96] Whites makes up a nearly identical percentage of those on death row, while comprising 62% of the general population.[97] Of those whose executions are carried out, African Americans tend to spend more time on death row before executions.[98] However, a state-by-state comparison shows that in some regions, African Americans are more likely to be executed than their white counterparts despite making up roughly equal proportions of the death row populations.[99]

The use of non-representative juries also causes larger societal problems beyond the damage it inflicts on individual defendants.[100] There are concerns about the effect of what is essentially jury disenfranchisement on levels of participation in both juries and other forms of political participation among minority citizens.[101] The Supreme Court has also expressed concerns that non-representative juries undermine confidence in the jury process.[102]

V. IS THE PROPER ROLE OF THE COURTS TO SOLVE THE PROBLEM?

Certainly, the current voir dire process for death-penalty cases is likely to result in non-representative juries. Our study and previous studies tell us that racially imbalanced juries are far more likely to produce unjust outcomes.[103] Moreover, the Court has ruled that these exclusions are more than just discriminatory. In *J.E.B.*, Justice Blackmun wrote, "Discrimination in jury selection, whether based on race or gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process..[104] There are a number of consequences for allowing for biased, non-diverse juries. The following section will focus on the

95. *Id.*

96. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (2018), http://deathpenaltyinfo.org [https://perma.cc/TL55-NHBS]: *Quick Facts: United States, Race and Hispanic Origin*, U.S. CENSUS BUREAU https://www.census.gov/quickfacts/fact/table/US/PST045216 [https://perma.cc/C62M-VDCY].

97. *Id.*

98. *Id.*

99. *Id.*

100. JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 8–10 (2010).

101. Perry Deess & John Gastil, *How Jury Service Makes Us Better Citizens,* 21 JURY EXPERT 51, 57–58 (2009).

102. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

103. Sommers & Ellsworth, *supra* note 31, at 210–12; William J. Bowers et al., *Race, Crime, and the Constitution: Article 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, 183–85, 187–88 (2001); Anwar et al., *supra* note 31, at 1019–20.

104. J.E.B. v Alabama, 511 U.S. 127, 140 (1994).

effect demographically imbalanced death-penalty juries have on conviction and sentencing.

Furman v. Georgia found that imposing the death penalty on the basis of a racially motivated jury verdict constitutes cruel and unusual punishment in violation of the Constitution.[105] However, despite acknowledging that racially-biased juries would generate unconstitutional verdicts,[106] the Court has seemingly failed to protect defendants' Sixth Amendment rights, instead moving toward almost complete deference to trial judges and prosecutors when it comes to determining the existence of bias.[107] The onus is now squarely on aggrieved defendants to prove that the prosecutors in their individual cases acted with racially biased intent in striking jurors in such a way as to prevent the formation of a representative jury.[108] That deference creates a very high standard for defendants to meet because they must exclude alternate explanations in order to justify to the courts that the prosecutor did not have a valid non-racial or non-gendered reason for striking a potential juror.[109] As the prosecutor is highly unlikely to admit to a racial or gender bias in jury selection, defendants are left to try to find evidence of the prosecutor's intent, which may not exist. *Foster* highlights this problem, as the Court's decision appeared to rest heavily if not entirely on the extensive evidence presented that clearly documented the trial prosecutors' racial bias.[110]

Not only has the judiciary been unwilling to provide a bright-line rule or any firm guidance on identifying racially based challenges, the Court is also not always equipped to evaluate and apply findings from social science research.[111] In *Lockhart v. McCree*, the Court was presented with a wealth of research finding that non-representative juries are more likely to reach decisions on guilt and sentencing that are racially biased.[112] The Court rejected this evidence and instead ruled that each trial defendant seeking to challenge his conviction on the basis of a racially biased jury would have to prove that the jury for his particular case was biased.[113] Similarly, in *McClesky v. Kemp*, the Court found that while there was a correlation between race and the likelihood of a death-penalty jury finding a defendant guilty, the evidence was not persuasive in proving any

105. Furman v. Georgia, 408 U.S. 238, 242 (1972).

106. *Id.*

107. *See* Wainwright v. Witt, 468 U.S. 412 (1986) (holding that deference was owed to the trial court in evaluating claims of racial discrimination by prosecutors); *see also* Swain v. Alabama, 380 U.S. 202 (1965) (holding that petitioner had the burden of proof in showing racial bias in discriminatory striking of prospective jurors).

108. *See generally Wainwright*, 468 U.S. at 412; *Swain*, 380 U.S. at 202.

109. *See generally* Foster v. Chatman, 136 S. Ct. 1737 (2016) (finding that prosecutors non-racial rationales for excluding black jurors were not equally applied to potential white jurors.).

110. *See generally id.* (discussing the record of evidence of racial bias in prosecutorial decisions to strike jurors).

111. David C. Baldus, *Keynote Address at the University of Indiana Law Journal Symposium: The Capital Jury Project*, 70 IND. L.J. 1033, 1037–38 (1995).

112. Lockhart v. McCree, 476 U.S. 162, 167–72 (1986).

113. *Id.* at 173.

particular jury or juror was in fact prejudiced in that case.[114] Such findings suggest that while the Court can be persuaded by scientific evidence showing that prosecutors are unconstitutionally rejecting jurors or the effects of non-representative juries on sentencing, the Court has made it very difficult to prove any individual prosecutor or juror acted inappropriately.

The appeals process, meant to provide a forum to right injustices that occur during the trial phase, actually furthers the problem. The case-by-case nature of the appeals process prevents the courts from exploring this problem, as they force the individual defendants to show individual-level bias in their specific cases. During the appeals process, for defendants seeking to prove that jury exclusions were racially motivated or that the jury was biased, the burden to prove misconduct by the prosecution is on the defendant.[115] This burden tends to be limited to the particulars of the defendant's individual case. Therefore, even as public opinion polls demonstrate that minorities are less likely to demonstrate strong support for the death penalty,[116] the rulings outlined above suggest that very strong evidence of racial discrimination is needed.[117]

The purpose of this paper is not to argue that non-representative juries are inherently biased, though this is certainly an idea worth exploring. The social science research and the data outlined earlier in this piece strongly argue for the biased nature of non-representative juries. If non-representative juries are more likely to convict minority defendants on the basis of race, then they are arguably biased and therefore not impartial under the Sixth Amendment standard.[118] As of now, the Court requires that a jury be impartial in order to satisfy the Sixth Amendment, which does not necessarily require representativeness.[119] If death penalty juries becomes less representative, this could become an increasingly important question.

VI. CONCLUSION

The evidence shows that death-penalty juries are unrepresentative of the American public in terms of race, gender, party affiliation, and ideology. It is reasonable to expect that the under-representation of death-penalty juries will worsen as the percentage of minorities in the population increases. If the Court

114. McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

115. Uttecht v. Brown, 551 U.S. 1, 4 (2007).

116. *See, e.g.*, *supra* note 52; Joseph Carroll, *Who Supports the Death Penalty*, GALLUP NEWS (Nov. 16, 2004), http://news.gallup.com/poll/14050/who-supports-death-penalty.aspx. [https://perma.cc/N98Z-LE98]; *see also Less Support for Death Penalty, Especially Among Democrats: Supporters, Opponents See Risk of Executing the Innocent*, PEW RES. CTR. (Apr. 16, 2015), http://www.peoplepress.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/ [https://perma.cc/5RUB-WAMG].

117. *See Foster v. Chatman*, 136 S. Ct. 1737 (2016) (noting defendant compiled an extensive record to show prosecutors were racially motivated and lacked race neutral grounds for dismissing African American jurors).

118. Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring).

119. Holland v. Illinois, 493 US 474, 480 (1990).

was to give weight to these findings, we believe it would recognize that the death penalty is unjustly administered and that the only effective solution is to abolish it. However, courts are unable to correct the problem because they can only address the cases in front of them. Therefore, the very real problems of non-representative juries will persist as long as we rely on the courts to redress the problem.

One potential answer is to look to Congress. However, there are concerns over attempting such an approach. First, most death penalty cases fall within the jurisdiction of state legislatures and courts; Congress only has control over a very small number of federal death penalty cases.[120] The individual states would need to intercede. This approach is certainly possible but there are a number of logistical hurdles at both the federal and state/local levels in trying to pursue a legislative answer. Juries are chosen from geographic areas that may limit the ability to truly create representative juries.[121] Requiring representative juries also does not solve socio-economic barriers to jury participation, which diminishes the number of minorities likely to be in any given jury pool.[122] Moreover, there are potential problems in trying to determine what standard of representativeness would need to be used—such as a local, state, or federal one.

Death penalty juries are a problem and are almost certainly leading to more minorities being unfairly sentenced to death. There may not be a solution to the problem under the current system. Thus, the only answer to creating an unbiased death penalty system may be ending the death penalty altogether.

120. *Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/federal-death-penalty [https://perma.cc/EL2N-47FF].

121. *See generally* Wheelock, *supra* note 82 (discussing the relationship between housing patterns, felony conviction rates, and race and their effect on jury composition).

122. *Id.*