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Yes, Jury Selection Is as Racist as You Think. Now We Have Proof.

A new study from North Carolina confirms some long-held folk wisdom about race and juries. The good news is there are two doable solutions.

By Ronald Wright
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Race, as a matter of constitutional principle, cannot factor into the selection of jurors for criminal trials. But in the American justice system, anyone with a bit of common sense and a view from the back of the courtroom knows the colorblind ideal isn't true in practice.

Racial bias largely seeps in through what's called "peremptory" challenges: the ability of a prosecutor — and then a defense attorney — to block a certain number of potential jurors without needing to give the court any reason for the exclusion.

The number of challenges allowed varies by state, but commonly 15 or more are permitted. Folk wisdom, among those familiar with the song and dance, is that prosecutors use these challenges to remove nonwhite jurors, who are statistically more likely to acquit, while defense attorneys — who can step in only after the pool has been narrowed by prosecutors — typically counteract by removing more white jurors.

For a long time, the opacity of court records rendered the dynamic as only that — folk wisdom — which has made it difficult to articulate the urgent need to reform this understudied aspect of our system. But now, this informal knowledge has

been empirically confirmed, and the case for change couldn't be more compelling.

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My recently published research on juror removal in North Carolina conducted with colleagues at the Wake Forest University School of Law proves — for the first time with statewide evidence — that peremptory challenges are indeed a vehicle for veiled racial bias that results in juries less sympathetic to defendants of color.

Based on statewide jury selection records, our Jury Sunshine Project discovered that prosecutors remove about 20 percent of African-Americans available in the jury pool, compared with about 10 percent of whites. Defense attorneys, seemingly in response, remove more of the white jurors (22 percent) than black jurors (10 percent) left in the post-judge-and-prosecutor pool.

The data also show variety within the state: Prosecutors in urban areas, which tend to have larger minority populations, remove nonwhite jurors at a higher rate than prosecutors do in other parts of the state. Finally, we discovered, to our surprise, that judges also remove black jurors "for cause" about 20 percent more often than they remove available white jurors.

When the dust settles at the close of jury selection, defense attorneys' actions in the last leg of the process do not cancel out the combined skewed actions from prosecutors and judges. The consistent result is African-Americans occupying a much smaller percentage of seats in the jury box than they did in the original jury pool.

This winnowing of nonwhite jurors is not a quirk of just one state. Earlier this year, investigative journalists in Mississippi and Louisiana collected and published jury data from public records that confirmed similar practices in some areas within those states. And given the parallel results identified in county-level

studies and in death penalty cases, the pattern probably holds true for jury selection in most states.

It is not possible, even with this new data, to say exactly why a prosecutor, defense attorney or judge decides to remove any particular juror in a single case. But this racially skewed trend, played out across many cases, is persistent. And it has two especially pernicious effects on the quality of criminal justice.

First, the defendant is not judged by a jury that reflects a cross-section of his or her community — a violation of the courts' interpretation of the Sixth Amendment. In a system that already disproportionately prosecutes people of color, hedging the constitutional rights of defendants can be particularly harmful.

Second, excluded parts of the community become more cynical about the justice system when they repeatedly see barriers to jury service. If people from certain similar neighborhoods are constantly getting booted from juries, then it's tempting for residents there to view the police — and prosecutors — as hostile occupiers rather than partners in public safety.

In theory, the Equal Protection Clause of the Constitution, as interpreted in Batson v. Kentucky, prevents attorneys from removing jurors on the basis of race. But "Batson claims" rarely succeed because they require the judge to declare the proposed stated reason for removal was only a pretext hiding discriminatory intent — a notoriously steep standard.

To address the problem, state courts could adopt rules such as the one that the Washington Supreme Court approved last April. The new rule makes it easier to stop juror removals rooted in implicit racial bias by outlawing peremptory challenges defended with explanations highly correlated with race, like "prior contact with law enforcement" or "living in a high-crime neighborhood."

There are now over half a dozen states completely controlled by Democrats, whose ascendant progressive wing would presumably support such

nondiscrimination protections.

Another answer — which could gain support in even the toughest of "tough on crime" red states — is simply to publish more information on jury selection. The details of judge and attorney removals of jurors is already public record, but those details usually remain buried in the hard-copy files of court clerks across the country.

While this year's successful research shows how journalists and scholars can collect these far-flung records into a useful database, the process can take months or years of driving from courthouse to courthouse, digging out the files of cases that went to trial, recording the clerk's notations from those files and turning to online resources for background information on judges and lawyers.

States could instead — without much work — just plainly make all jury selection information available online and keyword searchable, easing access for journalists and voters alike.

In most states, voters choose their prosecutors and their judges; and with journalists on hand to swiftly analyze digitized public records of the jury selection habits of prosecutors and judges, citizens could evaluate incumbents' tendencies as a measure of success or failure.

These two reforms alone would greatly aid efforts to hold prosecutors and judges accountable as well as shore up public trust in the criminal justice system.

The status quo shows that a barely enforceable constitutional doctrine isn't enough. It's time to bring this vital process of justice from behind closed doors and into the sunlight. It's the only way to ensure that defendants are judged by a representative cross section of their community, not the filtered few that litigants want to see in the jury box.

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R **RIs** **Times Pick**
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I work in a courtroom and have seen hundreds of juries be picked. It's not a good idea to have jury selection made available online to the public for the simple reason that potential jurors disclose a lot of personal information about themselves, much of it painful and/or traumatic. If they know it will be publicly available, they'll be less inclined to be honest, and that doesn't serve anyone's interest.

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