

# Attachment L

## Experiences of Excluded Jurors

*Hon. James H. Coleman, Jr.:*

As a trial attorney representing plaintiffs in state courts, I observed attorneys exercise peremptory challenges to excuse African Americans from petit juries solely because of their race. Similarly, as a trial judge, I observed assistant prosecutors, defense attorneys, and attorneys for parties in civil litigation engage in the same discriminatory conduct.

As a young lawyer and judge, I became aware that few African Americans were interested in serving on juries. Because of my active participation in civic affairs in the community, I had many opportunities to ask African Americans in churches, taverns, and on street corners why they lacked interest in serving as jurors. Some people told me that it was so painful to be told, by one of the attorneys, that he or she was unfit to serve, that African Americans frequently sought to be excused in other ways. Some would first attempt to be excused prior to reporting for jury duty. If that failed, they would express a strong viewpoint during voir dire that clearly favored one of the parties in the case so that the judge would discharge them.

In 1973, during the third month of my assignment as a trial judge in the criminal division, a prominent attorney asked if I knew of a recent New Jersey case that permitted a prosecutor to use peremptory challenges in a racially discriminatory manner. With much humiliation, I informed him that on November 7, 1973, the Appellate Division had found that a prosecutor's use of peremptory challenges to excuse all prospective African-American jurors did not deny a defendant "equal protection of the law and due process under the Fourteenth Amendment." I paused, and then informed the attorney that the same viewpoint had been expressed by the Supreme Court of New Jersey in 1970 in State v. Smith. My lawyer friend asked, "As a judge, are you

going to change that rule?" My response was, "I will try my best because equal justice is one of my core values."

Whenever I saw peremptory challenges used to exclude excellent prospective jurors solely because of group bias, the defendant, the excluded prospective juror, and I believed that it reinforced group stereotypes, and we found it demeaning. We felt much like the swallow in Aesop's Fables who built her nest under the eaves of a court of justice. Before the young ones could fly, a serpent glided out of a hole and ate the newborn. When the swallow returned and found the nest empty, she began to mourn her loss. Seeing this, a dispassionate neighbor suggested, perhaps by way of comfort, that the swallow was not the first bird to have lost her young. "True," the swallow replied, "but it is not only my little ones that I mourn, but that I should have been wronged in the very place where the injured fly for justice."

Justice Blackmun expressed my feeling so eloquently when he said, "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice," both in terms of reality and in providing the appearance of injustice.

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To be sure, an improper exclusion of potential jurors solely based on race not only violated the right of a defendant who belonged to the same cognizable group as the prospective juror, but it offended the potential juror's rights as well. In psychological terms, I experienced "transference." The way in which prospective jurors were treated at that time was transferred to me because, as Strauder said, such treatment became "practically a brand upon them, affixed by the law, an assertion of their inferiority." In addition, the defendant was harmed by the fear that the invidious discrimination practiced in the jury selection process would infect the entire proceeding. This, in turn, caused a loss of confidence in the judicial system.

[The Evolution of Race in the Jury Selection Process, 48 Rutgers L. Rev. 1105, 1107-09, 1127-28 (1996) (footnotes omitted).]

***Hon. Theodore McMillian & Christopher J. Petrini:***

When a prosecutor is allowed to exercise his peremptory challenges to excuse prospective jurors solely because of their race, several harms result. First, without the broad range of social experiences often found in a racially and ethnically diverse group, juries may be ill-equipped to evaluate the facts presented. For example, a minority defendant may be prejudiced because the all-white jury simply does not understand the defendant's demeanor or the language used in important testimony. Misunderstanding important testimony can create the opportunity for unconscious prejudice.

Secondly, when potential minority jurors are excluded from juries because of their race, those excluded are deprived of their basic democratic right to participate in the community's administration of justice. Along with the right to vote, participation on a jury is one of the most fundamental ways that an individual citizen can participate in democratic processes. Participation on a jury can be an empowering experience, especially for minorities who have been subjected to racial discrimination. One southern black who had grown up under segregation described being called for jury duty as "one of the proudest moments of my life. [W]hen I got my summons . . . . I got a sense of really belonging to the American community." On the other hand, when minorities are excluded from serving on juries, they are stigmatized by the implication that they are not the equal of others who presumably are able or willing to judge a defendant impartially.

Finally, discriminatory use of peremptory challenges undermines the legitimacy of and popular confidence in the fairness of the criminal justice system. Members of the excluded group will see that the law is treating them unequally and may come to believe that it will do likewise in other situations as well. In sum, eradicating discrimination from the jury selection process is a goal of the utmost importance. Fairness to the defendant, inclusion of minority jurors and maintaining the integrity of the criminal justice system all require that discrimination be identified and eradicated.

[Batson v. Kentucky: A Promise Unfulfilled, 58 UMKC L. Rev. 361, 362 (1990) (footnotes omitted) (quoting Dale R. Broeder, The Negro in Court, 1965 Duke L.J. 19, 26).]

*The Equal Justice Initiative's 2010 and 2021 Reports include reflections by a number of qualified prospective jurors who were stricken through a peremptory challenge, including **Melodie Harris**:*

Melodie Harris had lived in Lee County, Mississippi, for a decade and worked for the same local company for six years when a prosecutor claimed she had “no ties to the community” and struck her from a jury. Ms. Harris knew she and most of the other black jurors had been treated unfairly. “It was just so blatant,” she said. Instead of turning away, Ms. Harris chose to bear witness and take action. She returned to the courthouse every day for the trial of Alvin Robinson, a black man who had been chased and assaulted by a white man following a traffic altercation, then charged with murder for retaliating in fear. Ms. Harris was aghast as she watched three jurors sleep through portions of the trial, then vote guilty. A former bank teller in her 40s who has worked two jobs most of her life, Ms. Harris considered herself a supporter of law enforcement. “I like the police. I’ll dial 911 in a second,” she said. But watching the discriminatory tactics used to ensure Mr. Robinson would go to prison has shaken her faith in a system she wanted to trust. “I thought justice was supposed to be blind, and just sitting there, how could anybody vote guilty listening to the evidence with those jury instructions?” After the trial, Ms. Harris visited Mr. Robinson in prison and helped him with his appeal. Eventually, the Mississippi Court of Appeals confirmed her suspicions. The court reversed Mr. Robinson’s manslaughter conviction because of race-based strikes in selecting the jury. The reasons offered by the State were “so contrived, so strained, and so improbable,” the court found, that they were unquestionably pretexts for purposeful discrimination.

[Equal Justice Initiative, [Illegal Racial Discrimination in Jury Selection: A Continuing Legacy](https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf) 28 (2010), available at <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf>.]

*The 2010 Report explains that, in interviews conducted by the Equal Justice Initiative,*

Excluded jurors and their families spoke about suffering shame and humiliation as a result of false inferences that criminal activity made them unfit to serve. In Montgomery County, Mississippi, Vickie Curry was illegally struck by a prosecutor who claimed her husband had a felony record. The prosecutor mistook her husband for someone else, and the falsehood resurfaces each time the case appears in media reports. Charles Curry, retired from the National Guard after 23 years of service, is deeply disturbed that the district attorney suggested he does not respect the law. This common tactic thoughtlessly tarnishes the reputations of African Americans living lives of quiet decency. A prosecutor in Talladega County, Alabama, sought to characterize Ruth Garrett, a deeply religious woman who works as a school bus driver, as unfit for jury service because she was related to criminals. In fact, Mrs. Garrett had never met the family who shared her last name, but the prosecutor never bothered to ask her.

Another common theme among illegally struck jurors is the sad recognition that their individual experiences were small pieces in the structure of racism that envelops their communities. “I’m not surprised because that’s how the system is around here,” said Gerald Mercer, who was struck from a Russell County, Alabama, jury because he had traffic tickets and expressed hesitation about the death penalty, while white jurors with similar circumstances remained on the jury. “They do a lot of stuff around here that is unequal justice.” Vickey Brown was illegally struck from a jury in Houston County, Alabama, by a prosecutor who admitted he wanted to avoid “an all-black jury.” Although Mrs. Brown had encountered racist treatment in job interviews, she was particularly offended at the district attorney’s suggestion that she would be lenient on a black defendant because she is black. “I was shocked when I found out,” she said. Alice Branham, a 31-year veteran of the Florida Department of Corrections, was illegally struck from a jury in Jefferson County, Florida. When forced to provide a race-neutral reason for excluding her, the prosecutor noted only her work for the State. Ms. Branham was so accustomed to institutional

racism that she had no idea this was a violation of her rights. After all, when she started working for the prison system, her supervisor informed her he did not like black people, and only grew to accept her after she started bringing homemade cookies and collard greens to the office.

For many excluded black jurors, the pretexts provided to refute claims of discrimination add another layer of injury. A Baldwin County, Alabama, prosecutor characterized potential juror Allen Mason as “not very well educated” and having “difficulty understanding the concepts that the state asked him” even though Mr. Mason answered every question, “Yes, sir” or “No, sir,” and clearly explained his beliefs. Nearly 20 years later, Mr. Mason grew emotional as he recalled how the prosecutor’s racist actions made him feel unworthy. Elsewhere, prosecutors have countered Batson claims by describing African Americans in the jury pool as inattentive, unresponsive, or hostile. Black men have been struck for wearing jeans or an earring. A Mobile, Alabama, prosecutor claimed he struck Carolyn Hall because “she works at a retarded place” and he did not want jurors who were sympathetic to the disadvantaged. While Mrs. Hall remains committed to the mentally disabled people she cares for, she told EJI staff that her work would not have affected her ability to be fair.

Hester Webb . . . owns a successful child care center. She was struck from a jury in Montgomery, Alabama. When asked for a race-neutral reason, the prosecutor said Ms. Webb was chewing gum and was hesitant to answer questions, which led him to suspect she had prior knowledge of the case. Ms. Webb was stunned at the suggestion she did something so wrong: “It needs to stop. It’s not right. It’s not fair.”

[Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 29-30 (2010), available at <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> (footnotes omitted).]

***Darren Seiji Teshima:***

When selecting a grand jury foreperson, the San Francisco deputy district attorney looked for someone with “administrative abilities, leadership and people skills” -- a “hardy handshake sort of guy.” Another court official recommended individuals with “leadership capability”: people who could “get along with other people,” “conduct a meeting,” and “act to make sure the grand jury [was] doing what it’s supposed to be doing.” Applying these criteria, San Francisco superior court judges and officials failed to select a single Chinese American or Filipino American foreperson from 1960 to 1996 -- not one in thirty-six years. Court officials testified that race had nothing to do with the selection process. Nevertheless, since Chinese Americans and Filipino Americans constituted 17.4% of grand juries during this period, the statistical chance of this exclusion occurring randomly was 3 in 8.5 million, or 0.00000035%.

In Chin v. Runnels, a Chinese American defendant petitioned for a writ of habeas corpus on the theory that the complete absence of Chinese American forepersons in San Francisco grand juries violated his right to equal protection under the Fourteenth Amendment. Petitioner Chin demonstrated that during a thirty-six year period, judges selected grand jury forepersons after conducting voir dire of randomly selected prospective grand jurors and consulting with the jury commissioner and the district attorney. Through this process, no Chinese American, Filipino American, or Latino served as a foreperson on a grand jury, including the grand jury that indicted Chin. The district court denied Chin’s petition for habeas review, upholding the state court’s finding of no intentional discrimination as a reasonable application of law. However, Judge Charles Breyer noted that had he reviewed the case de novo, he would “feel compelled to scrutinize the state court’s finding more closely,” as “the compelling pattern of exclusion suggests that there may be more to the selection process than meets the eye.”

In this paper, I argue that Chinese Americans and Filipino Americans were excluded from serving as forepersons because of the racial mythology about Asian Americans as the “model minority.” The court officials did not lie about whether they considered race; rather, I argue that they unconsciously relied upon the stereotype of Asian Americans as unassertive and passive, unaware that the stereotype affected their decision-making. Their reliance on this stereotype is not exceptional; by unconsciously relying on a stereotype to make decisions, they engaged in a cognitive process common to all human beings. Nevertheless, through this unconscious reliance on the stereotype of Asian Americans as the model minority, these court officials excluded Chinese Americans and Filipino Americans from the position of grand jury foreperson for thirty-six years. Current equal protection jurisprudence finds no constitutional violation in this racial exclusion because there is no “discriminatory intent.” This jurisprudence obscures the continued racial inequalities in our society by refusing to acknowledge that intentional bad actors are not the sole cause of racial discrimination. Instead, well-meaning individuals who nevertheless unconsciously stereotype also perpetuate racial inequalities. Racial stereotypes, such as the one about Asian Americans as the “model minority,” are triggered automatically and influence our decision-making and conduct. Thus, racial discrimination is not a problem for which only a select few intentional bad actors are responsible; rather, it is a social problem for which we all must take collective responsibility. Equal protection jurisprudence must therefore abandon the discriminatory intent requirement and learn the lessons of critical race theory and social cognition to combat racial inequalities that continue to plague our society.

In Part II, I examine the racial construction of Asian Americans, exploring my own experience as a “model minority.” According to the racial mythology about Asian Americans, we are the “good” minority -- hardworking and successful, but also unassertive and unchallenging of white racial privilege. In Part III, I provide an overview of the growing body of research on social cognition, which demonstrates that racism is a phenomenon that operates at the

unconscious and unintentional level. I examine in particular one social cognition experiment that examines the implicit associations about Asian Americans as foreigners. I then apply the lessons of social cognition to the foreperson selection process at issue in Chin, and argue that the court officials' implicit reliance on the "model minority" stereotype caused the racial exclusion of Chinese Americans and Filipino Americans. In Part IV, I propose that equal protection jurisprudence must abandon the discriminatory intent requirement and incorporate the lessons of critical race theory and social cognition to confront instances of discrimination that, while not intentional, nevertheless perpetuate racial injustice.

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When I was in high school, my water polo teammates and I would greet each other with ever-firmer handshakes. Each greeting was a test of physical strength, some kind of expression of machismo, with neither player wanting to be the first to release his grasp. Being one of the smaller players (and the only Asian American) on the team, I self-consciously tried to assert myself through a firm grip. Although I have thankfully outgrown this competitive handshaking ritual, when I meet someone, especially a male superior, I still self-consciously extend a firm handshake. I fear, however, that no matter how firmly I grasp his hand, the other person will not see me as a "hardy handshake sort of guy."

Racism is not a thing of the past, and it is not only the intentional bad acts of a select few among us. Racism in society depends upon the unacknowledged and unchallenged racial myths that, although seemingly innocuous, maintain systems of racial privilege and subordination. . . . A just society demands that we acknowledge the operation of implicit or unconscious biases and take collective responsibility for such instances of inequality.

[A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias About Asian Americans in Chin v. Runnels, 11 Asian Pac. Am. L.J. 122, 122-24, 140-41 (2006) (footnotes omitted).]