REMOVAL OF WOMEN AND AFRICAN-AMERICANS IN JURY SELECTION IN SOUTH CAROLINA CAPITAL CASES, 1997-2012

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ABSTRACT

The Supreme Court’s May 2016 decision in Foster v. Chatman involved smoking-gun evidence that the State of Georgia discriminated against African-Americans in jury selection during 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.

Where 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 35 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 revealed that white and black potential jurors had substantially different experiences on their path to the jury box, while gender played a subtler role. Findings included that prosecutors used peremptory strikes against 35% of eligible African-American venire members, compared to 12% of eligible white venire members, and that the death-qualification process impeded a substantial number of African-Americans from serving. These disparities contributed to overrepresentation of whites on the juries. The study’s findings implicate the fairness of some of South Carolina’s current death row inmates, as well as further buttressing 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 involved smoking-gun evidence that the state of Georgia discriminated against African-Americans in jury selection during Foster’s 1987 capital trial. Prosecutors’ files included a list of black prospective jurors’ names highlighted in green with “B” next to them, and the handwritten note, “NO Black Church,” among other things. Prosecutors struck all four black prospective jurors who had been qualified to serve, resulting in an all-white jury. The Court held that “the focus on race in the prosecution’s file plainly demonstrates a concerted effort to keep black prospective jurors off the jury.”

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, Foster notwithstanding, this line of cases is known for its impotence. 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 striking party need only respond to such a showing with a race- or gender-neutral basis for the strike. The court then determines whether to accept the rationale as non-discriminatory. These neutral bases have been

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1 136 S. Ct. 1737, 578 U.S. __.
2 Id. at 1744, 578 U.S. at __. 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.
4 Id. at 1755, 578 U.S. at __.
6 Id.
9 Id.
10 Id.
called “an unbounded collection of justifications” that “run the gamut.” But the Court has directed courts to accept even “silly or superstitious” explanations if they appear race- and gender-neutral. Rarely is the evidence of discrimination as compelling and available as it was in *Foster*, and rarely do defendants succeed in their *Batson* challenges.

Where 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 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 use of peremptory strikes resulted in disproportionate removal of women and African-Americans on juries in a set of 35 South Carolina jury trials resulting in death sentences from 1997 to 2012. It is one of “only a handful of published studies” to examine these issues in actual trials, rather than simulated experiments. All cases were used to observe gender as a factor in removal, including observations for 3,031 venire persons, while a subset of 23 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, the study focuses in particular on removal for cause for opposition to or support for the death penalty. Capital juries must

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12 *Id.* at 1096 (discussing Purkett v. Elem, 514 U.S. 765, 768 (1995)).
17 *Id.* at 1550.
be “death-qualified,” or open to the possibility of imposing a death sentence upon the defendant.\textsuperscript{18} Although the Supreme Court has stated that capital juries have the mandate to “express the conscience of the community,”\textsuperscript{19} the death-qualification requirement means that judges in capital trials remove prospective jurors who oppose the death penalty due to a presupposed inability to apply the law impartially.\textsuperscript{20} As a result, approximately one-third of the population, most of whom are women and African-Americans, is likely to be removed from capital juries because of such beliefs.\textsuperscript{21}

As discussed in more detail below, 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.\textsuperscript{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.”\textsuperscript{23} But unrepresentative juries may do just the opposite, leading to unpredictable and discriminatory outcomes.\textsuperscript{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.\textsuperscript{25}

Unrepresentative juries are also particularly problematic in capital cases. Most critically, juries that over-represent white men are more inclined to seek convictions and death sentences, undermining defendants’ rights to an

\begin{itemize}
  \item \textsuperscript{19} Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).
  \item \textsuperscript{20} See Lockhart v. McCree, 476 U.S. 162, 172 (1986).
  \item \textsuperscript{22} As will be discussed in more detail below, 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 element of causal effect can reasonably be inferred based on the data’s consistency with previous studies that did use such controls and methods.
  \item \textsuperscript{23} See Taylor v. Louisiana, 419 U.S. 522, 530 (1975).
  \item \textsuperscript{24} David C. Baldus et al., \textit{The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis}, 3 U. PA. J. CONST. L. 3 (2001); Taylor, 419 U.S. at 531.
  \item \textsuperscript{25} Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).
\end{itemize}
impartial jury. Processes that siphon women and African-Americans off 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. Since 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.

Most immediately, the data discussed here have implications for the 38 South Carolina inmates on death row as of this writing. As discussed in more depth below, 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; their study has been the subject of ongoing litigation over the validity of certain North Carolina inmates’ capital sentences. Fourteen of the cases analyzed here are those of current death row inmates. Of current death row inmates who had jury trials and sentences imposed from 1997 to 2012, this Article includes 14 out of 29. Of 17 cases resulting in death sentences from 2005 to 2012, this study

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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[,]” despite South Carolina’s relatively low 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). The significant role of race in capital trials is underscored by the fact that “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 See O’BRIEN & GROSSO, supra note 7.

30 Robinson et al. v. North Carolina, No. 15-1397, filed with the Supreme Court of the United States on May 13, 2016. As discussed in more detail below, however, 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 of action for death row inmates to use statistical evidence revealing racial discrimination in their trials.
includes 13. Thus, 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 particular pre-trial procedures for jury empanelment, as well as relevant Supreme Court jurisprudence, including *Taylor v. Louisiana,*32 *Witherspoon v. Illinois,*33 and *Batson v. Kentucky*34 and related judgments.35 Part III surveys literature and empirical studies discussing removal of potential jurors on the basis of race and gender.

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.

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. Rather, “verdicts usually depend more on the facts of the case and less on the personal characteristics of the jurors[.]”36 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.”37

Nevertheless, studies suggest that juror characteristics do affect jury deliberations and verdicts in capital cases.38 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.39 For instance, in the sentencing phase in South Carolina, jurors are

31 According to records on file with author.
36 Eisenberg et al., *supra* note 28, at 282.
37 *Id.* at 277.
39 See Eisenberg et al., *supra* note 28.
given a list of aggravating and mitigating circumstances and are “told only that they may impose a life sentence for ‘any reason or no reason at all.’” 40 “[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[.]” 41

Various studies have shown that the racial composition of a jury influences the likelihood the jury imposing a death sentence. 42 In particular, white jurors vote for death more often than black jurors, 43 men vote for death more often than women, 44 and “support for the death penalty among whites is highly correlated with measures of anti-black racial prejudice and stereotyping[.]” 45 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. 46 Other juror characteristics, such as religion, influence outcomes as well. 47

The Supreme Court and Congress have acknowledged an interest in having proportional representation of the community on juries. 48 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[.]” 49 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[,]” it also eases the potential blow of the “minority effect,” where a faction of less than three on a

40 Id. at 283.
41 Id.; see also David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical Analysis and Legal Overview, with Recent Findings from Philadelphia, 83 CORNELL L. REV. 1638, 1644 (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 extra room for reliance on racial stereotypes in capital cases).
43 Eisenberg et al., supra note 28, at 298.
44 Lynch & Haney, supra note 26, at 69, 73.
45 Id.
46 Eisenberg et al., supra note 28, at 284, 286, 298.
47 See id.
50 Smith, 311 U.S. at 85–86 (1940); Fukurai, supra note 49, at 170, 172.
particular jury tends to be overwhelmed by the stance of the majority. Diversity also allows a jury to serve its democratic and political functions more effectively, acting as a “check on government functionaries,” “guard[ing] against the exercise of arbitrary power,” and counteracting the biases or zealotry of judges and prosecutors. Thus, the composition of the jury is central to a trial, with the stakes higher and the effects stronger in the context of capital cases. As is the case in South Carolina, “the typical jury exercises virtually complete discretion on the life or death decision once it finds a statutory aggravating circumstance present in the case.” 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 African-Americans.

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.” Defendants are not entitled to a jury composed in whole or in part of members of their race. 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

51 Id. at 170.
52 Id.
53 Taylor, 419 U.S. at 531.
54 Fukurai, supra note 49, at 172 (quoting Taylor and Duncan).
55 Eisenberg et al., supra note 28, at 282.
56 Baldus et al., supra note 41, at 1644.
the Sixth Amendment. Under the Equal Protection Clause of the
Fourteenth Amendment, also addressed in Taylor, no one racial group (or
gender) may be systematically excluded from jury service.

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

2. Removals for Cause during Voir Dire

After venire members arrive at 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

58 U.S. CONST. art. 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.
59 Taylor, 419 U.S. 522; Duncan v. Louisiana, 391 U.S. 145 (1968); Heather Davenport,
Note, Blinking Reality: Race and Criminal Jury Selection in Light of Ovalle, Miller-El, and
60 Fukurai, supra note 49, at 171 (emphasis added).
61 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://jlpp.org/blogzine/jury-
62 Fukurai, supra note 49, 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).
63 Id. at 146.
64 Id. at 146–47.
65 Id. at 148.
cross-examination. 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.

But commentators note flaws inherent in the voir dire process. 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. Jurors may also demonstrate inconsistency in self-assessments of their own biases. Subjective standards for removals combined with substantial judicial discretion might facilitate pretextual removals based on discriminatory motivations, whether conscious or not.

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[.]” The United States Supreme Court affirmed the constitutionality of this practice in Lockett v. Ohio. The parties may challenge venire members they find biased or otherwise unqualified based on voir dire questioning, but the judgment whether to remove them is within the sole discretion of the trial judge. Thus, in capital cases 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 an impartial jury.”

66 Id.; see also Neil Vidmar & Valerie Hans, American Juries: The Verdict 93 (2007).
67 See Vidmar & Hans, supra note 66, at 93–94.
68 See, e.g., Hans & Jehle, supra note 7, at 1182.
70 Id. at 200–05.
75 Lindsey, 642 S.E.2d at 561.
An excerpt from the transcript of a 2012 South Carolina capital trial 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 the Lord. And . . . thou shalt not kill . . . I am 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.

77 Transcript on file with author.
...[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 just 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.78

In a 2009 capital trial,79 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

78 Id. at 712–28.
79 Transcript on file with author.
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.80

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.81

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 reasons for their removal—their staunch opposition to the death penalty—the nature of the questioning above also suggests an element of subjectivity. Ample flexibility exists for potential jurors to 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.82 In

80 Id. at 108–09.
82 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 (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
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.\textsuperscript{83} 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 venires.\textsuperscript{84} The Court also reasoned that death-qualification did not involve excluding prospective jurors on the basis of race and 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.”\textsuperscript{85}

Although death-qualification’s constitutionality has been upheld, the process rather clearly stands to undermine juries’ ability to serve their function fairly and indiscriminately. Valerie Hans observes that exclusions based on death penalty attitudes “may have a deleterious impact on the representativeness and impartiality of the capital jury.”\textsuperscript{86} 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.\textsuperscript{87} Others have also noted that women and African-Americans are more likely to be removed during voir dire for their opposition to capital punishment.\textsuperscript{88}

\textsuperscript{83} 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. \textit{Id.} at 167–73 (questioning the reliability of petitioner’s social science evidence on the matter).

\textsuperscript{84} 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).

\textsuperscript{85} Buchanan, 483 U.S. at 416.

\textsuperscript{86} Hans & Jehle, supra note 7, at 1181.

\textsuperscript{87} Fukurai, supra note 49, at 162, 165–66.

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 parties may use against particular jurors without stating a reason for the veto. In South Carolina, defendants charged with serious crimes are allowed ten strikes, and the state is allowed five. Peremptory strikes are controversial: no constitutional right protects their use, and while some consider them to be essential to the jury system, others forcefully advocate their elimination. One commentator called peremptory challenges "the last best tool of Jim Crow."

Batson v. Kentucky and its progeny prohibited peremptory strikes motivated by prospective jurors’ race and gender, holding that they violate the Equal Protection Clause of the Fourteenth Amendment. 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, or, per J.E.B. v. Alabama ex rel. T.B., gender. The burden then shifts to the non-

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91 Melilli, supra note 89.
92 Id.; 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 ‘elimina[te] peremptory challenges entirely.’”).
93 Mary Rose, The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County, 23 LAW & HUM. BEHAV. 695, 696 (1999).
94 Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. 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, supra at 133. The decision in Swain “set the bar so high for proving discriminatory intent that no litigant was able to win a jury discrimination 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. Practice suggests that it has not been opened very far, however. See id. 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).
95 511 U.S. 127 (1994).
96 476 U.S. at 96–97.
moving party to provide a race- or gender-neutral explanation for the strike.\textsuperscript{97} The court then determines whether purposeful discrimination motivated the strike.\textsuperscript{98}

Although the subject of ample litigation, \textit{Batson} and related decisions are known for their lack of impact.\textsuperscript{99} This apparent inefficacy itself is cited as a potential indication that peremptory challenges should be eliminated altogether.\textsuperscript{100} As mentioned above, the central weakness is the fact that, when the non-moving party in a \textit{Batson} or \textit{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.\textsuperscript{101} “These perfunctory hearings fail to meaningfully interrogate the reasons prosecutors offer as race neutral motivations for peremptorily striking black jurors.”\textsuperscript{102} Consequently, defendants “monopolize the making of \textit{Batson} claims,” yet, “the success rate of such claims by criminal defendants is manifestly unimpressive[.]”\textsuperscript{103} Although anecdotal, it is telling that despite the rather blatant evidence in \textit{Foster}, the pursuit of Foster’s \textit{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 \textit{Batson} from 1986 to 1993, Kenneth Melilli found that 87.38\% of challenges during the period challenged the striking of black jurors.\textsuperscript{104} 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.

\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} Fukurai, \textit{supra} note 49, at 176 (emphasis added).
\textsuperscript{100} Melilli, \textit{supra} note 89, at 447.
\textsuperscript{101} \textit{See} Rose, \textit{supra} note 93, at 696.
\textsuperscript{102} Price, \textit{supra} note 7, at 57.
\textsuperscript{103} Melilli, \textit{supra} note 89.
\textsuperscript{104} Melilli, \textit{supra} note 89, at 464.
selection process without articulating these potentially offensive and divisive prejudices.\textsuperscript{105}

Consistent with Melilli’s concerns, commentators continue to observe the disproportionate striking of African-Americans and women by prosecutors and of white men by defense counsel.\textsuperscript{106}

A repeated concern in Supreme Court jurisprudence on discrimination in jury selection is preventing the arbitrary application of the law, which potentially violates the Eighth Amendment’s prohibition on cruel and unusual punishment.\textsuperscript{107} The Court explained in \textit{Taylor} and reaffirmed in \textit{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[.]”\textsuperscript{108} Yet, the 1987 decision in \textit{McCleskey v. Kemp}, which has been called “the \textit{Dred Scott} decision of our time,”\textsuperscript{109} the Court held that racial disparities in sentencing are “an inevitable part of our criminal justice system.”\textsuperscript{110} A discriminatory purpose, as opposed to impact, must be shown to establish a violation of the Equal Protection Clause.\textsuperscript{111} This high burden explains, in part, the impotence of \textit{Batson}.

The decision in \textit{Foster} in 2016 did not appear to alter the \textit{Batson} playing field substantially. The evidence, discussed above, prompted Justice Kagan to query during oral arguments, “Isn’t this as clear a \textit{Batson} violation as a court is ever going to see?”\textsuperscript{112} Commentators agree that the decision was

\textsuperscript{105} Melilli, \textit{supra} note 89, at 447. 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 \textit{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. \textit{E.g.}, \textit{Richard C. Dieter, Death Penalty Info. CTR., Blind Justice: Juries Deciding Life and Death with Only Half the Truth} 4 (Oct. 2005), http://www.deathpenaltyinfo.org/BlindJusticeReport.pdf.

\textsuperscript{106} Hans & Jehle, \textit{supra} note 7, at 1190–91.


\textsuperscript{110} 481 U.S. at 312.

\textsuperscript{111} Id.

limited in scope at best, and at worst, “create[d] an artificial and impossibly high burden of proof for future cases.”

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, which for a short time “effectively abolished the death penalty because it found juries exercised unfettered discretion” and could impose death discriminatorily. Furman was soon followed by Gregg v. Georgia, which upheld state death penalty schemes that incorporated “guided discretion.”

These early studies tended to focus on the race of the victim or defendant. In 1990, 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.” The study focused on Georgia 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.” Baldus attributed this effect to prosecutorial discretion. Generally, the researchers concluded that jury decisions in Georgia were highly unpredictable, and “that the problems with fairness and equal justice in Georgia’s death-sentencing system were widespread.” The study established a landmark for the examination of the role of race in the administration of capital punishment.

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113 See Cino, supra note 13.
114 408 U.S. 238 (1972). Furman had no controlling opinion, but held that arbitrariness and racial disparities in death sentencing violated the Eighth Amendment. Furman imposed a de facto moratorium on the death penalty.
120 Id. at 401, 403.
121 Id. at 403–04.
122 Id. at 409.
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.\textsuperscript{123} When studies did turn to jury representativeness, those studies tended to be experimental, i.e., conducted in simulated scenarios. As mentioned above, few published studies have examined the use of peremptory challenges in real trials.\textsuperscript{124} Both before and after \textit{Batson}, a variety of experimental or laboratory studies demonstrated the importance of race in jury selection.\textsuperscript{125}

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 challenges and how characteristics of seated jury panels compare[d] to those of the venire.”\textsuperscript{126} She observed thirteen felony criminal jury trials with a total of eighteen defendants, seventeen of whom were African-American and two of whom were women, in addition to 348 venire members questioned during voir dire.\textsuperscript{127} Rose concluded that, although African-Americans and whites had the same likelihood of being excused from the jury via peremptory challenge, African-Americans had a greater likelihood of being dismissed by the state—71\% of African-Americans dismissed—whereas 81\% of whites dismissed were excused by the defense.\textsuperscript{128} She found that women and men had roughly equal likelihoods of being excused through peremptory challenges, and equal likelihood of being excused by one side or the other.\textsuperscript{129} 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.”\textsuperscript{130}

In 2001, Baldus and colleagues focused specifically on peremptory challenges in capital murder trials.\textsuperscript{131} 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.\textsuperscript{132} Race and gender were also significant factors for defense counsel, with the defense particularly disfavoring men.\textsuperscript{133} The researchers found that death-sentencing rates were “higher when the prosecutorial strike

\begin{footnotes}
\footnote{123}{Rose, \textit{supra} note 93, at 697.}
\footnote{124}{O’Brien & Grosso, \textit{supra} note 16, at 1538.}
\footnote{125}{\textit{Id.} at 1536.}
\footnote{126}{Rose, \textit{supra} note 93, at 697.}
\footnote{127}{\textit{Id}.}
\footnote{128}{\textit{Id.} at 698--99.}
\footnote{129}{\textit{Id.} at 699.}
\footnote{130}{\textit{Id.} at 695.}
\footnote{131}{Baldus et al., \textit{supra} note 24.}
\footnote{132}{\textit{Id.} at 60.}
\footnote{133}{\textit{Id}.}
\end{footnotes}
rate against black venire members was high.”

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.” 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.

Informed in part by the Baldus Philadelphia study, as well as several others with similar findings, in 2010-2011, 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. They studied 173 proceedings with a total of 7,421 venire members, gathering data from court documents and jury selection transcripts. Their study used detailed, descriptive information about one sample of venire members in order to control for factors other than race that may have accounted for the decision to strike.

O’Brien and Grosso concluded “[p]rosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members.” Specifically, the prosecution struck 52.6% of eligible black venire members, and 25.7% of all other eligible venire members. They found this disparity to be even greater in cases where defendants were African-American. 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

134 Id. at 107 n.234.
135 Id.
136 See also Shari Seidman Diamond et al., Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge, 6 J. EMPIRICAL LEGAL STUD. 425, 425 (2009) (concluding that opposing race-based peremptory challenges “canceled each other out”).
137 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 O’Brien & Grosso, supra note 16, at 1538–39.
138 O’BRIEN & GROSSO, supra note 7.
139 Id. at 3.
140 Id. at 8.
141 Id. at 11.
142 Id.
143 Id. at 12. In these cases, “the average strike rate was 60% against black venire members and 23.1% against other venire members.” Id.
patterns “could not be attributable to the possibility that relevant attitudes vary along racial lines.”

O’Brien’s and Grosso’s study has been central to litigation over four North Carolina death row inmates’ sentences. 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.” In the first decision under the act, the RJA demonstrated its potential as an important new tool to eliminate the use of race-based peremptory challenges. In *State v. Robinson*, the 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 in prison without the possibility of parole.” Three additional death sentences were subsequently vacated as well. However, in 2012, “a very different legislative majority than the one that passed the RJA rewrote the law.” “It significantly reduce[d] in importance but [did] not eliminate the use of statistical evidence.” In 2015, the North Carolina Supreme Court reversed and remanded the vacated sentences on procedural grounds. In May 2016, the inmates petitioned for certiorari with the United States Supreme Court. The outcome of the

144 Id. at 13.
146 Id. at 105.
149 Id. at 106.
litigation is as yet unclear, and the RJA may be unique—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 \textit{Batson} claims.

Several studies have focused on the role of race and gender in South Carolina capital cases,\textsuperscript{150} although none has paralleled O’Brien’s and Grosso’s study of peremptory challenges and none has delved deeply into issues of jury representativeness. Michael Songer and Isaac Unah examined the role of race in South Carolina prosecutorial decisions to seek the death penalty in their study, \textit{The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina}.\textsuperscript{151} They concluded that “[l]egally 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.\textsuperscript{152}

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.\textsuperscript{153} Scholars have observed in particular the process’s disparate impact on potential women and African-American jurors.\textsuperscript{154} Study of the issue began in the early 1980s, when “researchers Robert Fitzgerald and Phoebe Ellsworth found that death qualified jurors are not representative of the general population . . . [They] found that about 15\% of whites were excluded compared to 25\% of blacks . . . [and] that the jury in capital trials is more biased towards the prosecution and a guilty verdict[.]”\textsuperscript{155} The Capital Jury Project recently produced similar findings, concluding that certain distinctive groups (including racial minorities, women, and Catholics) were less likely to be

\textsuperscript{151} 58 S.C. L. Rev. 161 (2006).
\textsuperscript{152} \textit{Id.} at 205–06.
\textsuperscript{153} E.g., Winik, \textit{supra} note 76.
\textsuperscript{154} E.g., Lynch & Haney, \textit{supra} note 26, at 73.
able to serve on capital juries, and that death-qualified juries were more likely to convict and impose a death sentence.  

IV. SOUTH CAROLINA DATA

This study attempts to build off of projects such as O’Brien’s 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 African-Americans.

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 35 trials from the period of 1997 to 2012 that resulted in death sentences.

156 Death Qualification, supra note 155.


including observations for 3,031 venire members. The analysis of race as a factor was based on a subset of 23 cases among those 35, including observations for 1,088 venire members.

The research presented here 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. 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 group 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, which may have contributed to the


160 Records on file with the author indicate that between 1997 and 2012, the state of South Carolina imposed 61 death sentences using juries, including five re-sentencings of repeat defendants.

161 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.)
results presented. Observations made for race may be less generalizable than those observations made for gender due to the smaller numbers.

Nevertheless, the findings presented here are not trivial. For certain periods, this research includes a strong majority of cases: five out of five death sentences imposed in 2004; 13 out of 17 death sentences imposed from 2005 to 2012; and 30 out of 43 death sentences for 2000 to 2012. In addition, the relative representativeness of the venire pools (see Table 1 below) in cases for which that data was available suggests that the juries in these cases were not particularly skewed in potential jurors’ backgrounds at the outset. The rates of excuse for cause in this study also reflect the rates of excuse for cause in other studies, suggesting an element of normality in the proceedings discussed here. The findings presented below illustrate how race and gender interact with South Carolina capital jury selection processes, and, potentially, elsewhere.

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.”).

162 Cf. tbl.1; Diamond et al., supra note 136, at 436.
B. Empirical Findings

1. Venire Representativeness

<table>
<thead>
<tr>
<th>CASE</th>
<th>VENIRE % BLACK/ WHITE</th>
<th>COUNTY % BLACK/WHITE</th>
<th>VENIRE REPRESENTATIVE?</th>
<th>STATISTICALLY SIGNIFICANT?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anthony Woods</td>
<td>47% Black 53% White</td>
<td>52% Black 48% White</td>
<td>YES</td>
<td>NO (p = .57, 2-tail Fisher exact)</td>
</tr>
<tr>
<td>Charles Williams</td>
<td>17% Black 83% White</td>
<td>20% Black 80% White</td>
<td>MAYBE</td>
<td>NO (p = .72, 2-tail Fisher exact)</td>
</tr>
<tr>
<td>James Bryant</td>
<td>13% Black 87% White</td>
<td>14% Black 86% White</td>
<td>YES</td>
<td>NO (p &gt; .99, 2-tail Fisher exact)</td>
</tr>
</tbody>
</table>

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163 Community demographics calculated using government census data at 2010.census.gov.

164 Determined using the comparative disparity test articulated in Duren v. Missouri, 439 U.S. 357 (1979), and Berghuis v. Smith, 559 U.S. 314, 328–29 (2010). The test has three prongs for showing a violation of the fair-cross section requirement: “(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.” NAT’L CTR. FOR STATE CTS., Jury Managers’ Toolbox: A Primer on Fair Cross Section Jurisprudence (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 (continued)
Comparison of Black/White Composition in Venires and Trial Counties

<table>
<thead>
<tr>
<th>CASE</th>
<th>VENIRE % BLACK/WHITE</th>
<th>COUNTY % BLACK/WHITE</th>
<th>VENIRE REPRESENTATIVE?</th>
<th>STATISTICALLY SIGNIFICANT?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jonathan Binney</td>
<td>32% Black 68% White</td>
<td>21% Black 79% White</td>
<td>MAYBE (under-represents Whites) [(Absolute disparity 11%) divided by (79% population) = 14% less than expected]</td>
<td>NO (p = .11, 2-tail Fisher exact)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Cherokee)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kevin Mercer</td>
<td>6% Black 94% White</td>
<td>15% Black 85% White</td>
<td>NO [(Absolute disparity 9%) divided by (15% population) = 60% less than expected]</td>
<td>NO (p = .06, 2-tail Fisher exact)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Lexington)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ron Finklea</td>
<td>8% Black 92% White</td>
<td>15% Black 85% White</td>
<td>NO [(Absolute disparity 7%) divided by (15% population) = 47% less than expected]</td>
<td>NO (p = .18, 2-tail Fisher exact)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Lexington)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jeffrey Jones</td>
<td>7% Black 93% White</td>
<td>15% Black 85% White</td>
<td>NO [(Absolute disparity 8%) divided by (15% population) = 53% less than expected]</td>
<td>NO (p = .11, 2-tail Fisher exact)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Lexington)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 1 represents the racial composition of the venires of seven cases for which that data was 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 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 African-Americans represented at the beginning might theoretically help explain low strike rates of African-Americans). One weakness is that the comparative disparity test is meant to be calculated
based on the available, jury-eligible element of the population,\textsuperscript{165} 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.\textsuperscript{166} Lexington was the only county that appeared to underrepresent African-Americans in its venire pools. Although the disparity was not statistically significant, the Mercer, Finklea, and Jones trials would clearly fail the comparative disparity test.


a. Status throughout Entire Selection Process

<table>
<thead>
<tr>
<th>Table 2: Summary of All Removals, by Gender\textsuperscript{N}</th>
<th>MEN</th>
<th>WOMEN</th>
<th>TOTAL (ROW)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did Not Reach Voir Dire</td>
<td>167 Individuals (11%)</td>
<td>171 Individuals (11%)</td>
<td>338 Individuals (11%)</td>
</tr>
<tr>
<td></td>
<td>(of column)</td>
<td>(of column)</td>
<td>(of column)</td>
</tr>
<tr>
<td>Excused for Cause</td>
<td>819 Individuals (53%)</td>
<td>800 Individuals (53%)</td>
<td>1,619 Individuals (53%)</td>
</tr>
<tr>
<td></td>
<td>(of column)</td>
<td>(of column)</td>
<td>(of column)</td>
</tr>
<tr>
<td>Struck</td>
<td>243 Individuals (16%)</td>
<td>216 Individuals (14%)</td>
<td>209 Individuals (16%)</td>
</tr>
<tr>
<td></td>
<td>(of column)</td>
<td>(of column)</td>
<td>(of column)</td>
</tr>
<tr>
<td>Qualified, Not Reached for Strikes</td>
<td>84 Individuals (5%)</td>
<td>91 Individuals (6%)</td>
<td>175 Individuals (6%)</td>
</tr>
<tr>
<td></td>
<td>(of column)</td>
<td>(of column)</td>
<td>(of column)</td>
</tr>
<tr>
<td>Seated on Jury</td>
<td>187 Individuals (12%)</td>
<td>182 Individuals (12%)</td>
<td>369 Individuals (12%)</td>
</tr>
<tr>
<td></td>
<td>(of column)</td>
<td>(of column)</td>
<td>(of column)</td>
</tr>
<tr>
<td>Alternate</td>
<td>33 Individuals (2%)</td>
<td>38 Individuals (3%)</td>
<td>71 Individuals (2%)</td>
</tr>
<tr>
<td></td>
<td>(of column)</td>
<td>(of column)</td>
<td>(of column)</td>
</tr>
<tr>
<td>Totals (Column)</td>
<td>1,533 Individuals</td>
<td>1,498 Individuals</td>
<td>3,031 Individuals</td>
</tr>
<tr>
<td></td>
<td>(100%)</td>
<td>(100%)</td>
<td>(100%)</td>
</tr>
</tbody>
</table>

\textsuperscript{165} Berghuis v. Smith, 559 U.S. 314, 328–29 (2010).

\textsuperscript{166} Id.

\textsuperscript{N} \chi^2 (5, N = 3,031) = 2.155, p = 0.8274. P-values were calculated using the tools at www.openepi.com.
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.\(^{167}\)

The data show no significant difference between men and women at any stage \((p = .8274, \chi^2)\). A total of 1,533 men and 1,498 women went through the jury selection process, and roughly the same percentages of each were empaneled 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 made it on to the actual jury, and 2-3% of each gender served as alternates.

\(b\). **Removals for Cause Based on Pro- or Anti-Death Stance**

<table>
<thead>
<tr>
<th>Table 3: Remove for Views on Death by Gender(^N)</th>
<th>Pro-Death Removal</th>
<th>Anti-Death Removal</th>
<th>Row Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>54 Individuals</td>
<td>205 Individuals</td>
<td>259 Individuals</td>
<td></td>
</tr>
<tr>
<td>(21% of women)</td>
<td>(79% of women)</td>
<td>(100%)</td>
<td></td>
</tr>
<tr>
<td>(30% of pro-death removals)</td>
<td>(58% of anti-death removals)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>125 Individuals</td>
<td>149 Individuals</td>
<td>274 Individuals</td>
<td></td>
</tr>
<tr>
<td>(46% of men)</td>
<td>(54% of men)</td>
<td>(100%)</td>
<td></td>
</tr>
<tr>
<td>(70% of pro-death removals)</td>
<td>(42% of anti-death removals)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Column Totals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>179 Individuals</td>
<td>354 Individuals</td>
<td>533 Individuals</td>
<td></td>
</tr>
<tr>
<td>(34% of death view-based removals)</td>
<td>(66% of death view-based removals)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{167}\) This number and proportion is 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 particularly significant to the issues being discussed here.

\(^N\) 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 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>
<thead>
<tr>
<th></th>
<th>Women</th>
<th>Men</th>
<th>Row Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense Strikes</td>
<td>134 Individuals (58% of women struck) (41% of D Strikes)</td>
<td>192 Individuals (74% of men struck) (59% of D Strikes)</td>
<td>326 Individuals</td>
</tr>
<tr>
<td>Prosecution Strikes</td>
<td>96 Individuals (42% of women struck) (59% of State Strikes)</td>
<td>67 Individuals (26% of men struck) (41% of State Strikes)</td>
<td>163 Individuals</td>
</tr>
<tr>
<td>Column Totals</td>
<td></td>
<td></td>
<td>489 Individuals</td>
</tr>
</tbody>
</table>

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

\[^{N}\] 2-tail Fisher exact, \( p = 0.0002909 \)
134 women and 192 men, and that the defense thus used 41% of its strikes on women and 59% of its strikes on men. The next row down indicates that the prosecution struck 96 women and 67 men (with the lower numbers resulting from the prosecution having half as many strikes as the defense), using 59% of its strikes on women and 41% of its strikes on men.

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.


a. Status throughout the Entire Selection Process

| Table 5: Summary of Removals/Placements throughout Selection Process, by Race |
|---------------------------------|-------|-------|----------------|
|                                 | WHITES | BLACKS | TOTAL          |
| Excused for Cause               | 284 Individuals (33% of whites removed) | 130 Individuals (51% of blacks removed) | 414 Individuals (38% of removals) |
| Struck                          | 267 Individuals (31%) | 38 Individuals (16%) | 305 Individuals (28% of removals) |
| Qualified, Not Reached for Strikes | 57 Individuals (7%) | 18 Individuals (7%) | 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%) |
| Total                           | 854 Individuals | 234 Individuals | 1,088 Individuals |

χ² (4, N = 1,088) = 43.75, p < .001. Data for individuals who arrived to the courthouse but did not reach voir dire was 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 African-Americans among the 1,088 assessed were removed during pre-trial procedures, if at all. For example, the first column in the first row shows that 284 whites were excused for cause, or roughly 33% of all white potential jurors. The next column shows that 130 African-American were excused for cause, approximately 51% of African-American venire members.

The differences illustrated in Table 5 are significant at the .001 level with a chi square test. African-Americans were excused for cause at a higher rate than their white counterparts. The overall percentage of African-Americans 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 high rate of for-cause removals of African-Americans. African-Americans ended up 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>
<thead>
<tr>
<th>Pro-Death Removal</th>
<th>Anti-Death Removal</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Blacks</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Individuals</td>
<td>75 Individuals</td>
<td>77 Individuals</td>
</tr>
<tr>
<td>(3% of blacks removed for views on death penalty)</td>
<td>(97% of blacks removed for views on death penalty)</td>
<td></td>
</tr>
<tr>
<td><strong>Whites</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>63 Individuals</td>
<td>72 Individuals</td>
<td>135 Individuals</td>
</tr>
<tr>
<td>(47% of whites removed for views on death penalty)</td>
<td>(53% of whites removed for views on death penalty)</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>65 Individuals</td>
<td>147 Individuals</td>
<td>212 Individuals</td>
</tr>
<tr>
<td>(31% of removals based on views on death penalty)</td>
<td>(69% of removals based on views on death penalty)</td>
<td></td>
</tr>
</tbody>
</table>

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

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\*R 2-tail Fisher exact, \( p < .001 \)
the defendant were found guilty. These two individuals were 3\% of those African-Americans removed for their views on death. The next cell to the right shows that 75 African-Americans were removed for being unable to impose the death penalty, or 97\% of African-Americans 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 African-American 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 African-Americans who were excused for their views on death were excused for opposing capital punishment.

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

<table>
<thead>
<tr>
<th>Table 7: Percentage of State and Defense Peremptory Strikes by Race</th>
<th>Blacks</th>
<th>Whites</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense Strikes</td>
<td>3 Individuals (1% of D Strikes)</td>
<td>200 Individuals (99% of D Strikes)</td>
<td>203 Individuals</td>
</tr>
<tr>
<td>Prosecution Strikes</td>
<td>36 Individuals (35% of State Strikes)</td>
<td>68 Individuals (65% of State Strikes)</td>
<td>104 Individuals</td>
</tr>
<tr>
<td>Total</td>
<td>39 Individuals</td>
<td>268 Individuals</td>
<td>307 Individuals</td>
</tr>
</tbody>
</table>

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 struck three black individuals, using 1\% of its total strikes on African-Americans. The next column shows that the defense used 200 of its strikes on white individuals, or 99\% of its peremptory strikes exercised. The differences in Table 7 are significant at the .001 level with a 2-tail Fisher exact test. While the defense struck virtually no African-Americans, the prosecution used 35\% of its strikes on blacks and 65\% of its strikes on whites.

John Blume and Lindsey Vann have noted that Lexington and Horry Counties in South Carolina have dramatically higher death sentencing rates.

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R 2-tail Fisher exact, \( p < .001 \)
than other counties. A death sentence that was vacated in 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. 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>
<thead>
<tr>
<th></th>
<th>Blacks</th>
<th>Whites</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Defense Strikes</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Individual (3% of D Strikes)</td>
<td></td>
<td></td>
<td>118 Individuals</td>
</tr>
<tr>
<td><strong>Prosecution Strikes</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>26 Individuals (35% of State Strikes)</td>
<td></td>
<td>33 Individuals (65% of State Strikes)</td>
<td>59 Individuals</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>29 Individuals</td>
<td>148 Individuals</td>
<td>177 Individuals</td>
</tr>
</tbody>
</table>

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 7.1 with the overall race data found in Table 5:

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169 Blume & Vann, supra note 157, at 26. Five of the cases used to analyze race in this study were from Lexington County. Donald Myers was prosecutor for all of them. Three of the cases were from Horry County.


N 2-tail Fisher exact, $p < .001$
Table 8:
Summary of Removals/Placements throughout Selection Process by Race, with Parties’ Use of Peremptory Strikes

<table>
<thead>
<tr>
<th></th>
<th>WHITES</th>
<th>BLACKS</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Excused for Cause</strong></td>
<td>284 Individuals</td>
<td>130 Individuals</td>
<td>414 Individuals</td>
</tr>
<tr>
<td><strong>Total Remaining after Voir Dire</strong></td>
<td>570 Individuals</td>
<td>104 Individuals</td>
<td>675 Individuals</td>
</tr>
<tr>
<td><strong>Total Struck</strong></td>
<td>268 Individuals</td>
<td>39 Individuals</td>
<td>305 Individuals</td>
</tr>
<tr>
<td><strong>Struck by Prosecution</strong></td>
<td>68 Individuals</td>
<td>36 Individuals</td>
<td>104 Individuals</td>
</tr>
<tr>
<td><strong>Struck by Defense</strong></td>
<td>200 Individuals</td>
<td>3 Individuals</td>
<td>203 Individuals</td>
</tr>
</tbody>
</table>

**Percentage of Post-Voir Dire Eligible Venire Members Struck by Prosecution**

\[
\frac{68}{570} = 12\% \quad \text{and} \quad \frac{36}{104} = 35\%
\]

**Percentage of Post-Voir Dire Struck by Defense**

\[
\frac{200}{570} = 35\% \quad \text{and} \quad \frac{3}{104} = 3\%
\]

Table 8 combines data from Tables 5 and 7 to calculate that the prosecution’s strikes were responsible for eliminating 12% of whites who went through the voir dire process without being removed, and 35% of blacks who did so. It shows that the defense’s strikes eliminated 35% of whites who were not removed during voir dire, and 3% of blacks. The differences are statistically significant at the .001 level.

\[\chi^2(6, N = 116.1) \; p < .001.\]
V. DISCUSSION OF RESULTS

1. 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. 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.” Although far from conclusive, it would seem reasonable to infer that Lexington County’s issues with representativeness are not unrelated to its high death sentencing rates.

2. 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 ($p = 0.8221, \chi^2$). 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 ($p < .05$, 2-tail Fisher exact) shows that men and women were treated differently by the court, while Table 4 ($p = 0.0002514$, 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


\[172\] Id. at 305 n.121.
prosecution exercised peremptory strikes on significantly more women than men (59% of prosecution strikes).

Interestingly, echoing similar findings by others such as Mary Rose, the opposing parties’ disproportionate use of peremptory strikes according to gender “cancelled each other out.” 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 ($p < 0.0002514$, 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 prior conclusions, such as Baldus’s Philadelphia study, 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.

Although the genders were equally represented, it is unclear whether conviction-proneness and pro-death bias also evened out.

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

3. 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 24-case subset observed

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173 Rose, supra note 93, at 697.
174 See Diamond et al., supra note 136, at 425.
175 Lynch & Haney, supra note 26, at 73.
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 African-Americans.

Unlike with gender, discrimination by opposing sides did not cancel itself out for race. Rather, the data here show that it was more difficult for black jurors to be seated on the jury than for white jurors. A rate of 20% of African-Americans ended up on juries or as alternates while 29% of whites did—roughly 2/3 the rate.

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 (51% and 33%, respectively) ($p < .001, \chi^2$). The results in Table 6 indicate that a majority of those African-Americans removed for cause were excused because of their opposition to the death penalty (130 African-Americans were removed for cause, 75 for anti-death penalty views—58% of those removed for cause and 32% of the overall black venire group). By contrast, 72 of 284 whites (or 25% of whites removed for cause and 8% of the overall white venire group) removed for cause were excused because of their opposition to the death penalty. While only two African-Americans were excused for favoring the death penalty, around 22% of whites excused for cause (63 of 284) were removed for pro-death views.

These findings 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 African-Americans 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.176

Although the overall percentage of African-Americans 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 African-Americans available to strike, since

176 Price, supra note 7, at 103–04.
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 African-Americans were struck (38 out of 104 individuals remaining after for-cause removals), whereas 47% of whites remaining were struck (267 out of 570 individuals remaining after for-cause removals). This difference is not statistically significant ($p = 0.2596$, $\chi^2$), 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.\(^{177}\) The prosecution used 36 of its 104 strikes on African-Americans (35% of its strikes), even though African-Americans constituted only 15% of those available to be struck.\(^{178}\)

The crux of these numbers is that the prosecution struck blacks at a rate higher than they were represented, and accounted for removing one-third of eligible black jurors. A comparable disparity emerged in O’Brien’s and Grosso’s study, where the prosecution struck 52.6% of eligible black venire members, and 25.7% of all other eligible venire members.\(^{179}\) Of course, the defense had even more dramatically differing numbers for each race, using only 1% of its strikes on African-Americans. 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

\(^{177}\) The racial disparities in the parties’ use of their peremptory challenges were significant ($p < .001$, 2-tail Fisher exact).

\(^{178}\) It might be a concern that if the defense used its strikes first in each trial (and South Carolina procedure would appear to dictate that the prosecution would go first, Juror Information, South Carolina Judicial Department, http://www.judicial.state.sc.us/jurorinfo/jurorSelection.cfm (‘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.”), although this was not always clear from the transcripts), the pool that was available for the prosecution to strike had different racial proportions than the one that includes the overall numbers. The trends 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 35% 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 using a 2-tail Fisher exact test.

\(^{179}\) Id.
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’s and Grosso’s study. Potentially, these disparities would not persist or would weaken with such controls. But such an outcome seems unlikely. O’Brien’s and Gross’s study revealed little difference in outcomes when they controlled for race-neutral factors.\textsuperscript{180} Other studies have shown similar trends. It is reasonable to infer here that the defense was targeting whites and that the prosecution was targeting blacks.\textsuperscript{181}

Finally, the combined effects of anti-death removals and prosecutorial strikes had dramatically disparate impacts according to race. Seventy-five blacks 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.

\textbf{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 \textit{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 jurors for their opposition to the death penalty stands in tension with a defendant’s Sixth and Fourteenth Amendment Rights and

\textsuperscript{180} O’BRIEN & GROSSO, supra note 7.

\textsuperscript{181} It appeared from the majority of the trial transcripts that litigants did not raise a significant number of \textit{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 \textit{Batson} challenges were made and not observed.
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 African-Americans 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 which maintain capital punishment schemes have embraced a fiction: that it is possible to reconcile death-qualification with society’s interest in, and defendant’s rights to, impartial, representative juries.