

Rigged: When Race and Poverty Determine Outcomes in the Criminal Courts

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I. INTRODUCTION

A Pennsylvania newspaper recently reported that many people sentenced to death in that state since 2005 were represented by lawyers who were drug and alcohol addicts, had histories of mishandling cases or were convicted felons.¹ Eighteen percent of those sentenced to death had been represented by lawyers who had been disciplined for professional misconduct.² A majority of those lawyers had received the most serious discipline: suspension or disbarment.³ A reporter from the paper asked how was it possible that the most important cases—involving life and death—were being handled by the least capable lawyers. The answer is that the system is rigged against the poor and against people of color.

What the newspaper in Pennsylvania found about legal representation in death penalty cases is the same as what courts and other observers have found in other states. United States Supreme Court Justice Ruth Bader Ginsburg has said, “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.”⁴

In fact, the *Chicago Tribune* found, in an analysis of capital cases in Illinois in 1999, that thirty-three people sentenced to death there were represented by

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¹ Nicole C. Brambila, *Disorder in the Court: Troubled Attorneys Often Take on Capital Cases*, *READING EAGLE* (Oct. 25, 2015), <http://www.readingeagle.com/news/article/disorder-in-the-court-troubled-attorneys-often-take-on-capital-cases>.

² *Id.*

³ *Id.*

⁴ Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, Joseph L. Rauh Lecture at the University of the District of Columbia, David A. Clarke School of Law (Apr. 9, 2001), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-09-01a.

attorneys who had been or were later suspended or disbarred.⁵ One lawyer had seventy-eight disciplinary complaints and was disbarred one year after representing a client sentenced to death; and another lawyer, who represented four men sentenced to death, was a convicted felon and the only lawyer in Illinois history to be disbarred twice.⁶ In Texas death penalty cases, lawyers have slept during trials,⁷ “fail[ed] to conduct even rudimentary investigations,”⁸ abandoned their clients,⁹ missed critical deadlines,¹⁰ and filed incomprehensible pleadings or filed the same brief in different cases.¹¹ The Supreme Court has observed:

⁵ Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, CHI. TRIBUNE (Nov. 15, 1999), http://articles.chicagotribune.com/1999-11-15/news/chi-991115deathillinois2_1_sentencing-hearing-bernon-howery-earl-washington.

⁶ *Id.*

⁷ Calvin Burdine, Carl Johnson and George McFarland were all sentenced to death in Houston at trials in which their lawyers slept. *See* *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (reversing where defense lawyer slept during trial); David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694–95 (1996) (describing defense lawyer sleeping during capital trial of Johnson who was executed); *Ex parte* McFarland, 163 S.W.3d 743, 751 (Tex. Crim. App. 2005) (upholding death sentence in post-conviction review because co-counsel remained awake even though “[v]irtually everyone in the courtroom noticed [lead counsel] sleeping,” including co-counsel who “stated that he first saw [lead counsel] sleeping during parts of voir dire, and it got worse as the trial progressed”); *McFarland v. State*, 928 S.W.2d 482, 527 (Tex. Crim. App. 1996) (upholding death sentence on direct appeal, despite the sleeping, over the dissent of Judge Baird, who pointed out:

[Co-counsel’s] preparation for this trial consisted of only a seven hour review of the State’s files. He visited appellant once before trial and prepared some pre-trial motions. . . . Neither attorney interviewed a witness and neither attorney reviewed the extraneous offenses that were to be later admitted. [Lead counsel] decided which witnesses he would cross-examine and he informed [co-counsel] of his decision only after the State’s examination. Thus, [co-counsel’s] preparation for cross-examination of his witnesses could not have been effective because he did not know which witnesses he was to question. And considering the role to which he was relegated, [co-counsel] was in no position to put forth a coordinated defense strategy. Even more disturbing, [lead counsel] could sleep during the direct examination and still elect to conduct cross-examination.

928 S.W.2d at 527–28 (Baird, J., dissenting)); John Makeig, *Asleep on the Job?: Slaying Trial Boring, Lawyer Says*, HOUS. CHRONICLE, Aug. 14, 1992, at A35 (describing lawyer sleeping during capital trial of George McFarland and the trial judge commenting that “[t]he Constitution doesn’t say the lawyer has to be awake”).

⁸ Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES (May 17, 2010), <http://www.nytimes.com/2010/05/18/us/18bar.html> (describing attorney Jerry Guerinot who had twenty clients sentenced to death as a result of his “failure to conduct even rudimentary investigations.”).

⁹ *Holiday v. Stephens*, 136 S. Ct. 387 (2015) (Sotomayor, J., statement respecting the denial of stay of execution and denial of certiorari) (expressing the view that new counsel should have been appointed after Holiday’s lawyers refused to seek clemency); *Perez v. Stephens*, 745 F.3d 174 (5th Cir. 2014) (describing lawyer’s failure to file a notice of appeal after district court denied habeas petition challenging conviction and death sentence); *id.* at 182 (Dennis, J., dissenting) (Attorney “egregiously breached her duty to Perez as his attorney by abandoning him without notice and causing him to lose his right to appeal.”); Brandi Grissom, *Condemned Man’s Lawyers Stop Helping*,

Alabama sets low eligibility requirements for lawyers appointed to represent indigent capital defendants at trial. Appointed counsel need only be a member of the Alabama bar and have “five years’ prior experience in the active practice of criminal law.” Experience with capital cases is not required. Nor does the State provide, or require appointed counsel to gain, any capital-case-specific professional education or training.

Appointed counsel in death penalty cases are also undercompensated.¹²

In these and other states, a poor person may be sentenced to death not for committing the worst crime, but because a judge assigned him the worst lawyer.¹³ In noncapital cases, a person may be denied bond, convicted, and severely sentenced because of poor legal representation.¹⁴

People of color are usually further disadvantaged because members of their race generally have no voice in making the many discretionary decisions that determine outcomes in criminal cases, such as charging, plea bargaining, seeking

Cite ‘False Hope,’ DALL. NEWS (Nov. 16 2015), <http://www.dallasnews.com/news/state/headlines/20151116-condemned-mans-lawyers-stop-helping-cite-false-hope.ece> (describing lawyers who abandoned death-sentenced inmate Raphael Holiday by refusing to seek clemency, opposed efforts of another lawyer to represent him, and hastily filed a petition for clemency in response to the controversy about their abandonment).

¹⁰ *Ex parte Rojas*, 2003 WL 1825617 (Tex. Crim. App. Feb. 12, 2003) (unpublished) (Price, J., dissenting) (lawyer failed to take any action to preserve the defendant’s right to federal habeas corpus review after being denied relief in the Texas courts); Lise Olsen, *Slow Paperwork in Death Row Cases Ends Final Appeals for 9*, HOUS. CHRONICLE (Mar. 22, 2009), <http://www.chron.com/news/houston-texas/article/Slow-paperwork-in-death-row-cases-ends-final-1736308.php> (describing failure of Texas lawyers to file federal habeas corpus within the statute of limitations in nine cases).

¹¹ Maro Robbins, *Convict’s Odds Today May Rest on Gibberish*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 2006, at A01 (describing incomprehensible pleading filed on behalf of Texas inmate shortly before his execution); Chuck Lindell, *Death Row Inmates Share Identical Appeals*, AUSTIN AM.-STATSMAN, Feb. 26, 2006 (on file with author) (reporting that 20 pages of appellate briefs in two capital cases were identical).

¹² *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012) (citations omitted).

¹³ *See, e.g., Moore v. Parker*, 425 F.3d 250, 270 (6th Cir. 2005) (Martin, J., dissenting) (observing that defendants with “decent lawyers” often avoid death sentences, while those assigned bad lawyers are sentenced to death); Stephen Henderson, *Defense Often Inadequate in 4 Death-Penalty States*, McCLATCHY NEWSPAPERS (Jan. 16, 2007), <http://www.mcclatchydc.com/news/nation-world/national/article24460360.html> (first in a series of five articles regarding the poor quality of legal representation found in a study of eighty death-penalty cases from Alabama, Georgia, Mississippi, and Virginia).

¹⁴ *See NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* (2009), <http://www.constitutionproject.org/manage/file/139.pdf>; Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152–55, 2160–71 (2013).

enhanced penalties, and striking the jury. The striking of the jury often involves the use of peremptory strikes against people of color to secure an all-white jury. It is well known and documented that a person of color is more likely than a white person to be stopped by police; and to be abused during that stop by being put in a chokehold, hit with a baton, having a gun pointed at him, pepper sprayed, made to sit in a squad car handcuffed, or in other ways.¹⁵ People of color are also more likely to be arrested than a white person who is stopped. However, discrimination is not limited to law enforcement practices. It continues when those arrested come before the criminal courts.

Until fairly recently, the criminal courts have been out of sight and out of mind for most people. Almost all people coming before these courts are poor and a disproportionate number of them are black and brown. However, people have recently become much more aware of injustices in the criminal courts because of two new developments in uncovering the truth. The first, deoxyribonucleic acid (DNA) testing of biological evidence, has conclusively established that many people convicted in the courts, including many sentenced to death, were completely innocent. The second, cell phones and the many surveillance cameras that are now a part of American life, have shown gross injustices that otherwise would not have come to light.

DNA testing established, for instance, that two, poor, black intellectually disabled men, Henry McCollum and his half-brother, Leon Brown, spent thirty

¹⁵ See, e.g., Nicholas K. Peart, *Why Is the N.Y.P.D. After Me?*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html> (describing treatment during stops and frisks in New York); Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813 (2007) (analyzing data from 125,000 pedestrian stops by the NYPD and finding that racial minorities were stopped more frequently than whites, even after controlling for precinct variability and race-specific estimates of crime participation); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014) (black drivers more likely to experience "investigatory stops" than white drivers); CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, *CONTACTS BETWEEN POLICE AND THE PUBLIC*, 2008 (Oct. 2011), <http://bjs.gov/content/pub/pdf/cpp08.pdf> (minorities were subjected to force by police more often than whites; minorities were more likely than whites to be searched during a traffic stop); Ryan Gabrielson, Ryann Grochowski Jones & Eric Sagara, *Deadly Force*, in *Black and White*, PROPUBLICA (Oct. 10, 2014), <https://www.propublica.org/article/deadly-force-in-black-and-white> (analyzing federally collected data on fatal police shootings 2010-2012 and finding that young black males were twenty-one times more likely to be shot by police than young white males); Terrence McCoy & Abby Phillip, *Eric Garner's Killing and Why the Police Chokehold is So Racially Charged*, WASH. POST (Dec. 4, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/04/why-the-police-chokehold-is-so-racially-charged/> (discussing link between police chokeholds and race); William Terrill & Stephen D. Mastrofski, *Situational and Officer-Based Determinants of Police Coercion*, 19 JUST. Q. 215 (2002) (finding that officers used greater amounts of force against male, nonwhite, poor, and younger suspects, irrespective of suspects' behavior); Jacinta M. Gau, Clayton Mosher & Travis C. Pratt, *An Inquiry Into the Impact of Suspect Race on Police Use of Tasers*, 13 POLICE Q. 27 (2010) (police twice as likely to use Tasers on Hispanic suspects than on whites).

years in prison—McCollum on North Carolina’s death row the entire time—for the rape and murder of an eleven-year-old girl even though they were completely innocent of the charges.¹⁶ DNA evidence established that the crimes were committed by a man who lived only a block from where the victim’s body was found and who had a history of convictions for sexual assault, including the rape and murder of a teenage girl a few weeks after the murder of the eleven-year old.¹⁷

McCollum and Brown spent thirty years in a prison population notoriously unfriendly to people convicted of child molestation. McCollum “spent three decades watching other inmates be hauled off to the execution chamber. He became so distraught during executions that he had to be put in isolation so he wouldn’t hurt himself.”¹⁸ Their lives were completely ruined, but Governor Pat McCrory took nine months after their exoneration before he issued a pardon which made each of them eligible to receive \$750,000 for the 30-year deprivation of their liberty and the immense suffering they endured.¹⁹ They were but two of hundreds of exonerated people who would have remained in prison or been executed if the truth had not revealed by DNA testing.²⁰

A cellphone video revealed that a police officer in North Charleston, South Carolina shot Walter Scott, a black man, in the back, killing him, as he ran away after a daytime traffic stop in April, 2015.²¹ Another cellphone video showed Eric Garner, another black man, being taken down in a chokehold in violation of police rules and held down by a swarm of officers despite his eleven pleas of “I can’t breathe”—his final words.²² A surveillance video showed a Cleveland police

¹⁶ Jonathan M. Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES (Sept. 2, 2014), <http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html>.

¹⁷ Richard A. Oppel, Jr., *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. TIMES (Sept. 7, 2014), <http://www.nytimes.com/2014/09/08/us/as-2-go-free-joe-freeman-britt-a-dogged-ex-prosecutor-digs-in.html>.

¹⁸ Kenneth J. Rose, *I Just Freed an Innocent Man from Death Row. And I’m Still Furious*, WASH. POST (Sept. 4, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/09/04/i-just-freed-an-innocent-man-from-death-row-and-im-still-furious/>.

¹⁹ Craig Jarvis, *Gov. McCrory Pardons Half-Brothers Imprisoned for Decades*, NEWS & OBSERVER (June 4, 2015), <http://www.newsobserver.com/news/politics-government/article23091657.html>.

²⁰ See *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide> (reporting at the end of 2015, 337 DNA exonerations of people who had served approximately 4,606 years).

²¹ Alan Blinder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html>.

²² Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>;

officer, who had resigned from another Ohio police department after a “dangerous loss of composure” during firearms training, shoot twelve-year old black child, Tamir Rice, within two seconds of arriving at a recreation center where the child had been playing with a toy gun, and another officer tackling Rice’s sister ninety seconds later as she ran toward her brother, and police standing around before attempting to help Tamir.²³ A Chicago police dash-cam video, withheld by Chicago officials for months until a judge ordered it released,²⁴ showed Officer Jason Van Dyke firing sixteen shots in fourteen seconds into the body of a seventeen-year-old black youth, Laquan McDonald, as he walked down the middle of a street and as he lay on the ground.²⁵

Without the videos, people would have never learned what actually happened when police shot these and other people to death. Prosecutors may persuade grand juries not to indict police officers, as they did in the cases of Eric Garner, Tamir Rice, and others,²⁶ but they cannot hide the videos, which have led to much-needed attention to discriminatory practices, excessive uses of force, and lack of a reverence for life by law enforcement officers. If public officials and the courts will not address these matters, organizations like Black Lives Matter will bring about urgently needed discussions of policing practices and the need for policy changes, including cameras on police and in police cars. There is an equally

Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html>.

²³ Elaha Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-year-old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/>; Michael Lester, *Timeline of Tamir Rice Case*, N.Y. TIMES (Dec. 29, 2015), <http://www.nytimes.com/video/us/100000004115799/timeline-of-tamir-rice-case.html>; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html>.

²⁴ See Bernard E. Harcourt, *Opinion, Cover-Up in Chicago*, N.Y. TIMES (Nov. 30, 2015), <http://www.nytimes.com/2015/11/30/opinion/cover-up-in-chicago.html>.

²⁵ Steve Schmadeke, Jason Meisner & Bill Ruthhart, *Shooting Video Latest Stain on Chicago’s Policing Record*, CHI. TRIBUNE (Nov. 25, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-cop-shooting-laquan-mcdonald-murder-charge-1125-20151124-story.html>.

²⁶ J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-statens-island-chokehold-death-of-eric-garner.html>; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0; Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> (reporting that officer Darren Wilson was not indicted for shooting Michael Brown in Ferguson, Mo.).

urgent need for attention to how people are treated in the legal system after they are arrested.

II. THE PURSUIT OF PROFITS INSTEAD OF JUSTICE IN MUNICIPAL COURTS

Most people come in contact with the judicial system through municipal courts. Often people come to these courts as a result of being summoned for traffic violations, but they may also come as victims, witnesses or as the accused in cases involving violations of municipal ordinances.²⁷ These courts may be very large in cities like Cleveland and Cincinnati and quite small in little towns and villages. Poverty is an enormous disadvantage in these courts, which are mostly in the business of generating revenue. A person who cannot pay fees and fines on the day they are imposed may be required to pay even more through installments and may be jailed if they fail to make a payment. About the only people sent to jail in these courts are people too poor to pay the fines and fees imposed on them. Those who can afford to pay do so, resolving their cases, and eliminating any chance they will be jailed for failure to pay.

Ferguson, Missouri, where Michael Brown was killed, in August 2014 by Darren Wilson, a white police officer,²⁸ is an example of a small municipality with a court. It is one of ninety municipalities ranging in population from twelve to over 50,000 in St. Louis County, each with its own court and police force.²⁹ A report by the Department of Justice on Ferguson found that “the City considers revenue generation to be the municipal court’s primary purpose” and that the court’s judge had been commended for his success in “significantly increasing court collections over the years.”³⁰

²⁷ For example, the website for New Jersey’s municipal courts states: “It is through the Municipal Courts that most citizens in the State come into contact with the judicial system, either as a defendant, a victim, or a witness. Since most citizens will never appear before another court, it is from their experience in the Municipal Courts that most people base their conclusions about the quality of justice in New Jersey.” NEW JERSEY COURTS, <http://www.judiciary.state.nj.us/mcs/history.htm> (last visited Apr. 17, 2016). New Jersey has 561 municipal courts. See *State List of Municipal Courts*, NEW JERSEY COURTS, <http://www.judiciary.state.nj.us/directory/munctadr.pdf>.

²⁸ See John Eligon, *Michael Brown’s Family Sues Ferguson Police Officer Who Killed Him*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/us/michael-browns-family-sues-ferguson-police-officer-who-killed-him.html>; Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html>.

²⁹ ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 4, <http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/08/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf>.

³⁰ U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEP’T 14 (2015), http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf.

Ferguson's primarily white police force stops and cites or arrests blacks in numbers far exceeding their percentage of the population. Despite making up 67% of the city's population, blacks accounted for 85% of traffic stops, 90% of citations, and 93% of arrests from 2012 to 2014.³¹ In Ferguson's municipal court, an analysis of cases in 2011 revealed that "black defendants [were] more likely to have their cases persist for longer durations, more likely to face a higher number of mandatory court appearances and other requirements, and more likely to have a warrant issued against them for failing to meet those requirements."³² A black defendant is "68% less likely than other defendants to have a case dismissed," and there appear to be racial disparities in the court's discretionary rulings and assessment of fines.³³

What happens in municipal courts varies greatly from one to another. One municipality in St. Louis County, Pine Lawn, which has a population of 3,275—96% black with a per capita income of \$13,000—collected more than \$1.7 million in fines and fees in 2013.³⁴ The more affluent city of Chesterfield, with a population of 47,000—fifteen times that of Pine Lawn—collected just \$1.2 million.³⁵

Municipal courts act as cash cows for their communities in many other states as well. In most states that have them, each municipality has its own municipal code, its own police force that primarily issues traffic citations, and its own court. In small municipalities, the judge may be part-time and hold court for a few hours once or a few times a week. Often there are no prosecutors or defense lawyers, but where there are lawyers, the same lawyer may be a judge in one court, a prosecutor in another, and a defense attorney in yet another. Each may maintain an active private practice as well. Many of these courts, like the one in Ferguson, are not courts of justice, but courts of profit. The police departments in those municipalities are under pressure to issue citations and arrest people, and the judges are under pressure to impose and collect fines and fees.³⁶

The tiny city of Warwick, Georgia, with a population of 411, collected \$1.4 million in fines and fees during fiscal year 2014, which constituted 89% of its revenue for the year.³⁷ The court in Warwick is one of more than 350 municipal

³¹ *Id.* at 62.

³² *Id.* at 68.

³³ *Id.* at 69.

³⁴ ARCHCITY DEFENDERS, *supra* note 29 at 9–10.

³⁵ *Id.* at 10.

³⁶ *See Policing and Profit*, 128 HARV. L. REV. 1723 (2015).

³⁷ GA. DEP'T OF CMTY. AFFAIRS, 2014 MUNICIPAL REVENUES FROM FINES, FORFEITURES AND COURT FEES AS A PERCENTAGE OF OWN SOURCE REVENUES 14 (Dec. 9, 2015), http://www.dca.state.ga.us/development/research/programs/documents/Muni_Fines_fees_rpt_004.pdf; *see also* Terry Lewis, *Warwick City Judge Addresses Concerns About Conduct of Police Department*, ALBANY HERALD (Aug. 17, 2014), <http://www.albanyherald.com/news/warwick-city->

courts in Georgia, with more than 400 judges handling more than 800,000 cases a year.³⁸ New York has 1,250 town and village courts in which nearly three-quarters of the judges are not lawyers, and people have been sent to jail without a lawyer, a guilty plea or a trial, or evicted from their homes without a proper proceeding.³⁹

In Ohio, mayors may preside over more than 300 “mayor’s courts” even if they are not attorneys, or they can designate a magistrate to preside over these courts.⁴⁰ Seventy-six percent of the mayor’s courts are in villages with fewer than 5,000 residents.⁴¹ Like the municipal court in Ferguson, mayor’s courts are often more about generating revenue than protecting the community. Paul E. Pfeifer, the most senior judge on the Ohio Supreme Court, has said their principal objective is “what’s in the cash register at the end of the evening,” and compared them to “a bad spaghetti western, . . . where the cabinet maker or coffin maker takes off his apron, sits on a bench with a gavel and metes out justice.”⁴²

Ohio also has municipal courts. The American Civil Liberties Union of Ohio found in 2013 that mayors’ courts and municipal courts in Ohio routinely and unconstitutionally imprisoned people who were unable to pay fines and court costs.⁴³ In response, the Ohio Supreme Court issued a two-page memorandum informing judges that they must determine ability to pay before putting people in jail.⁴⁴

Municipal courts not only impose fines, which may be several hundred dollars or more, but they also assess fees, surcharges, and add-ons that significantly increase the costs for the people coming before them.⁴⁵ There may be a fee for

judge-addresses-concerns-about-conduct-of-police-department/article_b345cf6a-b7d2-52b7-bc65-d9fa704c42e0.html.

³⁸ See COUNCIL OF MUN. COURT JUDGES, JUDICIAL COUNCIL OF GA. ADMIN. OFFICE OF THE COURTS, <http://municipal.georgiacourts.gov/> (last visited Oct. 22, 2016).

³⁹ William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), <http://www.nytimes.com/2006/09/25/nyregion/25courts.html?pagewanted=all>.

⁴⁰ SUPREME COURT OF OHIO, MAYOR’S COURTS SUMMARY 1 (2013), <https://www.supremecourt.ohio.gov/Publications/mayorscourt/mayorscourtreport13.pdf>; see also OHIO REV. CODE ANN. §§ 1905.01, 1905.05 (authorizing mayor to conduct court and appoint magistrates).

⁴¹ Justin Conley & Rebecca McKinsey, *Ohio’s Mayor’s Courts, Big Business*, COLUMBUS DISPATCH (July 22, 2012), <http://www.dispatch.com/content/stories/local/2012/07/22/big-business.html>.

⁴² *Id.*

⁴³ AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO’S DEBTORS’ PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES (Apr. 2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf.

⁴⁴ SUPREME COURT OF OHIO, COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (revised Sept. 2015), <https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf>.

⁴⁵ Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>; *State-By-State*

“court costs” or a “court operations fund,” a fee to support the crime laboratory, a fee to fund emergency medical services, a fee for a crime victims fund, a fee to fund DNA testing, and—in courts where there are public defenders—a fee for the public defender.⁴⁶

A person of means can usually pay all these charges, which may run between \$500 and \$2,000 dollars, at the time they are imposed and have no further involvement with the court and run no risk of ever being jailed. Most poor people cannot afford to pay the fines and fees and because of that, they may be thrown in jail. The municipal court probation officers in Bainbridge, Georgia, required a black woman, Vera Cheeks, to immediately pay \$50 after a judge fined her \$135 for her failure to come to a complete halt at a stop sign.⁴⁷ She did not have \$50 at the time, so the probation officers detained her until her fiancé pawned her engagement ring and his weed trimmer for the \$50.⁴⁸ A judge in another Georgia municipal court told one person who could not pay, “[Y]ou can call whoever you need to call, go to an A.T.M. if you need to, do what you need to do. . . . Call friends, call family, call your employer. But until you get \$300 here tonight, you won’t be able to leave.”⁴⁹ The same judge warned another person, “You’re going to have to figure out a way to get this paid, do you understand me? Or you’re going to go to jail. One or the other. You understand?”⁵⁰ Neither person had a lawyer.⁵¹ A woman, on probation for driving with a suspended license, after spending a month in jail, was ordered to remain there until she made a \$500 payment.⁵²

Other courts—not just municipal courts, but misdemeanor and felony courts in some jurisdictions—place people who cannot afford to pay their fines and fees on probation and require them to pay on an installment plan over a period such as twelve months; but poverty is expensive. In many jurisdictions, people are required to pay a monthly fee to a private probation company, usually around \$40.⁵³ There may also be additional fees for electronic monitoring, drug testing

Court Fees, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.

⁴⁶ See Shapiro, *supra* note 45.

⁴⁷ Carrie Teegardin, *Ticket Torment: Georgia Probation Systems Ensnare Those Too Poor to Pay Traffic Fines*, ATLANTA J.-CONST. (Nov. 22, 2014), <http://www.myajc.com/news/news/crime-law/georgia-probation-system-ensnares-those-too-poor-t/njB6n/>.

⁴⁸ *Id.*

⁴⁹ Shaila Dewan, *A Surreptitious Courtroom Video Prompts Changes in a Georgia Town*, N.Y. TIMES (Sept. 4, 2015), <http://www.nytimes.com/2015/09/05/us/a-surreptitious-courtroom-video-prompts-changes-in-a-georgia-town.html>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>; see also Sarah Stillman, *Get Out of Jail*,

and classes in anger management or other subjects.⁵⁴ When people cannot pay their monthly installments, courts issue warrants for their arrest and jail them until they can pay or extend the length of their probation, thereby requiring additional monthly fees.

After Vera Cheeks paid \$50 to be released from jail in Bambridge, she was ordered to pay not only her \$135 fine, but various fees that increased the cost of her punishment to \$267 over three months, and report to a probation officer every week.⁵⁵ Adel Edwards, a fifty-four-year-old intellectually disabled black man, who lives on food stamps, was fined \$500 for burning leaves in his backyard without a permit.⁵⁶ Because he could not make an immediate payment after the fine was imposed, he was jailed until a friend made a payment to secure his release.⁵⁷ He was ordered to pay his fine over twelve months along with \$44 per month to a private probation company to “supervise” him.⁵⁸ He was not represented by a lawyer and the court made no determination that he had the ability to pay as required by the Constitution.⁵⁹ Edwards reported weekly and paid what he could. Although the probation expired after twelve months, his probation officer instructed him to report and pay for another eleven months. She threatened to take out a warrant for his arrest if he did not continue to report and pay. By then, Edwards had paid only \$158 and supposedly owed \$608.⁶⁰

Human Rights Watch estimates that in Georgia alone private-probation companies take in around \$40 million in fees each year for collecting fines and fees from people so poor they could not pay them when imposed.⁶¹ By gouging the poorest people in their communities, municipal courts are not only bringing in

Inc.: Does the Alternative-to-Incarceration Industry Profit from Injustice?, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>.

⁵⁴ See *A Juicy Secret*, ECONOMIST (Apr. 22, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/04/private-probation>; *Private Probation: A Judicially Sanctioned Extortion Racket*, ECONOMIST (Jan. 20 2014), <http://www.economist.com/blogs/democracyinamerica/2014/01/private-probation?fsrc=rss>.

⁵⁵ Teegardin, *supra* note 47.

⁵⁶ Carrie Teegardin, *Lives Upended as Judges Push Legal Limits*, ATLANTA J.-CONST. (May 2, 2015), <http://www.myajc.com/news/news/crime-law/judges-push-legal-limits-on-probation/nk5Fj/>.

⁵⁷ Carrie Teegardin, *Bainbridge Settles Private Probation Suit Filed by Southern Center*, ATLANTA J.-CONST. (Sept. 21, 2015) (quoting lawsuit challenging the court’s practices), <http://investigations.blog.ajc.com/2015/09/21/bainbridge-settles-private-probation-suit-filed-by-southern-center/>.

⁵⁸ R. Robin McDonald, *Suit Claims Indigent Defendants Are Illegally Jailed*, DAILY REPORT (Apr. 13, 2015), <http://www.dailyreportonline.com/id=1202723375458/Suit-Claims-Indigent-Defendants-Illegally-Jailed?slreturn=20160818155135#ixzz3XE6KWY1Q>.

⁵⁹ The Supreme Court held in *Bearden v. Georgia*, 461 U.S. 660 (1983), that jailing someone for nonpayment of fines due to an inability to pay, rather than willful withholding of funds, denies fundamental fairness in violation of the Fourteenth Amendment.

⁶⁰ The probation ended after lawyers with the Southern Center for Human Rights filed a *Motion to Stop Enforcement of Expired Probation Sentence* (on file with author).

⁶¹ HUMAN RIGHTS WATCH, *supra* note 53.

revenue for their municipalities, but also for supposedly “respectable” business people who are getting rich in the private probation industry.

Part-time courts with part-time judges, tiny police departments which exist for almost no other purpose except to generate revenue by issuing traffic citations, and private probation companies which add to the financial burdens on the poor, make no sense. Communities would be far better served by urban-county governments with full-time courts, uniform practices such as providing lawyers to those accused, and professional police departments with a mission of public safety. Furthermore, public functions like probation supervision should be carried out by public employees to help offenders deal with their problems and become useful and productive citizens, not private companies seeking to exploit poor people for every penny they can squeeze out of them.

III. THE AMOUNT OF MONEY ONE HAS AND THE KIND OF JUSTICE ONE RECEIVES

The system is rigged against a person who does not have a lawyer immediately after arrest to argue for bail and begin preparing to defend the case. The Supreme Court has said there can be no equal justice where the kind of justice a person gets “depends on the amount of money he has.”⁶² The words “Equal Justice Under Law” appear above the entrance of the United States Supreme Court and, from childhood, “justice for all” is recited as an attribute of our “one nation” in the Pledge of Allegiance to the Flag.

However, nothing matters more in America’s courts than the amount of money one has. The difference that money makes is apparent from the moment a person is arrested and jailed. A person who can afford a lawyer usually retains one at once. The lawyer will attempt to secure the person’s immediate release from jail, often successfully, so that the client can maintain employment, take care of his or her family, and be engaged in preparing for trial. The lawyer will begin an investigation while the evidence is available and the memories of witnesses are fresh. If it appears that the charges lack merit, the lawyer will attempt to secure dismissal of the case and, if unsuccessful, prepare for trial. If the client appears to be guilty—either of the crime charged or some lesser offense—the lawyer will engage in plea bargaining based upon a detailed knowledge of the facts of the crime, and the background of the client. If the client is convicted at trial or by entering a guilty plea, the lawyer will provide individualized, client-specific advocacy with regard to sentencing.

In contrast, poor people accused of crimes, although entitled to counsel “within a reasonable time” after “the initiation of adversary judicial proceedings,”⁶³ may languish in jail for days, weeks or months after arrest without

⁶² Douglas v. California, 372 U.S. 353, 355 (1963) (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

⁶³ Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008).

a lawyer.⁶⁴ They do not receive the “consultation, thorough-going investigation and preparation” that are “vitally important” from the outset in a case.⁶⁵ They may lose their jobs, homes, and means of transportation, even though the charges may later be dismissed. Jacqueline Winbrone lost her husband. She was detained after arrest in New York because she could not make \$10,000 bail. With no lawyer to seek a reduction, she remained in jail and was unable to take her husband to dialysis; as a result, he died.⁶⁶ She was later released on her personal promise to return to court and ultimately the charges were dismissed.⁶⁷ Diego Morin, facing the death penalty in Del Rio, Texas, asked for a lawyer the day after his arrest, but he did not get one for over eight months.⁶⁸ A woman in Mississippi charged with shoplifting spent eleven months in jail before a lawyer was appointed to her case and three additional months before entering a guilty plea.⁶⁹

Many poor people spend more time in jail waiting for the appointment of a lawyer and a hearing on bail than they would spend if found guilty and sentenced.⁷⁰ People accused of misdemeanors may be released if they plead guilty, but are held in jail if they maintain their innocence. As a result, many innocent people plead guilty to get out of jail.⁷¹

It is not unusual for judges and prosecutors in some municipal and misdemeanor courts to encourage defendants to proceed without lawyers and plead guilty.⁷² As a result, “thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective

⁶⁴ See NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 85–87 (2009), www.constitutionproject.org/manage/file/139.pdf.

⁶⁵ *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

⁶⁶ *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff’d as modified*, 930 N.E.2d 217 (N.Y. 2010).

⁶⁷ *Id.*

⁶⁸ Brian Chasoff, *Indigent Often Are Left in a Legal Limbo*, SAN ANTONIO EXPRESS-NEWS, Oct. 10, 2010, at A01.

⁶⁹ NAACP LEGAL DEF. & EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS 3 (2003).

⁷⁰ NAT’L RIGHT TO COUNSEL COMM., *supra* note 64, at 86–87; ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASSOC. OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS (Apr. 2009), www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808.

⁷¹ See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* 16–18 (Cornell Legal Studies Research Paper 2012), <http://dx.doi.org/10.2139/ssrn.2103787>; see also *When the Innocent Plead Guilty*, INNOCENCE PROJECT (Jan. 26, 2009), <http://www.innocenceproject.org/when-the-innocent-plead-guilty/>.

⁷² See BORUCHOWITZ ET AL., *supra* note 70 at 18–19.

representation.”⁷³ An analysis of misdemeanor cases in twenty-one Florida counties in 2010 found that seventy percent of defendants in those cases entered pleas of guilty or no contest at hearings that lasted an average of 2.93 minutes.⁷⁴ One-third were not represented by a lawyer.⁷⁵ Some defendants were not advised of their right to a lawyer and others were handed forms encouraging them to waive representation by a lawyer.⁷⁶

Many poor people who are supposedly represented by lawyers do not see their counsel until moments before pleading guilty and being sentenced. They have a few minutes of conversation with harried lawyers who know nothing about them or their cases. Those in custody may have their only conversation with a lawyer while handcuffed to other people on either side of them. Despite the complete inability of the lawyers to meet even the most minimal professional responsibilities—such as having confidential communications, and being sufficiently informed about the charges and their clients to offer a professional assessment of the cases—these discussions are often followed a few minutes later by the entry of a guilty plea and sentencing. A California lawyer explained that he was able to handle a high volume of cases because seventy percent of his clients entered guilty pleas at the first court appearance after he spent thirty seconds explaining the prosecutor's plea offer to them.⁷⁷

In these instances—called “meet ’em and plead ’em” in many jurisdictions—the utter corruption of the system is on display for all to see. Everyone—the judge, the prosecutors, the defense lawyers, the court personnel and the other defendants waiting to be processed—know that those pleading guilty have had no representation by an attorney. There is no interview, no investigation, no assessment of legal issues, and no performance of the other duties of a lawyer. And yet, the defendants will be asked if they are satisfied with their lawyers and they will be prompted to say yes, even though they have no idea of what constitutes real legal representation by an attorney.

This is not fair and it is not justice. Many of those who plead guilty in order to gain their immediate freedom will be placed on probation and assessed fines and fees they cannot pay, as previously described, and told to comply with conditions of probation they cannot meet. They are set up to fail and will soon be back in jail.

⁷³ ABA COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* iv (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

⁷⁴ ALISA SMITH & SEAN MADDAN, NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, *THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS* 23 tbl.9 (July 2011), <http://www.nacdl.org/reports/threeminutejustice>.

⁷⁵ *Id.*

⁷⁶ *Id.* at 15, 22.

⁷⁷ Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 305 (2009).

IV. THE LACK OF DIVERSITY AND UNLIMITED DISCRETION OF DECISIONMAKERS AND THE RESULTING DISPARITIES

Outcomes in criminal cases are determined by many discretionary decisions by prosecutors, judges, and jurors. These decisions are often influenced by the race of the victim, the race of the defendant, and the race and the racial attitudes of the person exercising discretion.

The criminal courts lack diversity more than just about any other institution in the country. They are run almost exclusively by white people. Ninety-five percent of the nation's 2,437 elected state and local prosecutors are white.⁷⁸ Seventy-nine percent are white men, who make up only thirty-one percent of the population.⁷⁹ More than three-quarters of state trial judges are white.⁸⁰ Sixty-eight percent of the people accused coming before courts in the 75 largest counties in 2009 were black or Hispanic.⁸¹ Prosecutors use their discretionary jury strikes against people of color so that even in communities with substantial minority populations, all of the jurors in a case may be white.⁸² This system produces gross racial disparities in virtually every area, from the denial of bond to the likelihood of being sent to prison to the length of sentences.⁸³

The greatest power in the system is not exercised by judges, but by prosecutors. Prosecutors decide whether to file charges or dismiss a case after an arrest, what charges to bring in the many instances where the same behavior may be prosecuted as different offenses with different penalties, when to file the charges, whether to charge in state or federal court or both, and whether to seek enhanced penalties such as mandatory minimum sentences, life imprisonment without parole, or the death penalty. As a result of the discretion exercised by

⁷⁸ Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html>.

⁷⁹ *Id.* See also *Justice for All*, REFLECTIVE DEMOCRACY CAMPAIGN, <http://wholeads.us/justice/> (last visited Oct. 23, 2016).

⁸⁰ TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?* 12 (2016), <http://gavelgap.org/pdf/gavel-gap-report.pdf>.

⁸¹ *Id.* (relying on BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES* (Dec. 2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>).

⁸² See Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES (June 1, 2010), <http://www.nytimes.com/2010/06/02/us/02jury.html?pagewanted=all>.

⁸³ See, e.g., Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL'Y INSIGHTS FROM THE BEHAVIORAL & BRAIN SCIENCES 103, 106-09 (2014); Andrew Kahn & Chris Kirk, *There's Blatant Inequality at Nearly Every Phase of the Criminal Justice System*, BUSINESS INSIDER (Aug. 9, 2015), <http://www.businessinsider.com/theres-blatant-inequality-at-nearly-every-phase-of-the-criminal-justice-system-2015-8>; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

prosecutors, just two percent of all the counties in the United States account for the majority of people who have been executed since 1976.⁸⁴ That is, sixty-six of the 3,143 counties in the United States account for *over half* the executions that have taken place.⁸⁵ And twenty percent of the counties in the United States account for *all* of the 3,125 people on death row.⁸⁶

Most critically, prosecutors decide whether and how to resolve cases with plea bargains, which account for ninety-seven percent of federal convictions and ninety-four percent of state convictions.⁸⁷ As the United States Supreme Court has recognized, the criminal justice today “is for the most part a system of pleas, not a system of trials.”⁸⁸ There is virtually no regulation of the plea bargaining process. Prosecutors obtain guilty pleas by threatening severe sentences if defendants go to trial and offering more lenient ones if they plead guilty.⁸⁹ Defendants who reject plea offers and insist on trials usually receive far more severe sentences if convicted than if they had accepted plea offers.⁹⁰

Even a sentence of death may be the price paid for rejecting a plea offer, as illustrated by Georgia’s execution of Kelly Gissendaner on September 30, 2015, as she sang “Amazing Grace” while tied to the gurney.⁹¹ She planned her husband’s murder with Gregory Owen, with whom she was having an affair, and Owen

⁸⁴ James Liebman & Peter Clark, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. LAW 255, 266 (2011); RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL 1 (Oct. 2013), <http://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

⁸⁵ *Id.* at 10.

⁸⁶ *Id.* at 7.

⁸⁷ *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

⁸⁸ *Id.* (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012)).

⁸⁹ *See, e.g.*, HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (Dec. 5, 2013), <http://hrw.org/node/120933> (describing how federal prosecutors obtain guilty pleas in drug cases by charging or threatening to charge offenses carrying harsh mandatory sentences and offering much lower sentences in exchange for pleading guilty).

⁹⁰ *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (upholding a prosecutor obtaining a mandatory sentence of life imprisonment for a defendant who rejected an offer of a sentence of five years for writing a bad check worth \$88.30).

⁹¹ Tracy Connor, Dan Shepherd & Gabe Gutierrez, *Georgia Woman Kelly Gissendaner Sings ‘Amazing Grace’ During Execution*, NBC NEWS (Sept. 30, 2015), <http://www.nbcnews.com/storyline/lethal-injection/pope-urges-halt-execution-georgia-woman-kelly-gissendaner-n435566>; Rhonda Cook, *Witness to Kelly Gissendaner Execution*, ATLANTA J.-CONST. (Sept. 30, 2015), <http://www.myajc.com/news/news/local-govt-politics/witness-to-an-execution/nnrZ7/> (“Her voice was joyful and light as she sang the first verse of ‘Amazing Grace.’ By the second verse, though, the 47-year-old dying woman struggled to sing as the lethal injection drug took hold.”).

carried it out by stabbing the husband to death.⁹² The prosecution made the same plea offer to both Gissendaner and Owen: a sentence to life in prison with the possibility of parole after twenty-five years.⁹³ Owen accepted the offer, testified against Gissendaner, and received the promised sentence. Gissendaner, on the advice of her lawyer, declined the offer, went to trial, and was sentenced to death.⁹⁴ Despite being a mother of three, a model inmate throughout almost two decades on death row,⁹⁵ pleas for clemency from Pope Francis⁹⁶ and the former Chief Justice of Georgia,⁹⁷ and others who had seen her remorse and positive influence on other prisoners and prison guards,⁹⁸ she was put to death. She was the first woman executed by Georgia since 1945.⁹⁹

Gissendaner's execution underscores the importance of maintaining one's moral bearings so as not to miss the stark immorality and injustice of executing a person because she turned down a plea offer. What happened to her is not unusual, but it is acceptable only in a legal system that has expediency as its main objective and rationalizes all sorts of injustices in a cloud of procedural machinations. Life imprisonment with the possibility of parole after twenty-five years was a sufficient punishment for the state of Georgia, as shown by the prosecutor's plea offer. Had she accepted the offer, she would be in prison and eventually eligible for parole; because she did not, she was killed.

Of the few cases that go to trial, the outcomes may be determined by the success of prosecutors in excluding people from color from juries. Each side in a criminal case is allowed to exercise a certain number of "peremptory strikes" to select the final twelve people who will serve on the jury and any alternates.

⁹² Rhonda Cook & Mark Davis, *Gissendaner Executed Early Wednesday Morning*, ATLANTA J.-CONST. (Sept. 30, 2015), <http://www.myajc.com/news/news/local-govt-politics/gissendaner-executed-early-wednesday-morning/nnq9t/>.

⁹³ Rosalind Bentley, *Will Georgia Execute this Woman?*, ATLANTA J.-CONST. (Feb. 12, 2015), <http://www.myajc.com/news/news/crime-law/on-death-row-in-us-2990-men-59-women/nj9X9/>.

⁹⁴ Cook & Davis, *supra* note 92.

⁹⁵ See GISSENDANER APPLICATION FOR RECONSIDERATION OF CLEMENCY 8–21, <https://pap.georgia.gov/sites/pap.georgia.gov/files/ParoleConsideration/Application%20for%20Reconsideration%20September%202015%20received%20by%20the%20Board%20on%20September%2024%2C%202015.pdf>.

⁹⁶ Rhonda Cook, *Pope: Spare Kelly Gissendaner's Life*, ATLANTA J.-CONST. (Sept. 29, 2015), <http://www.ajc.com/news/news/pope-spare-kelly-gissendaners-life/nnqnj/>; *Georgia Executes Kelly Gissendaner, Despite Plea from Pope Francis*, USA TODAY (Sept. 30, 2015), <http://www.usatoday.com/story/news/nation/2015/09/30/gissendaner-execution-update/73069532/>.

⁹⁷ See GISSENDANER APPLICATION, *supra* note 95 at 3–4.

⁹⁸ *Id.* at 8–21. See also Bill Rankin, *Guards Were Willing to Testify for Clemency for Gissendaner*, ATLANTA J.-CONST. (Sept. 29, 2015), <http://www.ajc.com/news/news/crime-law/guards-were-willing-to-testify-for-clemency-for-gi/nnq42/>.

⁹⁹ Cook & Davis, *supra* note 92.

The number of strikes varies by state. Historically, a peremptory strike could be used for any reason to remove a prospective juror.¹⁰⁰ However, the Supreme Court held in *Batson v. Kentucky* in 1986 that prosecutors may not strike jurors on the basis of race,¹⁰¹ and later held that strikes could not be based on gender.¹⁰² Nevertheless, strikes based on race and gender continue because it is impossible for a judge to determine the prosecution's true motivations for a strike.

Under the procedures adopted in *Batson*, a defendant must make a prima facie case of discrimination by showing a "pattern" of striking blacks or other evidence of racial motivation.¹⁰³ Upon such a showing, the prosecution must give a race-neutral explanation for striking the juror in question.¹⁰⁴ Finally, the trial judge must determine, in light of all of the evidence, whether the defendant has shown intentional racial discrimination by a preponderance of the evidence.¹⁰⁵ So, for a *Batson* challenge to succeed, a racially discriminatory result is not sufficient; instead, the strike must be traced to a racially discriminatory purpose.¹⁰⁶

Thus, in making a *Batson* challenge, "the defendant's practical burden [is] to make a liar out of the prosecutor"¹⁰⁷ by showing that he struck jurors based on their race and then lied by giving untrue reasons for the strikes. As United States District Judge Mark Bennett has observed, "[m]ost trial court judges will only find such deceit in extreme situations."¹⁰⁸ This is particularly true of judges who were prosecutors before becoming judges and routinely struck minority jurors when they were prosecutors. The prosecutors before them may be their former colleagues. Others may simply have a good working relationship with prosecutors who come before them frequently and are unwilling to rule that they discriminated and lied

¹⁰⁰ The Supreme Court explained in 1965: "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality," a peremptory strike may be based on "a real or imagined partiality[. . .] upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' upon a juror's 'habits and associations,' . . . [and] race, religion, nationality, occupation or affiliations." *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (citations omitted). As noted in the text, the Court has since held that race, as well as gender, is not a permissible basis for a peremptory strike.

¹⁰¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁰² *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

¹⁰³ *Batson*, 476 U.S. at 96–97.

¹⁰⁴ *Id.* at 97–98. Although the prosecutor is charged with providing a race-neutral reason, the ultimate burden to prove racial discrimination rests on, and never shifts from, the party objecting to the strike. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995).

¹⁰⁵ *Batson*, 476 U.S. at 98. *See also Purkett*, 514 U.S. at 767 (describing the process).

¹⁰⁶ *Batson*, 476 U.S. at 93.

¹⁰⁷ *Munson v. State*, 774 S.W.2d 778, 780 (Tex. Crim. App. 1989).

¹⁰⁸ Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 162 (2010) (citing examples of dubious reasons upheld by judges as "race neutral").

about it. Some elected judges may refrain from sustaining a *Batson* challenge for fear that it could cost them an election. Some judges dislike the *Batson* decision because they think lawyers should be able to strike any jurors they want. And judges often have their own biases. A California trial judge responded to a challenge to the prosecution's strikes of five black women by saying, "I have to say in my other death penalty cases I have found that the black women are very reluctant to impose the death penalty; they find it very difficult no matter what it is."¹⁰⁹ Nevertheless, the California Supreme Court upheld the strikes.¹¹⁰

Prosecutors have found it easy to defy *Batson* and get away with it most of the time. But occasionally, there is a discovery that reveals an undeniable intent to select jurors on the basis of race and to get around *Batson*. A videotape that was disclosed to the public showed a senior Philadelphia prosecutor training newer prosecutors to strike black people because, among other reasons, "blacks from the low-income areas are less likely to convict."¹¹¹ He went on to explain how to give "race neutral" reasons for the racially-based strikes to satisfy *Batson*:

When you do have a black juror, you question them at length. And on this little sheet that you have, mark something down that you can articulate later if something happens . . . and question them and say, "Well the woman had a kid about the same age as the defendant and I thought she'd be sympathetic to him," or "She's unemployed and I just don't like unemployed people." . . . So, sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.¹¹²

An Illinois appellate court called the *Batson* process a "charade," and described it as follows: "The State may provide the trial court with a series of pat

¹⁰⁹ *People v. Williams*, 299 P.3d 1185, 1203 (Cal. 2013).

¹¹⁰ *Id.*

¹¹¹ *Wilson v. Beard*, 426 F.3d 653, 656–57 (3d Cir. 2005).

¹¹² Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1079 (2011) (quoting from videotape of Assistant District Attorney Jack McMahan conducting a training program for Philadelphia prosecutors). See also *Wilson v. Beard*, 426 F.3d at 656–58 (affirming finding of a *Batson* violation by McMahan); *Commonwealth v. Basemore*, 744 A.2d 717, 727–34 (Pa. 2000) (remanding a case involving McMahan for a hearing and noting that the contents of the videotape "constitute direct evidence of the prosecutor's motivations at least at the time the tape was made, and may constitute circumstantial evidence of what occurred in the selection of the jury at Basemore's trial, which is alleged to have been conducted within the year following the training seminar"); *Judge v. Beard*, No. 02-CV-6798, 2012 WL 5960643, at *9–10 (E.D. Pa. Nov. 29, 2012) (concluding that the prosecutor "may indeed have implemented some of Mr. McMahan's taught strategies," and granting an evidentiary hearing for the prosecutor to explain his peremptory strikes).

race-neutral reasons . . . [W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, ‘Handy Race-Neutral Explanations’ or ‘20 Time-Tested Race-Neutral Explanations.’”¹¹³ Citing cases upholding reasons for strikes, the court suggested that the list could include:

[T]oo old, too young, divorced, “long, unkempt hair,” free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, “lived in an area consisting predominantly of apartment complexes,” single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same “age bracket” as defendant, deceased father and prospective juror's aunt receiving psychiatric care.¹¹⁴

And, indeed, prosecutors are often provided with such a list of “race neutral” reasons long before they see the people of color that they will strike. The Texas District and County Attorneys Association distributed such a list, called “*Batson Basics*,” which was given to new Dallas County prosecutors at its Prosecutor Trial Skills Course in 2004. Among the ready-to-use race neutral reasons were:

Single; unmarried with children
Body language; poor facial expression
Long hair and a goatee
Earrings (male) or a nose ring
Wore sunglasses; T-shirt
Chewing gum
Didn't speak
Very vocal
Angry
Expressionless
Inattentive
Worked for a labor union
Teachers; postal workers; courthouse employees
Psychologists; consumer advocates
No religious preference¹¹⁵

¹¹³ State v. Randall, 671 N.E.2d 60, 65 (Il. App. Ct. 1996).

¹¹⁴ *Id.* at 65–66 (footnotes omitted).

¹¹⁵ *Gold Earrings and Sunglasses*, DALL. MORNING NEWS, Aug. 23, 2005, at 11A (part of a series of articles on the failure of *Batson* in Dallas); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1707 n.165 (2006).

The North Carolina Conference of District Attorneys distributed a one-page “cheat sheet” of race-neutral reasons titled “*Batson* Justifications: Articulating Juror Negatives” at a state-wide trial advocacy course called “Top Gun II.”¹¹⁶ The reasons included:

Age – Young people may lack the experience to avoid being misled or confused by the defense

Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney

Body Language – arms folded, leaning away from questioner, obvious boredom . . .

Juror Responses – which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.¹¹⁷

Many of the reasons on these handouts were subjective assessments of demeanor that apply to almost all jurors. It is usually impossible for a judge to know whether they are true.¹¹⁸

A North Carolina court found that a prosecutor had used reasons from the list distributed at the “Top Gun II” course to justify striking African Americans in three capital cases.¹¹⁹ The court also found, based on a comprehensive analysis of jury strikes in capital cases, that in death penalty cases prosecutors strike African Americans at double the rate they strike other potential jurors.¹²⁰ The probability of such a disparity occurring in a race-neutral process is less than one in ten trillion.¹²¹ The court also found a history of “resistance” by prosecutors “to permit[ting] greater participation on juries by African Americans.”¹²²

¹¹⁶ Order Granting Motions for Appropriate Relief at 73–74, ¶¶ 68–72, *State v. Golphin*, No. 97 CRS 42314-15 (N.C. Super. Ct. Dec. 13, 2012), https://www.aclu.org/files/assets/rja_order_12-13-12.pdf.

¹¹⁷ *Id.* at 74, ¶ 71.

¹¹⁸ *See, e.g.,* *People v. Mai*, 305 P.3d 1175, 1219 (Cal. 2013) (holding that a prosecutor’s assertions about a juror’s casual dress and “bored” and disinterested manner were race-neutral even if not found by the judge and confirmed by the record).

¹¹⁹ Order Granting Motions for Appropriate Relief, *supra* note 116, at 74–77, ¶¶ 72–78.

¹²⁰ The Court found that prosecutors statewide struck 52.8 per cent of eligible black venire members and 25.7 per cent of all other eligible venire members. *Id.* at 153, ¶ 254.

¹²¹ *Id.* *See also id.* at 153–158, ¶¶ 255–63 (further discussing disparity in strike ratios).

¹²² *Id.* at 4–5.

Hearings on whether strikes were motivated by race often occur at the bench or in chambers so that members of the public and the media do not see them. They may be mystified as to why there is an all-white jury in a community with a substantial black or Hispanic population. The hearings are held out of sight because, when observed, the racism and dishonesty is apparent for all to see in many instances. The prosecutor strikes the blacks. The defense objects. The prosecutor asserts that the reasons for the strikes were not race, but other reasons. Everyone observing knows that at least some of the reasons are not true and that the jurors were struck because of their race. But the judge will accept the reasons and move on. So most judges think it best not to have many observers.

Even when it is undeniable that prosecutors struck jurors because of race, they may get another chance to assert race-neutral reasons to justify the strike. For example, Florida prosecutors said that they struck a black woman because “[s]he is a young black female[;] the Defendant is a young black male.”¹²³ That is hardly a race-neutral reason, but they asserted a second reason: concern about the juror’s attitudes on the death penalty.¹²⁴ She had said that she was “in the middle” with regard to the death penalty and whether it was unevenly applied.¹²⁵ The trial judge upheld the strike based on “uneven imposing of the death penalty.”¹²⁶ On direct appeal, the Florida Supreme Court held that there was no *Batson* violation because the defendant did not show a strong likelihood that the strike was “solely because of race.”¹²⁷ A federal court of appeals on habeas corpus review deferred to the state court in upholding the “mixed motives” for the strike.¹²⁸ It had previously upheld the finding of an Alabama court that there was no *Batson* violation even though the prosecutor admitted, “Race was a factor that I considered just as I considered age, just as I considered their place of employment and so on and so forth.”¹²⁹ Allowing the consideration of race as one of multiple reasons for a strike encourages prosecutors to assert a number of reasons in hope of establishing that race was not the sole reason.

¹²³ King v. State, 514 So.2d 354, 356 (Fla. 1987); King v. Moore, 196 F.3d 1327, 1333 (11th Cir. 1999).

¹²⁴ King v. State, 514 So.2d at 356–57.

¹²⁵ King v. Moore, 196 F.3d at 1332–33.

¹²⁶ King v. State, 514 So.2d at 357.

¹²⁷ *Id.* (emphasis original).

¹²⁸ King v. Moore, 196 F.3d at 1335.

¹²⁹ Wallace v. Morrison, 87 F.3d 1271, 1273–75 (11th Cir. 1996). This “dual motivation” approach was also adopted by other courts, see, for example, *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995); *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995); and *Howard v. Senkowski*, 986 F.2d 24 (2d Cir. 1993), but rejected by others. See, e.g., *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (“A court need not find all nonracial reasons pretextual in order to find racial discrimination.”); *Robinson v. United States*, 878 A.2d 1273, 1284 (D.C. 2005); *McCormick v. State*, 803 N.E.2d 1108, 1112–13 (Ind. 2004).

However, requiring that race be the sole reason or allowing a strike as long as one reason is race neutral even if others are not appears inconsistent with the Supreme Court's decisions in *Foster v. Chatman*¹³⁰ and *Snyder v. Louisiana*¹³¹ finding *Batson* violations where peremptory strike were "motivated in substantial part by discriminatory intent."¹³²

In *Foster v. Chatman*, the prosecutor gave a "laundry list" of 11 reasons for one strike,¹³³ and eight reasons for the other.¹³⁴ The Court found that with regard to the first juror "much of the reasoning provided by [the prosecutor] has no grounding in fact,"¹³⁵ and with regard to the second, "many of the[] justifications [could not] be credited,"¹³⁶ but it did not require or find that all 19 reasons were false.¹³⁷

Nevertheless, prevailing on a *Batson* claim remains difficult. Trial judges are not required to explain on the record their ruling on a *Batson* challenge. Appellate courts do not reverse them unless they find their rulings to be "clearly erroneous."¹³⁸ Both trial and appellate judges may be under political, personal and other pressures to reject a *Batson* challenge. Federal courts are limited in review of *Batson* and other constitutional claims by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that federal courts may not grant a writ of habeas corpus unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"¹³⁹; or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."¹⁴⁰

¹³⁰ 136 S. Ct. 1737 (2016).

¹³¹ 552 U.S. 472 (2008).

¹³² *Foster*, 136 S. Ct. at 1754; *Snyder*, 552 U.S. at 478, 485. See also *Williams v. Plier*, 616 F. App'x. 864, 870 (9th Cir. 2015) (upholding district court's finding of *Batson* violation, where peremptory strike of black juror "was motivated in substantial part by race"); *Cook v. LaMarque*, 593 F.3d 810, 815 (9th Cir. 2010) ("[W]e reject the district court's mixed-motives analysis, and limit our inquiry to whether the prosecutor was 'motivated in substantial part by discriminatory intent.'").

¹³³ *Foster*, 136 S. Ct. at 1748.

¹³⁴ *Id.* at 1751.

¹³⁵ *Id.* at 1749.

¹³⁶ *Id.* at 1751.

¹³⁷ See also *Sheets v. State*, 535 S.E.2d 312, 315 (Ga. Ct. App. 2000) ("laundry list" of reasons suggests discrimination).

¹³⁸ *Hernandez v. New York*, 500 U.S. 352, 368–69 (1991).

¹³⁹ 28 U.S.C. § 2254(d)(1) (1996).

¹⁴⁰ 28 U.S.C. § 2254(d)(2) (1996). The deference is illustrated by *Lee v. Commissioner*, 726 F.3d 1172, 1191–92, 1223–28 (11th Cir. 2013), in which the Eleventh Circuit Court of Appeals deferred to a decision of the Alabama courts that *Batson* was not violated even in a case where the prosecution used all of its twenty-one peremptory strikes against blacks.

Thus, to succeed on a *Batson* challenge, defense counsel must overcome the natural reluctance of the trial judge to find the prosecutor a racist and a liar; the prosecutor's easy access to time-tested race neutral reasons, whether from lists like the ones distributed by Texas and North Carolina prosecutors or from caselaw; the conscious or unconscious racism of the judge and prosecutor; the willingness of courts to accept almost any reason as "race neutral"; deference by appellate courts and even greater deference by federal courts in habeas corpus review; and a long history of discrimination in the use of peremptory strikes and the unwillingness of courts to acknowledge and deal with it.

Batson has done so little to stop discrimination that the Washington Supreme Court found in 2013 that "racial discrimination remains rampant in jury selection."¹⁴¹ Justice Thurgood Marshall pointed out at the time *Batson* was decided that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."¹⁴² Justice Marshall also observed:

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.¹⁴³

Justice Marshall pointed out that only the elimination of peremptory strikes would end race discrimination in jury selection.¹⁴⁴ Justice Breyer has more recently called for the elimination of peremptory strikes.¹⁴⁵ The lack of any movement on the part of the Supreme Court, state courts, and the legislatures speaks volumes with regard to the lack of any commitment to prevent racial discrimination in jury selection. But even minor reforms, such as a reduction in the number of

¹⁴¹ *State v. Saintcalle*, 309 P.3d 326, 329 (Wash. 2013) (en banc); see also *Flowers v. State*, 947 So.2d 910, 937 (2007) (en banc) (finding in a case where the prosecution used all 15 of its strikes against African Americans that "racially-motivated jury selection is still prevalent").

¹⁴² *Batson v. Kentucky*, 476 U.S. at 106 (Marshall, J., concurring).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 103.

¹⁴⁵ *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (citing *Miller-El v. Dretke*, 545 U.S. 231, 267–68 (2005) (Breyer, J., concurring)).

peremptory strikes for each side, are not being considered. After observing that “it is evident that *Batson* . . . is failing us,”¹⁴⁶ the Washington Supreme Court stated:

[A] growing body of evidence shows that racial discrimination remains rampant in jury selection. In part, this is because *Batson* recognizes only “purposeful discrimination,” whereas racism is often unintentional, institutional, or unconscious. We conclude that our *Batson* procedures must change and that we must strengthen *Batson* to recognize these more prevalent forms of discrimination.¹⁴⁷

Yet, the courts, the legislatures, the bar associations and others responsible for protecting the jury are failing to address “rampant discrimination” and the abject failure of *Batson*.

V. CONCLUSION

This nation celebrates—in the abstract—equal justice for all. It imagines and glorifies a legal system in which race and poverty do not influence the outcomes of criminal cases, but the reality is far different. It will be very hard to change that reality because many people like it just the way it is. It makes it easier for prosecutors to get convictions in cases of poor people, and particularly poor people of color. It disenfranchises them. It gives an advantage to white people of means who can afford their own lawyers. In plea bargaining, the promise of immediate liberty or the threat of draconian sentences—even the death penalty—brings about guilty pleas that save time and avoid appeals. However, it is neither fair nor just and it is destroying lives, families and communities.

It is the collective responsibility of everyone to acknowledge this reality and try to change it. We will always be challenged by it. It will require our eternal vigilance and struggle to change it. As W.E.B. Du Bois put it, “We must complain. Yes, plain, blunt complaint, ceaseless agitation, unflinching exposure of dishonesty and wrong—this is the ancient, unerring way to liberty, and we must follow it.”¹⁴⁸ It is the duty of every member of the legal profession, which has a monopoly on the sale of legal services, to complain, to expose unfairness, and engage with other members of society in ceaseless agitation for equality and justice in the courts.

It will not be obtained through a great Supreme Court decision or a sweeping legislative act. It will not be universal, but with greater attention to diversity,

¹⁴⁶ *State v. Saintcalle*, 309 P.3d 326, 334 (Wash. 2013) (en banc); *Flowers v. State*, 947 So.2d 910, 937 (2007) (en banc).

¹⁴⁷ *Saintcalle*, 309 P.3d at 329.

¹⁴⁸ W. E. B. DuBois, *The Niagara Movement*, 2 VOICE OF THE NEGRO 619, 621 (1969) (originally appeared in the September 1905 Issue).

judges and prosecutors may look more like the people coming before them. Education and agitation may convince some state legislatures to abolish or consolidate municipal courts and prohibit private probation companies. If legislatures do not act, people can convince their municipalities to quit using their courts as cash cows and to quit jailing people who are too poor to pay fines and fees. Some legislatures and communities can be persuaded to fully fund public defender programs to represent those accused of crimes from the moment of arrest until the final resolution of their cases to minimize the risk of miscarriages of justice and increase the likelihood of just verdicts and sentences. Perhaps someday, so many all-white juries that do not represent the diversity of their communities may convince legislatures and courts to reduce or eliminate peremptory strikes in order to minimize or end that source of discrimination.

And no matter how great the failing of the system generally may be, lawyers—whether working in public defender offices, taking court-appointed cases, or serving clients *pro bono*—can provide clients with the representation that the Sixth Amendment requires. Lawyers have a wonderful opportunity to make a difference—to save a life, to preserve someone’s liberty, and, failing that, to lift up and offer hope, comfort, advice and advocacy to the neglected, mistreated and despised as they deal with the system. Lawyers can be what Dr. Martin Luther King, Jr. called drum majors for justice: people who are “there in love and justice and in truth and in commitment to others, so that we can make of this old world a new world.”¹⁴⁹

¹⁴⁹ Martin Luther King, Jr., *The Drum Major Instinct* (Feb. 4, 1968), http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_the_drum_major_instinct.1.html.