

**AN ANALYSIS OF THE LEGAL AND PRACTICAL IMPLICATIONS
OF THE POTENTIAL INCREASED PARTICIPATION IN JURY
SERVICE BY RACIAL MINORITIES IN THE U.S. CRIMINAL
JUSTICE SYSTEM**

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I.	INTRODUCTION.....	1366
II.	HISTORY OF RACIAL MINORITIES AND JURY SERVICE.....	1367
	<i>A. Juror Qualifications</i>	1367
	<i>B. Jury Selection</i>	1370
III.	LEGAL AND PRACTICAL BARRIERS FOR RACIAL AND ETHNIC MINORITIES TO JURY SERVICE.....	1372
	<i>A. Voter Registration Records</i>	1373
	<i>B. Juror Questionnaires</i>	1374
	<i>C. Felony Convictions</i>	1375
	<i>D. Lack of Adequate Education, Low-Income, and Poverty</i>	1377
	<i>E. Procedural and Substantive Legal Barriers</i>	1378
IV.	PROPOSED SOLUTIONS TO LEGAL AND PRACTICAL BARRIERS TO MINORITY JURY SERVICE.....	1379
	<i>A. English Language Assistance</i>	1379
	<i>B. Limitations on Felony Convictions</i>	1380
	<i>C. Alternative Criteria</i>	1380
	<i>D. Increased Training and Education for Prosecutors and Other Officials</i>	1381
V.	MODEL RACIAL REALITY IN JURY SELECTION ACT (“JSA”).....	1381
	<i>A. The Act</i>	1381
	<i>B. Analysis of the Act</i>	1383
	1. Equal Protection.....	1383
	2. Due Process.....	1385
	3. Impartial Jury.....	1387
VI.	EFFECTS OF INCREASED SERVICE BY ETHNIC AND RACIAL MINORITIES ON JURIES.....	1391
VII.	CONCLUSION.....	1395

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I. INTRODUCTION

Jury service has been regarded as both a privilege and an honor that all citizens should have the opportunity to engage in.¹ Similarly, the right of a criminal defendant to have an impartial jury of the state and district in which the crime was committed is guaranteed by the Sixth Amendment to the U.S. Constitution.² However, for many citizens, especially racial and ethnic minorities in this country, the opportunity to serve on a jury is not as readily available as it is for other citizens.³ As a result, many minority defendants face a jury that may be of the state or district in which the crime was committed, but that is arguably not impartial.⁴

Part II of this paper first seeks to examine the history of the exclusion of African-Americans and other racial and ethnic minorities from juries, especially criminal juries, including a discussion of the discriminatory acts and practices that resulted in such exclusion. Next, Part III of this paper will discuss the real, theoretical, legal, and practical barriers, that exist, which decrease, and in some cases deter, racial and ethnic minorities from serving on juries. After that, Part IV provides some proposed solutions to these barriers that local jurisdictions might be able to implement to help increase the numbers of racial and ethnic minorities that serve on juries. Part V discusses the Model Racial Reality in Jury Selection Act (“JSA”), a model act hypothesized by the late, great law professor Derrick Bell, as a prototype to increase the participation of racial and ethnic minorities on criminal juries. In that vein, included in this discussion is why such a law might be needed, arguments in favor and arguments against such a model act, and the likelihood of success of such a law passing constitutional muster and increasing the service of minorities on criminal juries. It is argued that the JSA should be enacted because it would serve as a necessary affirmative action measure for racial minorities in jury service, it would help to ensure that criminal defendants are not deprived of their due process rights by providing for the inclusion of racial minorities on the jury, and it would help to secure the right of minority defendants to a trial by an impartial jury, thus promoting the fair administration of justice not only for minority jurors and defendants, but for all people. Part VI will discuss some

¹ Powers v. Ohio, 499 U.S. 400, 406 (1991).

² U.S. CONST. amend. VI.

³ DERRICK A. BELL, RACE, RACISM, & AMERICAN LAW, 460–61 (5th ed. 2004) (discussing how white jury lists compiled from voting lists and driver’s license registries that have low minority representation, deny the poor, people of color and alien residents, the chance to serve on a jury).

⁴ William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 181 (2001). (“The divergent experiences and perspectives of black and white Americans have implications for their service as jurors.”).

of the effects of having increased service of racial and ethnic minorities on juries in helping to effectively carry out the jury's role in our society. Finally, Part VII concludes with some takeaways regarding increasing the service of minorities on criminal juries.

II. HISTORY OF RACIAL MINORITIES AND JURY SERVICE

Like many other institutions in this country, the jury room was not immune from discrimination toward minorities and the effects of slavery, Jim Crow, and other vestiges of these institutions and practices that make up the history of the United States.⁵

A. *Juror Qualifications*

The composition of the grand jury and petit jury, which indict and ultimately try a criminal defendant respectively, depends in large part on the pool from which the jury lists are compiled.⁶ Historically, and in many instances still today, potential jurors were and are chosen primarily through the use of voter registration records.⁷ This is probably the case for many reasons, chiefly among which is the requirement that a juror reside in the judicial district in which they may serve on a jury. It is likely easier to utilize voter registration information to develop juror lists, as this information will likely be the same as that necessary to qualify persons to serve on juries in the district where the case is being tried. Thus, a logical starting point to discuss early prohibitions on minority jury service must be the conditions which existed prior to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. Prior to the passage of these amendments, slavery had not been abolished, the former slaves did not have citizenship rights, and former male slaves did not yet have the right to vote.⁸ Thus, it follows that African-Americans could not serve on juries in the absence of these constitutional amendments.

Furthermore, in some states, such as West Virginia, jury service was limited to white males by state statute.⁹ Additionally, there were many counties, especially in the south, that used various devices, such as poll taxes, literacy

⁵ Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 355 (1999).

⁶ *See id.* at 356.

⁷ BELL, *supra* note 3.

⁸ *See* U.S. CONST. amends. XIII, XIV, XV. It must be noted that females were not granted the right to vote until the ratification of the Nineteenth Amendment to the U.S. Constitution. U.S. CONST. amend. XIX.

⁹ *See* 1872–73 W. Va. Acts 102 (“All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided.”).

tests, and grandfather clauses to exclude blacks from voting lists and consequently from jury service.¹⁰ In fact, even on a personal note, I remember growing up in Birmingham, Alabama, and my grandparents discussing the fact that they were required to take literacy tests in order to vote. In their neighborhood, the practice was to have one person go and take the test, and once they passed they would come back and assist the other neighbors with studying for the test so that they could pass and be entitled to vote. These literacy tests were required by law in many southern states, such as Oklahoma, which adopted an amendment to the Oklahoma Constitution, in order to deny suffrage to African-Americans, even after the ratification of the Fifteenth Amendment.¹¹ This amendment, like similar provisions in other states, provided in pertinent part that no person could vote unless they could read and write; but it included an exception, which “grandfathered” in white persons, who were entitled to vote prior to January 1, 1866.¹² Thus, the practical effect was that white persons would not have to take these literacy tests, since white persons or their parents or grandparents would have been entitled to vote prior to this date because they were not slaves or were not denied citizenship rights. Former slaves, or their descendants, on the other hand, who would not have been entitled to vote prior to that date, were required to take these literacy tests. Moreover, in many places, blacks were excluded from jury service even where facially neutral laws were in place.¹³ Furthermore, even in those instances where blacks survived these kinds of barriers, they were summarily excluded from election lists, and thus jury lists as well, by registrars and clerks.¹⁴

Despite these barriers, there were some early legal protections adopted through legislation or court decision, which attempted to protect minority rights in jury service. As an initial matter, the Civil Rights Act of 1875 prohibited the exclusion of African-Americans from jury service.¹⁵ However, the Supreme Court of the United States later declared this law unconstitutional.¹⁶ Notwithstanding the foregoing, there were several early cases and some later ones that invalidated the practice of excluding African-Americans from jury

¹⁰ HOWARD SMEAD, *BLOOD JUSTICE* 32 (1986) (noting that a study conducted around the turn of the century revealed that there were many counties with formally neutral laws where there had never been a black juror).

¹¹ See OKLA. CONST. art. III, § 4(a).

¹² See *id.*

¹³ See generally GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 247 (1910).

¹⁴ *Id.*

¹⁵ Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (“An act to protect all citizens in their civil and legal rights.”).

¹⁶ See, e.g., *United States v. Stanley*, 109 U.S. 3 (1883).

service.¹⁷ For instance, one of the Court's earliest decisions in this area involved upholding statutes prohibiting the exclusion of blacks from serving on state juries on Equal Protection grounds.¹⁸ Furthermore, in *Strauder v. West Virginia*, the Supreme Court invalidated the West Virginia statute specifically restricting jury service to white males on the basis that this statute violated the Fourteenth Amendment's equal protection clause.¹⁹ In *Guinn v. United States*, the Supreme Court held that the grandfather clause and accompanying literacy test provisions in the Oklahoma Constitution were unconstitutional based on the fact that this provision constitutes a violation of the Fifteenth Amendment's prohibition on the denial of the right to vote based on one's race, color, or former condition of servitude.²⁰ Later, the Supreme Court held that members of other minority groups may not be excluded from jury service.²¹ In *Whitus v. Georgia*, the Supreme Court overturned convictions of defendants that had been indicted and convicted by grand and petit juries selected from jury lists compiled using racially-segregated tax records.²² Furthermore, the Supreme Court has held that the systematic exclusion of minorities from serving on juries results in a denial of due process to minority defendants as well as white defendants.²³

Moreover, the Supreme Court's decision in *Taylor v. Louisiana* held that not only could women not be excluded from jury pools, but that the jury pool must constitute a fair cross-section of the community from which the pool is drawn.²⁴ The Court went even further to articulate a standard to be used to challenge the under-representation of racial minorities in the grand jury selection process.²⁵ As a result of these and other decisions, it became clear that the previous history of the legally-sanctioned total exclusion of minorities and women from jury pools was no longer going to be permitted.²⁶ That being said,

¹⁷ *Strauder v. West Virginia*, 100 U.S. 303, 309–10 (1880); *see also* *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Sims v. Georgia*, 389 U.S. 404, 407–08 (1967); *Whitus v. Georgia*, 385 U.S. 545, 551–553 (1967); *Coleman v. Alabama*, 377 U.S. 129 (1964).

¹⁸ *Ex parte Virginia*, 100 U.S. 339 (1880).

¹⁹ *Strauder*, 100 U.S. at 311–12.

²⁰ *Guinn v. United States*, 238 U.S. 347, 367–68 (1915).

²¹ *Hernandez v. Texas*, 347 U.S. 475, 481–82 (1954).

²² *Whitus v. Georgia*, 385 U.S. 545, 551–53 (1967).

²³ *Peters v. Kiff*, 407 U.S. 493, 503–05 (1972).

²⁴ 419 U.S. 522, 527–28 (1975).

²⁵ *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977) (finding that once plaintiff makes a showing that the procedure used resulted in the substantial under-representation of an identifiable group, of which they are apart of, the state must rebut this inference of discrimination).

²⁶ EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 11 (2010), available at www.eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf.

there were and likely will continue to be situations where racial and ethnic minorities may be disqualified from jury pools through other means.²⁷

B. Jury Selection

Probably the next most important aspect in the composition of the jury, at least with respect to the jurors that will hear a case in court, is likely the jury selection process.²⁸ During jury selection, the larger jury venire or the jurors selected from the jury pool or lists, is whittled down to the petit jury, which will actually hear the case at trial. This is done primarily through a process called voir dire where the respective attorneys or parties question prospective jurors, with each side having the opportunity to remove a potential juror either for cause, or for any reason, through the use of peremptory challenges.²⁹ Unfortunately, there is also a history of discrimination against African-Americans, other minorities, and women in the jury selection process, generally through the use of peremptory challenges based on race or gender.³⁰

In essence, discrimination in jury selection replaced the discrimination that had been all but forbidden with respect to juror lists and pools. Thus, even if a juror list or pool included African-Americans, other racial and ethnic minorities, or women, these individuals could still be excluded from the jury that actually heard the case at trial by virtue of the voir dire. The result is that criminal defendants still would face a jury that was likely not a fair cross-section of their community.

Moreover, the use of the peremptory challenge was an effective tool in excluding minorities from juries, as by its very nature, it is not necessary to provide a reason for striking a potential juror, even if the real reason is racially motivated. A challenge for cause does not carry with it the same level of danger created by use of the peremptory challenge. The misuse of the peremptory challenge in this manner resulted in several minority defendants, especially African-American defendants, being tried and convicted by all-white, male juries in the south. Ultimately, minority defendants ended up serving prison sentences or worse, being executed as a result of this practice.³¹

It was increasingly difficult to challenge this practice of using the peremptory challenge on the basis of race or gender, especially in light of the *Swain v. Alabama* decision of the Supreme Court.³² In *Swain*, the Supreme Court held that the peremptory challenge could be used to exclude potential

²⁷ *Id.* at 14.

²⁸ *Id.* at 11.

²⁹ *See id.* at 12.

³⁰ *See id.*

³¹ *Id.*

³² *See id.* (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

jurors, even if all jurors that were excluded were the same race, as long as there was no proof of systematically or intentionally excluding potential jurors based on race.³³ As one might imagine, the burden of showing intentional discrimination under *Swain* was just as difficult then as it is today, where one is unable to ascertain the true motives of the person accused of discriminatory conduct. As a result, there were very few successful challenges to this practice after *Swain*.³⁴

In fact, it was not until over 20 years later that the Supreme Court overruled *Swain* and held in *Batson v. Kentucky*, that the defendant may require the prosecutor to produce a race-neutral explanation for the exclusion of veniremen from the petit jury because of their race, other than the fact that the defendant is a member of the same race.³⁵ *Batson* made clear that the use of peremptory challenges to exclude a juror due to race in a criminal case was unconstitutional and could be challenged by the other side, even if it raised a mere inference of discrimination.³⁶ If so, then the other side is allowed to make a “*Batson* Challenge” to the striking of a prospective juror, at which time the party seeking to use the peremptory challenge must offer a legitimate non-discriminatory reason for seeking to exclude the potential juror.³⁷ It is ultimately up to the court to decide whether the proffered reason for excluding the potential juror is racially discriminatory based on the evidence considered under the circumstances.³⁸ This process takes place outside the presence of the other jurors, usually in the court’s chambers. If the court accepts the proffered explanation, the peremptory challenge may stand and the juror remains excluded, but if the court does not, then the challenge may not stand and the juror may sit on the jury, unless otherwise excluded or disqualified.

Furthermore, *Batson*’s principle has been extended to include civil cases and to prevent the exclusion of jurors based on sex or sexual orientation, at least according to one court of appeals case.³⁹ However, despite all of the positive effects of *Batson*, the tragedy lies in the fact that it is not retroactive, meaning that *Batson* is not applicable to any previous convictions, or sentences,

³³ *Swain v. Alabama*, 380 U.S. 202 (1965).

³⁴ EQUAL JUSTICE INITIATIVE, *supra* note 26, at 12.

³⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

³⁶ EQUAL JUSTICE INITIATIVE, *supra* note 26, at 30.

³⁷ *See id.*

³⁸ *See id.*; *see also* *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005).

³⁹ *See* *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) (extending *Batson*’s protections to discrimination based on gender); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that *Batson*’s protections apply to civil cases); *SmithKline Beecham Corp. v. Abbott Labs.* 740 F.3d 471 (9th Cir. 2014) (holding that *Batson*’s protections apply to discrimination based on sexual orientation).

occurring prior to *Batson's* holding.⁴⁰ Consequently, many minority criminal defendants may have been convicted, may have served prison sentences, and sadly maybe even were executed without enjoying the benefits that *Batson* provided.⁴¹

Nevertheless, an area of jury selection where the Supreme Court has attempted to provide protection to minority defendants is its allowance of inquiries about the personal racial biases of prospective jurors. Here, the Court initially provided that questioning jurors about racial bias and prejudice on voir dire was permissible only where the victim of the crime and the defendant are members of different races.⁴² However, the Court later went further in holding that in certain instances the Constitution requires voir dire questioning on the issue of racial bias.⁴³

III. LEGAL AND PRACTICAL BARRIERS FOR RACIAL AND ETHNIC MINORITIES TO JURY SERVICE

Despite the history of racial discrimination in jury service and the legal gains that have been attained to stop such practices, the reality is that there still remains legal and practical barriers for racial and ethnic minorities in jury service in this country. These exist in many forms, as there is a major difference between anti-discrimination in jury service on the one hand, and the enforcement of or increasing of diversity in jury service by racial and ethnic minorities on the other. The former, while vitally important and necessary, is only one step in the process of increasing jury service by racial and ethnic minorities. The latter is the next challenge or hurdle that must be surmounted as it still exists in many forms in today's society. For instance, some barriers to increased minority service on juries are facially neutral and deal more with practical issues than legal ones, such as the use of voter registration records and juror questionnaires in order to develop jury pools and the disqualification from jury pools due to felony convictions, lack of education, or poverty. Other barriers are legal or substantive in nature, such as courts giving too much deference toward prosecutors' proffered justifications for removing minority jurors, lack of experience by defense attorneys in being able to challenge

⁴⁰ See *Allen v. Hardy*, 478 U.S. 255, 257–58 (1986); EQUAL JUSTICE INITIATIVE, *supra* note 26, at 13.

⁴¹ EQUAL JUSTICE INITIATIVE, *supra* note 26, at 13.

⁴² *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

⁴³ *Ristaino v. Ross*, 424 U.S. 589, 598 (1976) (acknowledging the Court's decision in *Ham v. South Carolina*, 409 U.S. 524 (1973) (stating that the allowance of voir dire on the topic of racial prejudice, was "necessary to meet the constitutional requirement that an impartial jury be impaneled," in that case, where a prominent black civil rights worker was on trial in a southern courtroom, and as a part of his defense he claimed he was framed because of his civil rights activities)).

discrimination in jury selection, and the difficulty in inquiring into and/or discovering racial bias possessed by potential jurors.

A. Voter Registration Records

One of the initial barriers to jury service by racial and ethnic minorities is the use of voter registration records to compile jury pool lists.⁴⁴ At least as recent as the past 15 years or so, and over a decade after *Batson*, many counties utilized and still utilize voter registration records either as the primary means or at least to assist in developing jury pool lists.⁴⁵ As mentioned earlier, while there may be some arguments in favor of using voter registration records, there are some significant reasons why this provides a barrier to participation for racial and ethnic minorities.⁴⁶ Part II of the paper bears out the fact that even after the passage of the Fifteenth Amendment protecting the right to vote, racial discrimination continued to persist through various tactics designed to suppress voting by racial minorities, especially in the south, which precipitated the passage of the Voting Rights Act of 1965.⁴⁷

Thus, the continued use of these records could have an inherent discriminatory effect or impact on minority jury service, even if not intentional in nature, due to the racially discriminatory past involving voting and racial minorities. For example, in this country, more minorities live in the southern United States than any other area of the country.⁴⁸ However, there are several southern states that still have jury pools and ultimately trial juries that are not racially diverse in many respects.⁴⁹ It is likely no coincidence that this history of racial discrimination was more prevalent in the south, and the south happens to be the area of the country where more racial minorities are located; but yet, the jury service of racial minorities is still very low in comparison to their percentage of the population.⁵⁰ In addition, given the demographics of the south and racial minorities, it would seem that the “fair cross-section” requirement provided by the Supreme Court would yield greater results in racial and ethnic minority jury service. Indeed, the white jury lists compiled from voting lists and driver’s license registries that have low minority representation, deny the poor, people of color, and alien residents the chance to serve on a jury.⁵¹

⁴⁴ BELL, *supra* note 3.

⁴⁵ RANDALL KENNEDY, RACE, CRIME, AND THE LAW 233 (First Vintage Books ed. 1998).

⁴⁶ BELL, *supra* note 3.

⁴⁷ *Id.*; see also *supra* Part II.A.

⁴⁸ 2010 Census Shows Black Population Has Highest Concentration in the South, U.S. CENSUS BUREAU (Sept. 29, 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn185.html.

⁴⁹ EQUAL JUSTICE INITIATIVE, *supra* note 26, at 14–24.

⁵⁰ See *id.*

⁵¹ BELL, *supra* note 3.

On the other hand, there is an argument that the use of voter registration records in order to develop jury pool lists makes financial and practical sense.⁵² For instance, if persons are not sufficiently interested enough in civic service to get registered to vote, the argument goes that they would be equally as uninterested in and unlikely candidates for jury service.⁵³

B. Juror Questionnaires

Another barrier to minorities in jury service is the use of questionnaires that are mailed that must be returned by prospective jurors.⁵⁴ This is a barrier as most blacks, and likely other racial minorities, tend to move more often than the white majority, and as a result, many of these questionnaires may be returned to sender because they are utilizing outdated addresses.⁵⁵ Moreover, blacks for instance, tend to return these questionnaires at lower rates than whites.⁵⁶ Another problem with these questionnaires is that many blacks are disqualified from juror pool lists based on the subjective and objective criteria used by these questionnaires.⁵⁷ Some examples of subjective criteria that tend to disqualify blacks, and by comparison other racial and ethnic minorities, are those where officials disqualify respondents who appear to “be deficient in the understanding of English, in ‘intelligence,’ in ‘integrity.’”⁵⁸ Some objective criteria that tends to disqualify blacks and likely other racial and ethnic minorities are where respondents have failed to finish high school for example, as this is a purportedly objective measure of intelligence.⁵⁹ The problem with many of these measures of juror qualifications is that there is little, if any, legal authority or basis that these qualifications should be required for jury service. General legal capacity is based on a person being of legal age and sound mind.⁶⁰ If legal capacity is sufficient for the law to enforce contract, property, and testamentary rights, then this capacity should be sufficient to qualify a person for jury service. Any requirements above those necessary for legal capacity appear to disproportionately impact the representation of blacks and other racial and ethnic minorities in jury service, even if unintentional, and their validity is therefore suspect.

⁵² KENNEDY, *supra* note 45, at 236.

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *Id.* at 233.

⁵⁹ *See id.*

⁶⁰ JEFFREY F. BEATTY & SUSAN S. SAMUELSON, INTRODUCTION TO BUSINESS LAW 169 (4th ed. 2013).

C. Felony Convictions

Included with the objective criteria mentioned above, one of the most difficult barriers to jury service by racial and ethnic minorities is that of a felony conviction. This is because “larger percentages of blacks than whites have been convicted for committing felonies, a certification of misconduct that precludes jury service in most (if not all) jurisdictions.”⁶¹ Actually, a felony conviction presents two hurdles for racial and ethnic minorities, as not only is this disqualifying criteria, but generally, unless returned to them, most convicted felons also lose their right to vote through disenfranchisement, depending on the type of felony conviction. Thus, some convicted felons would not be listed on voter registration records to even be selected for a jury pool list. There are several causes of greater percentages of African-Americans and other racial and ethnic minorities having a felony conviction than whites, and thereby being disqualified from jury service, resulting in the underrepresentation of minorities on juries. For instance, the cradle-to-prison pipeline has created an overabundance of people of color being incarcerated at younger ages and in greater numbers than their white counterparts, which increases the likelihood that even once these young people reach the age of majority to serve on a jury, they will be disqualified due to a felony conviction.⁶²

Furthermore, the prison industrial complex has created an emphasis on increased incarceration, rather than an increased use of diversion programs which could help reduce or even avoid a felony conviction altogether.⁶³ Moreover, lack of adequate funding for mental health programs or initiatives, as well as substance and alcohol abuse treatment programs, results in the prison system becoming the “catch-all” for any portions of society for which there is no other place to turn, and the lack of these programs disproportionately affect communities of color, where in many cases these diseases go undiagnosed and untreated.⁶⁴

In addition, due to decreased budgets, lack of understanding and training by law enforcement and other officials in government, these issues are defaulted to criminal justice issues to be solved by a prison system with no hope of rehabilitation, rather than recognizing these issues for what they truly are, which are social issues, to be resolved by appropriately trained professionals.⁶⁵ This conclusion is supported by the fact that only about 10% of

⁶¹ See KENNEDY, *supra* note 45, at 233.

⁶² James Bell, *Correcting the System of Unequal Justice*, in THE COVENANT WITH BLACK AMERICA 49 (2006).

⁶³ *Id.* at 49–50.

⁶⁴ David M. Satcher, *Securing the Right to Healthcare and Well-Being*, in THE COVENANT WITH BLACK AMERICA 1, 5 (2006).

⁶⁵ See, e.g., *id.* at 17; see BELL, *supra* note 3, at 60–61; Maya Harris, *Fostering Accountable Community-Centered Policing*, in THE COVENANT WITH BLACK AMERICA 71, 89 (2006).

the prisoners in the federal prison system are serving sentences for serious and violent offenses, which means that the remaining 90% of those serving time in federal prison are there for non-violent offenses.⁶⁶

The most startling evidence of the over-incarceration of African-Americans and other racial and ethnic minorities, and as a result, the underrepresentation of minorities on juries, is the fact that African-Americans and Latinos each account for approximately 12% of the U.S. population, but over 43% and 18% respectively, of the prison population.⁶⁷ Moreover, almost 30% of all African-American males now born in this country are, or will have been, incarcerated at some point in their lives.⁶⁸ This means that there is at least one-third of an entire gender of one race that will likely be disqualified from ever serving on a jury. Thus, there is no doubt that African-Americans will be significantly underrepresented on juries, especially African-American males. The irony in this entire scenario is that generally these racial and ethnic minority prisoners or former prisoners were once criminal defendants, and based on all of the previous points mentioned earlier, it is likely that minorities were underrepresented on the jury they faced, if there were any minorities on the jury at all. It is even more ironic that these people, even after they have conceivably become a contributing member of society, will never be able to serve on a jury due to the prior felony conviction. Thus, these citizens who were initially tried and convicted by a jury that was not racially diverse—either through intentional discrimination or unintentional discriminatory impact—can never serve on a jury to possibly one day be part of the remedy to the system that helped incarcerate them. Thus, this serves to create and perpetuate the underrepresentation of minorities serving on juries.

Furthermore, another contributing factor to the underrepresentation of minorities on juries due to a felony conviction are the unequal sentencing guidelines at the federal level, and in some cases at the state level, that disproportionately result in African-Americans and other racial and ethnic minorities being incarcerated on average for longer sentences than their white counterparts.⁶⁹ As a result of these disproportionate numbers and results, members of the American Bar Association, justices on the Supreme Court, and other prominent legal scholars have called for sentencing reform.⁷⁰

⁶⁶ Mortimer B. Zuckerman, *Get a Little Less Tough on Crime*, U.S. NEWS (May 9, 2014, 1:00 PM), <http://www.usnews.com/opinion/articles/2014/05/09/its-time-for-prison-reform-and-an-end-to-mandatory-minimum-sentences>.

⁶⁷ See Satcher, *supra* note 64, at 53.

⁶⁸ See *id.*

⁶⁹ Joe Palazzolo, *Racial Gap in Men's Sentencing*, WALL ST. J. (Feb. 14, 2013, 5:36 PM), <http://www.wsj.com/articles/SB10001424127887324432004578304463789858002>.

⁷⁰ Rhonda McMillon, *Bipartisan Push Is on for Sentencing Reform*, A.B.A. J. (Feb. 1, 2014, 7:40 AM), http://www.abajournal.com/magazine/article/bipartisan_push_is_on_for_sentencing_reform.

The response to the argument against the use of a felony conviction as a disqualifying factor in jury service is that this requirement is necessary, as those convicted of a crime are more likely to have a negative view of the judicial and legal systems, a lack of personal judgment, and a disregard for the law in general.⁷¹ To that end, many of these criteria, including being a registered voter and having no felony conviction, have been upheld by courts as being constitutional despite the fact that they remain as practical bars to increasing jury service by racial and ethnic minorities.⁷²

D. Lack of Adequate Education, Low-Income, and Poverty

As indicated earlier, one of the bases or criteria for disqualifying potential jurors used by many officials is whether someone is intelligent or has a high school education.⁷³ However, merely because one does not have a high school diploma does not mean that he lacks sufficient intelligence in general or is not qualified to serve as a juror specifically. The problem is that African-Americans and other racial and ethnic minorities on average attend poorer schools and have a lower quality of educational opportunities and resources than their majority counterparts.⁷⁴ In addition, the percentage of African-Americans without a high school credential is higher than the percentage of whites who lack a high school credential on average.⁷⁵ This means that fewer African-Americans and racial and ethnic minorities will be able to serve on juries, as they will be disqualified for their lack of a high school diploma.

In addition to a lack of educational resources, unfortunately, wealth and income levels also have an adverse impact on the number of minorities serving on juries.⁷⁶ For instance, the wealth and income levels of African-Americans and other racial and ethnic minorities lag behind that of whites.⁷⁷ In addition, unemployment rates for African-Americans and other racial and ethnic minorities is almost twice that of whites.⁷⁸ Unfortunately, fewer educational and employment opportunities, coupled with the fact that many African-Americans and racial and ethnic minorities live in lower income neighborhoods, increases the possibility of their being less educated and

⁷¹ KENNEDY, *supra* note 45, at 235.

⁷² *See id.* at 234.

⁷³ *See id.* at 232.

⁷⁴ Edmund W. Gordon, *Establishing a System of Public Education in Which All Children Achieve at High Levels and Reach Their Full Potential*, in *THE COVENANT WITH BLACK AMERICA* 23, 25 (2006).

⁷⁵ *Id.* at 33.

⁷⁶ EQUAL JUSTICE INITIATIVE, *supra* note 26, at 25.

⁷⁷ Marc H. Morial, *Accessing Good Jobs, Wealth, and Economic Prosperity*, in *THE COVENANT WITH BLACK AMERICA* 163, 166–67 (2006).

⁷⁸ *See id.* at 166.

becoming involved with the criminal justice system in some form or another.⁷⁹ Based on the criteria mentioned above to disqualify potential jurors, this further leads to the lack of, or underrepresentation of, African-Americans and racial and ethnic minorities on juries.

E. Procedural and Substantive Legal Barriers

Even in recent years and current times, there are still many tactics that have been used to secure little or no minority representation on juries. For instance, even where African-Americans make up greater than one-fourth of the population, prosecutors have successfully removed 80% of qualified African-American jurors from death penalty cases in Houston County, Alabama, between 2005 and 2009.⁸⁰ This resulted in half of these cases having all-white juries and the other half of these cases having only one African-American juror.⁸¹ In Jefferson Parish, Louisiana, with an African-American population of over 20%, prosecutors struck African-American prospective jurors at least three times as much as white jurors, resulting in no effective African-American representation in 80% of criminal trials in 2003.⁸² This is a precise example of why some affirmative measures, such as those discussed in Parts IV and V of this paper respectively, may be necessary to avoid these kinds of results in criminal prosecutions. In addition, prosecutors, especially in southern states, have been trained on how to exclude African-American jurors, using apparently racially-neutral tactics.⁸³ Another example of a legal or procedural bar to African-Americans and other racial and ethnic minorities serving on juries includes situations where the defense attorney fails to properly object to the tactics of prosecutors in jury selection as well as where appellate courts accord too much deference to prosecutors' proffered reasoning behind excluding minority jurors, as in the state of Tennessee, for example.⁸⁴

These results illustrate the unfortunate truth that the value of the *Batson* decision is still limited,⁸⁵ and minorities are still being excluded. This is largely due to the fact that the prosecutor has a low threshold to justify his or her use of the peremptory challenge, and that white judges may not be well equipped to

⁷⁹ See generally AM. SOCIOLOGICAL ASS'N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM (2007), available at [http://www.asanet.org/images/press/docs/pdf/asaRace Crime.pdf](http://www.asanet.org/images/press/docs/pdf/asaRace%20Crime.pdf).

⁸⁰ EQUAL JUSTICE INITIATIVE, *supra* note 24, at 14.

⁸¹ See *id.*

⁸² See *id.*

⁸³ *Id.* at 16.

⁸⁴ *Id.* at 20, 22.

⁸⁵ *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) (warning that *Batson* would not be the end of the use of peremptory challenges to discriminate against minorities in the jury-selection process).

recognize elements of potential racism in the prosecutor's explanation.⁸⁶ For example, there have been several cases where prosecutors have been allowed to present almost any reason to exclude minorities from serving on juries.⁸⁷ Furthermore, many times prosecutors in the south offer purported facially neutral reasons for striking African-American jurors, which turn out to be merely pretext for the true intended result of excluding African-Americans from juries.⁸⁸ Some of these reasons have been upheld by courts as being permissible, such as where a juror "looked like a drug dealer," or "[had] dyed red hair and [wore] a large white hat and sunglasses."⁸⁹ In other cases, courts have overturned convictions based on a finding that prosecutors systematically excluded African-Americans from juries, where prospective African-American jurors were struck because they believed that police occasionally engaged in racial profiling, or had filed a civil employment discrimination lawsuit based on race against an employer.⁹⁰

Furthermore, despite the fact that inquiries into the racial biases of jurors is allowed, just like its other efforts in the area of jury selection, the Supreme Court enacted certain limitations on this practice by restricting inquiries about racial prejudice during voir dire only to special circumstances where there is a considerable possibility that the defendant's trial could be contaminated with racial prejudice.⁹¹ Moreover, even if special circumstances existed, it may not even be possible on voir dire to determine whether potential jurors will allow their racial attitudes to affect their deliberations.⁹²

IV. PROPOSED SOLUTIONS TO LEGAL AND PRACTICAL BARRIERS TO MINORITY JURY SERVICE

A. English Language Assistance

In addition to the Jury Selection Act ("JSA") discussed in Part V below, one recommendation to increase African-American and other minority jury service, if English language proficiency remains a requirement at the federal or state level, could be to utilize, for example, an interpreter to assist

⁸⁶ BELL, *supra* note 3, at 456 (discussing the possibility that white judges may share the racial biases of the white prosecutor, consciously or subconsciously).

⁸⁷ *Wallace v. State*, 507 So. 2d 466 (Ala. 1987) This was a post-*Batson* case where the Alabama Supreme Court upheld the prosecutor's exclusion of black jurors for reasons like being a homemaker, student, or "grandmotherly type." *Id.*

⁸⁸ *See id.* at 17.

⁸⁹ EQUAL JUSTICE INITIATIVE, *supra* note 26, at 18.

⁹⁰ *Id.* at 17.

⁹¹ *Id.*

⁹² BELL, *supra* note 3, at 463 (discussing the fact that potential jurors of any race will not likely divulge the extent of their racial attitudes or feelings).

jurors with English language deficiencies.⁹³ This would help jurors who need it with understanding the testimony at trial, for example. Interpreters are routinely used by the courts to assist criminal defendants and others involved in the court system with understanding and navigating the legal system.⁹⁴ If this practice is utilized for other participants in the legal system, there appears to be no reason why this could not be used as a method to increase racial and ethnic minority jury service.

B. *Limitations on Felony Convictions*

Another recommendation as it relates to the qualifications to serve on a jury, if the felony conviction requirement is not removed, is to, at minimum, place a time limitation on the date or type of the felony conviction, or some similar limitation that would not completely disqualify a person who had a previous conviction from ever serving on the jury, regardless of whether their voting privileges are restored. While some states have the moral turpitude provision that allows for restoration of rights if the person has not committed a crime of moral turpitude, this standard is not sufficient in that it does not provide clear guidelines, is too subjective, and in many cases may not be utilized or even interpreted consistently by state attorneys general on a state-by-state basis.⁹⁵ In addition, as mentioned earlier, this standard is generally only applied to the restoration of voting privileges.⁹⁶ The better option is for there to be clear standards or guidelines for when a conviction will no longer disqualify a person from serving on a jury that has at least minimum guarantees across state lines, especially given the fact that the right to an impartial jury is a federal constitutional right to which each criminal defendant is entitled.

C. *Alternative Criteria*

Furthermore, jurisdictions could adopt different criteria that is not so heavily focused on education, income, or affluence in selecting potential jurors for the jury pool list. To that end, rather than requiring at least a high school diploma, officials could utilize the same standard of capacity to serve on a jury as that commonly used in other areas of the law: sound mind and age of majority. In addition, providing for a waiver of certain requirements such as a high school diploma, depending on one's work experience, could also assist in this area.

⁹³ See, e.g., Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

⁹⁴ See Court Interpreters Act, 28 U.S.C. § 1827 (2012).

⁹⁵ OFFICE OF THE SEC'Y OF STATE OF ALA., THE VOTING RIGHTS OF PEOPLE WITH CRIMINAL CONVICTIONS IN ALABAMA (2005), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_9369.pdf.

⁹⁶ See *id.*

2015] *PARTICIPATION IN JURY SERVICE BY RACIAL MINORITIES* 1381

D. Increased Training and Education for Prosecutors and Other Officials

Moreover, as discussed in this Article, in several instances, prosecutors have been trained on effective ways to exclude or strike racial and ethnic minority potential jurors. However, if prosecutors were trained on methods that would not exclude racial and ethnic minorities, but rather include them, this could also assist with the increased participation of minority jurors. Furthermore, greater training and education for officials who are in charge of generating potential juror lists could assist in avoiding the exclusion of racial and ethnic minorities as well. These officials could be educated and trained to find ways to develop new criteria that will make sure that racial and ethnic minorities are not disqualified from jury pool lists. In addition, these officials or the judicial system could take steps to educate the general public about their rights to serve on a jury and ensure that if someone receives a jury summons or questionnaire, that they have the assistance to complete and return the questionnaire and have any other information that they need to be able to not only be listed in the jury pool, but also to actually serve on juries.

V. MODEL RACIAL REALITY IN JURY SELECTION ACT (“JSA”)

In addition to the proposed solutions mentioned in Part IV, an effort to respond to the effects of discrimination against racial and ethnic minorities in jury service, and based on the underrepresentation of African-Americans and other racial and ethnic minorities on juries, the late, great law professor Derrick Bell, discussed a hypothetical Proposed Model Racial Reality in the JSA.⁹⁷ It is important to first list the major provisions of the JSA and then to analyze the JSA in terms of its advantages, disadvantages, and its legal and constitutional validity.

A. The Act

§9.19 Racism Hypo: Proposed Model Racial Reality in Jury Selection Act

Following an extensive investigation of the nation’s jury selection procedures and an in-depth study of racial discrimination attributable to jury findings, a national commission of experts concluded that (a) nonwhite racial and ethnic minorities are not serving on juries in criminal cases in anything like their percentages in the population; (b) underrepresentation of nonwhite racial and ethnic minorities is due to exclusion from jury lists by blatant and subtle

⁹⁷ BELL, *supra* note 3, at 566.

discrimination, artificially high eligibility standards, inadequate jury fee compensation, and similar hardships; and exclusion from the jury box is due to the planned but nonsystematic use by prosecutors of peremptory challenges; (c) jury verdicts, the overwhelming majority of which are returned by all- [sic] or mainly white juries, strongly reflect the continued functioning of racial discrimination and racist beliefs in this country.

To remedy quickly as much of this discrimination as possible, the commission has prepared and urges state legislatures to enact the following Model Racial Reality in Jury Selection Act.

Section 1. Effective immediately, in all criminal cases in which defendants are from nonwhite racial and ethnic minorities and are entitled to a jury trial, the court shall take appropriate steps to insure that the jury impanelled in such trials contains no less than the percentage of the defendant's racial or ethnic minority group in the jurisdiction where the case is tried. Provided, however, that if the defendant's racial or ethnic minority group is less than 50 percent of the population in the jurisdiction where the case is tried, the court shall take appropriate steps to insure that the jury impanelled in such trials contains no less than 50 percent of the defendant's racial or ethnic minority. Notwithstanding this section, a nonwhite racial or ethnic minority defendant, at his or her discretion, may waive the special entitlement provided by this act. Exercise of this waiver will not jeopardize such defendant's right guaranteed by the U.S. Constitution to a jury from which no member of the community is excluded on the basis of race, sex, religion, or ethnic origin.

Section 2. The state Commission Against Discrimination is hereby given authority to promulgate such further regulations as may be necessary to put this act into effect.

Section 3. Failure by the state to comply with this act will result in the reversal of any convictions obtained against any such nonwhite racial and ethnic minority defendants.

Section 4. The results of this act will be evaluated by a team of specialists, designated by the State Commission Against Discrimination. The act will expire in three years. Renewal by legislative reenactment is, of course, possible.⁹⁸

B. Analysis of the Act

1. Equal Protection

As an initial matter, although the JSA makes a classification based on race, it does not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Under the Supreme Court's most recent Equal Protection jurisprudence, any time a statute places any classification based on race, it will be subjected to strict scrutiny.⁹⁹ In order for a statute to survive strict scrutiny, it must be narrowly tailored to achieve a compelling governmental interest.¹⁰⁰ The articulated purpose of the JSA is to remedy racial discrimination against minorities in jury service and the resulting jury verdicts that reflect the racial biases and prejudices of those serving on juries. The Supreme Court has determined that remedying the effects of past identified discrimination that is the result of the governing body's own policy or procedure is a compelling state interest.¹⁰¹ The Supreme Court has held in other contexts that diversity, and the benefits provided thereby, provide a compelling governmental interest.¹⁰² Here, both the Act's primary and secondary purposes are to increase diversity in the jury box and to ensure that minority criminal defendants' fates are not determined by the small or non-existent presence of minorities on the jury panel. Therefore, the JSA likely satisfies the standard for a compelling governmental interest under the strict scrutiny framework.

In satisfying the narrow tailoring prong of strict scrutiny, the Court considers several factors. One of these factors is whether the statute is limited in time. The Court has indicated that this factor is met where the statute contains sunset provisions or provides for periodic review or assessment.¹⁰³ The Act provides that it will expire in three years, and that the Act's results will be evaluated by a team of specialists. Both of these provisions fit squarely within the confines of the limited in time requirement. The next factor is the extent to which race-neutral alternatives were considered. Here, the Court will only

⁹⁸ BELL, *supra* note 3, at 566–67.

⁹⁹ Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995).

¹⁰⁰ *Id.*

¹⁰¹ City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492–93 (1989).

¹⁰² Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

¹⁰³ *Id.* at 342.

require a good faith effort to consider “workable race-neutral alternatives.”¹⁰⁴ As mentioned earlier, neutral processes for determining jury service involving the use of voter lists and vehicle registries have proven to be ineffective in making the jury box more diverse. This is due to literacy and language requirements, as well as others, that while neutral on their face, disproportionately eliminate persons of color from jury service.¹⁰⁵ In addition, where a case is tried in a white community, the lack of blacks and other minorities in the venire will be credited to neutral reasons, even if it is the result of housing discrimination.¹⁰⁶ Also, as mentioned earlier, despite their disparate effects on minorities serving on the jury, courts have been unwilling to permit challenges to the racial makeup of a jury based on neutral lists.¹⁰⁷ Thus, while it appears that there are race-neutral alternatives currently in place, the reality is that these alternatives have the practical effect of sustaining the underrepresentation of racial minorities in the jury box, rather than remedying these effects. Indeed this conclusion is supported by the fact that there are several instances where minorities have lived in a county or judicial district for many years, yet have either never served on a jury or have only served once on a jury.¹⁰⁸ This is true even in instances where minorities have held gainful employment, have been registered voters for many years, have had better than average levels of education, and have had no criminal history, and despite residing in a small jurisdiction.¹⁰⁹ Even more telling is for those who are minorities, or have minority family members, friends, or acquaintances, to consider for themselves how many times, if any, they have been summoned for jury duty, let alone served on a jury. This is likely one of the reasons behind the name of the Act, as it reflects the racial reality of minorities serving on juries rather than merely the theory or ideal of a racially diverse jury.

The next factor is whether the statute unduly trammels the interests and expectations of innocent non-minorities.¹¹⁰ In this regard, the Court is concerned with fixed percentages based on race that will eliminate fewer opportunities for other races.¹¹¹ Here, the Act provides for the jury to be made up of the percentage of minorities equal to the proportion that minorities

¹⁰⁴ *Id.* at 339.

¹⁰⁵ BELL, *supra* note 3, at 461 (finding other factors cited include the fact that employers do not compensate for jury service and child care responsibilities).

¹⁰⁶ *Id.*

¹⁰⁷ *See* United States v. Cecil, 836 F.2d 1431, 1446, 1451 (4th Cir. 1988); United States v. Young, 822 F.2d 1234, 1239 (2d Cir. 1987).

¹⁰⁸ EQUAL JUSTICE INITIATIVE, *supra* note 26, at 21.

¹⁰⁹ *See id.*

¹¹⁰ Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

¹¹¹ City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506–07 (1989).

occupy in the community in which the cases are tried.¹¹² The Act further provides that 50% of the jury should be composed of minorities in the event that minorities make up less than 50% of the population in the community. While this requirement might seem arbitrary, it does not create an absolute bar for whites serving on juries, nor does it exclude whites from jury service. Instead, it merely seeks to include minorities where they are currently significantly under-represented. Moreover, the Act also has a provision by which the minority defendant may opt-out or waive its use in their trial. This represents a further limitation on the Act's use and the extent to which it may adversely affect the rights of non-minorities serving on the jury panel. Due to all of the specific restrictions provided for in the Act, it should satisfy the narrow tailoring requirement of the strict scrutiny framework. Therefore, the JSA should survive strict scrutiny and withstand an Equal Protection challenge.

Opponents to the Act may argue against its validity on equal protection grounds, as well. These arguments would suggest that any measure that ensures racial representation in accordance with the racial population would be just as impermissible as the systematic exclusion of racial minorities based on their race.¹¹³ However, the systematic exclusion of minorities can be distinguished from the provisions of the Act, in that the justification for the latter is to remedy the effects of the former. Furthermore, as previously discussed, the Act is limited in time and scope and has the necessary safeguards to protect the interests of non-minority jurors. A practical argument that may also be proposed against the passage of the Act revolves around the potential administrative burden that would result from attempts to provide for proportionate racial representation in the jury panel. In response to these arguments, the JSA would provide for the State Commission Against Discrimination to administer the Act and its provisions and to promulgate any further regulations to facilitate its implementation.¹¹⁴ Moreover, given the compelling interests supported by the Act, it should not be dismissed based solely on speculation as to the perceived administrative burdens that may or may not result from its passage. In addition, the team of specialists that will review the Act may be able to develop efficient ways to administer the JSA once it is enacted.

2. Due Process

In addition, the JSA can be a helpful tool in guaranteeing minority defendants their right to due process in criminal trials. Under the Fourteenth Amendment, the core requirements for procedural due process are having

¹¹² BELL, *supra* note 3, at 566–67.

¹¹³ *Id.* at 441 (discussing that this conclusion is suggested by the Court's opinion in *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

¹¹⁴ *See id.* at 566–67.

notice of the charges or issue, the opportunity for a meaningful hearing, and an impartial decision maker.¹¹⁵ While it cannot be disputed that having a meaningful hearing is essential for any criminal defendant to obtain a fair trial, it is also apparent that many people retain their racial biases while serving on the jury.¹¹⁶ Thus, the racial composition of the jury can have a major impact on the extent to which the criminal defendant may receive a full and fair hearing. This is especially true where the jury is composed primarily of members of a race different from the defendant's or where the defendant's race and the race of the victim are different.¹¹⁷ Under these circumstances and others, for a minority defendant to have a meaningful hearing, it may be necessary that there is a proportionate representation of minorities in the community on the jury. The JSA is designed to accomplish just such a task. Without it, minority defendants face the ever-present danger that they will face a jury that has decided their case before the presentation of any evidence in court.¹¹⁸ Where this occurs, there is no question that the minority defendant has not received a meaningful hearing and thus no due process.

Equally as important, and indeed intertwined with receiving a meaningful hearing, is the opportunity to have an impartial decision maker.¹¹⁹ "Fair representation of cognizable groups is deemed essential to the impartiality and legitimacy of the jury system."¹²⁰ Thus, the JSA should be passed because it will help ensure that minorities are represented in the jury box, and in turn that all defendants, not just minorities, have a fair decision maker. Opponents to the Act would argue that the JSA will result in a jury that is not impartial because minority jurors will favor minority defendants. However, the mere presence of minorities on the jury does not automatically mean that they will be fair to members of their group.¹²¹ Instead, the fact that more minorities are on the jury will help to provide a greater spectrum of experiences, opinions, and

¹¹⁵ See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973) (impartial decision maker); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (meaningful hearing); *Mullhane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice).

¹¹⁶ BELL, *supra* note 3, at 441.

¹¹⁷ Bowers et al., *supra* note 4, at 241–42 (discussing the results of a study showing that in cases where the defendant is black and the victim is white, white jurors are more likely to view the black defendant as dangerous).

¹¹⁸ Dale W. Broeder, *The Negro in Court*, in RACE, CRIME AND JUSTICE 301 (Charles E. Reasons & Jack L. Kuykendall eds., 1972) (discussing a 1950 study, in which one juror commented that blacks must be taught how to behave); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1989).

¹¹⁹ *Gibson*, 411 U.S. at 578–79.

¹²⁰ BELL, *supra* note 3, at 440.

¹²¹ *Castaneda v. Partida*, 430 U.S. 482, 504 (1977) (Marshall, J., concurring).

attitudes, and such a variety of perspectives could help to replace prejudice with fairness.¹²²

For example, in many instances, black jurors and white jurors bring dramatically different perspectives into the jury box.¹²³ These perspectives then inform their decisions about the result of the case and the potential sentence to be imposed. The JSA provides the assurance that all of these perspectives are included on the jury. As a result, all participants in the criminal trial process can be confident that the jury verdict is based on the merits of the case, and not contaminated with the racial biases and prejudices that accompany many jurors participating in trials today. Therefore, the JSA should be passed because by ensuring the representation of minorities in the jury box, it can provide in fact, what the jury system has provided only in theory. That is, the standard of due process required by the U.S. Constitution, and one that would be a model for jury selection systems in all states to follow.

3. Impartial Jury

Finally, the JSA should be passed because it can secure the constitutional right of criminal defendants, especially minority defendants, to have a trial by an impartial jury.¹²⁴ This is because the current protective measures in jury selection are inadequate to completely address the underrepresentation of racial minorities on the jury.¹²⁵ At present, the efforts to eliminate discrimination in the jury box and increase the extent to which minorities serve on juries are focused on preventing the *exclusion* of minorities.¹²⁶ Instead, however, in order to truly secure the right to an impartial jury for minority defendants, and indeed all defendants, the focus must be on the *inclusion* of minorities in the jury box. Focusing only on combating the exclusion of minorities ignores the effects of the past exclusion of minorities from jury panels. Indeed, it is because of this past discrimination on the jury panel that a measure like the JSA is required.¹²⁷

An additional shortcoming of previous and current efforts in this area is that the constitutional requirement that a jury be composed of a fair cross-

¹²² BELL, *supra* note 3, at 440.

¹²³ Bowers et al., *supra* note 4, at 181 (discussing how black jurors are more skeptical of the evidence presented at trial, noting possible taints of racial bias, while white jurors are more likely to be more accepting of the prosecution's evidence).

¹²⁴ U.S. CONST. amend. VI.

¹²⁵ BELL, *supra* note 3, at 440 ("Fair representation of cognizable groups is deemed essential to the impartiality and legitimacy of the jury system.").

¹²⁶ Taylor v. Louisiana, 419 U.S. 522 (1975); Strauder v. West Virginia, 100 U.S. 303 (1879).

¹²⁷ BELL, *supra* note 3, at 467 (concluding that affirmative action in the jury box may be necessary to address the absence of minorities on juries, due to past discrimination).

section of the community has only been applied to the venire or jury panel.¹²⁸ The Supreme Court has never required a racially representative petit jury (the jury that actually hears and decides the case) in criminal trials.¹²⁹ Instead, the Supreme Court has consistently distinguished between the exclusion of minorities from the jury panel or venire (which is protected), and their inclusion on the petit jury that is actually drawn (which is not currently protected).¹³⁰ Thus, it is clear that in the court's opinion that the Constitution, through either the Sixth or Fourteenth Amendments, only requires the possibility of obtaining a jury from a fair cross-section of the community, through the venire, but does not guarantee that the jury actually selected for the trial represents a fair cross-section of the community.¹³¹ While drawing the line at this point theoretically seems to provide greater protection for minority defendants in practice, it does little in the way of securing the defendant's right to an impartial jury because it does little to increase the representation of minorities on the petit jury.¹³² Unfortunately, this means that the reality that a minority defendant ends up facing an all-white jury, even with all the attendant problems discussed above, many times may be deemed immaterial, thereby obviating the necessity for the JSA.¹³³ The JSA provides that where minority defendants are tried in criminal cases, the *jury impanelled* in such trials will be composed of minorities in the same proportion of minorities in the community. Thus, it is the petit jury that the JSA focuses on and is designed to address.¹³⁴ Therefore, the fair cross-section requirement focusing only on the venire or jury panel represents the ideal or goal of having an impartial, diverse jury, while the JSA is focused on making this requirement and the Sixth Amendment command of an impartial jury a reality. In doing so, the JSA helps to increase the level of justice that a criminal defendant may obtain; it guarantees increased diversity on juries for minority defendants, which some scholars argue is a necessity. Further, it is aimed at ensuring that minorities can go from the jury venire or panel to the jury room, a result that has historically and in many cases today, still remains out of reach.¹³⁵

The JSA provides that necessary next step beyond just the venire or jury panel because it applies to the petit jury, and arguably it is the petit jury whose impartiality should matter for constitutional purposes in criminal trials.

¹²⁸ *Taylor*, 419 U.S. at 538 (reaffirming principle from *Strauder*, specifically refusing to require that the petit jury consist of various distinctive groups in the population).

¹²⁹ *BELL*, *supra* note 3, at 441.

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 566–67.

¹³⁵ *See supra* Parts II, III; *see also* EQUAL JUSTICE INITIATIVE, *supra* note 26, at 72–76.

Moreover there is a historical basis for requiring the trial jury to have a racially diverse make-up.¹³⁶ For instance, in England in the 12th century, Jews sued by Christians were permitted to have a jury that was at least 50% Jewish.¹³⁷ In addition, in the early 1600s and 1800s, mixed juries of Indians and aliens were allowed in this country where the defendants were Indians and aliens, respectively.¹³⁸ Furthermore, during Reconstruction, a South Carolina statute provided that black defendants could be tried by a jury that was composed of black or negro jurors in proportion to the number of black or negro voters in a particular location.¹³⁹

Another area in the jury selection process where the Court's efforts have fallen short is where the Court has sought to place limitations on the use of the peremptory challenge by the prosecutor. As previously discussed, the efforts in the area of limiting the use of the prosecutor's peremptory challenges show that while the protection for minority defendants is there in principle, it is lacking in reality. Since the JSA provides that minorities are to serve on the jury that is impanelled, it provides a way to completely bypass the potential use of this barrier by the prosecutor, at least to the extent necessary to comply with the Act. The prosecutor would not be totally prohibited from using the peremptory challenge to select the petit jury, but would instead be able to use it only for those juror positions remaining after the Act's provisions are met. The fact that the JSA does not eliminate the use of the peremptory challenge by the prosecutor helps counteract the argument by opponents that it would be too broad in its application.

In addition, while courts have allowed inquiries into the racial biases of potential jurors during voir dire, the extent to which this can be done is limited to special circumstances where there is a significant probability that the defendant's criminal trial could be tainted by racial prejudice.¹⁴⁰ However, for all the reasons previously discussed in this Article, this threshold could be extremely difficult for a minority defendant to meet. As such, the JSA should be passed to help reduce the need to utilize voir dire on the subject of racial bias and prejudice and ensure that the jury is racially representative. While the JSA cannot eliminate any presence of racial bias in the jury box, at the very least it is designed to reduce the extent to which the jury's impartiality may be suspect due to the absence of minorities from the jury box, especially in cases involving minority defendants.¹⁴¹

¹³⁶ KENNEDY, *supra* note 45, at 237–38.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 238.

¹⁴⁰ See *Ristaino v. Ross*, 424 U.S. 589, 598 (1976).

¹⁴¹ BELL, *supra* note 3, at 566–67.

In these examples, just as with the systematic exclusion standard, the Supreme Court's efforts have fallen short, and thus the JSA is necessary to address the inadequacies left by these decisions. The JSA begins where previous court decisions left off and would be an effective way to truly provide minority defendants, and all defendants, with the right to an impartial jury provided in the Constitution. One further reason to support the passage of the JSA is the fact that it is not apparent when, if ever, the Supreme Court will decide to go further than it already has regarding the under-representation of minorities on juries and the subsequent effect on the right of minority defendants to have an impartial jury. Thus, without the passage of the JSA or a similar provision, many racial minorities in many states will continue to rely on the impartiality, or lack thereof, of mostly all-white juries in pronouncing judgment in their cases.

Opponents to the JSA's affirmative steps to guarantee the presence of racial and ethnic minority jurors from the same racial or ethnic group as the minority defendant may argue that the JSA goes too far in its attempt to achieve a racially diverse jury.¹⁴² For instance, opponents might suggest that by guaranteeing that at least 50% of the jury impaneled is composed of minorities, the white defendant could receive greater punishment than the non-white defendant or that the non-white defendants would be more likely to be acquitted.¹⁴³ While these arguments may be well-taken, the JSA specifically would apply to minority defendants, and thus, a white defendant would not be adversely affected by the provisions of the JSA.¹⁴⁴ Furthermore, some scholars have argued that an increase in minority representation on juries would actually assist the jury with fulfilling its role as the trier of fact in weighing and evaluating the facts at trial.¹⁴⁵ This would seem to cut against an argument that merely increasing the diversity of juries would guarantee an acquittal for criminal defendants. Moreover, such an argument would presume that a minority juror is utterly incapable of fulfilling their role on the jury, which if taken to its logical conclusion, would lead back to some of the earlier justifications that were used to exclude African-Americans and other racial and ethnic minorities from jury service.¹⁴⁶

¹⁴² See KENNEDY, *supra* note 45, at 245.

¹⁴³ *Id.* at 243 (quoting Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L. J. 919, 924–25 (1965)).

¹⁴⁴ BELL, *supra* note 3, at 566–67; see also *supra* Part V.

¹⁴⁵ KENNEDY, *supra* note 45, at 240.

¹⁴⁶ See *supra* Parts II, III.

VI. EFFECTS OF INCREASED SERVICE BY ETHNIC AND RACIAL MINORITIES ON JURIES

Typically, in any jury charge across America, the court will instruct the jury that they are not to check their experiences, common sense, and other natural faculties at the door, but rather that they are to include and consider those things when making their deliberation.¹⁴⁷ Quite frankly, even if the Court did not instruct the jurors to do so, they would still bring those same faculties with them into the deliberation room. However, in the same way, jurors will bring their biases, prejudices, discriminatory pre-conceived notions, prejudgments, and any other manner of potentially subjective mindsets into the jury deliberations as well.¹⁴⁸ That is the unfortunate truth of the jury system. While you may get a jury of people, as this Article discusses, who those people are, their income level, where they live, who they associate or do not associate with, where they work, whether or not they have had any previous interaction with the police or the criminal justice system overall, impacts and in some cases affects how a defendant's fate may be decided.

This fact can be illustrated by a very routine and simple example: a car accident where an officer has been called to the scene to investigate. The officer will typically interview the drivers involved, inspect the vehicles, interview witnesses, call for assistance, including medical, towing, etc., and if necessary, provide, and then generate a report. Many times, although not required to do so, the officer will render a decision as to the fault or cause of the accident.¹⁴⁹ Other times the officer does not render a decision or indicates that they are unable to determine fault under the circumstances.¹⁵⁰ However, the police report, the findings, if there are any, therein, and later at trial, the officer's testimony, become a very important part of the case. The problem is that typically, as mentioned earlier, the officer was not at the scene when the accident occurred. Therefore, the officer has no first-hand knowledge of what happened, but instead, is merely relying on the memories, the honesty, and the recollection of the parties involved and the witnesses, none of whom have had the veracity of their statements challenged. The practical result is that in many cases, liability determinations, including whether a lawsuit is filed, whether insurance companies pay claims, and many other important determinations, rest on the police officer's report and the usually limited investigation.¹⁵¹

¹⁴⁷ See generally ILL. SUPREME COURT COMM. ON JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN CRIMINAL JURY INSTRUCTIONS (2014), available at http://www.state.il.us/Court/CircuitCourt/CriminalJuryInstructions/Criminal_Jury_Instructions.pdf.

¹⁴⁸ BELL, *supra* note 3, at 441.

¹⁴⁹ See N.C. GEN. STAT. § 20-166.1(e) (2014).

¹⁵⁰ See *Inman v. City of Whiteville*, 763 S.E.2d 332, 335 (N.C. Ct. App. 2014).

¹⁵¹ See N.C. GEN. STAT. § 20-166.1(i) (2014) ("A report of an accident made under this section by a person who is not a law enforcement officer is without prejudice, is for the use of the

During discovery and at trial, many times the investigating officer will be called as a witness and their report will be provided and used in evidence. This creates a situation where the jurors have to make a determination as to the credibility or veracity of the police officer's testimony and report. That determination will depend greatly upon the previous experiences, life circumstances, and other factors of each individual juror. For instance, imagine Juror A (arguably the typical juror based on the criteria used by officials as discussed in Part III above), who is white, middle to upper class income, well educated, living in an affluent neighborhood that is probably not that diverse, with virtually no interactions or run-ins with the police, law enforcement, or the criminal justice system. Based on this background, Juror A may be more inclined to give greater weight to the testimony and report of the officer. As a result, Juror A may be less likely to question the veracity of the officer or the report, and may be more likely to accept virtually all facts indicated by the officer and the report as being true. Furthermore, Juror A may be more inclined to believe the officer's word and the report over anything else presented at trial.¹⁵² But it does not stop with the officer. Juror A may be more trusting of the prosecution, in a criminal case for example, or even more likely to side with the party in a civil case that the officer determined was not at fault for the accident. Consequently, Juror A may require less evidence to be introduced by that side or the prosecution, and may require less proof to decide whether the burden has been carried by that party or the prosecution in the case.

Conversely, the corollary is true; that is, Juror A may give less weight to the accused defendant in a criminal case or the party, possibly the defendant, in a civil case whom the officer indicated was at fault for the accident or injury. Furthermore, Juror A may be more inclined to disbelieve and question the veracity of that party or their witnesses, and may also require greater proof by that party or the defendant, whether or not that party has the burden of proof in the first place.¹⁵³

Contrast this juror with Juror B (not the typical juror based on the criteria used by officials as discussed in Part III above), in that they are African-American or belong to another racial or ethnic minority group, low-income, less educated, living in a less affluent neighborhood that is likely more

Division, and shall not be used in any manner as evidence, or for any other purpose in any trial, civil or criminal, arising out of the accident. Any other report [made by a law enforcement officer] of an accident made under this section may be used in any manner as evidence, or for any other purpose, in any trial, civil or criminal, as permitted under the rules of evidence.”)

¹⁵² Bowers et al., *supra* note 4, at 181 (discussing how black jurors are more skeptical of the evidence presented at trial, noting possible taints of racial bias, while white jurors are more likely to be more accepting of the prosecution's evidence).

¹⁵³ *Id.* at 241–42 (discussing the results of a study showing that in cases where the defendant is black and the victim is white, white jurors are more likely to view the black defendant as dangerous).

diverse, who themselves, an acquaintance, or family member have or has had an interaction with police, law enforcement, or the criminal justice system. Juror B may be less inclined to trust the police officer or the report, and may in fact specifically mistrust police or law enforcement, not only based on a negative interaction, but also due to some real or imagined, slight, mistreatment, or outright discrimination that they have personally or through another experienced at the hands of police or law enforcement. In that situation, Juror B is more likely to do the opposite of Juror A, in that Juror B will more likely than not question the veracity of the police officer, and require greater proof by the prosecution in a criminal case, or the side which is supported by the police officer.¹⁵⁴ Additionally, this juror may be more likely to trust the accused defendant in a criminal case or the party whom the officer indicated was at fault and require less proof by that party at trial.

Juror A and Juror B may hear the same testimony, view the same evidence, and listen to the same arguments of counsel, but, based on their divergent backgrounds, experiences, and life situations, they may come to very different conclusions regarding the same case. This difference can have drastic effects on the outcome of the trial, as it could be the difference between life and death, between freedom and loss of liberty, or between recovering compensation or walking away with nothing after an accident or injury. All because of the make-up of the jury. And as was discussed earlier in Part III of this Article, based on the criteria for jurors that many counties and districts utilize, it is more likely in this country that the jury will be composed of more jurors that are closer to Juror A than Juror B.¹⁵⁵ In many instances, Juror B will not even be able to serve on the jury that hears the case at trial, due to the reasons discussed earlier in Parts II and III of this paper.¹⁵⁶

Based on the reasons indicated in Part III, it is more likely that a minority defendant may face a jury that by and large has a different background, not just necessarily a different race, than the minority defendant. Unfortunately, the minority defendant may be subject to such racial stereotypes that certain minorities are lazy, untruthful, or lack responsibility.¹⁵⁷ These racial stereotypes are further promoted with the advent of the 24-hour news cycle.¹⁵⁸ For example, in cases where the criminal defendant was black and the jurors were white, the white jurors have considered the defendant as being more dangerous.¹⁵⁹ This can have a devastating effect on the life of the defendant,

¹⁵⁴ *Id.* at 181.

¹⁵⁵ *See supra* Part III.

¹⁵⁶ *See supra* Part III.

¹⁵⁷ Christopher Rounds, "I'm Not a Racist, but . . .": *The Rise of Casual Racism in the Age of Obama*, HIST. NEWS NETWORK (Aug. 3, 2014), <http://historynewsnetwork.org/article/156448>.

¹⁵⁸ *See id.*

¹⁵⁹ Bowers et al., *supra* note 4, at 241–42.

their family, their community, and on the victim and their family, and even on the country as a whole, as we have seen in recent months and years through the Trayvon Martin, Michael Brown, and Eric Garner cases.

By the same token, an increase in the diversity of the jurors who actually serve on a jury in a criminal case could have the opposite effect. This does not mean that simply a jury that is composed of people who share the defendant's race, background, or life experiences is guaranteed to issue an acquittal. However, it could mean that the case could be heard with a fresh perspective, not tainted or diluted with the false notions that might perpetuate and permeate throughout our society that is still struggling with how to embrace diversity in this country. In addition, it is likely that jurors who have a more diverse background and experiences are more likely to allow for the benefit of the doubt and consider gray areas that might exist, whereas people who have had a limited background and experiences, when it comes to diversity, are more likely to consider the facts in terms of absolutes, with a belief that things are black and white, with no room for gray areas.¹⁶⁰ In fact, some scholars have argued that, "[w]ithout the broad range of social experience that a group of diverse individuals can provide, juries are ill-equipped to evaluate the facts presented."¹⁶¹

Moreover, increased diversity in jury service can have many benefits as it has in many other sectors of life.¹⁶² In fact, in the field of higher education, the Supreme Court has held, and affirmed in later cases, that diversity is not only beneficial, but it constitutes a compelling interest under the strict scrutiny test for equal protection purposes.¹⁶³ Diversity of race is not the only consideration, but also diversity of viewpoint and perspective can be important to truly having a fair and impartial jury as the Constitution requires.¹⁶⁴ Increased diversity also requires consideration of more than one side or more than one perspective. Increased diversity could actually result in both Juror A and Juror B, mentioned above, questioning both the veracity of the police officer as well as that of the accused. Increased diversity of the jury could result in jurors requiring the right amount of proof to be offered at trial, depending on whose burden it is, and could hold each side to the appropriate standard. In fact,

¹⁶⁰ KENNEDY, *supra* note 45, at 240 ("Reformers fear moreover, that even in the absence of mobilized racial bias, all-white juries will be far less able than juries that are racially mixed to perform appropriately the difficult tasks they are called upon to do.").

¹⁶¹ *See id.*

¹⁶² *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) ("[O]ur tradition and experience lend support to the view that the contribution of diversity is substantial.").

¹⁶³ *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (discussing *Bakke's* recognition of achieving a diverse student body as a compelling interest, and the endorsement of this concept later in the Court's decisions in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003), respectively).

¹⁶⁴ BELL, *supra* note 3, at 440.

some scholars have argued that it is necessary to have African-Americans and other racial and ethnic minorities serving on juries in order to assist the jury in carrying out its duty as the trier of fact at trial.¹⁶⁵

Increased juror diversity could give a fair hearing to both the arguments made by the prosecution and the defense. Ultimately, increased juror diversity could help the jury accomplish its mission at trial, which is to be the trier of fact, to actually ascertain the facts as presented, and to arrive at a verdict. Coincidentally, the term verdict comes from the Latin word *veredictum*, which means literally “saying the truth.”¹⁶⁶ Thus, the jury’s role is to find the truth and, as the old saying goes, when there is a question of one person’s side versus another’s, the truth lies somewhere in the middle.¹⁶⁷ Increased juror diversity helps arrive at that place in the middle, but lack of juror diversity unfortunately can, and in many cases does, lead to only arriving at one person’s side of the story, which goes against the very fabric of the jury’s duty. If the right to a trial by jury in this country means anything, we have a duty to ensure that it means that a person has the right to a diverse jury because a diverse jury is the best way to ensure that the jury fulfills its role in our society: to find the truth through its verdict. In addition, in many cases the harsh reality is that the freedom of a criminal defendant, as well as their very life, may depend significantly on the racial composition of the jury.¹⁶⁸

VII. CONCLUSION

The right of a criminal defendant, especially one who is a minority, to have an impartial jury is guaranteed by the U.S. Constitution, as is the right of all citizens, including racial and ethnic minorities to serve on a jury. However, merely having these rights embedded in the U.S. Constitution is not sufficient. These rights must be protected and enforced, not only through the prohibition of practices that would abridge these rights, but also through proactive steps that will ensure that these rights become an actual reality for minority criminal defendants and racial and ethnic minority jurors as well. Given the Supreme Court’s current jurisprudence in the area of minorities and jury selection, there is a need for an affirmative action policy to address the under-representation of minorities in the jury box. The JSA or a similar provision could be that policy because it effectively addresses the effects of past discrimination in jury selection, and it helps protect the rights of minority defendants to due process and an impartial jury at trial. Also, the JSA would survive a challenge on equal

¹⁶⁵ KENNEDY, *supra* note 45, at 240.

¹⁶⁶ *Veredictum*, WEBSTER’S DICTIONARY, <http://www.webster-dictionary.org/definition/Veredictum> (last visited Apr. 2, 2015).

¹⁶⁷ RANDY HOWE, *THE QUOTABLE TEACHER* 181 (2003) (quoting Jean Gati).

¹⁶⁸ Bowers et al., *supra* note 4, at 171 (arguing that the composition of the jury could determine whether African American defendants live or die).

protection grounds. Furthermore, the JSA could help guarantee that juries in all states are composed of more than just those citizens who are non-minorities, or very well off financially.¹⁶⁹ Thus, the JSA or a similar provision would be a bold step toward ensuring that criminal trials in this country represent a system of justice that works in favor of all people, regardless of their race, including minority jurors and defendants. Diversity has its benefits in many sectors of our society. The jury box is no different and it can benefit from having a more diverse body of jurors who serve and hear criminal and civil cases. The challenge is not a small one, but the cause is just and one worth pursuing so that racial and ethnic minorities can enjoy the benefits of jury service and criminal defendants can enjoy the benefits of an impartial jury.

¹⁶⁹ BELL, *supra* note 3, at 467.