

Racial Profiling and Jury Trials

by Annabelle Lever



Should trial attorneys and experts condemn racial profiling as a police practice while condoning racial profiling in jury selection at trial? As a British philosopher who has lived and worked in the United States, I offer some suggestions to help readers make the most of their expertise. These are complicated issues and my position is motivated by two concerns. First, from a British perspective, American jury selection is alien to the ideal that people are tried by ‘a jury of their peers’. Above all, the American practice of selective peremptory strikes raises the worry that you cannot consistently ask jurors to evaluate the use of race-based expectations by police when the jury selection process, itself, is shaped by the idea that race is a good predictor of people’s beliefs and behavior. The second concern is an extension and generalization of the first, and exemplifies the problems posed by racial profiling: what does it mean to treat people as equals in a world where people are disadvantaged because

of their race? I will take these concerns in reverse order, briefly discuss them, and suggest some practical and theoretical approaches to racial profiling that will aid your legal practice.

Racial Profiling and Race: Some Terminological Remarks

I will follow Mathias Risse in defining racial profiling as ‘any police-initiated action that relies on the race, ethnicity, or national origin and *not merely* on the behavior of an individual’, although these arguments can be generalized to the use of race-based predictions in other areas of the law, such as employment law.¹ I am principally concerned with what I will call ‘preventative’ or ‘prospective’ profiling since it captures what we typically think about when we worry about racial profiling, and is the form that is most troubling morally, politically and legally (as opposed to ‘post-crime profiling’).

Post-crime profiling departs from a witness’s description, however vague, of a suspect who has committed *an actual crime*. Preventive profiling uses a profile based on statistical evidence of who is likely to commit a crime, in order to initiate police stops and searches in order *to prevent crime*. The pre-emptive features of prospective profiling reflect the American constitutional concerns with ‘warrantless searches’.² Thus, prospective profiling would be controversial even if it had no racial features to it. The use of race adds to worries created by pre-emption. Put simply, the use of racial characteristics could exacerbate racism in society,

and lead to the abuse and harassment of racial minorities.³ Thus, pre-emptive racial profiling is controversial on two grounds: first, because it is pre-emptive, and secondly, because of the use of race in pre-emptive police work.

It is important to say something about what ‘race’ means in this context. What we are concerned with, when we are concerned with racial profiling, is ‘race’ as a popular construct, rather than a philosophically coherent or justified entity.⁴ In other words, we are concerned with ordinary ideas about race, and with the practices and effects of those ideas – however contradictory these may be, and however lacking in logical consistency, clarity, or ‘fit’ with biological facts. There is, at present, a good deal of philosophical debate about whether the concept of race is so logically incoherent, and so politically damaging, that philosophers (or other people) should simply stop using it.⁵ However, we can largely ignore this debate, although it is important to remind ourselves and juries that there are no biological races and no coherent or consistent group to which racial statistics refer.⁶

The Problem of ‘Background Injustice’

We live in a world marked not simply by *racial difference*, but by *racial inequality*. That is, our world is one in which people do not simply bear different racial characteristics, such as colour and shape, but in which people who count as ‘black’ typically have less wealth, income, power and status than those who count as ‘white’. Both the causes and the degree of these inequalities are contested, and for any single person, race may be a poor predictor of their location on hierarchies of income, wealth, power and status. This is partly because racial differences are not the only ones which are associated with inequalities in our societies – sex, and sexual preference, for instance, are also relevant. However, the difficulty of determining where we will find a person on a given hierarchy is affected by luck, effort and native talent. In short, because liberal democracies are characterized by important personal, civil and political freedoms, birth is not destiny.

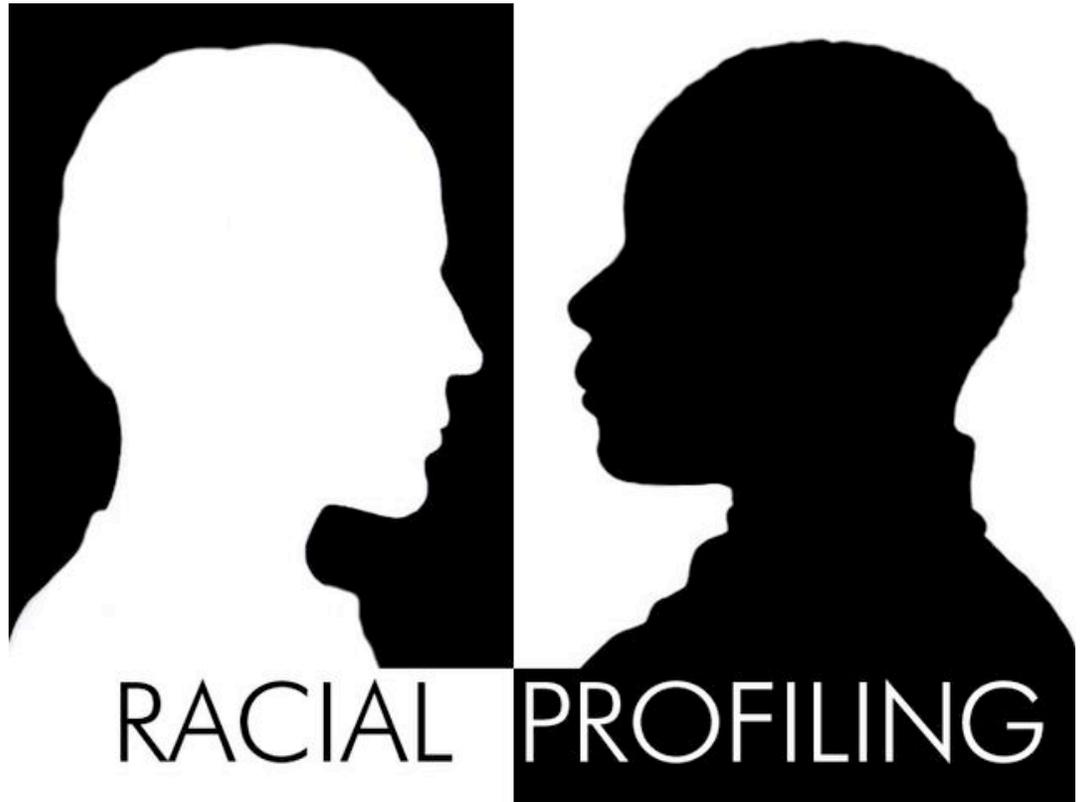
However, the fact that we cannot accurately predict the fate of an individual does not mean that our societies lack either racial hierarchies, or racial differences – anymore than our failure to guess how high someone can jump means that gravity has no bearing on the result. This is scarcely surprising since there are middle-aged people in the United States who grew up with legal segregation, including laws that made it a crime for white people to have sex with non-whites, that prescribed what areas and what schools people attended, and that ensured that white and black people were unable to share equally public facilities such as transport, restaurants, hotels and swimming pools.⁷

Remedying Background Injustice: The Courts

What should we do about this inequality, whatever its degree or cause? This question is scarcely the peculiar preserve of courts, but the demands of justice mean that courts are constrained in the ways they can address the problem, as compared to economists, policy-makers or legislators. Criminal courts, in particular, are principally concerned with whether a given defendant has broken a given law. Facts about the justice or injustice of our world do not alter the factual question that a criminal trial must answer, although they may affect our method for determining guilt or innocence, and the moral, political or legal consequences we attribute to this determination.

For example, given what we know about domestic violence (an unjust fact about our world), it may make sense to revise our standards of ‘reasonableness’ in order to accommodate what is likely to seem reasonable to a domestic violence victim.

Similarly, courts may find that certain facts about injustice mitigate or aggravate a potential crime – picking on the blind, for instance, is generally more reprehensible and despicable than picking on the strong and sighted. The injustice is greater because factors that ought to deter us from harming, that ought in fact, to incline us to offer defence and aid, are being deliberately used to harm. So, given the vulnerability of the blind to injustice and other harms, it is particularly reprehensible to steal from them, although stealing from the sighted is also wrong and deserving of condemnation.



Justice, therefore, requires us to notice and respond to racial inequalities, (when we have identified them) in some ways and not in others. Racial inequality does not turn what was a crime (theft, say) into a non-criminal act – in that sense, knowledge of racial inequalities or even racial differences, is irrelevant to a court judgement. In another way, however, justice does require us to identify and to take account of racial inequalities, as well as racial differences. It requires us to take account of them in so far as (a) they may constitute aggravating or mitigating factors; (b) they suggest alternative accounts of what happened; and (c) they suggest the need for *different methodologies* for determining and assessing what happened (as with standards of reasonableness).

Participation and Democratic Legitimacy

So, background injustice means that *we cannot treat people fairly by assuming that race is irrelevant* to the way we determine and assess crimes, even though the ways in which it is relevant may be complicated and contested. The idea of formal equality before the law, therefore, requires some attention to the substantive inequalities which people bring into court with them. A nice example of this was provided in a recent issue of *The Jury Expert*, in an article concerned with the legacy of sex-based, rather than race-based, injustice.⁸

Background injustice, then, explains why racially mixed juries are generally necessary for justice. These reasons parallel epistemological arguments for revising electoral practices in the USA and UK so that the formal equality created by universal suffrage and equally weighted votes does not consistently result in legislatures dominated by relatively elderly, wealthy and middle class white males.⁹ The epistemological claim for revised representation is that we will learn and deliberate better if our legislatures and juries fairly represent the cleavages in our society than if they do not.

This epistemological claim can be distinguished from a straightforward concern for fairness or equality – whose strength is independent of any benefits that might accrue to deliberation.¹⁰ However, both epistemological and fairness arguments for mixed juries reflect the view that democracy requires more than the ‘equal consideration of interests’ by political or judicial authorities.¹¹ Rather, it requires that people be able to participate in collectively binding decisions freely and as equals. In what follows, I will draw out the implication of these points for jury selection, and for the ways in which attorneys frame issues of race and crime.

Racial Inequality, Democracy and Jury Selection

Some ways of rectifying injustice are likely to cement, rather than alleviate, inequality. This is one problem with using race (and sex) as grounds to strike people from juries. One reason that all-white juries and all-white legislatures are problematic, and why ‘token’ minority members will not solve the problem, is that they *preclude adequate deliberation* before legally binding decisions are made. The difficulty, if we want our decisions to be reasoned, and to reflect the knowledge of our peers, is that all-white juries are likely to reflect only some of the knowledge of our fellow citizens. So, even if an all-white jury could somehow be unprejudiced, it would still be incomplete and inadequate in its perspective on collective matters.

Indeed, I would be inclined to suppose it inadequate even in cases that only concerned white people, and where we would not expect racial prejudice to be a factor. We do not well understand the ways in which race intersects with social cleavages based on class, sex, or religion, despite the pioneering work of legal theorists like Kimberle Crenshaw and philosophers like Elizabeth Spelman.¹² Consequently, we have a very poor sense of how racial distinctions shape white people’s expectations of other white people - of the way they should behave, the motives they should have, the sorts of homes, jobs, sexual partners and tastes they should have.

Put crudely, the legacy of white superiority may mean that some people appear more ‘white’ than others, even when they fall on the ‘white’ side of our color hierarchies.¹³ So, white people can disadvantage other white people because of the assumptions about white people that they unconsciously hold; just as black people may disadvantage other black people because they are thought not to be black in the right way, or to the right degree, and so on. A racially mixed jury is much more likely to notice these matters, in part because black people are more attuned to the ways that white people make racial judgments, and because they are more attuned to the ways in which black people favor or disfavor other black people based on their skin color, wealth, education and other attributes.

Hence, even when we are not concerned with racial prejudice, there are good reasons to want a racially mixed jury. It fosters reasoned assessment of the evidence; enables people to reflect on their own assumptions, knowledge and experience; and exemplifies the qualities of free, fair and equal deliberation which give juries their democratic appeal. If this is so, however, *there are good reasons to be wary of jury-selection procedures which depend on the idea that we can predict people’s judgments on matters of substance based on their racial characteristics*; and good reasons to be wary of forms of arguing and presenting evidence which are likely to reinforce, rather than to undermine, the assumption that race is destiny.

If these points are persuasive, then we may want to distinguish the different ways in which courts can respond to background injustice – in the case of race, as in other cases. In some, we want to block the operation of prejudice directly, as was the object of the recent article in *The Jury Expert*. In others, we seek to acknowledge that formal equality before the law is insufficient to ensure equal justice, given background inequality. However, in these cases, we are not seeking simply to block prejudice, but to open dialogue about

what it would mean to treat people as equals; about what justice requires. Hence, I would suggest, it is one thing to ensure that a jury is racially mixed, so that deliberation can adequately reflect the different beliefs and experiences of citizens; and another to try to establish what different jury members are likely to believe *in order to constitute a jury of a particular type*, particularly susceptible to certain types of rhetorical strategies and arguments, and particularly likely to return one verdict rather than another in cases involving race and crime.

Racial Profiling: Some Facts for Attorneys

I have argued that racial difference and racial inequality mean that we cannot ignore race in court; and have argued that ideals of free, equal and reasoned deliberation across racial lines mean that we should avoid practices and forms of argument which are likely to reinforce race-based differences of opinion and judgement. So, what can we say about race and crime in cases where what is at issue is the legality of a race-based stop and search, whether or not it results in an arrest for illegal conduct?

(1) *Criminals are a minority of the population and, also, a minority of their respective racial groups.* Most people do not go around assaulting, stealing, killing, carrying illegal weapons, or owning and dealing illegal drugs. So even if one racial group is more likely to commit a particular crime – even crimes in all categories – than other racial groups, most members of that group are unlikely to do so. Thus, while there are important controversies about the degree to which arrest rates reflect the actual incidence of crimes – and reflect prejudice against racial minorities and/or the poor and/or young men -- crime is committed by a minority of our population and a minority of any subgroup within it.¹⁴



(2) *Violent crime is mainly committed by the young.* For all racial and ethnic groups, ‘the probability of violence accelerates in early adolescence...reaching a peak between the ages of 17 and 18 and then declining precipitously thereafter’.¹⁵ Clearly, this figure does not tell us much about other crimes – white collar crime, presumably, will have an older profile – nor does it tell us who, if anyone, is planning and/or benefiting from violent crime. But it does suggest that the reasonableness of warrantless searches is likely to be age-dependent, and that many of those involved in violent crime are legally bound to be in school.

(3) *The evidence does not support the conclusion that black people are particularly prone to violence,* (whether for genetic or other reasons¹⁶). According to Sampson and colleagues, ‘High impulsivity increases the risk of violence’ but neither that, nor lower verbal/reading ability scores explain more than a small fraction of racial disparities in violent crime as between white and black people in America. As Sampson and his associates put it: ‘constitutional factors are significant predictors of violence, but weak explainers of racial/ethnic disparities in violence’¹⁷.”

“[O]ne reason Whites have lower levels of violence than Blacks is that Whites are more likely to be recent immigrants¹⁸.” In fact, “The sources of violent crime appear to be remarkably invariant across race and rooted instead in the structural differences amongst communities, cities and states in economic and family

organization¹⁹.” Racial disparities in violence, therefore, reflect the fact that America is a ‘high crime society’ compared to other societies. Racial statistics on violence also appear to lump together groups who, for other purposes, are distinguished based on nationality, religion, native language, employment, political leanings and other factors. *What the statistics pick out, therefore, is far from clear, and their bearing on the behavior of any particular defendant – whether cop or robber – is uncertain in the extreme.*

(4) *You do not have to suppose the police are particularly prone to racism in order to suppose that racial profiling is wrong.* There is no justification for pitting the police against racial minorities – or vice-versa – in cases that involve racial profiling. Racial profiling creates a real risk of injury or death for minorities because profiling itself sends the message that black people are so dangerous that normal standards of procedural justice – the need for warrants, for example – do not apply. You do not therefore have to suppose that the police are especially racist in order to worry that racial profiling creates serious risks of injury and death for racial minorities. You merely have to suppose that police, like other people, are likely to be more fearful and more prone to act with force if they suppose that they are facing people who are particularly prone to violence. The problem is likely to be particularly acute if, as in the United States, police are armed and expect criminals to be, likewise. In short, one of the reasons for thinking racial profiling unjustified is the risk of serious death and injury to civilians that it creates, and the ways in which it is likely to exacerbate any problems of racism in the police, and in society at large.²⁰

(5) *You do not need to be indifferent to the victims of crime in order to think that racial profiling is wrong.* Most crime is intra-racial, not inter-racial; young black men are disproportionately likely to be its victims, as well as its perpetrators. Nonetheless, most crime is committed by white people in the United States – as we might expect given their relative and absolute size in the population - and that is why most victims of crime are white.

One of the problems of racial profiling is that it focuses our attention on black people as *perpetrators*, rather than *victims* of crime. They are both. Whether as attorney for the prosecution, or for the defense, therefore, it is important to recognize that white people are likely to overestimate the tendency of black people to commit offenses, and underestimate the tendency of white people to do so. In short, they are likely to think of victims of crime as white, while supposing that the face of crime is black.²¹ Unfortunately, this is also likely to be true of the police who, after all, are unlikely to be immune to problems of biased perception affecting other members of society.

Racial Profiling and Courts: Concluding Thoughts

There are ways to win cases by playing to people’s prejudices and exacerbating painful divisions between white and black people and between young black men and older white police. There are ways to constitute and appeal to juries that make such tactics particularly appealing and particularly likely to succeed. Even if the right result is achieved by such means – so that only the innocent go free and only the guilty are convicted – we would have reason to think this a defeat for justice. It would be a defeat because, in the end, it would be chance, not reason, which explains the result: chance that the attorneys were able to push the right triggers, to the right degree, in the right cases, and with the right results. Chance that the right people went free and the right people were convicted. I take it that is not what we want.

Readers of this journal know far better than I that our ability to make reasoned decisions is complicated by our reaction to all sorts of subconscious factors. Many of these extraneous factors do not matter overly-much, because their weight is uncertain, they are unlikely all to point in the same direction, and are likely to

affect different people in different ways. Nor, of course, do these extraneous factors usually reflect or exacerbate injustice in our society. Unfortunately, we are still a long way from the situation where this is true of race. Attorneys, therefore, can try to win for their side by exacerbating what is known about our vulnerability to racial triggers. Or they can try to win by pretending that racism is no problem, by ignoring its existence, by insisting that it does not exist. I have suggested that neither of these is a good way to win if one cares about justice, or about the ability of people in our society to reach collectively binding decisions freely, reasonably, and as equals.

This is the ideal that underpins democratic government and the jury system. But it is a fragile ideal, and its fragility is apparent in cases where race and racism themselves are the object for judgment. I have therefore tried to suggest how we might think about the problems that racial inequality creates for court procedure, jury selection and for the way attorneys frame their respective arguments. I have only scratched the tip of a rather large iceberg, however, and this is only an introductory note to a complex and contentious subject.

Endnotes

¹M. Risse, 'Racial Profiling: A Reply to Two Critics', in *Criminal Justice Ethics*, 26.1. (2007) 4 – 19. The emphasis in the text is mine. Risse reviews and explains the justification of this definition at pp. 4- 5 in *Criminal Justice Ethics* and at pp. 135-6 of M. Risse and R. Zeckhauser, 'Racial Profiling', *Philosophy and Public Affairs*, 32.2 (2004), 131-70.

² See, for example, *Terry v. Ohio* 392 U.S.1 (1968) and its progeny. In *Almeida-Sanchez v. US*, 413 U.S. 266, (1973) Part II of Justice Potter Stewart's Majority opinion generated this much-quoted position: 'the needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards'. This 'resolute loyalty' seems to have found a different expression in the run of cases since *Oliver v. US*, 466 U.S. 170 (1984).

³ Randall Kennedy, *Race, Crime and the Law*, (Vintage Books, 1997), especially ch. 4; David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New Press, 2003); A. Lever, 'Why Racial Profiling Is Hard to Justify: A Response to Risse and Zeckhauser', *Philosophy and Public Affairs*, 33.1. (2005), 94-110; and A. Lever, 'What's Wrong With Racial Profiling? Another Look at the Problem' in *Criminal Justice Ethics*, 26. 1. (2007), 20-28.

⁴ For the argument that race, as popularly understood, has no scientific basis, see Kwame Anthony Appiah, 'How to Decide if Races Exist', *Proceedings of the Aristotelian Society*, 106 (May 2006), 363-80.

⁵ For efforts to 'rethink' the concept of race, rather than to jettison it, see Sally Haslanger, 'Gender, Race: (What) Are They? (What) Do we Want Them To Be?' *NOUS*, 34.1.(2000), 31-55; 'Oppressions: Racial and Other' in *Racism, Philosophy and Mind*, eds. R. Levine and T. Pataki, (Cornell University Press, 2004), 97-123.

⁶ For example, while Risse's justification of profiling refers to 'African Americans' it is obvious that police on the motorway can scarcely be expected to distinguish people's real or acquired nationality. Most of the time, I suspect, what 'race' means in these contexts is colour, with the idea of a black/white distinction structuring the treatment of those who do not fit into this dichotomy.

⁷ The failure to acknowledge this, and its likely consequences for racial equality, is one of the difficulties of Michael Levin's perspective on racial profiling. See Michael Levin, 'Comments on Risse and Lever', in *Criminal Justice Ethics* 26.1 (2007) 29-35. Levin is an example of someone who denies that racial inequality characterises American society and who seems to believe that there is a significant biological component to

racial disparities in crime, notwithstanding the fact that ‘There cannot be a crime gene...since crime is a legally defined category of behavior’.

⁸ See, for example, Elizabeth J. Parks-Stamm’s ‘Anticipate and Influence Juror Reactions to Successful Women’ in the Nov. 2008 issue of *The Jury Expert* (20.4), 8-15.

⁹ Anne Phillips, *The Politics of Presence*, (Oxford University Press, 1995); Melissa S. Williams, *Voice, Trust and Memory: Marginalised Groups and the Failure of Liberal Representation*, (Princeton University Press, 1998); Iris Marion Young, *Inclusion and Democracy*, (Oxford University Press, 2002).

¹⁰ John Rawls, *A Theory of Justice*, (Harvard University Press, 1971); Part 1, section 14 on ‘fair equality of opportunity’. At p. 84 Rawls refers to the ‘realisation of self which comes from a skilful and devoted exercise of social duties’. To be deprived of this, when one is otherwise capable of fulfilling those duties, is to be harmed, and unfairly treated.

¹¹ A helpful introduction to some of these issues is Albert Weale, *Democracy* (St. Martin’s Press, 1999). More specialised sources include J. Cohen, ‘Procedure and Substance in Deliberative Democracy’, in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. S. Benhabib, (Princeton University Press, 1996), 95-119; and B. Manin, ‘On Legitimacy and Deliberation’, *Political Theory*, 15. (1987).

¹² For examples of a much larger literature, see Kimberle Crenshaw, ‘A Black Feminist Critique of Antidiscrimination Law’ in *Philosophical Problems in the Law*, ed. D. M. Adams, (4th Edition, Wadworth, 2005), 339-343; and Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought*, (Beacon Press, 1988), especially pp. 80-132.

¹³ See, for example, Noel Ignatiev, *How The Irish Became White*, (Routledge, 1995).

¹⁴ Holbert and Rose show that only 2% of black people are arrested for committing any crime in a given year, although in 2000 black people made up 12% of the population and 56% of those arrested for murder; 42% of those arrested for rape; 61% of those arrested for robbery and so on. See Steve Holbert and Lisa Rose, *The Color of Guilt and Innocence: Racial Profiling and Police Practices in America* (Page Marque Press, California, 2004), p. 126 Likewise between 1995-2000 3431 violent offenses were reported in 180 Chicago neighbourhoods, but personal violence was relatively rare. See, Sampson, Morenoff and Raudenbush, ‘Social Anatomy of Racial and Ethnic Disparities in Violence’, *American Journal of Public Health*, 95.2. (Feb. 2005), 227-28.

¹⁵ Sampson et al., p. 229 As Risse and Zeckhauser note, the situations where profiling seems useful are ones in which ‘investigators must make quick decisions about (say) whom to search, or in which large numbers of people are involved; in most other areas a strong case will be available for using (much) additional information about individuals’. Risse and Zeckhauser, 135.

¹⁶ For an example see Michael Levin, ‘Comments on Risse and Lever’ in *Criminal Justice Ethics*, 26.1. (2007), 29-35, especially pages 31-33.

¹⁷ Sampson et al. 229; emphasis in the text.

¹⁸ Sampson et al. 229. Indeed, this 2005 study of 180 Chicago neighbourhoods, found that ‘the odds of perpetrating violence were 85% higher for Blacks compared with Whites...the majority of the Black-White gap (over 60%) and the entire Latino-white gap [10% less violence among Latinos than Whites] were explained primarily by the marital status of parents, immigrant generation, and dimensions of neighbourhood social context’.

¹⁹ Robert J. Sampson and William Julius Wilson, ‘Toward a Theory of Race, Crime and Urban Inequality in *Crime and Inequality*, ed. J. Hagan and R. D. Peterson, (Stanford University Press, 1995), 37-54 and, in

particular, p. 41. For example, their study found that the black homicide rate was three times higher in New York than in Chicago; and three times higher in San Francisco than in Baltimore. Black homicide rates in the state of California are three times those in Maryland – but so are white homicide rates. In short, we probably learn more about race and local politics from these figures than we do about race and crime – although crime partly reflects the consequences of past social policies and present politics. Sampson and Wilson’s figures on the displacement of poor blacks as a result of urban renewal are truly shocking; ‘Nationwide, fully 20% of all central-city housing units occupied by blacks were lost in the period 1960-70... This displacement does not even include that brought about by more routine market forces (evictions, rent increases, commercial development’.

They note that ‘one of every five poor blacks lived in ghettos or areas of extreme poverty in 1970, by 1980 nearly two out of every five did so’. Sampson and Wilson, p. 42.

²⁰ I present these arguments in more details in *Criminal Justice Ethics* p.24, and *Philosophy and Public Affairs*, pp. 96-98.

²¹ The phrase ‘the face of crime’ comes from Harris, p. 169.

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We asked three experienced trial consultants to respond to Dr. Lever’s article on the ethical issues in racial profiling. On the following pages, Sean Overland, Jill Schmid, and Doug Green offer their reactions.

Doug Green responds to Annabelle Lever

Douglas A. Green, Ph.D. [dgreen@dgjury.com] is a trial consultant based in Covington, Louisiana. He has 25 years of experience in the field and is a Past President of ASTC. He works primarily in civil litigation and has worked in venues across the country.

A few years ago I had the opportunity to do some reading on the history of the American jury system. I came away with a much deeper appreciation for the institution about which my professional life revolves. The American jury differs remarkably from its ancestral roots, but one constant over the centuries is the jury giving a voice to *the people* at the most elemental level. So, I enjoyed reading Annabelle Lever’s discussion of race in the courtroom. So fundamental to American democracy is the jury system that I believe trial consultants must help to protect and defend this important institution. Trial consultants should discourage the use of race (and other factors) in jury selection or in strategy decisions because it undermines the integrity of the jury system. Lever argues that democracy requires that people be able to participate in collectively binding decisions freely and as equals. My views are somewhat more pragmatic and are driven by perceptions of the jury system by the general public and by key decision makers, such as courts of appeal. The jury system will not survive if it loses credibility. This happens, primarily, when juries make decisions that many

people do not understand. It can also happen if the composition of juries does not include broad cross-sections of the communities that juries represent. I believe these two issues are related.

In the real world, however, we work as partisans in an adversarial system. Fairness and justice are defined from a particular point of view. We use our best efforts to advance the interests of our clients. Can we afford to concern ourselves with “background injustice” as Lever does under these conditions? If the use of race (or other factors) in jury selection or in other ways is in the best interests of our clients, then how can we not use it? It is here that I believe the rhetorical and practical are in happy alignment. It has been my experience that a diverse jury, as Lever argues, indeed “fosters reasoned assessment of the evidence.” Those instances where I have scratched my head in wonder after a jury verdict was announced have typically been where the jury was one dimensional. Lever draws attention to all white juries and this is a concern given the history of our country. But, there are many state courts in Alabama, Mississippi, and Texas, for example, where whites are the minority and are systematically excluded from jury service. More and more often across the country, I am seeing men excluded from jury service by one means or another. My experience is that women now constitute about 60 percent of jurors regardless of the venue and I have had a couple of cases where there were no men on the jury. Whatever the reason and whatever the bias, the result is the same – one dimensional juries produce one dimensional verdicts. The practical implication of such a system is that much of the evidence in the case becomes irrelevant and my client’s case may well reside within that irrelevancy.

One could argue that Lever’s concerns are outdated. After all, *Batson* cured the problem, did it not? The truth is that *Batson* is simply not enforced in civil litigation where I spend most of my time. There are other problems as well. First and foremost is the practice of allowing too many peremptory challenges. If there are only five people from a racial group on the venire, *Batson* is not enforced, and each side has ten peremptory challenges, the jury can easily end up one dimensional. Blind strike submissions are also a problem as it allows overly broad or narrow voir dire. Generous granting of hardship excuses and cause challenges are also contributing factors. These problems occur mainly in state courts, but I find them in a few federal courts as well.

Blaming the courts for being complicit is a little unfair. Lawyers or consultants, in the first instance, have to want to exclude certain kinds of people from the jury. Some might argue that it is naïve to ask from where such a desire may arise. I did begin my career thinking a lot about demographics, but (I think) for particular reasons. As a young social scientist 25 years ago, the problem of jury selection seemed simply a matter of gathering enough information about prospective jurors to make accurate predictions about future decision-making behavior. It is axiomatic that the ability of any particular factor to predict future behavior is closely related to the reliability with which that factor can be measured. The ability to collect information about prospective jurors was also typically limited in the courtroom setting by both time and scope. These fundamental ideas lead quickly to consideration of such factors as gender, race/ethnicity, and age. All three of these factors are easy to observe in the courtroom and can be measured with a high degree of reliability. Moreover, this triad rolls nicely off the tongue when describing people – young, white woman, older black man, etc. To a social scientist, these individual characteristics are just descriptive data and do not carry any particular connotations. So, if they prove useful in predicting behavior, then why not use them? The simple truth is that there is no simple solution to the problem of jury selection. While these factors are easy to observe, they are usually too confounded with life experiences to be of much use on any particular case, unless one of these factors is overtly part of the facts of the case. In other words, people are individuals and not a sum of their descriptive characteristics.

To be sure, I still work with trial lawyers who want to focus on race in jury selection. This bias, I believe, comes from a few different sources. First, trial lawyers rarely get the opportunity to connect the case they just tried to the jury verdict in a systematic way. Sure, lawyers often talk to jurors after a trial, but lots of filters color what jurors tell the lawyers. Second, race, as I have said, is easy to observe. In an environment where information is limited, people will tend to use information that is easy to obtain. Third, race has a long history of significance in this country. Race means something to most people – even if we cannot explain exactly what it might be. And, finally, lawyers are creatures of habit. If a lawyer has had good results in the past and has used race as part of jury selection practices, then he or she is likely to keep using it, whether it is actually useful or not.

Well, if simple demographics do not really tell us much about people, then how do I go about jury selection? Let me start by saying that in my practice we work hard to position the case strategy such that jury composition does not have a significant impact on the outcome of the case. We try to develop a trial strategy that appeals broadly to people in the venue or at least to a large percentage of the population. If this can be done, the group of people to whom the case does not appeal becomes relatively smaller and, hopefully, easier to define. This group of potentially adverse jurors needs to be defined by their life experiences as they relate to the case and the trial strategy. The easiest example I can think of today is the case where an individual is suing a large corporation. Setting aside other facts in the case, the relative status of the parties and perceptions of corporations in America will be factors in the case. So, the inquiry I want to make is how each prospective juror relates to large corporations. Work experience is a good indicator of such experience. Does this juror work in a small business or in a large organization? In the latter case, what kinds of experiences has this juror had in the organization? Does this person identify with the organization and its goals? Does this person benefit if the organization does well? Now, let's take it to a deeper level. Let's say we are dealing with a patent holder that claims the corporation is infringing his patent. Now, we need to know about the juror's experience with innovation. We also need to know whether the juror's employer uses patents or other intellectual property. Does the juror have experience with the particular technology involved in the case? These are the kinds of factors that actually provide useful information in jury selection. And, in my experience, they tend to be race-, gender-, and age-neutral. That's why race, gender, and age do not predict jury decisions very well most of the time. So, I have come to think a lot less about basic demographics in jury selection as a practical matter. And, my thoughts have come into line with the arguments that Lever is making from a very different point of view.

I believe it is important to get the same information from every prospective juror so that intelligent comparisons of the jurors can be made. As a general rule of thumb, I believe that information in three general categories is most useful. I want to know about jurors' family life, their work life, and their leisure time. I find that these three areas provide good insight into different aspects of the person if you have carefully thought about your case from a thematic point of view. Family structure provides an indication of a person's core values, whether they be traditional or less conventional. Work life usually captures the largest part of a person's time and provides a host of insights. And, finally, how a person chooses to spend their leisure time says a lot about those things they value most.

I think this is a good time of the year to step back from our busy schedules and think about the big picture. The jury system is where trial lawyers and trial consultants make their livings. It is a vital part of our democratic system and it needs to be protected. My experience working in the field has led me to the same conclusions as Anabelle Lever about the use of race in the courtroom. Rejecting demographic stereotypes in jury selection is the right thing to do for advancing your client's interests as well as promoting the integrity of the jury system.

Jill Schmid responds to Annabelle Lever

Jill D. Schmid, PhD [jill.schmid@tsongas.com] is a trial consultant for Tsongas Litigation Consulting, which is a full-service firm. Dr.Schmid's practice includes jury research, witness preparation, jury selection, litigation graphics, and attorney speech preparation.

Since reading Dr. Lever's article I found myself debating with one of my favorite debaters -- myself. I agree that one's race leads to unique life experiences that influence the development of attitudes. Race is not irrelevant and Dr. Lever points this out in some very important ways. But, I wonder how juries, or the composition of juries, can assist in the advancement of racial equality? Or, for attorneys and consultants, how does or should race impact what we do?

One aspect of our work is to uncover jurors' biases that would lead them to unfavorable findings for one party or the other. But, it does not stop there; through our strategy work we develop themes and stories that resonate with the jury and motivate them to find for our clients. Whether our jury is made up of mothers, CEOs, college students, or retired military, we seek ways to connect their experiences and attitudes to the evidence and arguments so that they will be compelled to render what we consider a favorable verdict. Hence, using race as one of the variables in that equation seems warranted—only if we believe that race is indicative of certain attitudes. So, when Dr. Lever writes, “...*we should avoid practices and forms of argument which are likely to reinforce race-based difference of opinion and judgment,*” or that it is “...*another [thing] to try to establish what different jury members are likely to believe in order to constitute a jury of a particular type, particularly susceptible to certain types of rhetorical strategies and arguments...*,” I find myself wondering why race (like occupation, education, or particular life experiences) is off-limits. Is justice better served by making sure our juries are racially diverse?

To that end, I recalled my recent involvement in a pro-bono criminal case. The allegation involved a twenty-something African-American male who was charged with resisting arrest and disturbing the peace. On the prospective panel there was only one African-American woman. During the D.A.'s voir dire it became obvious that she held some attitudes that were very positive for our side; I thought for sure she would be struck from the panel, but I wondered if he would do so considering her race. She was left on and turned out to be the hold-out for what would have been a conviction. Should he have struck her? Could he have done so without risking a *Batson* challenge? Was justice better served since the defendant's race was represented on the panel?

While I do think justice was better served, chances are good that her decision was influenced as much by her race as it was by her occupation (social worker, which the defendant was as well), her gender, where she went to college, or any of the other case-related experiences and attitudes she held. Race matters, but using race as a sole or even a primary indicator of how one might view a particular case is too broad to have significant value. Race is important insofar as we often make assumptions that people of similar races are more likely to have similar life experiences and attitudes, which we know is not necessarily the case. There are very good reasons not to strike arbitrarily all jurors of a particular race, not the least of which might be that it helps advance the goal of racial equality.

Dr. Lever raises interesting and thought-provoking issues that we have and will continue to wrestle with for years. Engaging in a dialogue about this important topic should continue to be a part of our continuing legal education as we seek ways to improve and reform our jury system.

Sean Overland: A Response to Lever's "Racial Profiling and Jury Trials"

Sean Overland, Ph.D. [soverland@overlandconsultinggroup.com] is a jury consultant based in Seattle, Washington. He works on civil cases nationwide.

Professor Lever makes important and insightful observations about race in the American system of justice. Clearly, race matters. Black and white jurors may see the same trial very differently. And during deliberations, recent research has demonstrated that racially-mixed juries behave differently than all-white panels. Lever then presents a challenge to legal professionals to be part of a solution to racial injustice, rather than perpetrators of it. The question for trial consultants becomes: what can and should we do to combat racial injustice?

At first blush, Lever's challenge seems daunting. She reminds us of the long road that still lies ahead toward true "background justice." A potential obstacle on that path is that attorneys, trial consultants, and the clients who employ them want first and foremost to win. All other ends, however noble, typically appear lower down our list of priorities. But in thinking about Professor Lever's article, it struck me that the goals of winning one's case and of combating racial injustice need not be contradictory. Lever focuses on two phases of a trial that may be susceptible to racially-unequal treatment: jury selection and arguments intended to evoke racial stereotypes. Fortunately, jury consultants have tools available to them in both areas that may not only improve their clients' chances of obtaining the best possible outcome, but that can also help reduce the incentives to use race in the courtroom.

Jury selection has a long and notorious history of racial inequality. While the Supreme Court's well-known decision in *Batson v. Kentucky* (1986) outlawed peremptory challenges based solely on the race of prospective jurors, it is unclear how successful the *Batson* line has been in reducing the use of race-based peremptories. Critics charge that *Batson* allows litigants to "explain" race-based peremptories with almost any "race-neutral" justification, regardless of how unpersuasive that justification might be. While more recent decisions such as *Miller-El v. Dretke* (2005) and *Snyder v. Louisiana* (2008) have attempted to give *Batson* some teeth, the use of race- and gender-based peremptory strikes continues.

In my experience, the incentives to use race and gender as predictors of verdict during jury selection are greatest when other information on prospective jurors is unavailable. For example, when judges deny the use of juror questionnaires and limit information on the jurors to a brief oral voir dire conducted by the court, counsel and consultants are left with almost no basis on which to make decisions about the use of their peremptories. Only easily observable factors such as race and gender differentiate one juror from another. And while the relationship between verdicts and factors like race and gender is relatively weak, particularly compared to, say, jurors' attitudes about case-specific issues, a relationship does exist in some types of litigation. A litigant interested in maximizing her chances of winning therefore has an incentive to consider race and gender as criteria for strikes when all other information is unavailable.

Debates over written juror questionnaires typically weigh the jurors' rights to privacy against the litigants' rights to a trial by an "impartial" jury. Perhaps it is time to introduce a new argument into this old debate. Perhaps written juror questionnaires not only give litigants a better picture of the attitudes of the prospective jurors, but also remove the incentive to use race and gender as crude proxies for verdict when making decisions about peremptory challenges. Clearly this is not an argument to be made in court in support of juror questionnaires, but is instead a suggestion for a different angle to an on-going debate.

Lever also expresses concern that prosecutors, eager to secure criminal convictions, may present arguments in court intended to evoke jurors' racial fears. I must confess here to a lack of experience in criminal matters, as my practice has dealt exclusively with civil litigation. But it seems to me that priming methods, used effectively in many types of cases, could inoculate jurors against such racial appeals. For example, Sommers' 2006 research study showed that white jurors who were asked voir dire questions about their attitudes toward race were less likely to convict a black criminal defendant than were white jurors who answered only "race neutral" voir dire questions. Sommers hypothesized that asking voir dire questions about race primed white jurors to think about those issues, which raised jurors' awareness about appearing to violate social norms of racial equality. This priming might not only reduce the effectiveness of the prosecutor's subtle racial appeals, but could even raise jurors' suspicions about the merits of such a case.

Jury selection and the arguments made during trial are two areas in which trial consultants can affect the outcome of a case. Lever reminds us that these two areas are also susceptible to the influence of racism. She challenges trial consultants to be part of a solution to the problem of on-going racial inequality in the courts. It is a challenge we should accept.

After reviewing consultant comments and a pre-publication copy of Professor Sommers' article on maintaining jury diversity, Dr. Lever had several additional comments.

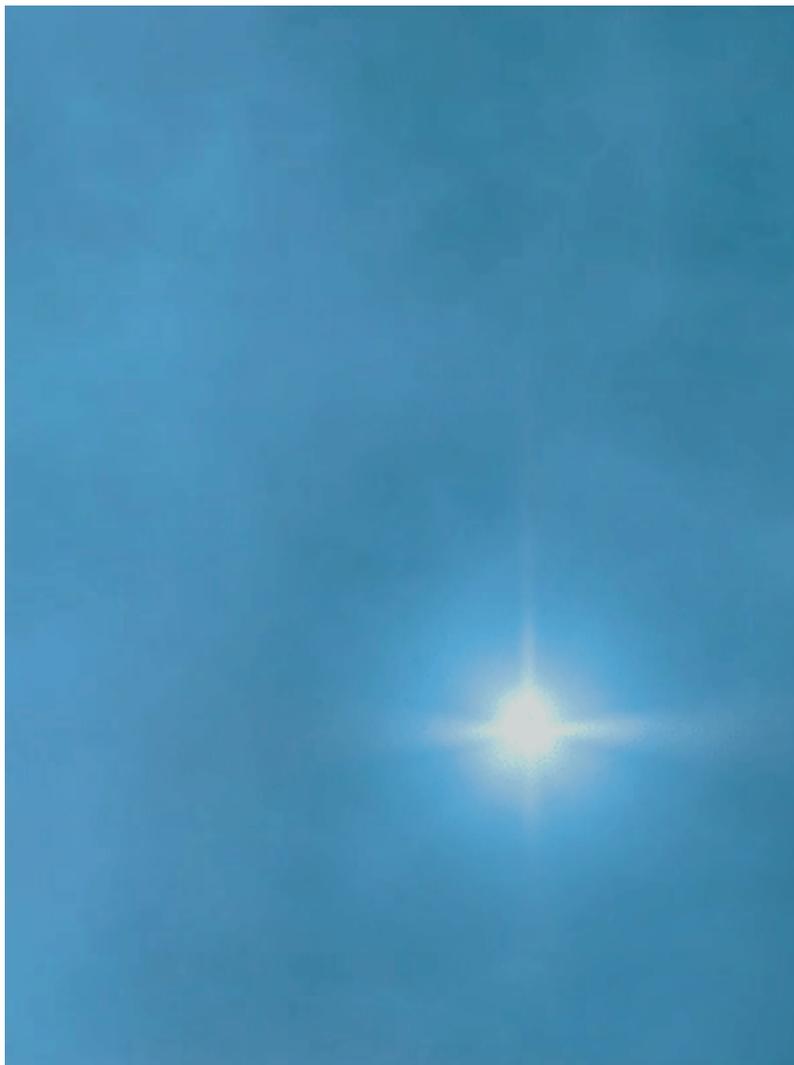
Annabelle Lever Responds to Comments and to Sam Sommer's article

I really appreciate readers' informative and supportive comments, and Professor Sommers' interesting article. These provide a much-needed practical and legal perspective for concerns about jury selection raised in my article. As might be expected, however, they also raise further questions of their own about the extent to which American juries are selected on a partisan basis, and about what it might mean to be tried by a jury of one's peers. In short, my concerns about the racial selection of juries are related to broader concerns as well as with the conception of justice underpinning of the practice of jury selection in America.

For example, Doug Green notes that one of the reasons that juries can be unrepresentative is that judges may allow "too many" peremptory challenges, and that, "Blind strike submissions are also a problem as is allowing overly broad or narrow voir dire". He states that his general practice is to develop "a trial strategy that appeals broadly to people in the venue or at least to a large percentage of the population" in order to avoid these problems. However, he still seeks information from all prospective jurors about their family life, work life and leisure time, in order to get a good sense of their values, and the potential relevance of these to the case at hand. From a British perspective this is truly astonishing. My sole experience as a juror in the UK involved one question – whether any of us felt we would be unable to hear and judge the evidence fairly? Perhaps this is insufficient probing of our capacities to understand and evaluate evidence, or to deliberate with others. But I would be very interested to hear how your readers understand the practical and moral justifications of American – as opposed to British – practice and, more broadly, how they understand the partisan shaping or formation of

juries, created by peremptory challenges, voir dire and blind strike submissions, and its fit with the ideal of a citizen jury.

After the commentaries and Professor Sommers' article, I have a long reading list to plough through, and many factual and normative questions about the jury system in Britain and America to think about. This exchange has also made me aware of how little I know about the relative strengths and weaknesses, from a deliberative perspective, of systems that do not use juries compared to those that do. Perhaps the precautions built into those systems to ensure fair assessment of the evidence will help us better decide what forms of partisanship are appropriate in jury selection, and whether intrusive questioning of jurors is consistent with the idea that ordinary citizens have a distinctive, and independent role to play in the administration of justice, along with legal professionals. At all events, a hearty thank you to Dr. Handrich and *The Jury Expert* for an exchange which has given me so much to think about.



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TJE's Favorite Thing for January 2009!

Thanks to **Leslie Ellis** of [TrialGraphix](#) | Kroll Ontrack we actually have TWO favorite things this issue.

Leslie's Favorite Thing One:

My new favorite thing is the **TripIt** website. You forward your confirmation emails from airlines, hotels, car rentals, etc. to the website, and it puts it all in one, easy to read, and (the best part) Blackberry-accessible itinerary, complete with maps and directions. It's totally awesome. And linkable.

The website is www.tripit.com.

Leslie's Favorite Thing Two:

Another favorite thing - the **Empirical Legal Studies blog**. These folks conduct and report on the empirical research on legal issues that we otherwise have a hard time getting access to. It's heavily academic, but chock-full of useful info and the posts are usually very well-written.

The website is: <http://www.elsblog.org/>

Happy New Year!

For *The Jury Expert*, it's especially good to turn the calendar year. In 2008, *TJE* went digital. We debuted in May, 2008 on the web in the form of downloadable PDF files. Now, especially for 2009, you can read *The Jury Expert* entirely on-line. You can still download and forward and print--everything you could do before. But now, you can read articles on-line in addition to downloading AND you can easily comment on what you're reading.

When we revamped this publication to be entirely on the web, our hope was to have your comments on articles published along-side the articles so that a dialogue could develop between litigators, consultants, academics, and other subscribers that would inform, challenge and stimulate us all. But first, we had to see if you liked where the [American Society of Trial Consultants](#) was going with this publication. (And you like us, you really like us!)

The Jury Expert is truly unique in legal publications--both in content and in our now interactive website. We owe a tremendous debt of gratitude to our web designer/developer, [Marc Lazo](#) who took our original ideas and made them into a reality on the web. Now, much like *TJE* articles strive to turn research and theory into practice, Marc and his associates have refined and expanded the website for *The Jury Expert* from our non-technical dreams to a reality meant to work for you with an intuitive ease. We also want to thank ASTC's [David Fish](#) for designing the sample ads you see throughout the print version and on the web. We'll start advertising in *The Jury Expert* this year to help ASTC defray costs of the publication.

So. Look around. Speak up! Comment. Interact. Tell us what you like and don't like. Even though it goes without saying--keep your comments professional and courteous even when/if you disagree. Happy 2009. Read on. Write in. And keep requesting article topics (we're hitting another requested topic this issue).

-- [Rita R. Handrich, PhD](#)



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