



The Jury in *To Kill A Mockingbird*: What Went Wrong?

BY JUDGE ROYAL FURGESON

The following selection is excerpted from a longer paper prepared for the Atticus Finch program at the State Bar Annual Meeting. To read the full article, which includes discussions of discrimination against Latinos and women in jury service, and the problem of pre-emptory challenges, go to www.texasbar.com/tbj.

How could the jury in *To Kill A Mockingbird*¹ find Tom Robinson guilty? It is clear, beyond a reasonable doubt, that he was *not* guilty. How could that very jury ignore the superb final argument of Atticus Finch, when he implored, “In the name of God, do your duty”?

The simple answer to the question is that the *Mockingbird* jury was not representative of Maycomb County, Ala., in 1935. While that jury had no women or minorities, we are certain that Maycomb County had lots of both. Rather than being diverse in gender, race, and ethnicity, the jury was monochromatic, populated by 12 white men. Scout describes the jury as “[s]unburned, lanky, they seemed to be all farmers, but this was natural: townfolk rarely sat on juries, they were either struck or excused. One or two of the jury looked vaguely like dressed-up Cunninghams.”²

Scout’s description confirms what history tells us about the composition of juries at that time: All white, all men. I believe it was this lack of diversity that prevented the *Mockingbird* jury from providing Tom Robinson with his guaranteed right to a fair trial “by an *impartial* jury of the State.”³

As history teaches us, “[t]he diverse and representative character of the jury must be maintained ‘partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.’”⁴ In 1879, the U.S. Supreme Court held in *Strauder v. West Virginia*⁵ that the 14th Amendment forbids a state to bar men from jury pools based on race or color. But in 1935, our country, especially in southern states like Alabama, still had far to go before

juries and courts would truly be “the great levelers” that Atticus Finch envisioned.⁶

For more than a century, racial minorities had been protected against jury discrimination in theory, but in practice these laws provided little actual protection. Congress enacted a law in 1875 making it a crime to engage in racial discrimination.⁷ But there has only been a single recorded prosecution under this statute, despite a long history of racial jury discrimination in the South.⁸

The Supreme Court first dealt with the question of whether minorities could protect their own rights against discrimination in *Strauder*, which challenged an 1873 West Virginia statute that limited jury service to white males over the age of 21 who were not elected officials.⁹ Justice Strong, in the Court’s opinion, found that singling out African Americans from service as jurors was “practically a brand upon them” and that it prevented “equal justice which the law aims to secure to all others.”¹⁰ Accordingly, the Court struck down the statute because it “excluded every man of [the defendant’s] race, because of color alone, however well qualified in other respects.”¹¹

But Justice Strong’s final qualification would prove to be a useful weapon for those seeking to exclude racial minorities. Indeed, the exception swallowed the general rule:

[The State] may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color.¹²



Thus, while the Supreme Court would not allow states to use race as the basis for exclusion, it appeared to have no qualms with other qualification requirements that could have the same effect, given the Supreme Court's view that African Americans were generally "abject and ignorant."¹³ Decided the same day as *Strauder*, *Commonwealth of Virginia v. Rives*¹⁴ narrowed the limited effectiveness of *Strauder*. Justice Strong found that there was no 14th Amendment violation when an African-American defendant was faced with the prospect of an all-white jury.¹⁵ Rather, an African-American defendant's right was the same as any other citizen: That jurors would be selected based on various qualifications with "no discrimination against them because of their color."¹⁶

Notwithstanding the hurdles that Justice Strong put in the way of African Americans challenging all-white juries in *Rives*, the Court's decision in *Strauder* was met by strong opposition in the South. William Royall, a well-known Virginia lawyer, wrote in his magazine, *Commonwealth*, that the *Strauder* decision amounted to a complete overthrow of federalism and a continuation of the Reconstruction.

[I]t was not supposed that [the 14th Amendment] would ever receive the wide construction now given to it [in *Strauder*], yet thinking men looked upon its provisions with alarm. ...¹⁷

After *Strauder*, minorities could not be excluded from juries solely on account of their race, provided that a law prohibited service. In *Neal v. Delaware*,¹⁸ the Supreme Court took up the issue considered in *Rives*: Could a state exclude all African Americans in practice even if the laws permitted jury service? All lower courts had dismissed the defendants' claims because they found no state law or constitutional provision that excluded African Americans.¹⁹ In *Neal*, no African-American juror had even been summoned from 1870 to 1880, let alone had actually served at a trial.²⁰ Justice Harlan found that, in the face of these facts, the state court's refusal to grant relief to the criminal defendant was:

[A] violent presumption ... that such uniform exclusion of that race from juries, during a period of many years, was ... fairly exercised, [because] the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States.²¹

Thus, *Neal* prohibits state officials from barring minority service on juries even when there is no law that bans certain classes of individuals from serving on juries based on racial grounds. But it is easy to overstate the strength of *Neal*. Delaware conceded in *Neal* that an African American had never served as a juror in the entire State of Delaware.²² Thus, the defendants in *Neal* were allowed to argue in federal court only

because the Supreme Court saw how openly hostile to African Americans the Delaware courts were.²³ Justice Harlan's discussion of the history of discrimination could have served as a basis for creating a burden-shifting mechanism — if states treated African Americans too discriminatorily over a period of time, then they would have the burden of proof. Unfortunately, subsequent courts minimized Harlan's discussion as *dicta*.²⁴ Thus, all *Neal* appears to stand for is that states should not concede the dearth of minority representation on juries.

Subsequent to *Strauder*, *Rives*, and *Neal*, the Supreme Court took a deferential approach to dealing with jury discrimination. An example of the deference is seen in *Smith v. Mississippi*.²⁵ Here, the defendant made allegations about African-American jury discrimination similar to those made in *Neal*, but was unsuccessful because the state did not concede to the allegations and the defendant provided only his own affidavit.²⁶ Absent any viable remedy in federal court, states were free to exclude minorities from juries so long as they did not concede that race was the motivating factor. A 1910 study on the racial makeup of juries found that African Americans rarely served in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia, and did not serve at all in Alabama and Georgia.²⁷

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It was not until the Supreme Court's opinion in *Norris v. Alabama*²⁸ that states would be required to do more than assert that minorities were not being excluded on the basis of race. Counsel for the defendants in *Norris* produced exhaustive evidence of the pervasive discrimination in Jackson County against African Americans.²⁹

In the face of all this evidence, the Court found that the *Neal* standard was met,³⁰ and reversed the convictions.³¹ Perhaps the most important evidence put forward by the defense counsel was the decision to bring copies of the tampered jury rolls — the names of six African-American men were added to make the rolls not appear to be exclusionary.³² In a moment that indicated how the Court would rule, Justice Van Devanter was heard whispering to Chief Justice Hughes: “Why it’s as plain as punch.”³³

By 1940, only five years later, the situation for African Americans appears to have improved, at least in the cities. A Carnegie Foundation Study found that African Americans now served quite frequently on juries in larger southern cities and in all southern federal courts.³⁴ But “the vast majority of rural courts in the Deep South ... made no pretense of putting Negroes on jury lists, much less calling or using them in trials.”³⁵ Thus, the all-white jury that convicted Tom Robinson was typical for rural Alabama, but Atticus Finch would have had grounds for an appeal, based on *Norris*, if nothing else. Yet, regardless of the strides made against discrimination, racism in jury selection continued even though the states were now subject to some oversight. There was still no requirement that jurors be randomly selected, so states could exclude jurors who were not “generally reputed to be honest and intelligent and ... esteemed in the community for their integrity, good character and sound judgment.”³⁶ Even though this vested states with great discretion to exclude jurors, the statistical requirements of the Supreme Court have gradually increased, and the federal government moved to random jury pools in 1968.³⁷

Professor Valerie Hans and Neil Vidman have been researching juries from their first jury book, *Judging the Jury* (1986) to their latest jury book, *American Juries: The Verdict* (2007). It is clear that juries get it right, so long as they are representative:

A key element contributing to jury competence is the deliberation process. A representative, diverse jury promotes vigorous debate. One of the most dramatic and important changes over the last half century is the increasing diversity of the American jury. Heterogeneous juries have an edge in fact finding, especially when matters at issue incorporate social norms and judgments as jury trials often do.³⁸

There is an interesting portion of Atticus’ closing argument: “A court is only as sound as its jury, and a jury is only as sound as the men who make it up.”³⁹ Atticus pinpoints exactly how the *Mockingbird* jury got it wrong. A court is only as sound as its jury, but that jury must be selected free from discrimination. Unfortunately, Tom Robinson’s case was an example of the

flawed institution of its day. But Atticus was not wrong to believe in the integrity of our courts and in the jury system, because while it may not be perfect, it is vital to the success of this great democracy.

Notes

- * I want to thank my law clerks, Erin Higginbotham and Joshua Barron, for their help in preparing this paper.
1. Harper Lee, *To Kill A Mockingbird*, 215–18 (J. B. Lippincott Company) (1960).
 2. LEE, *supra* note 1, at 175.
 3. U.S. Const. Amend. VI (emphasis added).
 4. *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975) (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
 5. 100 U.S. 303 (1879).
 6. Lee, *supra* note 1, at 218.
 7. See 18 U.S.C. §243.
 8. See Michael Meltsner, *Equality and Health*, 115 U. PA. L. REV. 22, 22 n.2 (citing *Ex parte Virginia*, 100 U.S. 339 (1880) as the only recorded prosecution under the statute).
 9. *Strauder*, 100 U.S. at 305.
 10. *Id.* at 308.
 11. *Id.* at 309.
 12. *Id.* at 310.
 13. *Id.*
 14. 100 U.S. 313 (1879).
 15. *Id.* at 322.
 16. *Id.* at 323.
 17. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1447 n.227 (quoting Fairman, *Reconstruction and Reunion, 1864–1888*, in 6 *History of the Supreme Court of the United States*, 1374 (P. Freund ed. 1971)).
 18. 103 U.S. 370 (1880).
 19. *Id.* at 387.
 20. *Neal*, 100 U.S. at 397.
 21. *Id.*
 22. *Id.* at 393.
 23. Schmidt, *supra* note 21 at 1457.
 24. *Id.* at 1458.
 25. 162 U.S. 592 (1896).
 26. *Id.* at 601.
 27. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 894–95 (1994).
 28. 294 U.S. 587 (1935).
 29. *Id.* at 592 (quoting the state court).
 30. *Id.*
 31. *Id.* at 599.
 32. Schmidt, *supra* note 21 at 1478.
 33. *Id.* at 1479.
 34. Alschuler, *supra* note 31 at 895.
 35. *Id.* (quoting Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 540–50 (Harper and Row, 2d ed. 1962)).
 36. *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 331, 332 (1970).
 37. Alschuler, *supra* note 31 at 894 (explaining the background for the Federal Jury Selection and Service Act of 1968).
 38. Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 *Judicature* 226, 230 (2008).
 39. Lee, *supra* note 1, at 217–18.

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