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# OPINION

## Rigged: Racial Bias in Jury Selection

### We need enforcement and monitoring

BY MARC H. MORIAL

During the Reconstruction Era, Congress passed the Civil Rights Act of 1875. The act guaranteed all citizens, particularly African Americans, equal treatment and access to public accommodations, public transportation and protected their right to serve on juries.

This month—140 years after the passage of the Civil Rights Act of 1875—the Supreme Court heard oral arguments in a Georgia death penalty case that serves as an intolerable reminder that people of color continue to be unlawfully excluded from jury service because of their race.



In 1987, Timothy Foster, an African American, was convicted and sentenced to death by an all-white jury in the murder of an elderly white woman. Foster, who was 18 years old at the time of the crime, is seeking a new trial on the basis of racial discrimination by the prosecution, who he claims deliberately singled out and purged all prospective black jurors.

Coincidentally, Foster's death sentence came only a year after the Supreme Court had ruled in *Batson v. Kentucky* that excluding potential jurors based on race was unconstitutional and violated the equal protection clause of the 14th Amendment.

The clear message of *Batson v. Kentucky* to not exclude jurors based on race failed to police the behavior of prosecutors in Timothy Foster's case. And Foster's

case is a textbook example of racial discrimination that is often so hard to prove.

In this rare instance of well-documented misconduct, prosecutors used a variety of methods to single out and remove potential black jurors. After getting access to the prosecution's jury selection notes in 2006, Foster's lawyer found "an arsenal of smoking guns in this case," including prosecutors highlighting the names of potential black jurors, circling the word "black" on questionnaires, and taking note of black jurors as "B#1" or "B#2."

Despite the efforts of our federal government and the Supreme Court to address and eliminate racial discrimination in the jury selection process, the practice continues to run rampant, and unchecked, throughout our criminal justice system—a system where more than half of the people on

death row are people of color. African Americans make up 42 percent of that number, while they make up only 12 percent of the United States population.

Deliberately excluding people of color from juries only serves to undermine our confidence in the credibility of our nation's criminal justice system. How can we believe justice is being served if the system is so blatantly rigged? And studies have shown that diversity makes for a better jury. In comparison to all-white juries, racially diverse juries are said to take longer to deliberate, they consider a wider variety of perspectives when deciding and make fewer factual errors. We cannot allow our constitutional right to be judged by a jury of our peers to be abused based on a prosecutor's implicit or explicit racial bias—lives are at stake.

If we are going to effectively

address prosecutorial misconduct, there must be real enforcement of rulings like *Batson v. Kentucky* to prevent the exclusion of jurors based on their race. Along with enforcement, there must be punishment. Right now, prosecutors are not taken to task when racial bias rears its ugly head during jury selection. With enforcement and monitoring, we can discover the patterns and punish the offenders. Foster's case has pulled back the curtain on an ugly and unlawful practice that we must remedy if we want a criminal justice system we can believe in.

Fortunately, we are decades past the all-white juries of the Jim Crow era, but we have a long way to go if we are committed to bring justice into our jury pools for all our nation's citizens.

Marc H. Morial is president and chief executive officer of the National Urban League.

## Entitled to Public Discourse Without Interference

### Demanding answers and accountability

**Editor's note: The following statement from Urban League of Portland President Nkenge Harmon Johnson is in response to the Oregon Department of Justice's surveillance of Oregonians who have used the social media hashtag 'Black Lives Matter,' a probe that's now under investigation.**

BY NKENGE HARMON JOHNSON

Together with other community leaders and concerned citizens, I sent a letter to Attorney General Ellen Rosenblum, and other state-wide- and locally elected officials on Tuesday, Nov. 10 calling for an immediate response to the Department of Justice's investigation of Oregonians who have used the social media hashtag "Black Lives Matter."

The letter calls for an audit of the Criminal Justice Division of the Oregon Department of Justice with regard to its surveillance of Oregonians using the Black Lives Matter hashtag, and others means of political and social justice engagement.

As President of the Urban League, working with my staff, part of my job is to work with government appointees and elected officials to better serve all Ore-

gonians and southwest Washingtonians. For 70 years, this Urban League has helped those who wish to help themselves. We register citizens to vote, and encourage them to use that right. We educate and challenge young people to exercise their leadership skills. We provide services and deliver results through advocating on the toughest subjects. At times, we also lead the way to hold government accountable for its treatment of Oregonians. This is one such time.

When a constituent contacts the Urban League about a concern, our first step is to gather the facts. If there is a charge of discriminatory treatment, we may contact the other parties involved to ask for more information. Then, if appropriate, the Urban League may conduct mediation between the parties, or refer the constituent to an attorney, the Oregon Bureau of Labor and Industry or other avenue to address the issue. My role is to use my voice to bring disparities to light, and to fight for fairness. In the present instance, however, I am unable to dispassionately engage those options because my family has become a target.

Unlike other issues that my office confronts, because the Criminal Justice Division of the Oregon Department of Justice has targeted my husband, I am personally in-

involved in this absurdity. I propose to speak for myself and for my family, while two senior members of the Urban League staff will push for a response and engagement from our elected leadership going forward. The Urban League aims for answers and accountability on behalf of you, our members, and all Oregonians.

Days ago, I learned that my husband Erious Johnson, the Director of Civil Rights for the Oregon Department of Justice and the Office of the Attorney General, has been profiled and targeted by his own agency. The Criminal Justice Division of the Department of Justice has printed and reviewed all of his photos and posts on Twitter. While finding nothing ominous or inappropriate, because he has used the hashtag "Black Lives Matter" the Department of Justice labeled Erious, created a file in the Criminal Justice Division, and reported his social media activity to Attorney General Rosenblum.

Upon hearing the allegations from Criminal Justice Divisions threat assessment of my husband, Attorney General Rosenblum and other members of her staff reviewed the file to determine whether additional action was warranted. Is he indeed a threat? The only troubling information they found relates to my husband's devotion to

the New York Jets football team but there's no accounting for fandom. A week later, the Attorney General called Erious to her office and notified him that he had been profiled in this way. We were stunned.

Regardless of one's civic or political affiliation, we are each entitled to engage in public discourse without the interference of Big Brother. We are allowed to post online family photos, recipes, cartoons, movie reviews, articles, and other items that interest us without the threat of intrusion from law enforcement. Yes, Black Lives Matter online, at work and at home. Privacy, the Constitution, and our right to freedom of speech matter, too. When there is probable cause to suspect that a crime has been committed, law enforcement can and should investigate. But what motivation could the Oregon Department of Justice Criminal Justice Division have had for conducting a threat assessment of my husband in the first place, let alone creating a file, and delivering it to the Attorney General, for further action? Yet, when nothing threatening was found, the department continued its investigation and escalation. If they labeled him a threat, who else is being wrongly targeted in this way?

Based upon the initial details provided by the attorney general, I have other questions, too. Have other Oregonians been intruded upon in this manner? Which other

hash tags did the Department of Justice analyze? Have they moved beyond digital surveillance? If someone with a mere seventy Twitter followers was assessed as a threat, is the Department of Justice also categorizing community activists this way? Law enforcement officials have used political and social justice commentary to target citizens for investigation and/or to label them as a threat.

I will close by saying; the posts we share via social media are in the public domain. Anyone may read them. That is not the issue. Here, however- even after no threat was found- criminal investigators at an Oregon state law-enforcing agency, used online posts to create an unwarranted threat assessment file of a citizen. That fails the smell test for equal treatment under law. If the Department of Justice treats one of its own directors in that manner, how does it approach you or me? If you read the letter below, you will learn that your Urban League, and our partner organizations, intend to find out.

If you have concerns about being targeted by the Oregon Department of Justice Criminal Justice Division threat assessment practice, or want to share your story, questions, concerns or support, please email us at [WeMatter@ULPDX.org](mailto:WeMatter@ULPDX.org).

Nkenge Harmon Johnson is president and chief executive officer of the Urban League of Portland.

