



The Fair Cross-Section Requirement

ROADMAP TO A REPRESENTATIVE JURY IN NEBRASKA (MARCH 8, 2024)

What is your role in the
Nebraska justice
system?

Poll 1



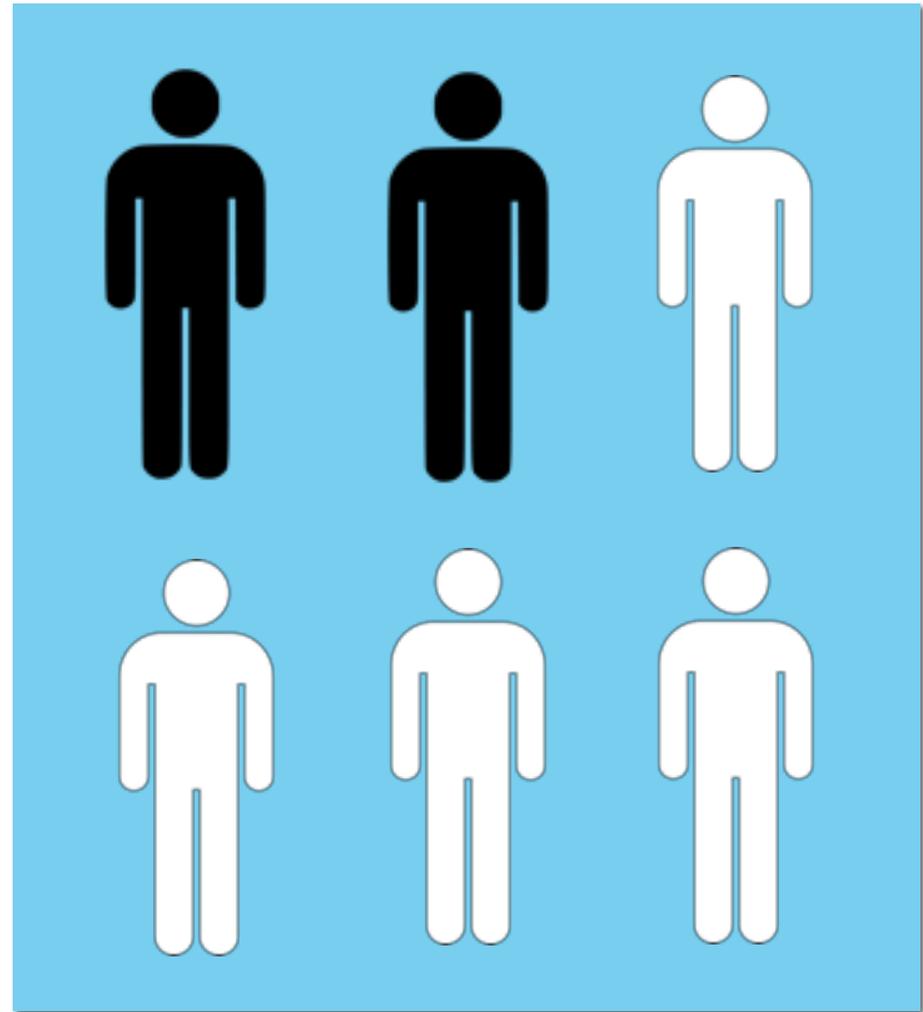
How often do juries in Nebraska fully reflect the diversity of their communities?



Why
jury
diversity
matters

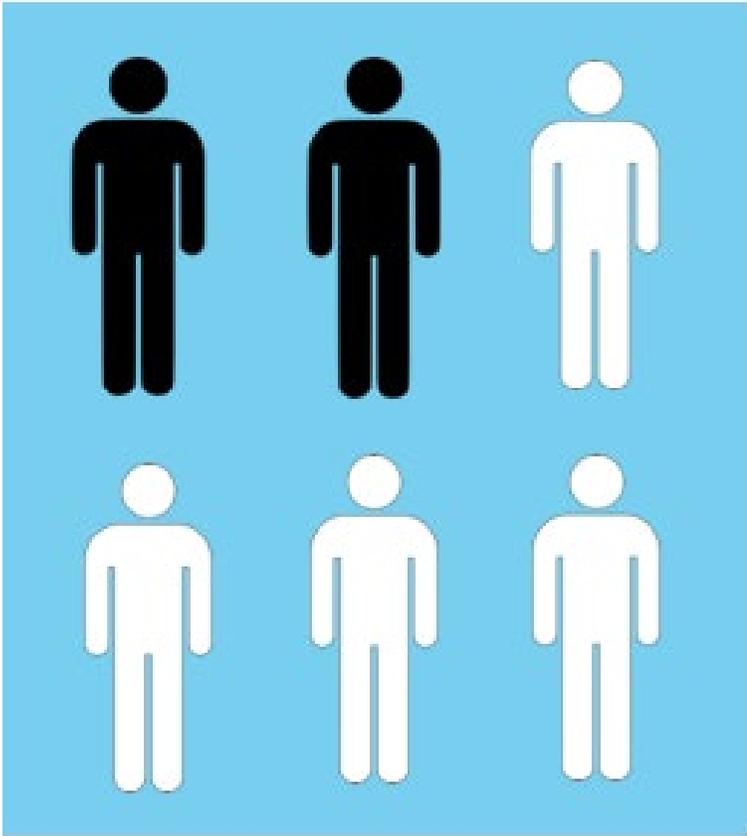


Higher quality deliberations



Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003); Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, *Social Issues and Policy Rev.*, V. 2., No. 1, pp. 65-102; Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, *J. Personality & Soc. Psych.*, V. 90, No. 4, pp. 597-612 (2006) .

RACIALLY MIXED JURIES



- Deliberate longer
- Discuss more case facts
- Fewer factual errors
- Fewer uncorrected factual errors
- More statements about race

Table 2
Group-Level Analyses of Deliberation Content

Measure	White jurors	
	Diverse group	All-White group
Deliberation length, in min	50.67 _a	38.49 _b
No. of case facts discussed	30.48 _a	25.93 _b
No. of factual inaccuracies	4.14 _a	7.28 _b
No. of uncorrected inaccurate statements	1.36 _a	2.49 _b
Amount of “missing” evidence cited	1.87	1.07
No. of race-related issues raised	3.79 _a	2.07 _b
No. of mentions of racism	1.35	0.93
% of time mention of racism met with objection	22% _a	100% _b

Note. Values with different subscript letters differ significantly at $p \leq .05$; $n = 15$ diverse groups and 14 all-White groups.

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“Jury representativeness can be more than a moral or Constitutional ideal;

it is sometimes an ingredient for superior performance.”

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Less biased verdicts

785 felony trials

Shamena Anwar, Patrick Bayer, Randi Hjalmarsson, *The Impact of Race in Criminal Trials*, *The Quarterly Journal of Economics*, 1-39 (2012)



Jury drawn from
all-white jury
venire

785 felony trials



Jury drawn
from venire
with at least
one black
person



In cases with no black people in the jury pool (typically consisting of around 27 people) blacks were convicted 81 percent of the time, and whites were convicted 66 percent of the time.



81%
CONVICTION

66%
CONVICTION





When the jury pool included at least one black person, the conviction rates were nearly identical.



71%
CONVICTION

73%
CONVICTION

IS JUSTICE COLOR BLIND?

A Duke University-led study on the impact of race on conviction rates raises questions about the criminal justice system.

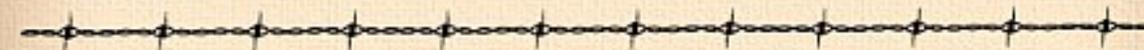
"Simply put, the luck of the draw on the racial composition of the jury pool has a lot to do with whether someone is convicted..." -- senior author Pat Bayer, chairman of Duke University's Economics Department

RESEARCHERS
EXAMINED MORE THAN
700 FELONY
TRIALS
IN SARASOTA AND LAKE COUNTIES
IN FLORIDA FROM 2000-2010.

Key findings:



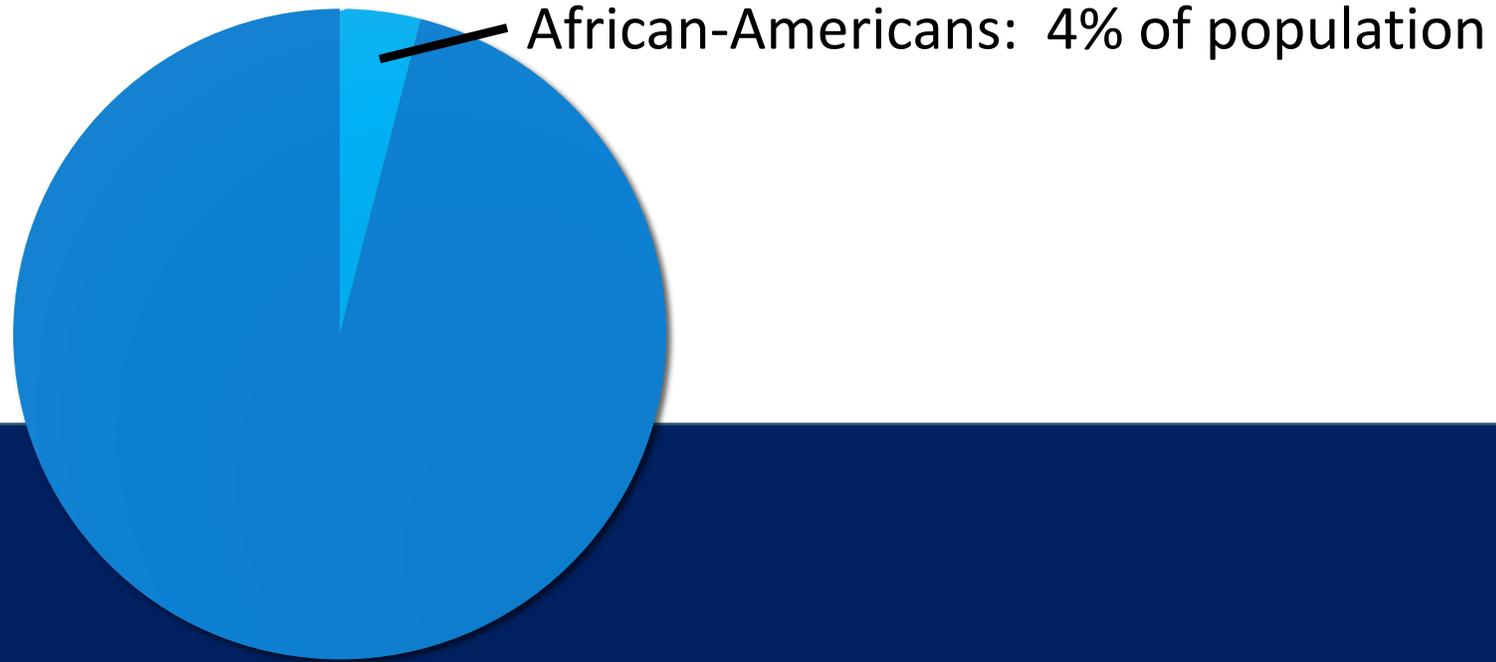
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When the jury pool included at least one black person, the conviction rates were nearly identical.



“The black-white conviction gap declines . . . in all trials in which there is at least one black member of the jury pool.”



“[E]ven **small changes**
in the composition of the jury
pool have a large impact”

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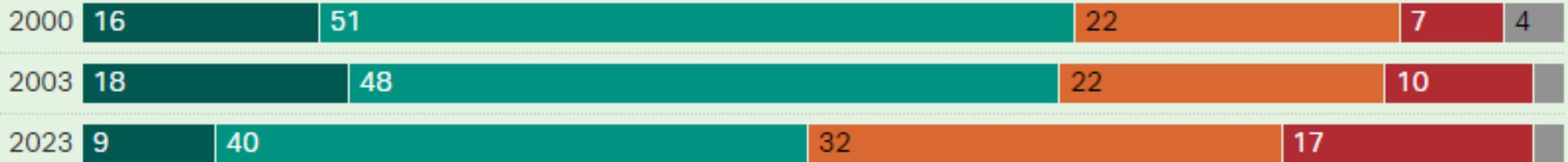
Increased public confidence

67%

Americans Less Likely Than in Past to Say Criminal Justice System Fair to Suspects

In general, do you think the criminal justice system is very fair, somewhat fair, somewhat unfair or very unfair in its treatment of people accused of committing crime?

■ % Very fair ■ % Somewhat fair ■ % Somewhat unfair ■ % Very unfair ■ % No opinion

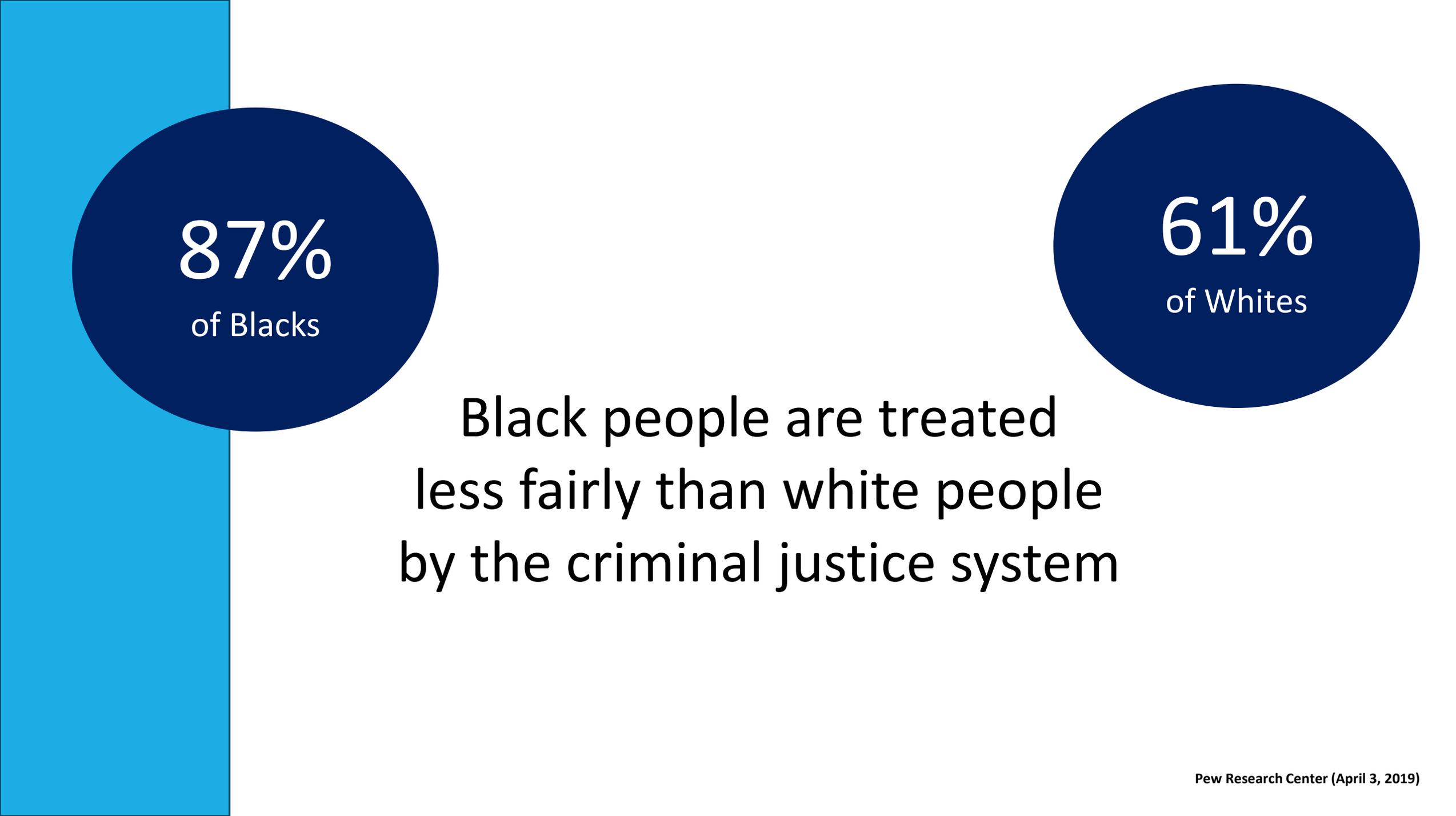


Get the data • Download image

GALLUP

49%

Gallup Poll (Nov. 16 2023) available at <https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx>



87%
of Blacks

61%
of Whites

Black people are treated
less fairly than white people
by the criminal justice system

Here is a list of institutions in American society. How much **confidence** do you have in each one?

Congress

U.S. Dept.
of Justice

U.S.
Supreme
Court

The
presidency

Juries
that
decide
criminal
cases

Table 9: Confidence in institutions

Among adults

Institution	Confidence		
	Great deal/a lot	Some	Little/None
Juries that decide criminal cases	34	42	24
The U.S. Department of Justice	25	36	38
U.S. Supreme Court	25	35	40
The presidency	25	31	44
Congress	10	33	57
Marquette Law School Poll, national survey, Feb. 5-15, 2024			
Question: Here is a list of institutions in American society. How much confidence do you have in each one?			

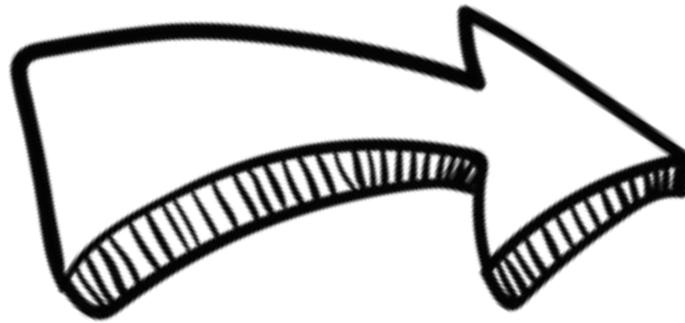
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**JURY
DIVERSITY**



**PUBLIC
CONFIDENCE**

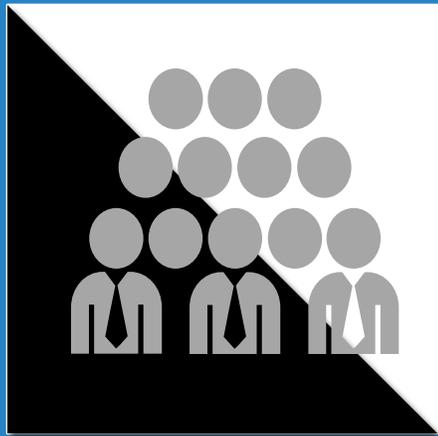
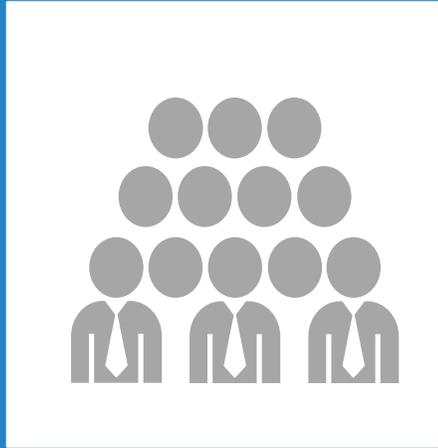


FAIR

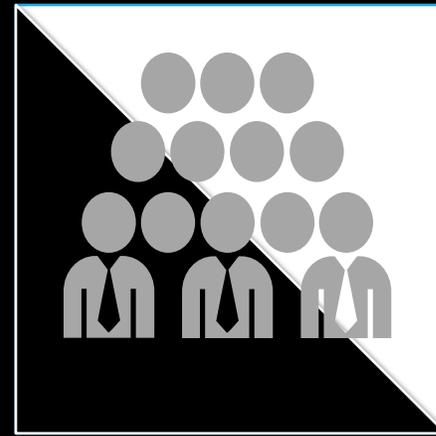
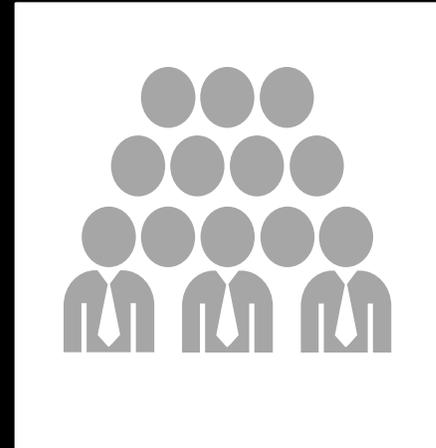


UNFAIR

ACQUITTED



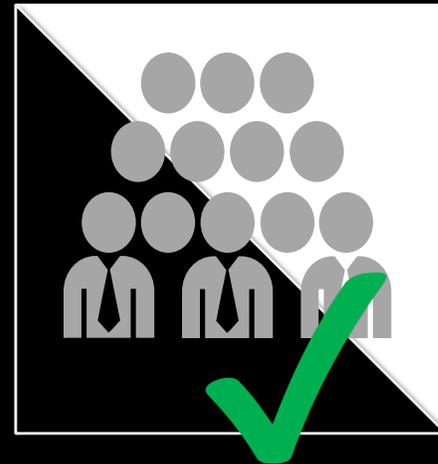
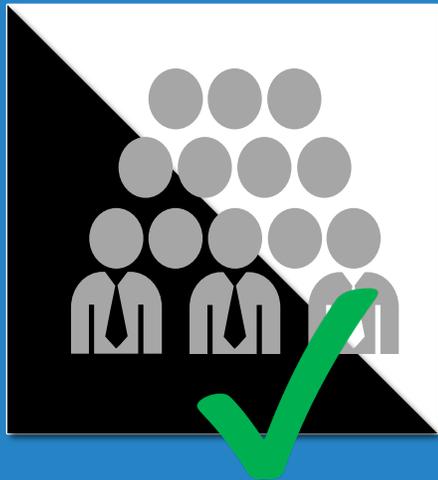
CONVICTED



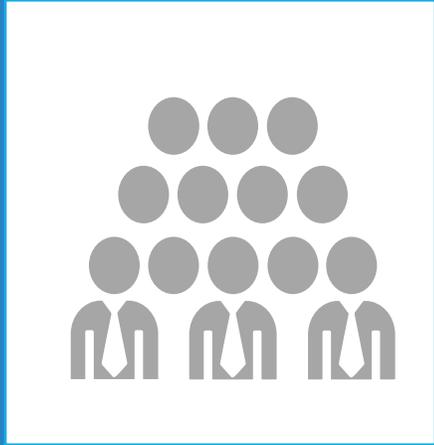
ACQUITTED

CONVICTED

Racially mixed jury = **any** outcome is seen as fair



ACQUITTED



CONVICTED



All white jury = convictions are seen as less fair

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Sixth Amendment

*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an **impartial** jury of the State and district wherein the crime shall have been committed*

U.S. Supreme Court, JOHN
ASHCROFT, RUTH BADER GINSBURG

Duren v. Missouri

439 US 357 (1979)



To establish a prima facie violation of the fair cross section requirement

The defendant must show that:

1. The group excluded is “distinctive”;
2. Representation is “not fair and reasonable” in relation to the number of persons in the community; and
3. Underrepresentation is due to systematic exclusion.

If all three prongs of the *Duren* test have been satisfied, the burden shifts to State to provide a compelling justification for systematically excluding the distinctive group.



First Prong

“Distinctive” groups ...

- See themselves as distinct;
- Others see them as distinct;
- They hold values not necessarily held by other groups.

Group characteristics are “immutable” – that is, they cannot be changed

- Mostly refers to race, ethnicity, or gender
- In rare instances, religion and national origin

Second Prong: Representation is not 'fair and reasonable'

ABSOLUTE DISPARITY

Measures the actual difference between the proportion of the distinctive group in the community and the proportion of that group in the jury pool

In *Duren*:

- 54% women in the community
- 16% women in the jury pool
- 38% absolute disparity

COMPARATIVE (AKA RELATIVE) DISPARITY

Measures the decreased likelihood that members of an under-represented group will be reflected in the jury pool

In *Duren*:

$$\frac{\text{38\% absolute disparity}}{\text{54\% women in the community}} = 70\% \text{ comparative disparity}$$



Third Prong

Systematic exclusion

- Does not have to be invidious (evil intended), simply systematic
- Is a function of the process or system
- Is due to some internal factor within the court's control
- Does not occur by random chance

Contributors to Underrepresentation in Jury Pools

Formal policies

- Qualification and exemption criteria

Computer errors

- Suppression files
- Database organization

Operational practices

- Two-step versus one-step jury systems
- Summons enforcement practices
- Creation/maintenance of master jury list
- Socioeconomic barriers

Berghuis v. Smith, 559 US 314 (2010)

Reaffirmed the basic framework of *Duren v. Missouri*

All tests of disparity should be considered if supported by competent evidence

Refused to adopt a brightline numerical threshold for disparity

Refused to address the question of whether socioeconomic factors could be used to support systematic exclusion

Which of these approaches should be the top priority?

- A. Raise juror pay
- B. Evaluate or expand source lists
- C. Public education about importance & process of jury service
- D. Improve technology & data collection on juror diversity
- E. Improve access to data about jury diversity



(And feel free to add other ideas into the chat)