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Unequal Protection under the Law:
Encoding Racial Disparities in the Case of *Smith v. Georgia*

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Abstract

We interrogate the Georgia Supreme Court ruling in the 2002 capital murder trial of Brandon Smith to illustrate how “fair cross section” implementation in Georgia’s legal system was used to create case law that institutionalized discrimination against Hispanic participation in the jury process. By paying scrupulous attention to legal precedents specifically intended to widen inclusion under the equal protection clause, the Justices’ decision put into place one legal standard for Hispanic participation in the jury process and another standard for all other groups. Using critical race theory, we argue that legal precedents based on distorted perceptions of the composition of the Hispanic community in new destination states, common practices of jury forced balancing and sole reliance on decennial census numbers collided to create case law that unintentionally deprives Georgia’s Hispanics of equal protection under the law and may contribute to the disproportionate presence of racialized minorities in the criminal justice system.

Keywords: new destinations, structural racism, critical race theory, Latina/o sociology, sociology of law

On December 28, 1999, nineteen-year-old Brandon Smith and two younger friends burglarized the home of Gary Lane Dale. Unexpectedly finding Dale at home, Smith shot and killed him and attempted to hide the crime by setting fire to the house. Within a month, all three men were apprehended, and Smith was charged with malice murder, armed robbery, burglary, arson and criminal gang activity. Ultimately, Smith was convicted and sentenced to life in prison.

Nothing about Smith's case obviously connects it to race or racism. Smith, his accomplices, and his victim were non-Hispanic whites, as were the prosecutor, judge, and defense lawyer in the case. Nonetheless, the string of events set in place by *Smith v. Georgia* (2002) led to a legal decision that demands a stringent representational standard for the nation's largest minority group, while holding non-Hispanics to a more lenient standard.

The sixth amendment to the Constitution guarantees criminal defendants the right to a jury of their peers. For much of this country's history, however, "peers" were non-Hispanic white men. Beginning in the forties (with *Smith v. Texas* [1940]), the courts upheld a series of constitutional challenges to the practice of excluding women (*Glasser v. United States* [1942]; *Taylor v. Louisiana* [1975]) and blacks (*Ballard v. United States* [1946]) from juries. Today, it is expected that *jury pools* (i.e., a list compiled by the courts of all adult citizens from whom juries can be selected, also called a *venire*) must be comprised of a fair cross section of the population.

In this study, we examine the Georgia Supreme Court's decision on a challenge to the findings in a pre-trial motion in the *Smith* case on fair cross-sectional representation. We argue that a unique set of circumstances operating within a racialized legal system created ideal conditions for the institutionalization of new but inequitable practices in the justice system. Legal precedents based on Georgia's methods of jury balancing and sole reliance on the decennial

census collided to create case law that deprives Hispanics¹ of equal protection under the law and may contribute to the disproportionate presence of racialized minorities in the criminal justice system. With Hispanic defendants less likely to be tried by a jury of their peers, legal decisions like *Smith* promise to exacerbate already disproportionately high levels of incarceration for Hispanics and other minority populations.

Structural Racism, Critical Race Theory, and the Law

Popular explanations of racism tend to focus on “bad” individuals who hold antiquated and irrational ideas that lead to discriminatory acts. In these accounts, racist individuals reproduce racial disparities through their individual and collective expression of racist ideologies. Critical race theorists (e.g., Delgado & Stefancic, 2011; Jones, 2002; Yosso, 2005), in contrast, assert that individualized explanations of racism inadequately account for the continued existence of racial disparities. Opinion polls regularly show that acceptance of explicitly racist attitudes and actions has declined (cf. Feagin, Vera & Batur, 2001), and groups that advocate ideologies of racial superiority are marginalized in society. Still, race researchers document the existence of a *laissez faire* racism (Bobo, Kluegel & Smith, 1996), which is reframed as a color-blind critique of perceived or projected “cultural” differences (Bonilla-Silva, 2010).

Critical race scholars argue that racism is embedded within societal structures and institutions. Moving beyond individualized explanations of racism, *structural racism* suggests that social systems are racialized (Lawrence et al., 2010; Powell, 2007). Thus, structural racism is endemic to the human experience since hierarchies of race and the resulting systematic disparities are deeply embedded within the social, political, and economic structures of society (Bonilla-Silva, 1997; Powell, 2007). For example, the University of Georgia (UGA) for many years

offered preferential admission to “legacy students”—children of former UGA students—ignoring the fact that this policy favored white students since UGA was an all-white school until 1961. Thus, structural racism describes the ways that society is racialized to confer privileges upon the dominant race and to marginalize minority races (Lawrence et al., 2010; Vaught & Castagno, 2008). Harms that are enacted upon racialized minorities thus become systemic—a central component of the social structures of society. Harm can therefore occur regardless of the presence or absence of specific individuals who consciously intend to discriminate. In the words of Bonilla-Silva (2010), structural racism describes “racism without racists.”

Structural racism is often enacted at the institutional level, as policies that are intended to be color-blind or race neutral—even ameliorative of racial inequities—actually encode disparate and racialized outcomes for minorities (Feagin, Feagin & Feagin, 1986). Since structural racism operates without individual racist actors to encode racial disparities at a broad societal level, institutions within societies can and do enact laws and policies that contribute to and reproduce racialized outcomes (López, 2000). Unintentionally racialized institutional policies arise from the stigma and marginalization of racial minorities² in society as a whole (cf. Hing, 2009), and from stereotyping in a way that allows minorities to be blamed for majority-minority differences (Bobo, Kluegel & Smith, 1996). For example, a large proportion of US immigrants are Hispanic, so Hispanics tend to be stereotyped as (often unauthorized) immigrants, and immigrant status is used to explain Hispanic-Anglo differences in income, education, and other social conditions.

The law is one institution that maintains racial hierarchies (Altman, 1990; Bartholomew & Hunt, 1990). Critical race theorists hold that color-blind laws, including case law, cannot ameliorate racial inequalities, because inequalities are intrinsically embedded into the social

structure, including the legal structure (Matsuda & Lawrence, 1993). At best, color-blind rulings perpetuate the status quo, which underscores white privilege as a valuable property that can be possessed only by whites (Harris, 1993; Ladson-Billings, 1999). At worst, color-blind rulings exacerbate existing inequalities. In our analysis of the *Smith* case, we argue that the Justices' interpretation of the "correct" means for implementing the fair cross section requirement of a demographically representative jury—a constitutional right that should, theoretically, expand legal inclusion of minorities—underscores that legal remedies fall short of justice.

Color-blind legal decision-making has far-reaching consequences for punishment in the United States, including death penalty sanctions and mass incarceration. If legal actors produce jury pools that are not representative of minority constituencies, they fail to adequately represent the communities where these cases are tried and they also overlook the statistically influential role of jurors' race and jury racial composition in jury decision-making. The Capital Jury Project, one of the major research initiatives on the death penalty in the United States, has demonstrated that the presence of five or more white males on the jury dramatically increases the likelihood of a death sentence (Bowers, Steiner & Sandys, 2001). The presence of minority jurors dramatically lowers the likelihood of death; the addition of a single white male tips the scale to a far greater chance of a death sentence. Because of the small size of juries, racial impacts develop at the level of the individual included (and excluded) in jury composition.

The absence of Hispanics in jury pools also shapes court decision-making broadly in a manner that risks increasing the flow of Hispanics into the US prison system. The term *mass imprisonment* is defined both by sheer numbers (a rate of incarceration and prison population size that dramatically exceeds historical norms) and the social concentration of imprisonment's

effects upon whole groups of the prison population (Garland, 2001). The groups most dramatically impacted by mass incarceration are African Americans and Hispanics (Travis, 2002). For instance, in 2000 as the US prison population neared a record-breaking two million mark, drug admissions for Hispanics were 22 times the number of 1983 admissions, while white admissions increased at a much lower rate (even as whites were and continue to be the primary drug users in the U.S.). As the War on Drugs accounts for the vast majority of this increase in imprisonment, the daily decision-making processes of justice actors who ignore the racial implications of drug policies and enforcement produce racial disparities in punishment (Alexander, 2010; Western, 2006). In the case of juries and jury pools, through a process of under-inclusion, legal actors have made discretionary decisions that produce and exacerbate issues of minority overrepresentation in the punishment phase of criminal justice processes.

The overall effects of this phenomenon extend outward into social life by way of the collateral consequences of mass incarceration. State laws that disenfranchise prisoners and former felons have nullified the voting rights of millions of minority citizens (Manza & Uggen, 2006) and have severely restricted access to housing, employment, education, and public benefits of millions more (Mauer & Chesney-Lind, 2002). Hispanic communities, like African American communities, have been the direct targets of mass incarceration and its collateral consequences, further marginalizing and removing them from political representation.

The exclusion of Hispanics from mainstream institutions of US society may be worsened by the escalation in anti-immigrant laws and policies (McKanders, 2010). Georgia, in particular, has a lengthy history of implementing state and local anti-immigrant policies in response to the increasing Hispanic and immigrant population (Bohon, 2006). In the past, state policymakers

have declared English the official state language, severely restricted unauthorized immigrants' access to public benefits, and banned unauthorized students from the state's top five public universities. Across the state, law enforcement agencies have partnered with the federal government to implement 287(g), a federal program that deputizes state and local law enforcement officers as immigration agents. These practices extend policing tactics against those perceived as foreign-born into new destination settings³.

In 2011, the Georgia legislature passed HB 87, the "Illegal Immigration Reform and Enforcement Act." Modeled after Arizona's controversial SB 1070, Georgia's law empowered police officers to verify the immigration and citizenship status of individuals in the course of a routine traffic stop, mandated that employers use the federal electronic eligibility verification (E-Verify) database to confirm the documentation status of employees, and established criminal penalties for those who knowingly "harbor" or transport unauthorized immigrants. Although most of these provisions have been permanently blocked, the bill's passage is an indication of Georgia's escalation in anti-immigrant legislation. The plethora of anti-immigrant laws, and the devolution of immigration enforcement (Coleman, 2012) to state and local officials like police officers and public benefits coordinators, ensures that Hispanics—who are often perceived as unauthorized, regardless of their actual citizenship or immigration status—will be increasingly targeted for enforcement (Conley, 2013).

Analytical Approach

We interrogate *Smith* as a case of structural racism in a new destination setting. Using participant observation, discourse analysis, interviews, and quantitative data, our analysis provides an "an in-depth, multifaceted investigation"(Feagin, Orum and Sjoberg, 1989: 2) of the *Smith* decision in

order to “make claims grounded in the claims of those who make them” (ibid: 8). The first author served as an expert witness in the *Smith* case and in several cases impacted by the *Smith* ruling, thus allowing her to observe court proceedings, interactions between key players, and courtroom dynamics and to gain access to those involved in the *Smith* case. Further, we examined court transcripts and the majority and minority decisions along with other jurisdictional rulings on jury composition in order to better understand the *Smith* ruling. We also interviewed expert witnesses and Smith’s defense attorney to extend our analysis of the findings. Finally, we used data from the American Community Survey and two decennial censuses (1990 and 2000) to predict the extent to which the *Smith* ruling could adversely affect racial minorities in the State of Georgia.

Smith v. The State of Georgia

Jury pools must reflect a fair cross section of the population, and whether or not a trial court’s jury pool meets the fair cross section requirement is evaluated based on the demographic composition of the county’s population. If women comprise 53 percent of a county’s over-18 population, then both the grand jury pool and the *traverse* (trial) jury pool must be about 53 percent women. The groups that must be accounted for in the jury pool differ from jurisdiction to jurisdiction, and the US Supreme Court has articulated few guidelines for which groups must be included in the pools; fair cross section only requires that “distinctive” groups cannot be systematically excluded. In many states, courts have maintained that three classes constitute distinctive groups: (1) women and men, (2) whites, blacks⁴, and other races, and (3) Hispanics and non-Hispanics. In most Southeastern states, including Georgia, Hispanics were not recognized as a distinctive group at the time of the *Smith* ruling.

In 2000, five distinctive groups were recognized in each of Georgia's 159 counties: men, women, blacks, whites, and "other race" persons. Dan Summer, Smith's attorney, filed a challenge to Smith's indictment and a pre-trial challenge to the traverse jury arguing that the juries in Smith's case were unconstitutional because they were drawn from jury pools that proportionally accounted for these five groups but did not represent a fair cross section of the Hall County, Georgia population. Specifically, Summer argued that the jury pools reflected the 1990 demographic composition of Hall County, but the jury commission did not account for the fact that the Hispanic population—less than one percent of the population in 1990—had grown exponentially between 1990 and 2000. By 2000, Hispanics accounted for nearly one-fifth of Hall County's total population (US Census Bureau 2000).

The trial judge ruled against Smith with regard to the grand jury challenge, noting that the grand jury composition was correctly comprised based on 1990 Census numbers (the grand jury indicted Smith eight months prior to the release of the 2000 Census data). In the case of the traverse jury, however, the judge ruled that the jury commission had access to 2000 Census data when compiling Smith's traverse jury list. Since adult Hispanics comprised 17.1 percent of the Hall County adult population, but likely only a tiny fraction of the jury pool, the venire did not meet the fair cross section standard.

It is worth noting that the degree to which Hispanics were underrepresented in Hall County's jury pool was a subject of dispute in the case. Because the Hall County jury commission did not collect data on potential jurors' Hispanic origin, there was no way to conclusively determine how many people in the jury pool were Hispanic. The defense conducted a Hispanic surname analysis—a widely used and well-validated technique for identifying

Hispanics within a larger population (Abrahamse, Morrison & Bolton 1994)—of the more than 20,000 names in the pool, and found that only two known Hispanic names (less than .01 percent of the jury pool) were on the list. However, the judge sided with the prosecution, who argued that all members of the jury pool who reported their race as “other” should be considered Hispanic, excluding the possibility that some jury pool members might have been Asian or American Indian. From this perspective, it was determined that 2.6 percent of the jury pool was Hispanic. Still, 2.6 percent on the jury pool fell far short of the 17.1 percent of the Hall County population enumerated as Hispanic adults. With this ruling, the trial judge in the *Smith* case became the first judge in Georgia to recognize Hispanics as a distinctive group for the purpose of jury selection.

In response to this decision, prosecutors in the *Smith* case petitioned the Georgia Supreme Court for a ruling on whether or not the trial court correctly found that Hispanics were a distinctive group and whether or not the trial court correctly found that Hispanics had been systematically excluded from jury pool selection. The court unanimously upheld the trial court’s finding of Hispanics as a distinctive group that must be accounted for in creating a jury pool. In a 6 to 1 decision, however, the Justices ruled that the trial court’s finding of systematic exclusion was unfounded. Justice P. Harris Hines, who wrote the decision, noted:

To establish a prima facie case of a fair-cross-section Sixth Amendment violation, Smith had to show an actionable disparity between the percentage of Hispanics on the traverse jury list and the percentage of Hispanics in Hall County who are jury-eligible . . . [Smith] based his percentage of jury-eligible Hall County Hispanics on census numbers showing that the number of over-18 Hall County Hispanics was 17,424, but the evidence showed that the over-18 Hispanics who are U.S.

citizens, and thus eligible to serve on juries, amounts to a small fraction of that number. Even a generous assumption... that a fifth of the over-18 Hispanics in Hall County are U.S. citizens, still leaves the absolute disparity between the percentage of Hispanics on the traverse jury list and the percentage of jury-eligible Hispanics in Hall County at only 0.82%, well within constitutional bounds . . . The trial court erred by finding that Smith had satisfied the second prong of the Sixth Amendment fair-cross-section test (*Smith v. Georgia* [2002], p. 747).

In essence, the Supreme Court found that jury representation for Hispanics should be based on citizenship, since many Hispanics in Hall County were non-citizen immigrants. Although this requirement may seem reasonable on its face—after all, only citizens can serve on juries—the decision creates disparity. The citizenship standard is not applied to other groups; thus, the decision requires jury commissions to hold Hispanics to a different standard. The decision also suggests that residents of a county can be denied equal protection if they are not yet citizens.

The lone dissenting Justice, Robert Benham, recognized some of the problems inherent in the majority decision. In his dissenting opinion, Benham wrote:

In a heterogeneous society such as ours, jurors charged with reaching decisions on matters that are not readily subject to scientific proof but are influenced by public policy, shared values, and facts that are oftentimes in conflict, must often take into consideration cultural differences, traditions, customs, and mores before a final determination can be made. Placing undue restrictions on the jury pool selection process by forcing jury commissioners to use only methods that pre-screen for citizenship could result in the exclusion of many citizens who are

potential candidates for jury service. Such a state of affairs might not bode well for our system of justice. The majority approach will cause jury commissioners to short circuit their quest for a more representative jury pool and stifle attempts to make our jury pools more inclusive. This is the very problem the U.S. Supreme Court sought to remedy in *Duren*.⁵ We need to learn from our mistakes of the past and not feel duty bound to repeat them (*Smith v. Georgia* [2002], pp. 751-752).

We argue that the *Smith* ruling represents a type of institutionalized racism arising in new Hispanic destinations. First, we examine how existing legal and practical precedents for meeting the fair cross section rule created conditions for systematic discrimination against Hispanics in new destinations. Next, we discuss how a lack of understanding of the Hispanic community and immigrant assimilation created a foundation for the citizenship requirement in the *Smith* decision. Finally, we demonstrate how the implementation of the *Smith* decision in Georgia, abetted by common procedural practices such as jury forced balancing and sole reliance on decennial census data for evaluating community composition, has exacerbated the exclusion of Hispanics from fair cross sectional representation in legal proceedings since 2002. This court logic creates conditions for concentrating disproportionately high levels of criminal justice control and imprisonment among minority and Hispanic populations through their non-inclusion in jury decision-making.

A “Fair” Cross Section for Hispanics

The sixth amendment to the Constitution declares that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury” in criminal prosecutions. The requirement of jury impartiality led to the *Duren v. Missouri* (1979) ruling that jury pools must represent a fair cross section of the community. In Georgia, fair-cross section has two prongs: (1) group distinctiveness

and (2) proportional representation. Group distinctiveness can vary from court to court. In *Avery v. Georgia* (1953) and *Reece v. Georgia* (1955), the court held that blacks could not be systematically and intentionally excluded from jury selection. Women were guaranteed jury representation in *Sanders v. Georgia* (1976). With *Smith v. Georgia* (2002), the courts added Hispanics and non-Hispanics to the list of distinctive groups in Georgia.

The recognition of Hispanics as distinctive was an important step toward expanding notions of racial and ethnic equality, particularly in a state with little previous experience with Hispanics and a tendency to ignore the minority status of these newcomers (Bohon, 2006; Neal & Bohon, 2003). However, the application of the second prong—more specifically, the Justices’ parameters regarding how proportional representation should be applied—eradicating any gains made by elevating Hispanics as a distinctive class. Case law requires that a distinctive class’ representation in a jury pool reflects its proportional makeup of the adult population (*Avery v. Georgia* [1953]), but the courts also recognize that population sampling results in a discrepancy between the sample and the population (*Swain v. Alabama* [1965])—a difference referred to by statisticians as *sampling error*. Thus, courts established rules about how large discrepancies can be before exclusion is no longer considered accidental, but systematic (Re, 2007).

Sampling error is an inevitable outcome of sampling (c.f. Yammarino, Skinner & Childers, 1991). However, Georgia’s methods for compiling jury pools at the time of *Smith* would not have yielded sampling error because the venire was not sampled; it was *forced balanced* (Simmons, 2012). That is, county-level jury commissioners constructed their jury pool from a list of registered voters. They then removed certain classes of people from the pool until the composition of distinctive groups in the pool proportionally matched the adult population of

the county.⁶ We examined jury pools in 15 counties and noted that the absolute disparity for each distinctive group was less than one percent in each pool; this underscores that forced balancing creates absolute disparity close to zero.

Despite the state-wide practice of forced balancing, and, thus, the absence of sampling error, the court determined in *Morrow v. Georgia* (2000) that “an absolute disparity between the percentage of a group in the population and its percentage in the jury pool of less than 5% is almost always constitutional; an absolute disparity between 5% and 10% is usually constitutional; and an absolute disparity of over 10% is probably unconstitutional” (Golden 2004, p. 3). *Absolute disparity* refers to the total difference between a group’s percent representation in the population and its percent representation in the jury pool. Thus, if women are 45 percent of the population but 35 percent of the jury pool, the absolute disparity is 10 percent ($45-35=10$), which is “usually constitutional.” Georgia courts use a “five percent rule” when certifying jury pool certificates. That is, if the absolute disparity between a distinctive group in the population—as determined by the US Census Bureau—and their representation on the jury pool is less than five percent, courts will certify the pool as constitutional.

In the subsequent sections, we contend that the five percent rule, the standard of absolute disparity, and the methods for determining population size exemplify how the judicial system is structured to confer privilege to the advantaged. First, absolute disparity understates the degree to which groups are underrepresented if the group is small relative to the overall population, and use of this standard enables intentional and systematic exclusion to be “almost always constitutional.” Second, the five percent rule allows judges to ignore Hispanic populations even when Hispanics outnumber other “distinctive” groups, and its arbitrariness allows judges to ignore Hispanic

populations, even when Hispanics outnumber other “distinctive” groups. Third, using the decennial census as the sole basis for determining population size ignores the fact that Hispanics are particularly likely to be undercounted in the US Census and guarantees underrepresentation of Hispanics in counties where the Hispanic population is growing rapidly.

The Five Percent Rule and the Distortions of Absolute Disparity

Fair cross section standards were instituted to guarantee minority representation in jury selection, but the evaluation of fair cross section using absolute disparity and the five percent rule actually discriminates against groups that are *truly* minority, defined as small relative to the dominant group. In fact, legal scholars have argued that “using either of the two most common methods of representation (absolute disparity and comparative disparity) would create ‘safe harbors’ in which the courts in a majority of jurisdictions across the country would become effectively immune from fair-cross-section challenges” (Hannaford-Agor & Waters, 2011, p. 762).

Regardless of a group’s total numbers, groups that do not comprise at least five percent of the population can be ignored in jury selection. Under the five percent rule, completely excluding a group under these conditions—even intentionally—is “almost always constitutional.” In Gwinnett County, Georgia—which has an adult population in excess of 570,000 according to the 2010 Census—a distinctive group would have to comprise more than 28,000 adult members before its complete exclusion from the jury pool would provide evidence of systematic exclusion under the five percent rule.

Table 1 shows the size of the Hispanic adult population in the Georgia counties with the largest Hispanic presence in 2010. The table shows how an absolute disparity between the size of the adult Hispanic population and zero (a hypothetical representation of Hispanics in the jury

pool if all Hispanics were blocked from jury participation) would be evaluated under *Morrow*.

[Table 1 about here]

The degree to which absolute disparity can be distorted by relative population size is obvious in a comparison of Atkinson and Chatham counties, two Georgia counties with 1,209 and 9,986 adult Hispanics, respectively, as of the 2010 Census. The absolute disparity in Atkinson County, if no Hispanics were in the jury pool, would be 20.3 percent. By contrast, in Chatham County, where Hispanics outnumber those in Atkinson County by eight to one, the absolute disparity would only be 4.9 percent if Hispanics were purposely excluded from jury selection; this complete exclusion would be considered “almost always constitutional.”

Hispanics are the nation’s largest minority group, and Georgia is the nation’s largest new destination for Hispanics (Bohon, 2006). The 2010 Census reports almost 900,000 Hispanics living in Georgia, a sub-population larger than the total population of some US states (US Census Bureau, 2010). Since 2000, all of Georgia’s 159 counties had at least some Hispanic presence; in many counties, the Hispanic population doubled between 2000 and 2010. Moreover, Georgia has one of the nation’s largest black populations and a sizeable Asian population. Despite this large minority presence, if every Georgia county refused to seat Hispanics in their jury pools, this would produce absolute disparities that are “almost always constitutional” in 108 counties, “usually constitutional” in 37 counties, and “probably unconstitutional” in only 14 counties.

The constitutionality of absolute disparity has been challenged repeatedly. In 2010, the US Supreme Court heard arguments in *Berghuis v. Smith* in which counsel for Diapolis Smith argued that the absolute disparity standard made it impossible for the jury selection system to violate the fair cross section provision until a minority group reached at least 10 percent of the

population (blacks comprised 7.28 percent of the county where Diapolis Smith was convicted). Smith's counsel argued for the use of *comparative disparity*, a measure that would calculate truer underrepresentation. That is, if a population is 8 percent black, but the jury pool is only 4 percent black, the absolute disparity would be 4 percent but the comparative disparity (the degree to which the sample proportion does not match the population proportion) would be 50 percent. In *Smith v. Georgia* (2002), the absolute disparity between the over-18 Hispanic population and the percent of Hispanics in the jury pool was at least 14.5 percent, and the comparative disparity was 85 percent. That is, there were at least 85 percent fewer Hispanics in the jury pool than we would expect from random selection of the population. However, in *Smith v. Georgia*, as in *Berghuis v. Smith*, the Courts rejected the notion that absolute disparity standards should be reconsidered.

There are few Georgia counties where the Hispanic adult population exceeds five percent of the total adult population and even fewer where Hispanics exceed ten percent, even in places like Chatham County, which has nearly 10,000 adult Hispanics. Judges have thus used the *Smith* decision to strike down fair cross section challenges of Hispanic jury pool representation in counties where Hispanics are less than ten percent of the population. In Gordon County, for example, a judge determined that jury commissioners did not have to account for Hispanics, since the difference between the percent of Hispanics in the population and their percent in the jury pool (zero) was only seven percent in 2000.⁷ Despite the fact that Hispanics outnumbered blacks two to one in Gordon County, the jury commission certified a jury pool in which the percent of blacks exactly equaled black representation in the county. In excluding non-citizens from the Hispanic counts, Hispanic representation need legally occur in only seven of Georgia's 159 counties.⁸

Using the Decennial Census to Determine Group Size

The problems with the five percent rule are exacerbated by the court's exclusive use of the decennial census to calculate disparity. The Census Bureau collects information on the population in two forms. The *short form* captures basic data for 100 percent of the population. The *long form* (now the American Community Survey [ACS]) collects detailed data on a sample of the population. Although the short form is administered every ten years, the ACS is administered every year. Thus, the ACS captures important changes to the population in the years between the decennial censuses.

The Justices in the *Smith* case put great store in the decennial census numbers and reasonably argued that jury commissions should not be expected to hit a "moving target" (p. 745). They ruled that only the decennial census should be considered in fair cross section challenges. Thus, counties that experience a sizeable minority influx in the ten years between censuses do not have an obligation to meet sixth amendment standards until new census data are collected and released. In Georgia, the Hispanic population grew nearly 300 percent between 1990 and 2000. Ignoring growth between Census years disadvantages minorities, especially Hispanics, because these sub-populations grow rapidly.

Citizenship Requirements and the Impact on the Black Population

Removing non-citizen Hispanics from the population base is discriminatory because non-citizens are not removed from the population base of any other groups. For example, in Gwinnett County alone there are 36,925 non-citizen, non-Hispanic white adults according to the ACS. There are also 10,771 non-citizen black adults. In fact, Georgia is a primary receiving destination for African immigrants, most of whom are black, and few of whom are citizens (Takougang, 2003). Yet, each of these non-citizens is counted in the black population base.

Other racialized factors are also at work. In the majority decision, the phrase “jury-eligible” was used twelve times. Presumably this underscores the fact that non-citizens are not eligible to sit on juries. However, jury-eligibility is a standard applied only to Hispanics. In this vein, a distasteful argument could be made that the black base population should be reduced to reflect its disproportionately high rates of incarceration (Alexander, 2012). Similarly, the white population could be reduced to reflect the high number of whites in nursing homes (Charles & Sevak, 2005). In other words, jury eligibility (and the reasons for ineligibility) varies by race and ethnicity; singling out citizenship is arguably anti-Hispanic.

The institution of the *Smith* ruling in jury balancing in Hall County also has implications for black representation in jury pools. To illustrate this, we created four hypothetical scenarios for the population composition based on the 2010 population of DeKalb County. We use DeKalb, rather than Hall County, because DeKalb has a sizable black population. The scenarios are illustrated in Table 2.

[Table 2 about here]

Scenario 1 illustrates the composition of DeKalb County if Hispanics were considered a cognizable group but no consideration was given for citizenship status (i.e., if Hispanics were treated as all other groups). In this scenario, Hispanic adults are 8.5 percent of the population and would comprise close to 8.5 percent of a forced balanced jury pool. Scenario 2 uses DeKalb County data to illustrate how Hall County juries were balanced in the years immediately following *Smith*. In this scenario, Hispanic non-citizens are removed from the Hispanic sub-population, reducing their proportionate representation to 2.4 percent. With the exception of non-Hispanics, no distinctive groups are affected, although they should be.

The problem with Scenario 2 (i.e., the *Smith* decision in practice) is that non-citizen Hispanics are also men, women, black, white, and other race people. Thus, non-citizen Hispanics should be removed not only from the Hispanic group, but from all other groups as well. However, doing so requires more information. In Scenario 3, we reduced the total male and female populations by the number of non-citizen, adult Hispanic men and women, respectively. We then tried to reduce the total number of adult blacks by the total number of black Hispanic non-citizens in the county, but we were unable to do so because such small numbers are suppressed by the Census Bureau. For this reason, race categories are not adjusted.

Scenario 4 demonstrates the magnitude of failing to adjust by race. In this Scenario, we adjusted all categories to eliminate non-citizens, regardless of whether or not these non-citizens are Hispanic. In doing so, the proportionality of the gender groups does not change significantly, but the racial proportions change substantially. Blacks, who comprise 52 percent of the population when citizenship is ignored (Scenario 1), account for 57 percent of the population when citizenship is considered for all groups. Thus, the failure to account for non-citizens among all racial groups disadvantages non-Hispanic blacks as well as Hispanics.

Conclusion

Just as structural racism operates without conscious and intentional racist actors to encode racial disparities at a broad societal level, institutions within that society enact policies that contribute to and reproduce racialized outcomes. The law is a significant site for this reproduction, and new destinations set the stage. In the case of *Smith v. Georgia*, the Supreme Court Justices extended representation in jury pools to Hispanics, but they placed parameters around their representation that do not similarly restrict other distinctive groups. The stated basis for the *Smith* decision—

primarily the five percent rule—was founded on a color-blind legal precedent of citizenship.

However, the majority's concern about non-citizen Hispanics in the absence of concern for non-Hispanic non-citizens is overtly exclusionary in effect, thus reproducing racialized outcomes, including increasing the disproportionate presence of minorities in the criminal justice system.

Georgia's courts have a long history of racial bias in sentencing (Stevenson & Friedman 1994), and the US Supreme Court has often shrugged at overwhelming evidence of judicial racial bias, referring to racism as “an inevitable part of our criminal justice system” (*McCleskey v. Kemp* [1987]). An irony in the *Smith* case is that the Georgia Supreme Court upheld a lower court's decision that recognized that a fair cross section of a population had to include the section represented by Hispanics. However, by reifying the five percent rule and placing citizenship restrictions solely on Hispanic representation, the courts created a policy that reproduced racial disparities. In doing so, Hispanics can be rendered invisible in the legal system (except as criminal defendants) in new destination places where they are hyper-visible.

It is impossible to predict the long-term consequences of restricting Hispanic representation in juries, but many factors suggest a poor outcome. First, multiple pathways to citizenship for immigrants—many of whom are Hispanic—remain blocked, and immigration reform has stalled indefinitely. We can therefore expect that Hispanics will continue to be underrepresented in jury venires now and into the future. Second, the increasing criminalization of Hispanic immigrants (Conley, 2013), combined with the courts' apparent lack of concern that defendants are heard by a jury comprised of a fair cross section of the population, poses an alarming potential for the ongoing mass incarceration of minorities (Bowers, Steiner & Sandys, 2001) and the deportation of Hispanic immigrants. Finally, changes in case law, such as those

seen in *Smith*, represent a form of macroaggression that creates structural vulnerabilities for Hispanics, resulting in increased stress and worry and leading immigrants to feel marginalized.

References

- Abrahamse, A. F., Morrison, P. A., & Bolton, N. M. (1994). Surname analysis for estimating local concentrations of Hispanics and Asians. *Population Research and Policy Review* (13), 383-398.
- Alexander, M. (2012). *The New Jim Crow: Mass incarceration in the age of colorblindness*. New York: The New Press.
- Altman, A. (1990). *Critical legal studies*. Princeton: Princeton University.
- Avery v. The State of Georgia*. 345 US 559. (1953).
- Ballard v. United States*. 329 US 187. (1946).
- Bartholomew, A., & Hunt, A. (1990). What's wrong with rights? *Law and Inequality*. (9), 1-58.
- Berghuis v. Smith*. 559 US 314. (2010).
- Bobo, L., Kluegel, J. R., & Smith, R. A. (1997). Laissez-Faire racism. In S. Tuch & J. K. Martin (Eds.), *Racial attitudes in the 1990s* (chapter 2). Westport, CT: Praeger.
- Bohon, S.A. (2006). Georgia's response to new immigration. In G. Anrig, Jr. & T.A. Wang (Eds), *Immigration's new frontiers* (Pp. 67-100). New York: The Century Foundation.
- Bonilla-Silva, E. (1997). Rethinking racism. *American Sociological Review* (62), 465-480.
- _____. (2010). *Racism without racists*. Lanham, MD: Rowman and Littlefield.
- Bowers, W. J., Steiner, B. D., & Sandys, M. (2001). Death sentencing in black and white. *University of Pennsylvania Journal of Constitutional Law* (3), 171-274.
- Charles, K. K., & Sevak, P. (2005). Can family caregiving substitute for nursing home care? *Journal of Health Economics* (24), 1174-1190.
- Coleman, M. (2012). The "local" migration state. *Law & Policy* (34): 159-190.

- Conley, M. (2013). Immigrant rights in the nuevo South: Enforcement and resistance at the borderlands of illegality (Doctoral dissertation). The University of Tennessee, Knoxville.
- Delgado, R. & Stefancic, J. (2011). *Critical Race Theory*. New York: NYU Press.
- Duren v. The State of Missouri*. 439 US 357. (1979).
- Feagin, J. R., Feagin, C. B., & Feagin, J.R. (1986). *Discrimination American Style*. Malabar, FL: RE Krieger.
- Feagin, J. R., Orum, A. M., & Sjoberg, Gideon. (1991). *A Case for the Case Study*. Chapel Hill, NC: UNC Press.
- Feagin, J. R., Vera, H., & Batur, P. (2001). *White Racism*. London: Routledge.
- Glasser v. United States*. 315 US 60. (1942).
- Garland, D. (2001). Introduction in D. Garland (Ed.) *Mass Imprisonment* (Pp. 1-3). Thousand Oaks, CA: Sage.
- Golden, M. (2004). Jury pool selection in Georgia. Report to the Administrative Office of the Courts. Atlanta, GA.
- Hannaford-Agor, P., & Waters, N. L. (2011). Safe harbors from fair-cross-section challenges? *Journal of Empirical Legal Studies* 8, 762-791.
- Harris, C. (1993). Whiteness as property. *Harvard Law Review* 106, 1707-1791
- Hing, B. O. (2009). Institutional racism, ICE raids, and immigration reform. *University of San Francisco Law Review* 44, 307-352.
- Jones, C. P. (2002). Confronting institutionalized racism. *Phylon* 50, 9-10.
- Judicial Council of Georgia. (2005). *Georgia Jury Commissioner's Handbook*. Atlanta: Administrative Office of the Courts.

- Kennedy, D. (2004). *Legal education and the reproduction of hierarchy*. New York: NYU Press.
- Ladson-Billings, G. (1999). Just what is critical race theory and what's it doing in a nice field like education. In L. Parker, D. Deyhle, & S. Villenas (Eds.) *Race is...race isn't*. (Chapter 1). Boulder, CO: Westview.
- Lawrence, K., Sutton, S., Kubisch, A., Susi, G., & Fulbright-Anderson, K. (2010). Structural racism and community building. In R. Hofrichter & R. Bhatia (Eds.) *Tackling health inequities through public health practice*. (Chapter 7). New York: Oxford (2nd ed.).
- Loh, W. D. (1984). *Social research in the judicial process*. New York: Russell Sage.
- López, I. F. H. (2000). Institutional racism. *The Yale Law Review* 109, 1717-1884.
- Manza, J. and Uggen, C. (2006) *Locked Out: Felon Disenfranchisement and American Democracy*. New York: Oxford University.
- Matsuda, M. J., Lawrence, C R. (1993). Burning crosses and the R.A.V. case. In M. J. Matsuda, C. R. Lawrence, R. Delgado, & K. W. Crenshaw (Eds.) *Words that wound*. (Chapter 6). Boulder, CO: Westview.
- Mauer, M. & Chesney-Lind, M. (eds.) 2002. *Invisible Punishment*. New York: The New Press.
- McCleskey v. Kemp*. 481 US 279 (1987).
- McKanders, K.M. (2010). Sustaining tiered personhood. *Harvard Journal of Racial and Ethnic Justice* 26, 163-210.
- Morrow v. The State of Georgia*. 532 GA 78. (2000).
- Neal, M., & Bohon, S. A. (2003). Dixie Diaspora. *Sociological Spectrum* 23, 181-212.
- Powell, J. A. (2007). Structural Racism. *North Carolina Law Review* 86, 791-816.
- Re, R.M. (2007). Re-justifying the fair cross section requirement. *Yale Law Review* 116, 1568-

1883.

Reece v. The State of Georgia. 350 US 85. (1955).

Sanders v. The State of Georgia. 230 GA 291. (1976).

Simmons, A. (2012, July 2). State expands jury duty pool. *Atlanta Journal Constitution*, pp. B1.

Smith v. The State of Georgia. 571 GA 740. (2002).

Smith v. The State of Texas. 311 US 128. (1940).

Stevenson, B. A., & Friedman, R. E. (1994). Deliberate indifference. *Washington and Lee Law Review* 51, 509-527.

Swain v. The State of Alabama. 380 US 202. (1965).

Takougang, J. (2003). Contemporary African immigrants to the United States. *Irinkerindo: A Journal of African Migration* 2, 1-15.

Taylor v. The State of Louisiana. 419 US 522. (1975).

US Census Bureau. (2000). Census of population and housing, summary file 1. Generated August 27, 2013, from <http://factfinder.census.gov>.

US Census Bureau. (2010). Census of population and housing, summary file 1. Generated August 27, 2013, from <http://factfinder.census.gov>.

Vaught, S. E., & Castagno, A. E. (2008). "I don't think I'm a racist." *Race, Ethnicity and Education* 11, 95-113.

Western, B. (2006). *Punishment and Inequality in America*. New York: Russell Sage.

Yammarino, F. J., Skinner, S. J., & Childers, T. L. (1991). "Understanding mail survey response behavior. *Public Opinion Quarterly* 55, 613-639.

Yosso, T. J. (2005). Whose culture has capital? *Race, Ethnicity and Education* 8, 69-91.

Table 1. “Constitutionality” of complete exclusion of Hispanics from jury service, 2000 and 2010

County	2000 Census			2010 Census		
	Hisp. Pop.	%	Constitutional?	Hisp. Pop.	%	Constitutional?
Barrow	961	2.9	almost always	3613	7.3	usually
Bartow	1631	3.0	almost always	4506	6.1	usually
Bibb	1392	1.2	almost always	2849	2.5	almost always
Bulloch	816	1.9	almost always	1726	3.1	almost always
Camden	975	3.3	almost always	1622	4.4	almost always
Carroll	1625	2.5	almost always	4258	5.2	usually
Chatham	3822	2.2	almost always	9986	4.9	almost always
Cherokee	5281	5.2	usually	12908	8.3	usually
Clarke	4529	5.4	usually	7933	8.2	usually
Clayton	11823	7.1	usually	21831	11.8	probably not
Cobb	32367	7.2	usually	53080	10.4	probably not
Coffee	1609	6.0	usually	2554	8.2	usually
Colquitt	3037	10.0	usually	4701	14.3	probably not
Columbia	1463	2.3	almost always	3862	4.3	almost always
Coweta	2072	3.3	almost always	5588	6.0	usually
DeKalb	39251	7.8	usually	46921	8.9	usually
Douglas	1679	2.5	almost always	6581	6.9	usually
Fayette	1702	2.6	almost always	4183	5.3	usually
Floyd	3288	4.8	almost always	5376	7.4	usually
Forsyth	3787	5.3	usually	10403	8.5	usually
Fulton	35704	5.8	usually	48745	7.0	usually
Gilmer	1200	6.8	usually	1557	7.1	usually
Glynn	1380	2.7	almost always	3283	5.4	usually
Gordon	3268	7.4	usually	4603	11.4	probably not
Grady	827	4.8	almost always	1570	8.4	usually
Gwinnett	44167	10.5	probably not	102225	17.9	probably not
Habersham	1707	6.2	usually	2997	9.2	usually
Hall	17424	17.1	probably not	27227	21.0	probably not
Henry	1690	2.0	almost always	7182	5.0	usually
Houston	2252	2.8	almost always	5357	5.2	usually
Jackson	793	2.6	almost always	2251	5.1	usually
Liberty	3181	7.6	usually	3649	8.2	usually
Lowndes	1655	2.4	almost always	3467	4.2	almost always
Murray	1223	4.6	almost always	2875	9.9	usually
Muscogee	5772	4.2	almost always	7954	5.6	usually
Newton	741	1.7	almost always	2719	3.8	almost always
Paulding	845	1.5	almost always	4235	4.3	almost always
Polk	1862	6.6	usually	2781	9.1	usually
Richmond	3794	2.6	almost always	5630	3.7	almost always
Rockdale	2961	5.8	usually	5017	8.1	usually
Spalding	632	1.5	almost always	1612	3.4	almost always
Tattnall	1219	7.1	usually	1598	7.9	usually
Telfair	170	1.9	almost always	1838	13.9	probably not
Tift	1923	6.9	usually	2376	8.0	usually
Toombs	1406	7.5	usually	1779	9.1	usually
Walton	775	1.8	almost always	1619	2.6	almost always
Whitfield	11396	18.8	probably not	18717	25.5	probably not

Source: 2000 and 2010 US Census Bureau redistricting data (PL 94-171).

Table 2. Proportionate Representation of Distinctive Groups: DeKalb County, 2010

	Scenario 1	Scenario 2	Scenario 3	Scenario 4
<i>Gender</i>				
Men	46.81%	46.81%	45.66%	45.23%
Women	53.19	53.19	54.34	54.77
<i>Race</i>				
Black	52.48	52.48	unknown	57.07
White	37.31	37.31	unknown	37.99
Other	10.21	10.21	unknown	5.00
<i>Hispanic origin</i>				
Hispanic	8.50	2.44	2.44	2.44
Non-Hispanic	91.50	97.56	97.56	97.56

Note: Calculations are based on numbers taken from the 2010 US Census.

Endnotes

¹ In this manuscript, we use the term “Hispanic” to mean Hispanic and/or Latino. Although we prefer *Latino*, we chose *Hispanic* over *Latino* for simplicity and consistency, because this term is used exclusively in the legal decisions upon which this study is based.

² Although the US government has maintained that Hispanics and Latinos do not constitute a race, per se, we assert that, as a social construct, any reasonable definition of race would place Hispanics and Latinos into a racial category. Thus, theories of race and racism are applicable to Hispanics and Latinos as a group, and it is appropriate to examine Hispanics and Latinos through a race lens.

³ New destinations and new Hispanic destinations are places (counties, states, or metropolitan areas) that now have a sizable presence of immigrants or Hispanics, respectively, but had little previous experience with these groups in the past.

⁴ Georgia law established “African Americans” as a distinctive group; however, in practice, all blacks living in a jurisdiction (whether or not they are Americans) are included in this class, so we use “black” throughout to underscore this point.

⁵ In *Duren v. Missouri* (1979), the US Supreme Court ruled that it was unconstitutional for states to make jury duty optional for women because the practice was based on an underlying notion that women’s service is less valuable than men’s.

⁶ In 2012, Georgia changed their jury pool selection process by centralizing jury pool creation at the state level and removing forced balancing. Georgia was the last US state to discontinue the use of forced balancing (Simmons, 2012). This move—which was enacted by the state legislature, rather than the courts—does not nullify the *Smith* ruling, since jury pools still have to balance in a way that reflects only citizen Hispanics.

⁷ The first author served as an expert witness in the Gordon County case.

⁸ It is impossible to adjust the Hispanic population for citizenship in counties with very small populations, because the Census Bureau suppresses those numbers due to confidentiality concerns. In those counties, the *Smith* decision is impossible to apply. However, we adjusted the numbers based on the assumption that every non-citizen in the smallest counties was Hispanic in order to obtain our calculations. Although it is unlikely that every non-citizen in every small county is Latino, employing this assumption has little impact on our calculations, since there are few non-citizens in the smallest counties, and the counties with very few Latinos do not reach the five percent threshold with regard to Latinos.