

# THE NY TIMES, ELENA KAGAN AND BATSON

✘ The New York Times has an article up that will appear in the front section of Wednesday's print edition decrying the fact that racial selection and exclusion still maintain in jury selection for trials in the South.

Arguments like these were used for years to keep blacks off juries in the segregationist South, systematically denying justice to black defendants and victims. But today, the practice of excluding blacks and other minorities from Southern juries remains widespread and, according to defense lawyers and a new study by the Equal Justice Initiative, a nonprofit human rights and legal services organization in Montgomery, Ala., largely unchecked.

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While jury makeup varies widely by jurisdiction, the organization, which studied eight Southern states – Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina and Tennessee – found areas in all of them where significant problems persist. In Alabama, courts have found racially discriminatory jury selection in 25 death penalty cases since 1987, and there are counties where more than 75 percent of black jury pool members have been struck in death penalty cases.

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The Equal Justice Initiative study argues that jury diversity “is especially critical because the other decision-making roles in the criminal justice system are held mostly by people who are white.” In the eight Southern states the study examined, more than 93 percent of the district attorneys are white. In Arkansas and Tennessee, all of

them are white.

Race based selection and exclusion in the formation and empanelment of juries is prohibited, and rightly so. It is considered improper, unethical and a violation of duty to the court, bar and public. And rightfully so. There mere inference of it, as is made clear by the numerous instances discussed in the NYT article can bring strong questions of propriety, especially for representatives of the people, i.e. prosecutors. And, as the Equal Justice Initiative points out, the systematic exclusion of people of color from public leadership roles, like prosecutors, is just as problematic and disgraceful.

It is a righteous thing the New York Times has emphasized and drawn attention to the depressing report by the Equal Justice Initiative on racial exclusion in the law. Which makes it all the more distressful that the famed Gray Lady of the Times never evinced the same concern about analogous inferences which could just as easily be drawn about Elena Kagan's record of faculty hiring at Harvard Law School.

First raised by Duke Law Professor Guy Uriel Charles, and noted by other bloggers like Glenn Greenwald and yours truly (but never substantively addressed or reported by the New York Times or other major media), Kagan has a record that puts the examples in the New York Times article on Southern jury biases to shame. From Professor Charles:

But what about people of color? How could she have brokered a deal that permitted the hiring of conservatives but resulted in the hiring of only white faculty? Moreover, of the 32 new hires, only six seven were women. So, she hired 25 white men, six white women, and one Asian American woman. Please do not tell me that there were not enough qualified women and people of color. That's a racist and sexist statement. It cannot

be the case that there was not a single qualified black, Latino or Native-American legal academic that would qualify for tenure at Harvard Law School during Elena Kagan's tenure. To believe otherwise is to harbor troubling racist views.

Third, what is the justification for putting someone on the Supreme Court without a demonstrated commitment to opening barriers for women and people of color? Kagan's performance as Dean at Harvard raises doubts about her commitment to equality for traditionally disadvantaged groups. I am eager to be convinced that she is committed to full equality for marginalized groups, but I'd like to see the evidence.

As I noted in the above linked post, the seminal Supreme Court case on racial selection and exclusion in jury empanelment (*voir dire*) is *Batson v. Kentucky*. If Elena Kagan's Harvard hiring record were considered under the *Batson* standard, it would raise immediate serious questions. While, as the Times article points out, there have been weaknesses in the application of *Batson* (in fact, that is the point of the article and the Equal Justice Initiative report), the fact remains serious ethical questions are raised by an appearance of violation.

So, why is it that the New York Times is suddenly up in arms about racial selection and exclusion in Southern Juries, but has no similar lofty concerns about the same inferences about the putative next Supreme Court Justice? Democrats, including then Senator Barack Obama, groused about the nomination of Sam Alito and John Roberts as it was; can you imagine the shrieking and howling that would have occurred if either Alito or Roberts had a record with the negative racial exclusionary inferences of that possessed by Elena Kagan? Why are they all so silent and credulous now in the face of damning

inference?