American Bar Association

NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS
Western Regional Hearing

FRIDAY, AUGUST 9, 2013
Westin Hotel Market Street
50 Third Street
Metropolitan I, 2nd Floor
San Francisco, CA 94103
Welcome to San Francisco and the Western regional hearing of the American Bar Association’s National Task Force on Stand Your Ground Laws. The Task Force has served as an independent leader on the legal critique and analysis of the impact of state Stand Your Ground laws, consistent with the mandate conceived by its primary sponsoring entities—the ABA’s Coalition on Racial and Ethnic Justice, the Center for Racial and Ethnic Diversity, the Commission on Racial and Ethnic Diversity in the Profession, Council for Racial and Ethnic Diversity in the Educational Pipeline, the Section on Individual Rights & Responsibilities, the Criminal Justice Section, the Standing Committee on Gun Violence and the Commission on At-Risk Youth.

During today’s public hearing, you will hear testimony from a diverse selection of featured California community leaders, regional stakeholders, legal experts and policymakers who will offer their distinct perspectives and open the dialogue on the many issues concerning the impact of Stand Your Ground laws, which have substantially altered the contours of traditional self-defense law in over half of jurisdictions in the United States.

The Task Force will receive testimony concerning a range of issues, including:

1. The utility of Stand Your Ground laws from legal and policy perspectives;
2. The impact of Stand Your Ground laws on public safety;
3. The impact of Stand Your Ground laws on traditionally marginalized communities and racial and ethnic minorities; and
4. The impact of Stand Your Ground laws on the criminal justice system, with a particular focus on law enforcement and the prosecutorial function.
The Western regional hearing marks the fourth of a series of public hearings in jurisdictions across the United States at which the Task Force will receive official testimony for its assessment and consideration in preparing the final report of its findings. The final report will summarize the comprehensive legal study undertaken by the Task Force and make recommendations concerning the utility of enacted state Stand Your Ground laws as well as their impact on the criminal justice system, public safety and individual liberties. We hope that this report will serve as an important guide to state and federal policy makers, government agencies, and organizations throughout the United States.

We thank you for your support of the work of the Task Force. We would like to give particular recognition and convey our appreciation to the Coalition on Racial & Ethnic Justice for hosting this Western regional hearing.

Leigh-Ann A. Buchanan, Co-chair          Jack Middleton, Co-chair
National Task Force on Stand Your Ground Laws
The American Bar Association’s National Task Force on Stand Your Ground Laws will hold its Western regional public hearing on Friday, August 9, 2013 at the Westin Market Street in San Francisco, California. The Task Force was convened principally to review, analyze, and assess the utility of the recently enacted state Stand Your Ground laws as well as the potential impact these laws may have on public safety, individual liberties and the criminal justice system.

Expert witnesses drawn from local and regional community and government stakeholders, law enforcement, prosecutors, public and private criminal defense attorneys, and legal academicians will testify on the impact of Stand Your Ground laws in the Western region, where several states that have enacted similar expanded self-defense statutes. Topics will include:

- The utility of Stand Your Ground laws from legal and policy perspectives;
- The impact of Stand Your Ground laws on public safety;
- The impact of Stand Your Ground laws on traditionally marginalized communities and racial and ethnic minorities; and
- The impact of Stand Your Ground laws on the criminal justice system, with a particular focus on law enforcement and the prosecutorial function.

WHO: ABA National Task Force on Stand Your Ground Laws

WHAT: Western regional public hearing regarding the impact of Stand Your Ground laws on the community, public safety and the criminal justice system

DATE: Friday, August 9, 2013 from 8:30 a.m. — 10:30 a.m.

WHERE: The Westin San Francisco Market Street, Metropolitan I, 2nd Floor, 50 Third Street, San Francisco, CA 94103

This hearing is free and open to members of the public and press. For more information on the August 9, 2013 Western regional hearing in San Francisco, or the National Task Force on Stand Your Ground Laws, generally, please contact: Rachel Patrick, Staff Director, ABA Coalition on Racial & Ethnic Justice, at: (312) 988-5408 or via email at: corej@americanbar.org.

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The ABA National Task Force on Stand Your Ground Laws is hailed as the prevailing independent leader on the legal analysis and social critique of the impact of state Stand Your Ground laws which exist, to some degree or another, in over half of jurisdictions in the United States. The American Bar Association-affiliated Task Force is uniquely qualified to analyze the impact of Stand Your Ground laws and the implications the expansion of the justified use of deadly force by these laws has on protecting the integrity of the criminal justice system as well as individual liberties, particularly those of systemically vulnerable constituencies.

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With nearly 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.
WESTERN REGIONAL PUBLIC HEARING SCHEDULE

HEARING CALLED TO ORDER & REMARKS

Justice Michael B. Hyman, Chair
ABA Coalition on Racial & Ethnic Justice

Leigh-Ann A. Buchanan, Co-Chair
ABA National Task Force on Stand Your Ground Laws

Leigh-Ann Buchanan, Introduction of Keynote Speaker
Presentation by Eva Paterson, President, Equal Justice Society

PRESENTATION OF TESTIMONY

1. Patricia Rosier, President, National Bar Association

2. Yolanda Jackson, Deputy Executive Director and Diversity Director,
   The Bar Association of San Francisco

3. Hon. Arthur Burnett, Sr. (Ret.), National Executive Director, National
   African American Drug Policy Coalition, Inc.

4. Marc Philpart, Senior Program Associate, PolicyLink

5. David Muhammad, Chief Executive Officer, Solutions, Inc.

6. Juliet Leftwich, Legal Director, Law Center to Prevent Gun Violence


8. Hon. Demetrius D. Shelton, Past President, National Bar Association,
   Past Vice President, State Bar of California
9. Dr. Jennifer Eberhardt, Associate Professor, Stanford University


11. George Gascón, District Attorney, City and County of San Francisco


13. John A. Powell, Professor of Law, University of California Berkley School of Law, Haas Institute for a Fair and Inclusive Society

OPEN FORUM FOR PUBLIC COMMENT

CLOSING REMARKS

Jack Middleton, Co-Chair
ABA National Task Force on Stand Your Ground Laws

ADJOURNMENT
WITNESS BIOGRAPHIES

Jeff Adachi

Jeff Adachi is the elected Public Defender of the City and County of San Francisco. The office provides a panoply of innovative programs to its clients, including Drug Court, expungement services and a full-service juvenile division. Mr. Adachi has served on the American Bar Association’s Standing Committee on Legal Aid and Indigents and is a member of the National Board of Trial Advocacy. He currently sits on the board of the California Public Defenders Association and is a past board member of California Attorneys for Criminal Justice and the San Francisco Bar Association. In 2006, Mr. Adachi received the American Bar Association’s Dorsey Award for excellence in public defense. In 2007, Mr. Adachi was the recipient of the prestigious California Lawyer Attorney of the Year award for his work in the field of prisoner reentry. In April 2009, Mr. Adachi received a second California Public Defenders Association Program of the Year Award for the office’s innovative Children of Incarcerated Parents program. In May 2010, Mr. Adachi was honored with the 2009 Defender of the Year award from the California Public Defenders Association. In December 2012, Mr. Adachi received the National Legal Aid & Defender Association’s Reginald Heber Smith Award for outstanding achievement and dedicated service. Adachi is a graduate of the University of California, Berkeley and Hastings College of the Law.

Judge Arthur L. Burnett, Sr.

Judge Arthur L. Burnett, Sr. (Retired) is the National Executive Director, National African American Drug Policy Coalition, Inc. He is a graduate from Howard University summa cum laude with a major in political science and minor in economics. In his junior year he was elected to Phi Beta Kappa. He then attended New York University School of Law where he received his law degree in 1958, graduating in the top 10% of his class and as a Founders’ Day Award Recipient. He was also Associate Research Editor of its Law Review.

While retaining the status of a Senior Judge, on August 1, 2004 he took a sabbatical from the Bench and assumed the position of National Executive Director of the National African American Drug Policy Coalition, Inc. in which position he now serves. He served as an Adjunct Law professor in Trial
Advocacy at Howard University School of Law from 1998 - 2011. He also served as an Adjunct Law professor at Catholic University School of Law teaching appellate advocacy from 1997 to 2008. On February 15, 2013 he officially completely retired from the Superior Court of the District of Columbia.

Bob Egelko

I’ve been a reporter in California since 1970. I spent 30 years with the Associated Press in Los Angeles, San Diego, Sacramento and San Francisco, covering state government from 1974 to 1984 and legal affairs from 1984 onward. I worked briefly for the San Francisco Examiner in 2000 and then moved in November 2000 to the Chronicle, where I cover federal and state courts. I attended McGeorge School of Law at night from 1979 to 1983, got a J.D. and passed the bar exam. Received a career award from the Society of Professional Journalists, Northern California chapter, in 2011, and at noon Friday I’m to be a co-recipient of this year’s Toni House Award for legal journalism from the American Judicature Society.

George Gascón

George Gascón is the District Attorney for the City and County of San Francisco. He is the first Latino to hold the office in San Francisco and is the nation’s first police chief to become District Attorney. His approach to public safety and reform is based on the need to hold people accountable without breaking the wallets of California taxpayers. Throughout his thirty year career in law enforcement, he has successfully lowered crime in all his positions.

As District Attorney, he created three groundbreaking initiatives – the Alternative Sentencing Program, the Neighborhood Courts and Neighborhood Prosecution Program and a county level Sentencing Commission to begin addressing the high recidivism rate in California. He launched innovative programs to reduce truancy, increase mentoring opportunities for youth, and reduce bullying. He expanded his office’s multilingual Victims Services Unit to community centers throughout the city.
Yolanda M. Jackson

Yolanda M. Jackson is the Deputy Executive Director and Diversity Director of The Bar Association of San Francisco, where her focus is on the organization’s operations and increasing diversity within the legal profession. She has years of experience as a litigator, mediator, arbitrator, consultant, trainer and facilitator, and has helped businesses address diversity and organizational development needs and conflict resolution methods.

Ms. Jackson is an Adjunct Professor at UC Hastings College of the Law, where she teaches negotiations and settlement courses and classes on Bias/Diversity in Negotiations. She has presented over 100 “elimination of bias” training sessions for law firms, bar associations, corporations/entities and various law schools. She is also an Adjunct Professor at Golden Gate University Law School where she teaches Insurance Law and Practical Legal Writing. She has served on the boards of numerous legal and professional organizations throughout the country and has won several awards including the California Association of Black Lawyers President’s Award, the Association for Dispute Resolution of Northern California “Gil Lopez Award”, the League of Women Voters of San Francisco’s “Women Who Could Be President” award, the National Diversity Council’s “California’s Most Powerful and Influential Women” and the National Bar Association Presidential Award.

Judge John F. Lakin

Florida Circuit Court Judge John F. Lakin was elected in 2012, to the 12th Judicial Circuit Court for Sarasota, Manatee and DeSoto Counties. Judge Lakin started his legal career in Boston, Massachusetts in 1990, working for a Boston area criminal defense firm. Thereafter, Judge Lakin was with the Andover, Massachusetts law firm of Broadhurst, Lakin and Lakin where he was partners with his brother Kenneth A. Lakin and then State Representative, Arthur J. Broadhurst until 2000.

Judge Lakin has extensive experience in insurance litigation, representing policy holders in coverage disputes and the appraisal process, and in breach of contract and bad faith claims in both state and federal courts. Judge Lakin has also represented clients in complex business and commercial litigation for many years, including handling re-insurance litigation in London and other international markets. He has
extensive experience in criminal defense work, representing clients in serious felonies for many years in Florida and Massachusetts. Judge Lakin was lead counsel in over fifty (50) civil and criminal jury trials

Juliet Leftwich

Juliet Leftwich is the Legal Director of the Law Center to Prevent Gun Violence (formerly Legal Community Against Violence), a national law center that provides legal assistance and expertise to legislators seeking to advance effective, legally-defensible laws to reduce gun violence. The organization was founded by lawyers in the wake of the 101 California Street assault weapons massacre in downtown San Francisco in 1993.

Ms. Leftwich oversees the Law Center’s legal activities nationwide. She has worked extensively on the development and drafting of state and local gun laws throughout the United States, and has testified at numerous public hearings in support of such laws. She is also an expert on the Second Amendment. Ms. Leftwich obtained her undergraduate degree from the University of California at Berkeley and her law degree from the University of California at Davis. She is a member of the American Bar Association’s Standing Committee on Gun Violence and Association of Bay Area Government’s Youth Gun Violence Task Force, and has served as Co-Chair of the Alameda County Bar Association’s Gun Violence Prevention Committee. In 2013, she was appointed as an American Bar Association advisor to the Study Committee on Firearms Information of the National Conference of Commissioners on Uniform State Laws.

David Muhammad

David Muhammad is a leader in the fields of criminal justice, violence prevention, and youth development. David is the CEO of Solutions Inc., a consulting firm providing technical assistance to philanthropic foundations and government agencies on juvenile and criminal justice issues.

Through Solutions, Inc, David is the leading Positive Youth Development consultant and technical assistant provider to six California counties through the Sierra Health Foundation’s Positive Youth Justice Initiative. David is also providing leadership and technical assistance to the City of Oakland’s CeaseFire violence reduction initiative through the California Partnership for Safe Communities. David is helping to develop a new organization in Los Angeles, the Anti-Recidivism Coalition (ARC). ARC is a support
network and advocacy organization for the formerly incarcerated. David is also co-coordinating a statewide coalition of juvenile justice advocates, the CA Alliance for Youth and Community Justice.

Civil rights attorney Eva Jefferson Paterson is co-founder and President of the Equal Justice Society, a national strategy group focused on reclaiming the 14th Amendment and its Constitutional safeguards against discrimination.

She previously served 13 years as Executive Director of the Lawyers' Committee for Civil Rights. At the Lawyers' Committee, she was part of a broad coalition that filed the groundbreaking anti-discrimination suit against race and gender discrimination by the San Francisco Fire Department. That lawsuit successfully desegregated the department, winning new opportunities for women and firefighters of color.

Paterson is co-chair of the California Civil Rights Coalition (CCRC), which she co-founded and previously chaired for 18 years. One of the priorities for the Coalition is devising a progressive slate of ballot initiatives for the November 2012 election. As co-chair of CCRC she was a leading spokesperson in the campaigns against Proposition 187 (anti-immigrant) and Proposition 209 (anti-affirmative action) and numerous other statewide campaigns against the death penalty, juvenile incarceration and discrimination against lesbians and gay men. She also served as Vice President of the ACLU National Board for eight years, and chaired the boards of Equal Rights Advocates and the San Francisco Bar Association Foundation.

Marc Philpart, Senior Program Associate, supports the Boys and Men of Color team and leads the PolicyLink Black Male Achievement team. As the team lead for Black Male Achievement initiatives at PolicyLink, he co-directs the Leadership and Sustainability Institute for Black Male Achievement (LSI). The LSI is a national membership network dedicated to improving the life outcomes of Black men and boys through systemic change.

He has specific expertise in supporting and developing networks that advance policy and practice to strengthen the field and further race and gender equity in the areas of health, education, employment and juvenile justice. Prior to joining PolicyLink, Philpart worked in the president’s office at PATH, a non-
profit global health organization. He holds masters degrees in public affairs and public health from the University of Washington in Seattle and earned his BA in History from Xavier University of Louisiana.

John A. Powell

Professor John A. Powell is Executive Director of the Haas Institute for a Fair and Inclusive Society (HIFIS) and Robert D. Haas Chancellor’s Chair in Equity and Inclusion at the University of California, Berkeley. Formerly, he directed the Kirwan Institute for the Study of Race and Ethnicity at The Ohio State University and the Institute for Race and Poverty at the University of Minnesota. He led the development of an “opportunity-based” model that connects affordable housing to racialized spaces in education, health, health care, and employment. He is the author of Racing to Justice: Transforming our Concepts of Self and Other to Build an Inclusive Society.

Patricia M. Rosier

After attending her first NBA Convention in 1980, Patricia Rosier has dedicated a major portion of her life’s work to the National Bar Association. Her love and devotion to the NBA are unquestioned. She has attended every convention since 1980, and even met her husband, NBA Past President, Michael Rosier, at an NBA event. She has over twenty-five (25) years of NBA leadership experience including Vice President, Board of Governors, Executive Committee, Regional Director of Regions X and XII, and Chair /Co-Founder of the Small Firms/Solo Practitioners Division. She is also a member of the NBI and General Counsel to NABBS.

Patricia began her journey in the Association by joining the Government Lawyers Division, since she was at that time Staff Attorney for the U.S. Securities and Exchange Commission, as well as the Women Lawyers Division. When she became Assistant General Counsel for American General Life Insurance Company, she joined the Institutional/Corporate Law Section. Subsequently, Patricia became Chair of this Section and became a Member of the NBA Board of Governors after becoming General Counsel for American General Securities, Inc.
Demetrius Shelton

Demetrius Shelton has served on the Board of Governors of the National Bar Association (“NBA”) since 1998. Prior to his current position of President, he served as Vice President of the association over regions and affiliates. He has also previously served the association as Special Advisor to the President, Board Member-at-Large, member of the Executive Committee, Regional (IX) Director, Sergeant at Arms, Chair of the Government Lawyers Division (during which time the division was named Division of the Year), member of the Nominations and Federal Judicial Selection Committees, Affiliate Chapter President (Charles Houston Bar Association and the California Association of Black Lawyers), Special Assistant to a number of Presidents, and Co-Chair of the NBA Annual Convention in San Francisco, CA.

Shelton, a municipal law specialist, served as a Deputy City Attorney for the City of Oakland for the past 11 years. Over those years Shelton worked in the litigation division, served as Special Counsel to the Oakland Police Department and lead counsel and policy advisor to a number of departments and agencies, including the City’s Code Enforcement Division, the Life Enrichment Agency, the Oakland Public Library and the Oakland Ice Center. Shelton has also served as chief advisor to the Oakland City Council’s Life Enrichment Committee and on matters pertaining to Business Improvement Districts and Measure Y – the Violence Prevention and Public Safety Act of 2004.

Shelton currently serves the City of Oakland as its Administrative Hearing Officer. Shelton is also the principal attorney for the Shelton Law Offices which specializes in representing governmental entities throughout California.
WRITTEN SUPPLEMENT TO TESTIMONY OF PATRICIA ROSIER
While different versions of the “stand your ground” law were enacted as early as 1990, in 2005 Florida became the first of nearly two-dozen states to pass a stand your ground law that removed the requirement to retreat. As a result, if a person felt at risk of harm in a park or on the street, they could use lethal force to defend themselves.

Following the law’s enactment in Florida, this version of stand your ground law aggressively made its way to state legislatures throughout the country.

Researchers who have studied the effect of the laws have found that states with a stand your ground law have more homicides than states without such laws.

Increase in Homicides
Studies Show Link Between Stand Your Ground Laws and Homicide

A recent study out of Texas A&M University found that not only did the homicide rate increase by 7 to 9 percent in states that pass stand your ground laws, but also, there was no evidence of any deterrence for criminals or reduction in crime.

A 2012 study out of Georgia State University found that stand your ground laws not only increase the number of homicides, but also, increase emergency room visits and hospital discharges related to firearm inflicted injuries.

What Now?
Standing Our Ground for Justice

These studies demonstrate that Stand Your Ground laws do not make the public safer – they, in fact, decrease public safety.

The National Bar Association is committed to working on model legislation to amend and/or repeal these laws. Furthermore, we urge state legislative bodies to follow the example of Florida and hold hearings on these laws.
WRITTEN SUPPLEMENT TO TESTIMONY OF HON. ARTHUR L. BURNETT, SR. (RETIRED)
A JUDICIAL PERSPECTIVE ON NEEDED JURY REFORMS
TO MEET THE DEMANDS OF THE 21\textsuperscript{ST} CENTURY

By Senior Judge Arthur L. Burnett, Sr.*

Introduction

Jury service in our federal and state judicial systems is absolutely essential to assure the proper functioning of our democracy, just as important as our voting for our elected officials. Every citizen 18 years of age and older should deem the right not to be unlawfully discriminated against in the process of being selected for jury service as being not only a basic constitutional right, but an essential responsibility for assuring the integrity of our judicial system and that we remain a truly functioning democracy. The American Bar Association, American Jury Project, \textit{ABA Principles Relating to Juries and Jury Trials}, Principle 2 provides in Standard 2(A) that all persons should be eligible for

* Judge Arthur L. Burnett, Sr. serves as a Senior Judge on the Superior Court of the District of Columbia. He has been on a sabbatical leave commencing August 1, 2004 for a two-years period serving as the National Executive Director, National African American Drug Policy Coalition, a group of African American national professional organizations consisting of lawyers, judges, doctors, dentists, nurses, pharmacists, sociologists, psychologists, social workers, law enforcement officers which have come together to develop programs and practices to reduce drug abuse and excessive use of alcohol in African Americans communities throughout the Nation, to prevent African American youth from becoming involved in drug usage and binge alcohol consumption, and to increase drug treatment facilities and resources for persons involved in illegal drug usage and addicted, thus reducing related crime and juvenile delinquency in America.

Judge Burnett thanks Kassra Goudarzi, Esq., the current law clerk to the senior judges group of which Judge Burnett is a member, Sherell Daniels, a former law clerk to the senior judges group, and Adrienne Freeman, a Howard University School of Law student who served as a legal research assistant on this project for their extensive legal research and review of case materials for preparation of this article.
jury service except those who are less than eighteen years of age, who are not citizens of
the United States, and who are not residents of the jurisdiction in which they have been
summoned to serve. Standard 2(A)(4) would except from jury service those who are not
able to communicate in the English language and where the court is unable to provide a
satisfactory interpreter. Standard (2)(A)(5) would also except from jury service those
who have been convicted of a felony and who are in actual confinement or on probation
parole or other court supervision. Jury service should be universal and no one should be
excepted, or excused, from jury service because of official status or position. This
would mean that judges, other public officials, law enforcement officers, priests,
ministers, doctors, nurses, lawyers and persons in other professional fields all would be
required to serve.¹

In giving orientation presentation and instructions to a jury venire panel when
they responded to my courtroom during the more than thirty-one years I have been on the
bench, I explained to the potential jurors at the very beginning of the process that they
had been sent to my courtroom to perform a core function of assuring that true justice is
done in that the individuals who become members of the petit jury become judges of the
facts and of the credibility of the witnesses in determining the outcome of cases handled
in the court system. I explain to them that to that extent, they indeed exercise more
power than the judge, who makes sure the trial is conducted with the proper procedures
and pursuant to the rules of evidence, and that they are given the proper instructions of
the law to be applied to the facts that they may find to be established at the end of the
case, but that they make the ultimate decision of whether the prosecutor in a criminal case

¹  ABA Principle 10. Standard 10(C)(1) provides that all automatic excuses or exemptions from jury
service should be eliminated.
has proven a person accused of crime guilty beyond a reasonable doubt. I have emphasized that in substance they become a part of the judicial system to assure its quality control so that the public will accept and respect its orders and judgments. Thus, I stressed that they are valuable contributors to the concept of maintain the essential rule of law in striking the balance between the power of government and the prosecuting authorities and protection of the rights and liberties of all individuals as protected by the United States Constitution and its Bill of Rights.

Thus, it becomes imperative that we change the attitude of American citizens to being jurors – that jury service is not to be avoided or shirked, but rather it is to be embraced and exercised as one of the most important civic responsibilities of our adult citizens. Indeed, all of our citizens have a constitutional right not to be subject to unlawful discrimination in the process of jury selection to serve on juries. To put it rather simply, we must change the culture of the American people towards rendering jury service in this Nation. Jury service should be considered a patriotic obligation of citizenship.

**Increasing the Pool of Jurors in the Venire**

While perhaps a radical suggestion, just as many of our older male citizens in the past were required to register for the draft to serve in the military upon becoming eighteen (18) years of age, the government could require all citizens – male and female – upon reaching eighteen (18) years of age, to register for jury duty, unless the individual could show a lack of mental or intellectual capacity or other disability which would

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2 Selective Training and Service Act of 1940, September 16, 1940, Ch. 720, 54 Stat. 885.
disqualify him or her for jury service.\textsuperscript{3} It may also be wise legislative policy to exempt the elderly from jury service after the age of 70, as conditions of health may make it difficult for them to sit through a jury trial. Their inability to travel and to get around may also justify not requiring them to serve.\textsuperscript{4} The privilege to serve on a jury as a juror should be considered on a par with the right to vote to determine how the government exercises its power over its citizens and respects each individual’s constitutional and human rights.

How can we achieve the objective of getting more adults into the venire of people available for jury service in the absence of a law requiring compulsory registration? The ABA American Jury Project in Principle 10 has urged courts to use open, fair and flexible procedures to select a representative pool of prospective jurors. Standard 10(A) provides that juror source pools should be assembled so as to assure representativeness and inclusiveness. Standard 10(A)(1) provides that the names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These lists should be updated at least annually. This is especially so in view of the high mobility of our population. Lists frequently used are voter registration lists and list of people with motor vehicle driver’s licenses in the particular jurisdiction. Many jurisdictions also issue identification cards

\textsuperscript{3} Perhaps one or more of our States could attempt this experiment to determine if it would produce a sizable pool of citizens available for jury service and that such a pool would be representative of a cross-section of the population of the entire State and include adequate representation of the minorities and the lower socio-economic persons within that State.

\textsuperscript{4} According to the most recent state court organization report by the U.S. Department of Justice’s Bureau of Justice Statistics, 24 states have age exemptions to jury service, ranging from 65 to 75. Article, Seniors rail at jury crackdown, Nat’l L. J., p. 4 (August 23, 2004) (Seniors in Arizona found its new law enacted in 2003 burdensome in requiring the submission of a letter from a doctor to be excused for medical condition and a hardship in traveling to do so, many also claiming a lack of means of transportation to get to the courthouse or to the doctor’s office, the cost of attaining a doctor’s letter, and the embarrassment of having to explain their conditions. This new law had been sparked by the alarmingly high percentage – in some areas hovering at 80% - of people who disregarded their jury summonses and provided for larger fines for failure to respond to juror summonses.)
to persons requesting them for identity purposes and in connection with employment. A list of such issuances could also be a source. Standard 10(A)(3) provides that a jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. To be representative the percentages of cognizable group members on the source list and in the venire assembled jury pool should be reasonably proportionate to the corresponding percentage in the population of the jurisdiction. Thus, to be avoided is the formation of a jury pool consisting predominantly of retired persons, the affluent, and older Caucasian persons with a very small percentage of blue-collar and low level employees who are racial or ethnic origin minorities where the number of such individuals who end up in the jury pool is a substantially smaller percentage than their respective percentage numbers in the general population. As many of these people may not register to vote, or obtain a driver’s license, those responsible for creating the jury pools must develop and implement alternative means of getting an adequate list of such individuals. This may be difficult because they are frequently renters and people who may be transient and move several times a year. However, many of these people have school age children and thus one creative way of obtaining the names of their parents would be to obtain the enactment of

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5 However, this does not mean that each cognizable group must be represented in a chosen jury and in a percentage proportion equivalent to the percentage of its members in the general population. In Thiel v. S. Pac. Co., the Supreme Court observed that while a jury should be representative of all citizens in the community from which it is chosen without unlawful discrimination against any cognizable group, “[t]his does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographic groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.” 328 U.S. 217, 220 (1946).

6 One means of encouraging individuals in the lower socioeconomic bracket earning less than $30,000 per year to make themselves available to serve on juries is to enact a statute providing for their compensation at a rate which would minimize the financial hardship on them serving as jurors where their employers may not be financially able to continue to pay them when they are not working and serving on a jury or where they are self-employed. Such statutes could be patterned on statutes such as those existing in Connecticut and Massachusetts. See Conn. Gen. Stat § 51-247; Mass. G. L., Ch. 234A, Sections 48 and 49.
a law permitting access to the records of the parents of children in each of the schools within the jurisdiction for the purpose of supplementing the standard sources now used for compiling the list of potentially available jurors.

In addition to the foregoing steps, courts should develop and implement strong community outreach programs in which judges address civic associations and other adult groups in the community. The public is too often misinformed about jury service, perceiving it negatively, as an inconvenience to avoid. It has been reported that nationally only about forty (40) percent of the people summoned show up at the courthouse for jury duty. This means that sixty (60) percent fail to appear. Judges can inform and educate members of the public of the importance of jury service in order to improve the administration of justice. Further, through community outreach programs to students in our junior and senior high schools on how courts function and the importance of the role of juries, judges can inculcate in them a sense of civic responsibility and participation. Chief judges, administrative judges, and other judges so designated can also write opinion articles for publication in newspapers and magazines to improve the administration of justice and submit to interviews by representatives of the

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7 Article, *Fla. High court asks public for jury reform ideas,* Nat’l L. J., p. 6 (January 10, 2005). In Florida only about thirty (30) percent of the people summoned appear for jury service, according to the state court administrator’s office. In Miami-Dade County in fiscal year 2003-04 fewer than 13 of every 100 people who were summoned, actually reported for jury duty. Reports from other jurisdictions are just as bad. According to G. Thomas Munsterman, Director of the Center for Jury Studies, National Center for State Courts, in metropolitan areas “juror delinquency rates are as high as 40 percent. He further stated that a study in Dallas County, Texas showed that about 80 percent of the people there who received jury summonses ignored them. Joyce Howard Price, *Courts Crack Down on Jury Duty Shirkers,* Washington Times, October 5, 2004 at A11. In 2003 nearly 48,000 residents in Massachusetts failed to show up for jury duty despite repeated warnings. Price, *id;* Jonathan Saltzman, *Massachusetts Gets Tough on Jury Delinquents,* THE BOSTON GLOBE, September 26, 2004 at A1. Los Angeles has experienced a similar problem. Mary Graham, *L.A. Jurors Ignore Jury Duty, as Well as Threats,* Nat’l L. J., p. 6 (October 11, 2004). In the District of Columbia in 2002 only fourteen (14) percent of the people who were summoned actually appeared for jury duty in the Superior Court of the District of Columbia. The Council for Court Excellence, a non-profit court improvement organization, established a special project to study ways of improving the master jury wheel to increase the percentage of eligible people in the District of Columbia who are placed in the pool of eligible jurors. It plans to make its report in the very near future.
news media to educate and inform members of the public of the important and critical role jurors perform in the justice system in America. Court improvement organizations can publish studies and reports promoting positive attitudes towards jury service and encourage citizens to respond affirmatively to jury summonses when received. They should endeavor to obtain favorable press coverage of these studies and reports. Finally, we can urge colleges and universities to stress the importance of jury service in the courses involving government, political science, criminal justice, law enforcement and in related areas so that those persons with college educations can then exert a positive influence on their peers and associates and on the people they serve in their professions or with whom they associate in their work setting.

**Voir Dire – The Jury Selection Process**

When a jury venire panel is sent to a judge’s courtroom, the judge on the record should initially give the panel an orientation on the jury selection process which is about to commence. The judge should explain the questioning process and that neither the judge nor the lawyers are there to pry needlessly into their private lives or to embarrass anyone, but that it may become necessary to ask sensitive and delicate questions to assure that the jurors finally selected can be completely fair and impartial in deciding the case. The judge can explain that he or she will first ask a number of general questions, the answers to which would not normally needlessly invade anyone’s privacy or be confidential in nature.  

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8. In many instances, the answers to these types of questions would have been obtained by written responses to questions in a questionnaire completed by the potential jurors before the oral questioning begins. *Principle 11*, Standard 11(A) provides that before *voir dire* begins, the court and the parties, through the appropriate questionnaires, should be provided with data pertinent to eligibility of the jurors.
instructions which permit a juror to merely give his or her juror number if the juror would feel uncomfortable to giving the answer in the presence of all of the other jurors, in which case the judge will make a notation as to that question and the juror’s number for follow up in individual questioning outside of the presence of the jury panel. Following initial questioning by the judge, counsel for each party should have the opportunity to question the jurors as a panel.

As a presiding judge in many jury trials, I have found that potential jurors are far more forthcoming and candid when each juror is questioned individually and in a private room, not in the presence of the jury panel, but with only the judge, the lawyers and the parties present. Many jurors fear that even if talking to the judge, the lawyers and the parties at the bench in hush tones, they will still be overheard by other potential jurors sitting out in the courtroom. Further, the demeanor and body language of the potential juror may be more revealing in the setting of a private room than in the open courtroom.9 Where there is reason to believe that a potential juror may have been previously exposed to information about the case, or for other reasons is likely to have preconceptions, these matters are better explored in a separate private room outside of the presence of the jury venire panel.10

Principle 11, Standard 11(B)(4) provides that counsel for the parties

and to some general matters ordinarily raised in voir dire. Standard 11(A)(1) recommends that in appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. Standard 11(A)(3) recommends that all completed questionnaires should be provided to the parties in sufficient time before the start of the voir dire to enable the parties adequately to review them before the start of the oral examination.

9 Principle 7, Standard 7(A)(3) provides that judges should ensure that jurors’ privacy is reasonably protected and that the questioning is consistent with the purpose of the voir dire process. Standard 7(A)(6) provides that courts should inform jurors that they may provide answers to sensitive questions privately to the court and the parties.

10 Principle 7, Standard 7(A)(7) provides that jurors should be examined outside the presence of other jurors with respect to questions of prior exposure to potentially prejudicial material.

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should be given liberal opportunity to question the jurors individually about the existence and extent of each such juror’s knowledge and preconceptions.

**Acting on Challenges for Cause**

During the course of the voir *dire* examination, potential jurors will give answers which will lead counsel for a party to move to excuse the juror for cause.\(^{11}\) A juror may have a medical problem which makes it difficult for the juror to sit for more than one-half hour without access to a restroom, or a juror may have the symptoms of a mental illness, or show signs of dementia or Alzheimer’s disease, or the juror may know a party, a witness in the case, or counsel personally, or may be responsible for the care of an invalid senior citizen or a paralyzed child. Principle 11, Standard 11(C)(2) provides that at a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially. The provision explicitly provides that there should be no limit to the number of challenges for causes. In ruling on a challenge for cause, the judge should evaluate both the substantive response of the challenged juror and the juror’s demeanor. Principle 11, Standard 11(C)(3) provides that if the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from sitting as a juror in that case. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate. A juror’s preconceived notions or opinions

\(^{11}\) Principle 11, Standard 11(C)(2) provides that challenges for cause should be available at the request of a party or at the court’s own initiative.
about a case or the law do not necessarily render the juror incompetent to fairly and impartially sit in a case, if the juror genuinely after an explanation by the court states that he or she can comply with the law as the court states it and base his or her decision on the evidence presented. If the juror can lay aside his or her lay opinion on an issue of law and follow the instructions of the court, his or her initial opinions do not require that he or she be dismissed for cause.12

Where a judge denies a challenge for cause, counsel so moving may then decide to exercise a peremptory challenge. Even assuming that the trial judge erred in denying the challenge for cause, the forcing of the lawyer to exercise a peremptory challenge to remove that juror from the potential of being on the jury does not give the defendant a right to have his conviction reversed, if the resulting jury which convicted him was in fact impartial and fair. *Georgia v. McCollum*, 505 U.S. 42 (1992). While noting that the peremptory challenge has a venerable historic past, Justice Blackmun writing for the Supreme Court, observed that peremptory challenges are not constitutionally protected fundamental rights, but are but one state-created means to the constitutional end of obtaining an impartial jury and a fair trial. He noted that the defendant has the option of allowing the juror to be seated who was not struck pursuant to his challenge for cause, and preserving the issue for appeal, or he can use his peremptory challenge to cure the potential error by the judge. This instantaneous ability to cure the error comports with the reality of the jury selection process, where challenges for cause and rulings upon them are fast paced, made on the spot and under pressure. He concluded that in such a setting, counsel and the court must be prepared to decide often between shades of gray in very short intervals of time. Since the peremptory challenge is not mandated as a

constitutional requirement, and the defendant received a verdict from a fair and impartial jury, the interests of justice have been served and a defendant would not be entitled to a reversal of his conviction and a new trial.

**Peremptory Challenges – Should they be abolished?**

Significant controversy has evolved since 1986 as to whether peremptory challenges should be abolished, based on the development of a body of law recognizing that under the Equal Protection Clause of the Fourteenth Amendment individual jurors have a constitutional right not to be discriminated against in the jury selection process on the grounds of race, gender, ethnic and national origin, and religion. As to religion, there are cases which rely upon the Free Exercise Clause of the First Amendment which leads to the same result in connection with the use of peremptory challenges to reject a person for jury service based on religious affiliation or religious grounds. Indeed, it may be argued that for any cognizable minority group for which heightened scrutiny under the United States Constitution is required as to claims of unlawful discrimination, if the judge is satisfied that the movant’s explanation for the strike is a “pretext” for unlawful discrimination, then the peremptory challenge should not be allowed. It is significant to note that the *ABA Principles Relating to Juries and Jury Trials, Principle 2*, Standard 2(B) to the extent here relevant reads: “Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction ....” The breadth of this provision suggests the question whether it is so sweeping that peremptory challenges should be abolished. In
this connection it is most interesting to note that England in 1989 abolished peremptory challenges in its judicial system.\(^\text{13}\)

Our Supreme Court has held that the peremptory challenge is not constitutionally based as a federal constitutional right, but is merely a means provided by legislation and court rule as a means to obtain a fair and impartial jury. In *Georgia v. McCollum*, supra, Mr. Justice Blackmun stated: “This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial,” citing *Frazier v. United States*, 335 U.S. 497, 505, n. 11 (1948); *United States v. Wood*, 299 U.S. 123, 145 (1936); *Stilson v. United States*, 250 U.S. 583, 586 (1919).” 528 U.S. at 57 He also referred to *Swain v. Alabama*, 380 U.S. at 219 in support of this principle. *(Id.)* It has been asserted that peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial towards the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.\(^\text{14}\) While this philosophical rhetoric sounds great, there is a question of whether it comports with reality. In this court’s experience, there have been instances in which a counsel may exercise a peremptory challenge against a potential juror who is truly neutral\(^\text{15}\) in order to get a replacement potential juror who would be deemed more favorably disposed to his

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\(^\text{13}\) The Criminal Justice Act, 1988, ch. 33 §118 (1)(Eng).


\(^\text{15}\) The courts have gone so far as to state that the decision to exercise a peremptory strike need not be supported by any reason. They state that it usually is based on educated guesses about probabilities on the limited information available to an attorney about prospective jurors. The challenge is intended for those situations in which an attorney cannot articulate a specific conflict, but has reason to believe a juror may be less desirable than other jurors who may be called. *See United States v. Úwaezhoke*, 995 F.2d 388, 394 n.5 (3d Cir. 1993), cert. denied, 510 U.S. 1091 (1994). It is now time to ask the question whether it is consistent with recognizing that a juror has a constitutional right not to be discriminated against in connection with serving on a jury, that the person can be stricken on the whim or hunch of a lawyer or for “no reason at all” or should peremptory challenges be abolished also for this additional reason.
client based on his or her life history, experience and answers to counsel’s questions. These manipulations may result, in reality, in a balkanization of the jurors into two (2) camps, rather than truly neutral, fair and impartial jurors, those predisposed to the prosecution and those predisposed to the criminal defendant. While some might argue that as the members of these two (2) camps argue and deliberate on the merits of the evidence and the law as applied to the facts they find, this process will pull them to “the center” and achieve true justice in the individual case. Query would it be far better to obtain persons not predisposed to either side in a controversy, but truly neutral, fair and impartial from the very beginning of the jury selection process?

In 1986 the Supreme Court rejected the approach of Swain v. Alabama, 380 U.S. 202 (1965) requiring the showing of a historical pattern over a period of time and in a number of cases that race was the basis for prosecutors exercising peremptory challenges, which in reality turned out to be an almost impossible burden for a criminal defendant challenging a prosecutor’s peremptory strikes in his prosecution, and narrowed the focus to what the prosecutor was doing in his individual case. In Batson v. Kentucky,\textsuperscript{16} the court held that the defendant could focus on the prosecutor’s intent and motives in his case, and if the person was a member of a cognizable minority group, the defendant could question the strike by showing it was racially motivated and if he made a \textit{prima facie} case, then the prosecutor had to articulate a race-neutral reason for the challenge, and then the opponent to the challenge could endeavor to show that the proffered reason was a pretext for racial discrimination.\textsuperscript{17} The problem with this approach is that if the prosecutor comes up with any plausible reason, even if not rational, a trial judge could

\textsuperscript{16} 476 U.S. 79 (1986).
\textsuperscript{17} The ultimate burden of persuasion regarding racial motivation rested with the opponent of the strike. Purkett v. Elem, 514 U.S. 765, 768 (1995).
reject the challenge to the exercise of the peremptory strike. There are many cases in which potential jurors have been dismissed on the basis of stereotyping or assumptions the prosecutor has made about them without an accurate factual basis, and the judge has granted the peremptory strike, thus excusing the juror on whim or hunch of the prosecutor which well may be a “cover” for what really may be an invidious discriminatory basis.

The issue of “pretext” is not an easy one with which to deal. Mr. Justice Kennedy observed in *Miller-El v. Cockrell*,¹⁸ that to the extent a divergence in responses to questions can be attributed to a lawyer’s racially disparate mode of examination of black verses white potential jurors, this disparity may be relevant to whether the reason that lawyer gives is “pretext” or not. Against this backdrop he noted, “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.” ⁵³７ U. S. at 332. Further, he noted that while a prosecutor’s explanation may appear to be race neutral, if he seeks to excuse black jurors with certain characteristics, while white jurors with identical characteristics were not excused, such as black jurors who have family members or friends with criminal records being excused, but white jurors with family members or friends with criminal records not being excused, this pattern may show that his explanation is a “pretext.”¹⁹ Justice Kennedy then observed that it is for the trial judge to determine the credibility of the lawyer’s explanation, noting that credibility can be measured by, among other factors, the prosecutor’s demeanor, by how reasonable, or how improbable, the explanations are, and

¹⁹ Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged. *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997); *Doss v. Frontenac*, 14 F.3d 1313, 1316-17 (8th Cir. 1994).
by whether the proffered rationale has some basis in accepted trial strategy. 537 U. S. at 339. He concludes that even though the trial judge’s decision should be accepted, unless clearly erroneous, this does not mean that an appellate court should abandon or abdicate its role of judicial review and in an appropriate case rule that the trial judge’s decision in granting the peremptory challenge over a *Batson* objection was unreasonable or that the factual premise was incorrect, and that the factual findings were clearly erroneous.

It is significant to note that historically the “peremptory challenge” has been stated to be by its nature “an arbitrary and capricious right.” *Batson*, supra at 123 (Burger, C.J. dissenting)(quoting *Swain v. Alabama*, 380 U.S. 202, 291 (1965)(quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892). Viewed from this perspective, the question is whether the power of the lawyer to dismiss a potential juror for “arbitrary and capricious” reasons or on a whim, hunch or educated guess should continue when such reasons may be a “pretext” or “cover” for unlawful discrimination to keep certain individuals off the jury. Worded more poignantly, the question is has the potential juror been denied a constitutional right against unlawful discrimination based on an irrational action of a lawyer, resting not on a factual basis, but based on stereotyping and assumption, but based on the unchecked discretion of the lawyer and the failure or unwillingness of the judge to find “pretext” and that the reason given is merely an excuse to hide an unlawful discriminatory motive in reality.

Mr. Justice Marshall in his concurring opinion in *Batson*, supra was not as confident as Mr. Justice Kennedy as to the ability or willingness of trial judges to ferret out “pretext” explanations for peremptory challenges. He pointedly stated: “The decision today will not end the racial discrimination that peremptories inject into the jury-
selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” 476 U.S. at 102. He strongly suggested that the three-step process worked out by the Supreme Court could not ferret out all of the subtle ways clever lawyers could take race into consideration and yet give plausible explanations to defeat a claim of “pretext” made by the opponent of the strike. He first noted that defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a *prima facie* case. He concluded that this means in those States where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race, because there are not sufficient numbers to establish a pattern or other factual basis for a *prima facie* case. Second, when a defendant can establish a *prima facie* case, trial judges will face the difficult burden of assessing a prosecutor’s motives. He concluded that any prosecutor can easily assert facially neutral reasons for striking a juror, and that trial courts are ill-equipped to second-guess those reasons. He then poses the questions, how is the court to treat a prosecutor’s statement that he struck a juror because the juror had a son about the same age as the defendant, or the juror seemed “uncommunicative” or he “never cracked a smile” and therefore “did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case.” 476 U.S. at 106. Finally, he concluded that outright prevarication by prosecutors is not the only danger here, noting that it is even possible for an attorney to lie to himself in an effort to convince himself that his motives are legal and proper. He observed that a prosecutor’s own conscious or unconscious racism may lead him to the conclusion that a prospective black juror is “sullen” or “distant,” a characterization that would not have come to his
mind if a white juror had acted in an identical manner.\textsuperscript{20} Finally, Justice Marshall noted that a judge’s own conscious or unconscious feelings about race may lead him or her to accept such an explanation as well-supported. Of course, what has been said about prosecutors could equally be said about defense counsel initiated peremptory strikes.

In \textit{J.E.B. v. Alabama, 511 U.S. 127 (1994)} the Supreme Court extended the \textit{Batson} holding to gender and specifically brought to the fore the dominance of the juror’s right not be discriminated against with reference to serving on a jury and in essence making this right to trump a party’s right to exercise a peremptory strike against that individual on the basis of gender.\textsuperscript{21} The Supreme Court emphasized that juror competence is an individual rather than a group or class matter, and that fact lies at the very heart of the jury system. To add even stronger emphasis, Justice Blackmun stated, “To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury,” citing \textit{Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946)}.\textsuperscript{22}

While the Supreme Court has not yet ruled directly on a case involving alleged unlawful discrimination against an individual on religious grounds, it is only logical and reasonable to conclude that it would do so. In \textit{State v. Davis, 504 N.W. 767 (Minn. 1992)}

\begin{itemize}
\item \textsuperscript{20} It is interesting to note that in a dissenting opinion in \textit{Georgia v. McCollum, supra}, Justice O’Connor recognized that in purely pragmatic terms, the Court’s holding may fail to advance nondiscriminatory criminal justice, stating: “It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilty or innocence.” \textit{505 U.S. at 68}. She then concluded that using peremptory challenges to get secure minority representation on the jury may help to overcome such racial bias by the white people, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury. \textit{Id.} If her conclusions as to white jurors are sociologically sound, would not the same problem exists as to white prosecutors in cases involving black defendants?
\item \textsuperscript{21} Earlier in \textit{Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)} the court had extended \textit{Batson’s} prohibition against racial discrimination to civil litigation and had held that the potential juror’s right against racial discrimination trumped a party’s right to exercise a peremptory challenge against an individual if done for racial discriminatory reasons.
\item \textsuperscript{22} \textit{511 U.S. at 146}.
\end{itemize}
the State Supreme Court had refused to extend *Batson* to peremptory challenges where the objection to the strike is based on the grounds that the person is being excused because of his or her religion or religious affiliation. The State Supreme Court had noted the difficulty in distinguishing between religious bias and “moral values” or “societal views” and thus concluded that there would be difficulty in distinguishing between impermissible discrimination based on religious beliefs and the valid uses of peremptory challenges.\(^{23}\) Justice Ginsburg in her concurring comments in denying certiorari in that case observed that the Minnesota Supreme Court had made two key observations: (1) religious affiliation (or the lack thereof) is not as self-evident as race or gender; and (2) ordinarily inquiry on *voir dire* into a juror’s religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper.\(^{24}\)

Mr. Justice Thomas, with whom Mr. Justice Scalia joined, dissented to the denial of certiorari in *Davis v. Minnesota, supra*, stating that the judgment of the Minnesota Supreme Court should be vacated and the case remanded in light of the Supreme Court’s then recent decision in *J.E.B. v. Alabama, supra*, which shattered the Minnesota Supreme Court’s understanding that *Batson’s* equal protection analysis applied solely to racially based peremptory strikes, and that in extending the Equal Protection Clause analysis to prohibit strikes exercised on the basis of sex in *J.E.B.*, the United States Supreme Court explicitly disavowed that understanding of *Batson*. It was against this backdrop that Justice Thomas cogently observed: “I can only conclude that the Court’s decision to deny certiorari stems from an unwillingness to confront forthrightly the ramifications of the decision of *J.E.B.* It has long been recognized by some members of the Court that

\(^{23}\) 504 N. W. 2d at 771.

subjecting the peremptory strike to the rigors of equal protection analysis may ultimately spell the doom of the strike altogether, because the peremptory challenge is by nature “an arbitrary and capricious right,” citing Batson, supra at 123 (Burger, C. J. dissenting)(quoting Swain v. Alabama, 380 U.S. 202, 291... (1965)(quoting Lewis v. United States, 146 U.S. 370, 378 ... (1892))). ... Once the scope of the logic in J.E.B. is honestly acknowledged, it cannot be glibly asserted that the decision has no implications for peremptory strikes based on classifications other than sex, or that it does not imply further restrictions of the exercise of the peremptory strike outside the context of race and sex.” 511 U.S. at 1115. He further observed that in breaking the barrier between classifications that merit strict equal protection scrutiny, J.E.B. would seem to have extended Batson’s equal protection analysis to all strikes based on the latter category of classifications – a category which presumably would include classifications based on religion. Ibid.

Notwithstanding Justice Ginsburg’s suggestion that it should be unnecessary to ask questions about a person’s religion, many cases have since arisen. In Overton v. Newton, the Second Circuit stated that religion, like race and gender, is an “impermissible consideration” in government decision-making. The court cogently observed that exercising peremptory strikes simply because a venire member affiliates himself or herself with a certain religion is therefore a form of “state-sponsored stereotype rooted in, and reflective of, historical prejudice, citing J.E.B. v. Alabama, 511 U.S. at 128. The court held that the logic and rationale of the race and gender cases clearly supported

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25 295 F.3d 270, 278. See also United States v. Nelson, 277 F.3d 164, 207-08 (2d Cir. 2002).
the conclusion that religion is entitled to the same treatment in this context as we treat race and gender.26

A number of federal appellate courts have dealt with cases involving alleged unlawful religious discrimination, concluding that there can be no per se rule of excusing a potential juror solely based on his or her religious affiliation, but with the caveat that the individual’s religious beliefs may in a given case show sufficient bias or prejudice which would make it impossible for the juror to comply with the instructions of law given by the court, and stressing the need for questioning of that juror as to whether his or her religious beliefs are so deeply held that the juror could not follow the judge’s instructions as to the law.27 However, one of the troubling issues in these cases is whether trial judges are insisting that the individual questioning occur before the potential juror can be excused, or whether judges are too ready to accept the proponent’s explanation for the reason for exercising the peremptory challenge based on the supposed devotion to religious practices or how a person is dressed or garbed, when the explanation may be based on stereotyping and assumptions which are unfounded.

The appellate courts throughout the Nation are increasingly distinguishing between religious affiliation and religious belief. Thus, it has been stated that a Muslim

26 A number of Justices in discussing unlawful discrimination have explicitly included “religion” in that discussion along with references to “race” and “gender.” In Georgia v. McCollum, supra, Justice Blackmun in the majority opinion for himself, Chief Justice Rehnquist and Justices White, Stevens, Kennedy and Souter stated: “In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption – as a per se rule – that justice in a court law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion,” quoting from and citing Ristaino v. Ross, 424 U.S. 589, 596 n. 8 (1976).
27 Justice Ginsburg suggested in Davis v. Minnesota, supra that lawyers could avoid getting into issues of religion by asking directly if any juror knew of any reason why he or she could not sit, or if he or she would have any difficulty in following the law as given by the court, or if he or she would have any difficulty in sitting in judgment. But avoiding getting into religious issues is not so simple. Even such broad general questions may result in the potential juror giving an answer which implicates the juror’s religious beliefs, principles and tenets, and follow-up questions will become necessary to determine whether those beliefs and principles would interfere with the potential juror’s ability to comply with the court’s instructions of the law and to weigh the evidence and decide the case in accord with the law.
can not be struck from a jury panel for a trial of a Muslim terrorist simply because he is a Muslim, any more than a Catholic can be struck from a death penalty case simply because he or she is a Catholic, and the Pope is opposed to the death penalty. While it is proper to strike a juror on the basis of a religious belief that would prevent him or her from basing his or her decision on the evidence and the instructions of law, *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998), one could question whether the appellate court correctly upheld peremptory strikes against two potential jurors because “of concern that their heightened religiosity would render them unable or unwilling to convict.” *United States v. DeJesus*, 347 F. 3d 500 (3rd Cir. 2003), cert. denied, 2004 U.S. LEXIS 4059 (U.S. June 2004). It could well be argued that the prosecutor in that case was engaged in stereotyping and making unfounded assumptions and that further questioning of the individual jurors could have revealed that one or both of the potential jurors might have been pro law and order or at least totally neutral and capable of following the trial court’s instructions on the law. Many persons active in their churches, who may even be deacons or trustees, work in law enforcement and believe in vigorous enforcement of the law. Thus, one could question whether the trial judge and the appellate court in *DeJesus* were too ready to accept the prosecutor’s explanation for the peremptory challenges, denying these individuals the right to be free of unlawful religious discrimination and to sit as jurors. See also *United States v. Nelson*, where in a habeas corpus and plain error appellate review standard context, the Second Circuit

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28 In a case in which the defendant had requested that all Catholics be stricken from the jury for cause on the ground that no Catholic could fairly judge the credibility of the priests who were victims of the crime of robbery, the appellate court held that “[a] prospective juror who is otherwise competent to serve on a jury may not be disqualified merely because of religious belief or status. The mere potentiality for bias based on religious affiliation cannot justify the elimination of a prospective juror. Only the demonstration of an actual bias may provide such a justification.” *Coleman v. United States*, 379 A.2d 951, 953 (D.C. 1977).

29 See also *United States v. (Deborah) Brown*, 352 F.3d 654 (2d Cir. 2003).
upheld the prosecutor’s peremptory strike against a person who was very active in church groups, based on the prosecutor’s explanation that he considered such persons as being sympathetic to persons in distress, including criminal defendants. The appellate court acknowledged that this was “a dubious inference” but concluded that it did not make it an unconstitutional one. The court suggested that had an objection been made at the time at trial, perhaps the trial judge would have further probed the prosecutor’s thinking and would have developed a more precise record to determine whether the strike was properly grounded or not.30

The same can be said of Card v. United States, 776 A.2d 581, 594-05 (D.C. 2001) in which the appellate panel divided 2-1 not to find error because trial counsel had not been sufficiently precise in framing the issue as one involving religious discrimination, focusing instead on racial discrimination, and not significantly addressing the religious discrimination until after the juror had been excused, and the entire remaining venire panel had been excused, and the petit jury seated, but yet not sworn. Under these circumstances, the majority upheld the action of the judge in allowing the peremptory challenge, while the dissenting judge, much more persuasively, criticized the majority view, and stated that the trial judge still had time to rectify the situation, presumably by recessing and getting the excused juror back and the remaining jurors who were in the venire panel to resume the jury selection process, and to question the challenged juror as to whether he was in fact Muslim and whether he adhered to Louis Farrakhan’s teaching that black defendants should not be convicted, and whether he personally could follow

30 277 F. 3d at 207-08 (2d Cir. 2002) It clearly appears that the appellate court was influenced by the fact that this was a habeas corpus case and that plain error analysis applied, as the issue had not been raised in the trial court. Had it been raised in the trial court and the trial judge had permitted the peremptory challenge without the questioning of the individual juror, and the case was on direct appeal, it appears that the court might have reached a different result.
the instructions of law by the court even as a Muslim and notwithstanding the views expressed by Louis Farrakhan. The prosecutor’s challenge had been based on his observation of the potential juror as being a young black male, dressed in dark pants, with a white shirt and wearing a bow tie. What if the true facts revealed that he had been raised as a “military brat” and was always nattily attired for that reason and not a Muslim and not even aware of Louis Farrakhan’s teachings? Cases such as DeJesus, supra and Card raise the issue of whether appellate courts are truly overseeing trial judge’s decisions in permitting these peremptory strikes and making “pretext” determinations as contemplated by Justice Kennedy in Miller-El, supra, in deciding whether the judge erred in permitting the challenge, even under the clearly erroneous standard.31

Several state appellate courts have employed a similar analysis in distinguishing between strikes based upon beliefs of the potential jurors as opposed to membership in a particular religious group. Particularly enlightening are the opinions in State v. Fuller, 812 A.2d 389 (N. J. Super. App. Div. 2002), reversed ____ A.2d ____ (Slip opinion, dated December 22, 2004). The majority in the intermediate appellate court had held that the prosecutor had properly exercised peremptory challenges against a potential juror who wears clothing associated with a religious group and against another potential juror who had indicated during voir dire that he had worked as a missionary. When asked the basis for his challenges, the prosecutor responded that he had excused them because they were “demonstrative about their religions” and that in his experience, such persons “tend to

31 Trial judges should also be particularly sensitive to representations by prosecutors and defense counsel when they rely on facial expressions or “body language” alone to advance as the reason for a peremptory challenge against a minority juror, for the inferences the lawyer may be drawing may be based on unfounded assumptions or cultural differences not appreciated by the lawyer. State v. Higginbotham, 917 P. 2d 545 (Utah 1996). See also Yarborough v. Texas, 947 S.W.2d 892 (Tex. Crim. App. 1997)(representations concerning inattentiveness of venire members and demeanor may easily be a contrived explanation which must be scrutinized with a healthy skepticism lest the Batson protection becomes illusory.)
favor defendants to a greater extent than do persons who are, shall we say, not as religious.” The New Jersey Supreme Court in an unanimous opinion written by Chief Justice Poritz, in reversing the conviction and remanding the case for a new trial, observed that as to the black potential juror, the prosecutor had noted the “gentleman who came in wearing head to toe black and a skull cap is obviously Muslim.” The record however did not indicate that on *voir dire* this man had ever identified himself as a Muslim, had ever discussed his religious convictions, or had said that he anticipated any difficulty in serving fairly and impartially. The prosecutor had not inquired as to his religious beliefs and whether they would interfere with his ability to follow the court’s instructions or to deliberate in an unbiased manner. The Supreme Court explicitly stated that such assumptions about group bias is not acceptable, and that the explanation provided by counsel must provide a statement of situation-specific bias. Chief Justice Poritz specifically stated: “To carry this burden, the State must articulate ‘clear and reasonably specific’ explanations of its ‘legitimate reasons’ for exercising each of the peremptory challenges.” Slip opinion at 16. The explanation can not be “sham excuses belatedly contrived to avoid admitting acts of group discrimination.” *Ibid.* The court further stated: “…[p]ut simply, the prosecutor’s ‘belief’ that demonstrably religious persons are all alike in sharing defense-minded sympathies ‘sweep so broadly as to attenuate [its] validity’ by subverting ‘valid trial-related reasons . . . to approximate presumed group bias itself”, *State v. Gilmore, 511 A.2d 1150 (N.J. 1986).*” Slip opinion at 19. The Chief Justice concluded with the following cogent comment: “To permit the use of such challenges to foster group bias would be to subvert that purpose [i.e. to search for unbiased juries]. To turn a blind eye to the discriminatory impact of peremptory
challenges exercised on religious grounds would leave trial courts unequipped to scrutinize prosecutors’ explanations for pretext. We leave in the hands of our capable trial judges the task of probing any proffered reasons for religion based peremptory challenges, thereby ensuring review of those challenges that may be rooted in group bias.” Slip opinion at 19.  

When the issue of religious discrimination is involved, the First Amendment is also implicated. To allow a peremptory strike based on religious affiliation would condition the right to free exercise of religion upon a relinquishment to be able to serve on the jury. In Overton v. Newton, supra the Second Circuit noted that religious discrimination challenges, unlike discrimination in the race and gender contexts, are rarely brought under the Equal Protection Clause, thanks to the existence of the First Amendment, which also requires the application of the strict scrutiny rationale to sustain government action. In State v. Purcell, supra, the court noted that whether the analysis is pursuant to the First Amendment or the Equal Protection Clause, the standard of review is the same – the law or practice must be narrowly tailored to achieve a compelling state interest. An emphasis on equal treatment is the sound approach on either constitutional rationale. The Free Exercise Clause and the Equal Protection Clause as applied to religion both speak with one voice on this point. Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights, duties or benefits in our democracy.

32 For other cases grappling with this issue, see Ristainov v. Ross, 424 U.S. 589, 596 n. 8 (1976), State v. Hodge, 726 A.2d 531 (Conn.), cert. denied, 528 U.S. 969 (1999)(One’s religious affiliation, like one’s race or gender, bears no relation to that person’s ability to serve as a juror), and State v. Purcell, 18 P.3d 113, 120 (Ariz. Ct. App. 2001)(upholding peremptory challenge of a Catholic potential juror on her beliefs indicating that she was against the death penalty, who was also employed with the Catholic Diocese as a secretary, and who was concerned about protecting her job status).
Discrimination based on ethnicity in the exercise of peremptory challenges is also prohibited. In *Hernandez v. New York*, 500 U.S. 352 (1991) the Supreme Court applied the *Batson* rule to potential jurors who were bilingual Latinos, viewing them as a cognizable race for *Batson* purposes but also referring to Latinos as both a race and as an ethnicity. 500 U.S. at 371-72. See also *United States v. Canoy*, 38 F.3d 893, 897-98 (7th Cir. 1994) where the court applied *Batson* to analyze a peremptory strike against a venire member of Asian descent, where the government did not dispute that the defendant, who was Filipino and had spent most of his life in the Philippines, was a member of a cognizable minority group. For other cases expressly involving the confluence of race, ethnicity and religion, see *United States v. Greer*, 939 F.2d 1076, 1086 n.9 (5th Cir. 1991) (“Whether Jewish jurors are viewed as members of a ‘race’ … or a religion, a defendant’s exercise of peremptory challenges against them is subject to *Batson*’s strictures.”), aff’d en banc by an equally divided court, 968 F.2d 433 (1992), cert. denied, 507 U.S. 962 (1993); *United States v. Clemmons*, 892 F.2d 1153 (3rd Cir. 1989) (Hinduism), cert. denied, 496 U.S. 927 (1990). See also *Rico v. Leftridge-Byrd*, 340 F.3d 178 (3d Cir. 2003) in which the Pennsylvania Supreme Court had assumed without deciding that Italian-Americans were a cognizable group subject to the *Batson* rule and that *Batson* was “triggered”, but on the facts rejected Rico’s *Batson* challenge on the trial court’s finding that the prosecutor’s reasons for the strikes were ethnically-neutral and no purposeful discrimination occurred.

It is significant to note that Mr. Justice Thomas in a separate concurring opinion in *Georgia v. McCullom*, supra observed that while he was of the view that a criminal defendant’s use of peremptory strikes cannot violate the Fourteenth Amendment because
it did not involve state action, he concluded that the Supreme Court’s prior decision in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) governed the case and required the opposite conclusion. Against this backdrop, he stated that he wrote separately to express his general dissatisfaction with the Supreme Court’s continuing attempts to use the Constitution to regulate peremptory challenges. He then observed: “I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.” 505 U.S. at 52. He then concluded that the decision while protecting jurors, left defendants with less means of protecting themselves, and unless jurors actually admit prejudice during *voir dire*, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict.33 He then asserted that in effect the majority of the Supreme Court had exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, and not the jurors, who face imprisonment and even death. But the answer to this argument is that the State is also entitled to a neutral and impartial jury and not one stacked in favor of the defendant.

Thus both Mr. Justice Thomas and Mr. Justice Marshall talk about the elimination of peremptory challenges, although for different reasons and with different predictions as to the impact thereof. Justice Marshall concluded that criminal defendants would fare much better were peremptory challenges abolished and as a result juries would become more diverse and representative of a cross section of the community. For him, *Batson*

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33 But jurors with prejudices do not necessarily have to admit prejudice and bias to be detected. Ingenious and skilled questioning by counsel on *voir dire*, including questioning in a separate private room outside of the presence of the venire panel in detail about life experiences can be quite revealing, and if not enough for a strike for cause is developed and a judge declines to excuse the juror for cause, this is the one instance in which peremptory challenges should be retained to be exercised where a trial judge declines to grant a strike for cause, whether based on racial animus, religious discrimination or some other genuine factual basis.
did not go far enough – it would not eliminate all forms of subtle and subconscious racism and trial judges would not effectively handle this issue in dealing with the issue of pretext. This same observation can now be made with reference to courts handling claims of religious discrimination as well. Many of the cases discussed herein bear out these apprehensions both as to race and as to religious affiliation, where prosecutors have acted on the basis of stereotypes and assumptions without the detailed questioning of the individual to determine if the prospective juror would, in fact, be neutral, fair and impartial as a juror in the case. The Constitution’s guarantees of equal protection and religious freedom lie in the simple command that our government must treat each citizen as an individual, not as simply components of a racial, religious, ethnic, gender or religious group. Because the right to non-discriminatory jury selection procedures belongs to the State, the defendant and the potential juror, the exclusion of even one juror for impermissible reasons harms that juror, damages the jury system, and undermines public confidence in the administration of justice. In view of our increasingly heterogeneous population of this Nation, public respect for our criminal justice system and the rule of law will be greatly strengthened if we ensure that no citizen is disqualified from jury service because of unlawful discrimination based on race, sex, national origin or ethnicity, or religion.

Thus, the time has now come in 2005 that the legal profession and the legislative bodies of this Nation should take a hard look at the question of whether peremptory challenges should be abolished in all except one area, that being in situations in which the trial judge has refused to grant a requested strike for cause, in which case the party requesting the strike for cause should then have the right to excuse that individual juror,
using a peremptory challenge to do so. This approach has the advantage of curing any potential error by the trial judge in refusing to dismiss the juror for cause, and even if the peremptory challenge is used to remove that potential juror, the defendant would not have been harmed, if the jury which resulted contained only individuals who were totally fair and impartial. If a prospective juror has a right not to be excluded from jury service for unlawful discriminatory reasons – reasons which have been determined to be constitutionally impermissible, then is it not time that we ask the policy question whether he or she should be excluded for reasons which, by definition, cannot be rationally articulated? Should we continue to tolerate the practice of excluding a person as a juror merely on a hunch, intuition, or whim? Is it not an odd constitutional right indeed which cannot be taken away for certain discriminatory reasons, but which can be freely taken away for a universe of other unstated and unstatable reasons? Are the benefits of the peremptory challenge system outweighed by the damage which that system does to the integrity of the individual juror summoned to serve and to the justice system, in that it gives the appearance of lawyers manipulating the system to get those jurors most favorable to the litigation position being taken by that lawyer, rather than obtaining true judges of the facts who will be totally impartial, and neither biased for or against either party in the case to be decided?

The Orientation of the Jury at Beginning of Trial

Once the jury has been empanelled and sworn, the trial judge should give them in plain English orientation instructions as to the role of the trial judge during the trial and their role as jurors to determine the facts and the credibility of witnesses, how a trial is
conducted, what constitutes evidence in a case, and instructions about the nature of the offenses involved in the indictment on which they will hear evidence. Prior to giving these orientation instructions, it is prudent for the judge to consult with counsel to get their input, especially as to the instructions the court will give as to the nature of the offenses involved and what defenses may be raised. The judge should tell the jury that they have a duty to remain impartial and neutral in the case, that they should keep an open mind until they have heard all the evidence, and that they should not allow anyone to talk with them about the facts of the case except from the witness stand in the courtroom, nor should they go to the crime scene to investigate or confirm factual representations made by witnesses, nor should they “surf the Internet” or read newspapers or check other media for alleged facts about the case. They should be told that such conduct or behavior by a juror could cause a mistrial. The trial judge should emphasize that if any one juror is approached by an individual during the trial to provide information or to influence that juror, that juror should not discuss it with the other jurors, but instead should write a confidential note to be presented to the trial judge, who should take up the matter with counsel and decide on an appropriate course of action.

The jurors at the very beginning of the case should be told that they must follow the instructions of the law as the trial judge gives it to them, but that they will have the complete and absolute right solely to determine the credibility of witnesses and the facts in the case. In order to prevent the potential that any juror may endeavor to engage in

34 See, e.g. State v. Wadle, 77 P.3d 764, 771 (Colo. App. 2003) (a juror during deliberations checked the Internet concerning the effect of certain drugs on a defendant’s state of mind in a criminal case charging cruelty to child resulting in the death of that child).

35 If it becomes necessary during the trial to dismiss that juror, the judge can replace that juror with an alternate. If such a contact occurs during jury deliberation, the same process should be followed and the juror could be dismissed, and the court could proceed to allow the eleven (11) remaining jurors to reach a verdict, provided they have not been exposed to the information or conduct which led to the dismissal of the juror who had the contact. See the discussion, infra.
jury nullification, the trial judge should instruct the jury that if during the trial any juror concludes that he or she can not follow the court’s instructions of law, then that juror should write a note to the judge so advising and will be excused. The judge can further instruct that if any juror hears another juror state that he or she will not follow the court’s instructions of law, then that jury should write a note to the judge for the judge to decide what course of action should be taken.

If the case involves multiple defendants, the court should explain to the jurors that it may give them instructions during the trial as to the use to be made of certain evidence, as being admissible against one defendant and not another defendant. The court should explain that there may be some evidence which would be admitted limited solely to a particular purpose, or that there may be other qualifications and restrictions as to certain evidence about which they will be told when that occurs during the course of the trial. The judge should emphasize that they will be required to follow the instructions of the court as to its evaluation and use of that evidence when such specific instructions are given.

The trial judge may also allow the jurors to take written notes of the testimony they hear and as to the evidence presented and also allow them to write questions to be submitted to the judge for evaluation as to whether those questions should be asked of a witness. If these procedures are allowed, the judge should also during the orientation give the jurors instructions as to these procedures. It should be recognized that different individuals have different capacities as to concentration in taking notes. Some persons have argued that jurors in taking notes may become distracted and not follow the testimony. Others suggest that the act of taking notes aids them to focus and to follow
what is submitted much better. ABA Principle 13, Standard 13(A)(1) provides that jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. It also provides that jurors should be told that after they have reached their verdict, all juror notes will be collected and destroyed. Standard 13(A)(2) provides that jurors should ordinarily be permitted to use their notes throughout the trial and during deliberations. Standard 13(A)(4) provides that the court should collect all juror notes at the end of each trial day until the jury retires to deliberate.36 The judge should tell the jurors that at the end of the case it will be their collective recollection of the evidence which will control, but if there is a dispute as to the testimony of any witness, the court can arrange for a court reporter to read back that testimony or play back a tape recording of that testimony in the event of a dispute between jurors during deliberations as to certain testimony in the case.37

With reference to proposed questions, the judge should tell the jurors that because of the rules which apply under the Constitution of the United States and in criminal cases and burden of proof, the court must review their questions first and discuss them with counsel, and that certain questions may not be proper under the law and rules applicable in criminal cases, or as a matter of trial strategy, counsel may decline or refuse to have that question put to a witness during the course of trial. ABA Principle 13, Standard

36 It is suggested that the trial judge personally should not see or read these notes during the trial, but that they be collected by a deputy courtroom clerk who also should not read the notes nor communicate the contents to the judge, to the lawyers involved in the proceedings or to any other person.

37 In the Superior Court of the District of Columbia, the entire trial proceedings are recorded on a court taping computer system and thus there is the capacity to play back a witness’ testimony verbatim. This is in addition to a live court reporter taking stenographic notes during the trial.
13(C) provides that in deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it. Standard 13(C)(2) provides that upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. Counsel for the parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question. The trial judge should tell the jurors that the prosecutor has the burden of proving the defendant guilty beyond a reasonable doubt and that the defendant has no burden to prove his innocence, and that under the constitutional right against self-incrimination, he can not be required to testify, nor communicate to the prosecutor facts which would help convict him of the offense or offenses charged. They should be clearly and unequivocally told that the defendant has a constitutional right to decline to take the witness stand and that they can not draw any adverse inference that he is guilty of the crime or crimes charged because he did not take the witness stand and give testimony. Thus, constitutional requirements may restrict what questions may be asked in certain circumstances.

Handling Matters Occurring During Trial

Frequently events or incidents occur during the trial involving jury management and issues arise which necessitate excusing a juror and replacing the juror with an alternate. For a trial which would last more than three (3) days, I always made it a

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38 For example, a juror may become ill, a juror may have a death in the family, a juror upon hearing some of the evidence may decide that the facts of a sexual assault is so close to an experience she had that she
practice of seating two (2) alternates and not letting the jurors know who were the alternates, so that all fourteen (14) individuals seated in the jury box would pay equal attention to the evidence. Even before the jurors were seated, I would have the lawyers designate the two (2) seats which would be occupied by the alternates, and thus while the judge and lawyers knew who were the alternates, the jurors themselves would not know.

If during the trial a juror writes a note to the judge indicating an ethnic animus or bias, which if known before trial could have been a basis for excusing the juror for cause, or perhaps even a peremptory challenge, then the judge has a responsibility to take action. An ideal approach would be for the judge to question the juror out of the presence of the remaining jury members, with counsel present and on the record. If, for example, the juror had indicated in his note that he had a concern as to whether one of the two (2) defendants was a Muslim, he could be questioned as to whether this concern meant that he had a bias against Muslims and thought there might be a terrorist connection or other wrongdoing by that individual. If he confirmed that he was not sure whether he could remain impartial, then he could be excused and replaced with an alternate juror. It would also be prudent to ask whether he had expressed his concern with the other jurors, and if he said “no” the court could provisionally accept that answer during the trial, with defense counsel reserving a motion for mistrial, should the jury return a verdict of guilty. After the jury has rendered its verdict, the trial judge could then question the jurors individually as to whether there had been any discussion prior to the excused juror’s dismissal about one of the defendants being Muslim, and if one or more jurors confirmed that there had been such discussion and speculation, the trial judge could then decide

can no longer remain impartial and free of bias, or other such facts may occur which would justify excusing a juror.
whether the jury verdict should be vacated, and he should grant the motion for mistrial, and order a new trial. On the other hand, if the remaining jurors confirmed under oath that the excused juror had not mentioned the apprehension about one of the defendants being Muslim, then the jury verdict of guilty would stand. *Cf. United States v. Omar Fazal, 61 Fed. Appx. 289, 2003 U.S. App. LEXIS 4775 (7th Cir. 2003).*

At the close of the presentation of evidence, the trial judge should review with counsel the final version of the proposed comprehensive jury instructions to be given to the jury just before they retire to begin their deliberations. Once the review with counsel has been completed outside the presence of the jury, and presumably while the jury has been excused for the day or the time period involved, the instructions as settled upon should be typed up in final version, so that in addition to being orally delivered to the jury by the judge in the courtroom, copies would be available to give them to take with them to the jury room to be available while they deliberated. Another approach, which I used as a trial judge, was to have a tape recorder on the bench, recording literally word by word my jury instructions as actually given. I then gave the recorder and the tape to the jury to play and replay in the deliberation room as much as necessary to aid them in their deliberations. I found that this practice almost totally eliminated the need to give further instructions while the jury was deliberating, unless the instruction was to deal with a matter unanticipated when the jury was given the case. Even here to prevent jury nullification from occurring, in the final jury instructions, the trial judge can re-emphasize the duty of the jury to follow the instructions of law as given to them, in the

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39 This is necessary to give counsel the opportunity to state their objections to any of the instructions the court deems necessary to give and thus to protect the record for any appeal. It also provides guidance to counsel as to the contours of the closing argument they can make to the jury. I preferred that closing argument precede the giving of final instructions as I wanted the instructions of the law to be the last thing the jury hears before beginning their deliberations.
course of telling them again that they are the judges of the facts and of the credibility of the witnesses, and that it is permissible for them to draw such reasonable inferences from the evidence as common sense and their experience indicate is proper.

Handling the Issue of Jury Nullification

If during deliberations, a juror sends out a note that one or more jurors are engaged in juror misconduct or have indicated that they will not follow the judge’s instructions on the law, the judge has three (3) options. First, the trial judge can call the jury in and give a further general instruction on the duty of the jurors to obey their oath and to apply the law as the court has instructed. Second, the trial judge can make a reasonable investigation and conduct interviews, in counsel’s presence, of the reporting juror and perhaps even of the alleged offending juror, and if the judge concludes that the juror has engaged in misconduct or has refused to comply with the court’s instructions of law, the judge can dismiss that juror and in federal and District of Columbia practice allow a jury verdict to be returned by eleven (11) jurors. In Williams v. Florida, 399 U.S. 78 (1970) the Supreme Court held that the United States Constitution did not require

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40 See United States v. Krzyske, 836 F.2d 1013 (6th Cir.), cert. denied, 488 U.S. 832 (1988)(trial judge did not error in responding to jury inquiry on nullification that included the admonition to the jury: “You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case.” 836 F.2d at 1021. See also Ford v. United States, 759 A.2d 643, (D.C. 2000)(“Inasmuch as no juror has a right to engage in nullification – and, on the contrary, it is a violation of a juror’s sworn duty to follow the law as instructed by the court – trial courts have a duty to forestall or prevent such conduct, whether by firm instruction or admonition …. It would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath. This is true regardless of the juror’s motivation for “nullification,” including race, ethnicity, or similar considerations...” 759 A.2d at 648 (emphasis in original).

41 United States v. Geffrard, 87 F.3d 448, 451-52 (11th Cir.), cert. denied, 519 U.S. 985 (1996)(the trial judge acted properly where a juror expressed inability to follow the judge’s instructions on the law due to religious beliefs after the jury started deliberations, finding “just cause” existed to dismiss the juror and to allow a verdict from eleven (11) jurors.)
a jury verdict by twelve (12) individuals and that a State could provide for a jury trial even with a jury of six (6) persons.\footnote{The requirement for 12 persons and that their decision be unanimous has been imposed by statute and court rule. In 1983 the applicable Federal Rule of Criminal Procedure, Rule 23(b) was amended to permit the taking of a verdict from 11 jurors if there was a finding of just cause to do so. After the passage of an Act of Congress as to the District of Columbia, Superior Court of Criminal Rules, Rule 23(b) was amended to permit the taking of a verdict from 11 jurors provided the trial judge found “extraordinary circumstances” and “just cause.”}

However, if the judge’s inquiry results in probing into how the jurors are evaluating the evidence and the credibility of witnesses, then the judge has no option but to grant a mistrial and order a new trial. Thus, a trial judge must be extraordinarily careful that when jurors send out notes saying that another juror is refusing to follow the instructions of the court, thus suggesting jury nullification, that what in fact has occurred is merely that that juror sees the evidence and credibility of the witnesses differently than the complaining jurors. While appellate courts have worded the test differently, if there is any possibility,\footnote{United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987).} any substantial possibility,\footnote{United States v. Abbell, 271 F.3d 1286, 1302-04 (11th Cir. 2001).} or any reasonable possibility\footnote{Shotikare v. United States, 779 A.2d 335 (D.C. 2001). See also (Thalia) Brown v. United States, 818 A.2d 179 (D.C. 2003)(the trial judge found beyond a reasonable doubt that the juror was engaged in making a political statement and was emotionally and mentally exhausted and was not basing his actions on an evaluation of the evidence); United States v. Symington, 195 F.3d 1080 (9th Cir. 1999).} that a recalcitrant juror is not simply refusing to follow the judge’s instructions of the law, but is also basing his reluctance to agree to a verdict based on his evaluation of the case on the merits and the credibility of witnesses, then the judge can not dismiss the alleged offending juror, but must allow jury deliberations to continue or declare a mistrial, and order a new trial.\footnote{Thus, in a case where it is not clear whether a recalcitrant juror is taking the position that she will not believe any police officer or that she does not believe the police officers who testified in the case under consideration, it would be error for the trial judge to dismiss the juror on the grounds of jury nullification and the failure of the juror to follow the instructions of law given by the court. In Braxton v. United States, 852 A.2d 941, 948 (D.C. 2004) court cogently observed that the line between disbelieving most police officers and disbelieving the officers who testified in the case at hand may not always be a clear one, and a juror may not be dismissed if it is reasonably possible that he or she simply disbelieved the police officer.}
In a society committed to the rule of law, jury nullification is not to be encouraged or allowed. The courts have the authority and the responsibility to prevent jury nullification if they can do so without intruding or probing into the deliberations of the jury on the merits of the particular case. A federal judge’s own oath of office requires that the judge “faithfully and impartially discharge and perform all the duties incumbent upon the judge under the Constitution and the laws of the United States.” The same applies to District of Columbia judges and to the judges in the States. Thus the judge may not ignore colorable claims that a juror is acting on the basis of improper considerations and intends to nullify the application of the law, whether based on race, ethnicity, religion, political disagreement with the government or the prosecuting authority, or simply disagreement with the law itself.

**Conclusion**

The legal analysis of the judicial precedents discussed herein and the views and comments offered by the author are intended to supplement the *ABA Principles Relating to Juries and Jury Trials* dated February 2005 as applicable to criminal cases and to add to the debate of what reforms are needed in the jury system in America to bring about real improvements in our justice system. If the rule of law and democracy are to have a more complete meaning in our increasingly heterogeneous society in the 21st Century, we must involve many more of our citizens in serving as jurors, especially including those individuals in the lower socio-economic group, for example, with gross incomes under $30,000 per annum, and who are members of racial, national origin and ethnic

 witnesses in the cases being tried, and was not adhering to some inflexible and impermissible prejudiced stance.
backgrounds, who have been the victims of unlawful discrimination in the past. We must seriously consider adopting laws to eliminate peremptory challenges, or alternatively, to restrict their use only to those instances in which a trial judge has refused to grant a challenge for cause. We must adopt compensation laws which will pay jurors in the lower socio-economic income bracket the equivalent of what they would have earned a day if not serving on a jury, if their employers are financially unable to pay them while they are serving on a jury, thus avoiding the imposition on them of a financial hardship burden to serve as jurors. We must make serving on the jury a more invigorating experience by allowing note-taking and the submission of written questions to be asked of witnesses, where appropriate. We must encourage judges to give clear plain English instructions to the jury so that its members fully understand the explanations as to the law. Finally, we should encourage judges to monitor more carefully juries to make sure that they do not engage in jury nullification, but at the same time when they make inquiries that they do not intrude upon the cherished secrecy of jury deliberations as to the merits of the particular case. We are capable of making these improvements and we must proceed to do so.
WRITTEN SUPPLEMENT TO TESTIMONY OF JULIET LEFTWICH
“SHOOT FIRST”/ “STAND YOUR GROUND” LAWS

THE DEATH OF TRAYVON MARTIN

“Shoot first” laws (also known as “stand your ground” laws) gained national attention following the tragic death of 17-year-old Trayvon Martin in Sanford, Florida, on February 26, 2012. That evening, Trayvon was walking back to his father’s girlfriend’s house after buying candy and a drink at a nearby 7-Eleven when 28-year-old neighborhood watch volunteer George Zimmerman began following the unarmed teen, telling police in a 911 call from his car that Trayvon looked “real suspicious” because he was “just walking around looking about.” Zimmerman had been issued a state license to carry a concealed weapon - even though he had been previously arrested for battering a law enforcement officer and had been the subject of a domestic violence restraining order - and was carrying a hidden, loaded handgun. Zimmerman pursued Trayvon, despite the 911 dispatcher’s statement that Zimmerman did not need to do so, ultimately shooting and killing him.

When questioned by the Sanford police, Zimmerman claimed he was acting in self-defense, invoking Florida's extreme shoot first law, which allows a person to use deadly force in a public place in self-defense, even if such force can be avoided by the person’s retreat. After much delay, and amid a nationwide call for justice, George Zimmerman was finally charged with second-degree murder on April 11, 2012. On July 13, 2013, a jury found George Zimmerman not guilty. The court had instructed the jury on Florida’s shoot first law and one of the jurors subsequently stated that the jury had found the law applicable to Zimmerman.

The Trayvon Martin case demonstrates that shoot first laws threaten public safety, particularly when combined with permissive laws governing the carrying of concealed weapons (like those in Florida and in most states). Shoot first laws encourage people to take the law into their own hands and act as armed vigilantes, often with deadly consequences. The laws also have a profound impact on the criminal and civil justice systems, tying the hands of law enforcement and depriving victims of remedies by providing blanket immunity from criminal prosecution and civil lawsuits to individuals who claim they were acting in self-defense.

Unfortunately, the gun lobby has aggressively promoted shoot first laws and a majority of states now have laws similar to the law in effect in Florida. In the aftermath of the death of Trayvon Martin, however, there has been a nationwide call for the reexamination and repeal of such laws.

In his remarks to the NAACP in the wake of the verdict on July 16, 2013, Attorney General Eric Holder observed that as a nation it is time to “question laws that senselessly expand the concept of self-defense and sow dangerous conflict in our neighborhoods. These laws try to fix something that was never broken. There has always been a legal defense for using deadly force if - and the ‘if’ is important - if no safe retreat is available.” The Attorney General went on to
encourage America to “examine laws...eliminating the common-sense and age-old requirement that people who feel threatened have a duty to retreat, outside their home, if they can do so safely. By allowing and perhaps encouraging violent situations to escalate in public, such laws undermine public safety.” Finally, the Attorney General stressed that “we must stand OUR ground to ensure - we must stand our ground to ensure that our laws reduce violence, and take a hard look at laws that contribute to more violence than they prevent.”

FLORIDA’S “SHOOT FIRST” LAW AND ITS DEADLY AFTERMATH

Under centuries-old legal principles, when a person is confronted with a possible threat to his or her safety in a public place, the person must retreat as much as is practicable before using deadly force in self-defense. Florida’s shoot first law radically departs from these traditional principles, providing that a person who reasonably believes that deadly force is necessary to prevent imminent death or great bodily harm has no duty to retreat from a confrontation outside the home before engaging in deadly force.

As a result of Florida’s law, law enforcement agencies are prevented from arresting a person who used deadly force in self-defense unless the agency determines that probable cause exists that the force used was unlawful. The law may also be invoked by a criminal defendant in a pretrial hearing or at trial to avoid all criminal or civil liability.

According to a March 26, 2012 statement of the Association of Prosecuting Attorneys (APA), shoot first laws “give the killer immunity from prosecution. This blanket immunity is greater than the legal protections given to police officers who are involved in a shooting in the line of duty. This grant of immunity, both civil and criminal, can sharply undermine the ability of law enforcement and prosecutors to protect the public by prosecuting acts of gun violence.”

The APA has consistently raised concerns about shoot first laws, arguing that they inhibit the ability of law enforcement and prosecutors to hold violent criminals accountable, may encourage vigilante behavior, and, in some circumstances, may put law enforcement lives at greater risk.

The Tampa Bay Times has analyzed the Florida law extensively. The Times’ 2010 investigation found that the Florida law had been invoked in at least 93 criminal cases involving 65 deaths, including “deadly neighbor arguments, bar brawls, road rage - even a gang shoot-out - that just as easily might have ended with someone walking away.” A follow-up investigation in March of 2012 increased the total number of cases in Florida to 130, finding that “[i]n the majority of the cases, the person who plunged the knife or swung the bat or pulled the trigger did not face a trial. In 50 of the cases, the person who used force was never charged with a crime.” That investigation also found that “justifiable homicides" reported to the Florida Department of Law Enforcement had increased threefold since the law went into effect.
Another Tampa Bay Times report, released June 1, 2012, found that Florida’s shoot first law had “stymied prosecutors and confused judges,” and been used “to free killers and violent attackers whose self-defense claims seem questionable at best.” That report found that nearly 70 percent of those who had invoked the law had gone free.

The Tampa Bay Times continues to evaluate “Shoot First” cases. As of July 30, 2013, the newspaper had identified over 200 such cases. Of the cases involving a fatality, 40 had resulted in convictions, while 73 deaths had been found to be justified.

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**A MAJORITY OF STATES NOW HAVE “SHOOT FIRST” LAWS**

Florida’s shoot first law was promoted by the National Rifle Association (NRA), and was adopted by the state legislature despite widespread opposition in 2005. Efforts to advance shoot first laws nationwide accelerated later that year, when the conservative, corporate-funded American Legislative Exchange Council (ALEC) adopted a model law bearing many similarities to Florida’s law. The ALEC model was developed in conjunction with the NRA, which has funded ALEC for years and, until 2011, co-chaired the council’s Public Safety and Elections task force that developed the model shoot first law.

Since 2005, a majority of states have adopted either part or all of the ALEC model law. After widespread outcry and the loss of a number of major corporate sponsors following the death of Trayvon Martin, ALEC announced in 2012 that it was disbanding the Public Safety and Elections task force. The NRA, however, shows no signs of ceasing its efforts to convince states to adopt dangerous, expansive shoot first laws nationwide.

**Since 2005, twenty-six states, including Florida, have adopted shoot first statutes that generally permit the use of deadly force in self-defense in public places with no duty to retreat.** These states are:

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* In these states, the statute only applies when the shooter is in a vehicle.
Before Florida adopted its law, the State of Utah adopted the nation’s first shoot first law, permitting the use of deadly force in self-defense in public with no duty to retreat, in 1994.

Seven additional states - California, Idaho, Illinois, New Mexico, Oregon, Virginia, and Washington - permit the use of deadly force in self-defense in public with no duty to retreat through a combination of statutes, judicial decisions, and/or jury instructions. These states are distinct from true “Florida-style” laws in several respects, however. For one, many of the shoot first protections established in these states may only be invoked during criminal trials, as opposed to the Florida law and the ALEC model, which enable a shooter to escape liability in a pretrial hearing. Additionally, these states do not have some of the especially onerous elements found in the Florida law, such as the provision preventing law enforcement from arresting a shooter without probable cause that the force used was unlawful.

In Florida, Governor Rick Scott appointed a task force shortly after Trayvon Martin’s killing to review the state’s shoot first law. That task force concluded, in a report released on February 22, 2013, that no major changes were needed to the state’s law. A separate task force led by State Senator Chris Smith issued a report in April, 2012, however, recommending significant reforms, including the removal of the provision preventing the arrest of a shooter who claims self-defense, and the elimination or limitation of immunity for a shooter where the alleged attacker was unarmed or fleeing.

**SEVERAL STATES HAVE CONSIDERED ADOPTING OR REPEALING “SHOOT FIRST” LEGISLATION THIS YEAR**

Increased public awareness about shoot first laws following the Trayvon Martin shooting led legislators in some states to consider repealing either part or all of their shoot first laws. New York City Mayor Michael Bloomberg and the leaders of a number of national African-American organizations launched “Second Chance on Shoot First,” a national grassroots coalition seeking the repeal or reform of shoot first laws across the country.

In 2013, legislators in seven states (Alabama, Florida, Mississippi, New Hampshire, North Carolina, Pennsylvania and Texas) introduced legislation to weaken or repeal their shoot first laws. The legislation has not yet passed in any of the states.

Twelve states (Alaska, Alabama, Colorado, Connecticut, Florida, Georgia, Iowa, Nevada, Oklahoma, Pennsylvania, Texas and West Virginia) introduced bills in 2013 that would establish or expand shoot first provisions. Of these states, only Alaska has adopted a bill expanding shoot first, removing the duty to retreat from any place the person using deadly force in self-defense has a legal right to be.
“SHOOT FIRST” LAWS AND WEAK CONCEALED CARRY LAWS: A DEADLY COMBINATION

Shoot first laws become exponentially more dangerous when paired with laws that grant large numbers of people licenses to carry concealed firearms in public places. As noted above, Florida’s concealed handgun licensing law enabled George Zimmerman, who had been previously arrested for battering a law enforcement officer and had a restraining order issued against him, to legally carry a hidden, loaded handgun in public. Currently, thirty-seven states require law enforcement officers to issue concealed handgun licenses to individuals who meet very minimal requirements; four states even allow people to carry concealed weapons statewide without permits.

Trayvon Martin would not have been killed if George Zimmerman had not been carrying a gun. Zimmerman is not the only individual with a license to carry a concealed weapon who has killed an innocent person, however. An analysis of news reports by the Violence Policy Center has identified at least 502 people, including 14 law enforcement officers, killed nationwide by individuals with concealed handgun licenses since May 2007. Given the limitations of news reports, the actual number of individuals killed by concealed handgun licensees is likely significantly higher.

Unfortunately, the number of concealed weapons permit holders in Florida has grown dramatically since the state enacted its shoot first law. According to the Tampa Bay Times, “[a]s ‘stand your ground’ claims have increased, so too has the number of Floridians with guns. Concealed weapons permits now stand at 1.1 million, three times as many as in 2005 when the law was passed.”

For more information, please visit our website smartgunlaws.org.
Four years ago, the U.S. Supreme Court singlehandedly inserted the judicial system into the ongoing national debate over gun laws in America. In a 5-4 decision in 2008’s *District of Columbia v. Heller*,¹ the Court invalidated the District of Columbia’s handgun ban and firearm storage law, stating for the first time that the Second Amendment protects a responsible, law-abiding citizen’s right to possess an operable handgun in the home for self-defense.

*Heller* was unquestionably a radical decision, overturning the Court’s previous ruling that the Second Amendment was tied to state militia service.² For almost seventy years, lower federal and state courts nationwide had relied on that pronouncement to reject hundreds of Second Amendment challenges.

The *Heller* decision immediately drew strong criticism from a wide array of legal scholars, historians, advocates, and legislators, including a particularly scathing rebuke from respected conservative judge Richard Posner, who noted that, “The only certain effect of the *Heller* decision...will be to increase litigation over gun ownership.”³

In fact, new litigation started almost immediately. The day that *Heller* was announced, plaintiffs filed a lawsuit challenging the City of Chicago’s handgun ban, with a second suit filed the next day. Other suits emerged soon after, escalating once the Supreme Court confirmed that the Second Amendment also applied to state and local laws in 2010’s *McDonald v. City of Chicago*.

Thankfully, despite the explosion of litigation, courts across the country have rejected the overwhelming majority of Second Amendment challenges initiated since *Heller*. As discussed inside, gun rights advocates and criminal defendants across the country have sought to expand the Second Amendment to invalidate almost every gun law on the books today. In siding with us and the majority of Americans who support sensible gun laws, courts are finding that smart laws aren’t just constitutional – they’re also critical to keeping our communities safe from gun violence.

Seventh Circuit Judge Richard Posner criticized Justice Scalia’s majority opinion in *Heller* as giving “short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation.”⁵
Since the U.S. Supreme Court’s 2008 decision in District of Columbia v. Heller, courts across the country have been confronted with an onslaught of costly, time-consuming Second Amendment litigation. In addition to the hundreds of legal challenges raised by indicted and convicted criminals, the gun lobby has also initiated dozens of lawsuits against federal, state, and local governments.

The Outbreak of Second Amendment Lawsuits since *Heller*

Since *Heller*, federal and state courts have issued over 600 decisions on Second Amendment challenges nationwide. This onslaught of litigation shows no signs of ending soon.

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The Volume of Second Amendment Litigation Clogging America’s Courts

Since *Heller*, federal and state courts have issued over 600 decisions on Second Amendment challenges nationwide. This onslaught of litigation shows no signs of ending soon.
The Supreme Court may have opened the floodgates to Second Amendment litigation with the *Heller* decision, but the majority’s opinion also made clear that the Amendment protects only a limited right. The Court directly stated that the Second Amendment does not protect a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” and listed several examples of presumptively constitutional regulations.

Given the Court’s clear instruction that the right to possess a handgun in the home for self-defense is consistent with a variety of gun laws, it’s not surprising that lower courts have almost uniformly rejected Second Amendment arguments in hundreds of decisions in federal and state courts nationwide over the past four years.

What have been shocking are the extreme claims that gun lobby lawyers and criminal defendants are raising in their Second Amendment challenges.

Courts have been confronted with challenges to a variety of critical public safety measures, including laws preventing dangerous persons from possessing guns, laws prohibiting military-style firearms, and laws limiting guns in public places.

Despite the gun lobby’s rhetoric about “individual rights,” the breadth and scale of Second Amendment lawsuits filed over the past four years reveal the lobby’s true intent: to overturn all reasonable laws intended to prevent gun violence. So far, thankfully, most of the courts confronted with these important challenges since *Heller* have affirmed the continued vitality of smart gun laws. Still, the courts remain an active battleground over the meaning of the Second Amendment and the future of sensible gun laws in America.

In *Heller*, the Supreme Court identified several examples of presumptively constitutional regulations, including laws prohibiting firearm possession by felons and the mentally ill, forbidding guns in sensitive places such as schools and government buildings, and regulating the commercial sale of firearms. The Court also noted that the Second Amendment is consistent with laws banning “dangerous and unusual weapons” and laws “regulating the storage of firearms to prevent accidents.”
Should convicted domestic abusers be able to possess firearms?

Federal law prohibits anyone convicted of a misdemeanor crime of domestic violence from possessing a firearm. In United States v. Skoien, an individual who had been twice convicted of domestic violence was found in possession of three firearms. He challenged the law prohibiting domestic abusers from possessing guns as a violation of the Second Amendment.

“No matter how you slice [the] numbers,” the Seventh Circuit observed, “people convicted of domestic violence remain dangerous to their spouses and partners.” The court upheld the law at issue, noting the volume of data showing the role of guns in domestic violence and the “substantial benefits in keeping the most deadly weapons out of the hands of domestic abusers.”

Should military-style assault weapons and large capacity ammunition magazines be available on the consumer market?

After the Heller decision, the District of Columbia adopted a set of strong new gun laws, including a measure prohibiting the possession of dangerous assault weapons and large capacity ammunition magazines – military-style devices commonly employed in mass shootings. In Heller II, plaintiffs argued that these laws were unconstitutional restrictions on their Second Amendment rights.

The D.C. Circuit Court of Appeals rejected the plaintiffs’ argument, citing the District’s careful review of the evidence showing the dangers posed by assault weapons and large capacity magazines. The court found that the District had sufficiently established a “substantial relationship between the prohibition of both...and the objectives of protecting police officers and controlling crime.”

Should an individual be able to carry a hidden, loaded handgun in public without showing any compelling reason to carry a weapon?

Given the inherent dangers posed by guns in public, ten states, including New Jersey, grant law enforcement discretion in issuing permits to carry concealed handguns in public places. In Pascotoski v. Filko, five plaintiffs who had been denied permits argued that the New Jersey law requiring an applicant to show a justifiable need to get a permit violated the Second Amendment.

Like several other courts across the country, the federal district court upheld the New Jersey law, citing the state legislature’s “reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State’s interests in public safety.”

Significant Issues Before the Courts

40%

Laws preventing convicted abusers from accessing guns are critical because many domestic abusers continue to harm their victims. One study found that, within 5 years after receiving treatment for domestic violence, 40% of studied abusers were convicted or suspected of domestic assault or made subject to an order of protection. Researchers suspect that repeat offense rates are likely much higher, because many victims do not report instances of abuse.

12x

Domestic violence assaults involving a firearm are twelve times more likely to result in death than assaults involving other weapons or bodily force.

95%

Domestic violence assaults involving a firearm are twelve times more likely to result in death than assaults involving other weapons or bodily force.

440 KILLED

According to an analysis of news reports by the Violence Policy Center, individuals with concealed carry permits have killed at least 440 people nationwide – including 12 members of law enforcement – since May 2007.

39 STATES

Thirty-five states require law enforcement to issue concealed carry permits to anyone who meets minimal requirements, and another four allow a person to carry a concealed weapon without even getting a permit. These weak laws enable convicted criminals and other dangerous people to legally carry hidden, loaded handguns in public places.
Why Success in the Courts Matters

If the gun lobby expected to get rid of smart gun laws through an aggressive Second Amendment litigation campaign, it seriously miscalculated. Through their decisions, courts have repeatedly proven that laws to keep our communities safe from gun violence are consistent with the Second Amendment because they don’t prevent law-abiding people from possessing guns in the home for self-defense.

All too often, the Second Amendment is cited as a reason why our gun laws remain far too weak. If the Second Amendment is an obstacle, it’s a rhetorical impediment, not a legal one. As four years of post- Heller decisions show, legislators and activists should feel confident that a variety of smart laws, supported by a significant majority of the American public, are both constitutional and desperately needed.

Strong gun laws aren’t just constitutional. They’re also critical to reducing America’s gun violence epidemic.

- Laws requiring background checks with every firearm purchase help ensure that guns don’t end up in the wrong hands.
- Laws limiting the carrying of concealed weapons reflect our shared desire to have public places free from guns and gun violence.
- Laws restricting dangerous military-style firepower seek to prevent tragic mass shootings and protect members of law enforcement.
- Laws requiring the safe storage of firearms help prevent children from accessing guns in the home, reducing the risks of firearm accidents, school shootings, and youth suicides.
Take Action Today!

Together, we can prevent the loss of countless lives to gun violence. Stand up for our right to live in safe communities.

There are many ways to be involved:

**Become a Member**
Your support is critical to our efforts. Your membership helps our legal team promote smart laws that keep guns out of the wrong hands. Plus, you will receive a range of benefits to keep you on the forefront of the gun violence prevention movement.

**Spread the Word**
You know that smart gun laws can make you and your family safer, but does your neighbor? Help us by spreading the word to your friends and family. Join us on Facebook and share our news, host a house party to help others understand the importance of our work, or ask your employer to sponsor one of our events.

**Volunteer**
The Law Center to Prevent Gun Violence needs a strong group of volunteers to assist us with our gun violence prevention projects. Volunteer assignments may involve pro bono legal research and analysis, drafting amicus curiae briefs, authoring op-eds and letters, assisting with educational publications and mailings, and speaking at public meetings and hearings. Your skills are vital to changing the state of gun laws in this country. Volunteer with us today!

**About Us**
Law Center to Prevent Gun Violence is a non-profit organization focused on ending the epidemic of gun violence in America. Formed in the wake of the July 1, 1993 assault weapon massacre at a law firm in San Francisco, the Law Center to Prevent Gun Violence is now the premier clearinghouse for information about federal and state firearms laws and Second Amendment litigation nationwide.

Our trusted and in-depth legal expertise, analysis, and comprehensive data tracking are relied upon by legislators seeking to enact smart gun laws, advocates working to educate others on how to make communities safer, and journalists seeking to uncover the truth about America’s gun laws.

For more information or an annotated copy of this publication, please visit smartgunlaws.org.

We can be free from the epidemic of gun violence in America.

June 14, 2012
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Endnotes

4 McDonald v. City of Chicago, 130 S. Ct. 3020 (U.S. 2010).
5 Posner, supra note 3.
6 For more information about significant ongoing lawsuits nationwide, please read our Post-Heller Litigation Summary at http://smartgunlaws.org/post-heller-litigation-summary/.
7 For more information about significant Second Amendment decisions since Heller, please read our Post-Heller Litigation Summary at http://smartgunlaws.org/post-heller-litigation-summary/.
8 Heller, 554 U.S. at 626.
9 Id. at 626-27.
10 Id.
11 Id. at 627, 632.
12 United States v. Skoien, 614 F.3d 638 (7th Cir. 2010).
13 Id. at 644.
14 Id.
19 Id. at 1263.
22 Id.
23 For more information on these issues, see our publication Guns in Public Places, at http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/.
25 Id. at *62. The court also observed that the Second Amendment “is unique among all other constitutional rights...because it permits the user of a firearm to cause serious personal injury – including the ultimate injury, death – to other individuals, rightly or wrongly.” Id. at *3.
Since *Victories in the Courts and Why They Matter* was first published, the flood of lawsuits raising Second Amendment claims in the wake of *District of Columbia v. Heller* has continued unabated. In *Heller*, a 5-4 majority of the Supreme Court held for the first time that the Second Amendment recognizes the right of responsible, law-abiding citizens to have a handgun in the home for self-defense.

Fortunately, advocates for sensible gun laws have continued to have widespread success nationwide in these cases.

**Courts have upheld a wide range of gun laws against Second Amendment challenges, including those:**

- Requiring “good cause” for the issuance of a permit to carry a concealed firearm (discussed below);
- Requiring that firearms be stored in a locked container or other secure manner when not in the possession of the owner;
- Forbidding convicted felons from owning firearms;
- Forbidding persons convicted of certain classes of misdemeanors such as domestic violence-related crimes from owning firearms;
- Requiring the registration of all firearms;
- Forbidding persons who have been involuntarily committed to a mental institution from owning firearms;
- Prohibiting the possession of firearms and ammunition on public property;
- Forbidding persons under 21 from owning firearms;
- Requiring proof of state residency for the issuance of a permit to carry a concealed firearm; and
- Requiring payment of a $340 fee for a three-year permit to own a handgun.
Despite these victories, the gun lobby continues to relentlessly attack common sense gun laws and in 2013 filed lawsuits in Connecticut, New York, and Colorado challenging bans on assault weapons and large capacity magazines enacted in the wake of the Newtown shooting.

However, when it comes to the most hotly litigated issue since *Heller* and *McDonald*—the validity of restrictions on the carrying of firearms in public—the gun lobby has been consistently defeated in the large majority of cases. For example, the Second Circuit Court of Appeals in *Kachalsky v. Cacace* upheld a New York law requiring applicants for a concealed carry permit to demonstrate that they have some special need for self-protection above and beyond that of the general public.

In *Kachalsky*, the court observed that “outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense” and that “[t]here is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety.”

The Fourth Circuit upheld a similar Maryland law in *Woollard v. Gallagher*, observing that Maryland had “clearly demonstrated” that “limiting the public carrying of handguns protects citizens and inhibits crime[.]” The Tenth Circuit went even further in *Peterson v. Martinez*, flatly holding that “the Second Amendment does not confer a right to carry concealed weapons.”

Although the Seventh Circuit did, in *Moore v. Madigan*, strike down an Illinois law that prohibited all public carrying of weapons, even that court suggested that a discretionary scheme like the laws in New York and Maryland would be constitutionally permissible.

As this torrent of litigation develops, the Law Center to Prevent Gun Violence will continue to provide support to state and local government attorneys defending smart gun laws. Among other things, the Law Center tracks major Second Amendment cases across the country, regularly publishes updates to its *Post-Heller Litigation Summary*, maintains a brief bank with all the major filings in dozens of ongoing Second Amendment cases, and regularly files amicus briefs in significant cases.

For more information about the Second Amendment and our victories in the courts, please visit [http://smartgunlaws.org/the-second-amendment/](http://smartgunlaws.org/the-second-amendment/).
WRITTEN SUPPLEMENT TO TESTIMONY OF BOB EGELKO
To its sponsors, it’s the Affordable Care Act, or the Patient Protection and Affordable Care Act. To its detractors on the right, it’s Obamacare.

To reporters, it is, or should be, simply the new federal health care law. Or the law that’s supposed to provide health coverage for most of the nation’s uninsured by increasing federal aid, requiring insurers to accept applicants regardless of medical condition and requiring everyone to buy insurance.

Labels are simple. Issues and legislation are often complicated. It’s our job to explain the complicated stuff without subjecting the readers to labels that are one-sided and misleading, or at best un-illuminating.

Consider Jessica’s Law. Or Marsy’s Law. Or other ballot initiatives and legislative measures sponsored by prosecutors and promoted to the public as testimonials to young victims of hideous crimes.

Writing about these laws, both before and after passage, is a challenge. No one wants to be, or to appear, insensitive to the real suffering of victimized youths and their families.

But it’s no disservice to the memory of 9-year-old Jessica Lunsford, raped and murdered by a registered sex offender in Florida in 2005, to point out that the 2006 California ballot measure bearing her name had far-reaching effects with little apparent connection to her case.

One provision barred any previously convicted sex offender, regardless of the victim’s age, from residing within 2,000 feet of a school or a park where children congregate, a forbidden zone that includes virtually all of San Francisco and other urban areas. Some law enforcement officials say the resulting increase in homeless sex offenders has made them harder to trace, despite the law’s requirement that they wear GPS tracking devices for life.

Marsy’s Law, approved by the voters in 2008, has a closer tie to its namesake, Marsy Nicholas, a college student murdered by an ex-boyfriend in 1982.

Her survivors, including brother Henry Nicholas, the billionaire who put the initiative on the ballot, grew weary of attending parole hearings for the murderer every few years. So the measure requires prisoners to wait as long as 15 years between hearings while giving victims’ families the right to consult with prosecutors and limiting parolees’ right to a lawyer.

 Californians weren’t voting on whether to honor Jessica and Marsy, but on whether to overhaul the state’s criminal and parole laws. When post-election legal challenges reach the courts, reporters on the legal beat need to look for other ways of identifying the measures - as Propositions 83 and 9, or by describing their contents - while coping with endless first-name references in advocates’ comments, news releases and even judicial rulings.

This isn’t entirely new; in 1982, Californians approved a ballot measure widely known as the Victims’ Bill of Rights even though its central feature had little to do with victims, but instead limited defendants’ right to challenge police searches.

Or consider abortion - specifically, the 2003 federal law known as the Partial-Birth Abortion Ban Act.

Medically, the term is meaningless. The law, upheld by the Supreme Court in 2007, prohibits a type of abortion called intact dilation and extraction, in which the fetus is partially removed from the womb before being dismembered.

Doctors who performed the procedure said it was the safest method available in certain pregnancies to reduce bleeding and protect the woman’s cervix. It was done usually during the second trimester, long before the fetus was viable (and thus was not a "late-term abortion," a commonly used alternative description).

Those details take a lot more time and space than a three-word slogan, the use of which invites readers to draw the same conclusion as the law’s sponsors: that the procedure amounts to infanticide.

That conclusion would be applauded by pro-life groups and rejected by their pro-choice opponents - two more labels that reporters should avoid whenever possible.

For one thing, they’re far from precise - "pro-lifers" often support the death penalty, for example, and "pro-choice" advocates might not favor the right to choose certain narcotics. The main objection, journalistically, is that both terms are euphemisms that obscure opposing stands on the right to an abortion.
It's not an easy path to navigate, as most anti-abortion groups use "life" in their title, and the National Abortion Rights Action League has changed its name to NARAL Pro-Choice America. But our duty is to look past the names and get to the issues.

Perhaps the most treacherous label of all, because it sounds so benign, is "reform."

When businesses talk of tort reform or its offspring, medical malpractice reform, they’re referring to limiting a victim’s right to sue. Campaign-finance reformers want to limit private political contributions or spending. Sentencing reformers seek shorter terms for lesser crimes, and education reformers are usually promoting more testing, charter schools or private-school vouchers.

Some of these might be worthy goals. All of them would be clarified by the semantic reform of eliminating the word from the journalistic vocabulary.

What message should the reader take from all this? Be skeptical of self-serving, unexplained nomenclature in stories about legal and political issues. And let us know when we fall short.

**Chronicle Style Council**

Conventions on nomenclature, what journalists refer to as "style," are established to ease reading of the text. Language evolves over time, and thus The Chronicle's style is constantly under revision. Style questions are debated at length and decided by a 16-member council chaired by copy desk chief David Steinberg.

*Bob Egelko is a Chronicle staff writer. E-mail him at begelko@sfcchronicle.com.*

**Ads by Yahoo!**
Stand-your-ground the rule in state, courts affirm

Bob Egelko
Published 4:00 am, Sunday, April 15, 2012

The stand-your-ground doctrine, which has vaulted into national prominence with the killing of Florida teenager Trayvon Martin, isn't limited to the two dozen states that have passed laws since 2005 expanding the right to use deadly force in confrontations.

It's also the rule in California, by court decree. For more than a century, the state's judges have declared that a person who reasonably believes he or she faces serious injury or death from an assailant does not have to back off - inside or outside the home - and instead can use whatever force is needed to eliminate the danger.

The California Legislature has never enacted one of the National Rifle Association-sponsored laws, pioneered by Florida in 2005, that spell out the rights of a defendant in such confrontations and the procedures for applying them in court. But in California, the judicial rulings had much the same effect. The rulings are binding on state courts and are reflected in judges' instructions to juries in cases involving claims of self-defense.

The instructions say a person under attack is even entitled, "if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating."

Most states had similar rules until 30 or 40 years ago, when some passed laws barring a claim of self-defense outside the home if the person could have fled safely, said Andrea Roth, a UC Berkeley law professor. She said almost all states still allow the use of deadly force against home intruders.

"California's law perpetuates the old frontier rule," she said. "This is not some new brainchild of the NRA."

The Florida law, however, contains a major pro-defense feature absent in California and other states: a pretrial, nonjury hearing in which a judge, after considering the evidence, decides whether it's more likely than not that the defendant acted in self-defense.

If so, the judge must dismiss the charges. In California, such factual disputes must be resolved by a jury.

In the Martin case, a judge will have to decide whether it was more likely than not that George Zimmerman, the neighborhood watchman who fatally shot the unarmed 17-year-old in a gated community in Sanford, Fla., on Feb. 26, reasonably believed he was in danger from Martin.

"That hearing is the big difference," said Marty Vranicar, assistant chief executive of the California District Attorneys Association and a former Los Angeles prosecutor. "A jury's going to be deciding that in California. ... I have often had more luck presenting my case to 12 fact-finders than to an individual bench officer."

There are also differences in the legal culture of California and a state such as Florida, where self-defense rights have been broadened by the Legislature, said Robert Weisberg, a Stanford law professor.

Passage of such a law is "a signal to the courts that the overall legislative intent is to be extremely deferential to defendants who claim self-defense," he said.

The laws also have a different practical impact, said Adam Winkler, a UCLA law professor, because it's easy for Floridians, including Zimmerman, to get a permit to carry a handgun, but much more difficult in California. That disparity may affect the number of stand-your-ground homicides in states with permissive gun laws, he wrote in a recent article, although studies are conflicting.
But even Californians who illegally carry handguns can invoke the stand-your-ground doctrine, as shown in a 2005 ruling by a state appeals court in Santa Ana. The court overturned the attempted-manslaughter conviction of Lenard Rhodes, who shot and wounded a man who he said had approached his car with a gun.

Although Rhodes could have driven off - and although he was a convicted felon who had no right to possess a gun - the court said he "had the right to defend himself, stand his ground and use the amount of force reasonable under the circumstances." Because the jury was not given those instructions, the court said, Rhodes was entitled to a new trial.

Differences in California, Florida

Differences in the stand-your-ground laws in California and Florida:

-- Florida's 2005 law was passed by the state Legislature. California's legal rules are a product of court decisions dating to the 19th century.

-- Florida entitles the defendant to a pretrial, nonjury hearing at which the judge must dismiss the charges if the evidence shows it was more likely than not that the defendant was acting in self-defense. In California, such factual disputes go to the jury.

-- It is much easier in Florida than in California to get a permit to carry a handgun, which affects the number of cases covered by the law.

Stand-your-ground jury instruction

CALCRIM 3470, the instruction given to juries in California cases involving a defendant who says he or she acted in self-defense because of a reasonable belief that he or she was in danger of death or serious injury:

"He or she is entitled to stand his or her ground and defend himself or herself, and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating."

Bob Egelko is a San Francisco Chronicle staff writer. begelko@sfchronicle.com
American Bar Association National Task Force on Stand Your Ground Laws

The American Bar Association’s Coalition on Racial & Ethnic Justice (COREJ), along with ABA entities, the Center for Racial and Ethnic Diversity, the Commission on Racial and Ethnic Diversity in the Profession, Council for Racial and Ethnic Diversity in the Educational Pipeline, the Young Lawyer’s Division and the Section on Individual Rights & Responsibilities, the Criminal Justice Section, the Young Lawyers’ Division, the Standing Committee on Gun Violence, and the Commission on Youth at Risk, have created the National Taskforce on Stand Your Ground Laws to review and analyze the recently enacted state Stand Your Ground laws that have received increased attention for their potential impact on public safety, individual liberties and the criminal justice system.

The Task Force and its advisory committee are comprised of legal scholars, social scientists, public health professionals, law enforcement executives, criminal defense attorneys, prosecutors and leading victims’ rights advocates. Members are appointed by ABA entities and strategic partners, including the Association of Prosecuting Attorneys, the Urban Institute, the International Association of Chiefs of Police and the National Organization of Parents of Murdered Children. Members of COREJ, Leigh-Ann Buchanan of Miami, FL, and Jack Middleton of Manchester, NH, will serve as the Co-Chairpersons of the Task Force.¹

The Task Force and its partners have already convened several regional public hearings. The Southwest regional public hearing was held on February 8, 2013 during the 2013 ABA Midyear Meeting in Dallas, TX. The Midwestern and Northeastern regional public hearings were held in Chicago, IL, on May 2, 2013, and Philadelphia, PA, on June 6, 2013, respectively. The Western regional public hearing is slated for August 9, 2013 during the 2013 ABA Annual Meeting in San Francisco, CA.

¹ A complete roster of the Task Force members is appended here as Attachment A.
The Task Force will embark upon a comprehensive legal analysis of the impact of the Stand Your Ground statutes which have substantially expanded the bounds of self-defense law in over half of the jurisdictions in the United States. The multidisciplinary study to be conducted by the Task Force will be national in scope, incorporating criminological and social science methodology and perspectives, to assess the utility and necessity of existing and proposed Stand Your Ground laws across the United States. The Task Force is also charged with examining and reporting on the potential effects these laws may have on public safety, individual liberties and the criminal justice system.

**THE PRINCIPAL CHARGES OF THE TASK FORCE**

The principal charge of this Task Force will be to review existing state Stand Your Ground laws and all available qualitative and quantitative data regarding the impacts of such laws to support the development of recommendations concerning the prudence of modifying or repealing these laws as well as the effect of such legislation on public safety, traditionally marginalized communities, racial and ethnic minorities and economically disadvantaged societal cross sections. In fulfilling this charge, the Task Force will endeavor to:

1. Evaluate the construction of Stand Your Ground laws through the lens of traditional criminal law principles to gauge the propensity for misapplication in operation due to missing or imprecisely articulated procedural safeguards, mandatory statutory presumptions of reasonableness, lesser thresholds of proof at early procedure stages, the absence of proportionality requirements, and absence of guidelines to be applied to circumstances involving unarmed individuals.

2. Analyze existing data compilations, including state records, national and state-level reports and published data concerning the measurable impact of Stand Your Ground laws on crime rates, including fluctuations in homicide rates, with the objective of identifying and extrapolating quantitative support for indicators of ways in which Stand Your Ground laws may adversely impact the criminal justice system and the diverse population of constituents with which it interacts. Further, The Task Force will undertake a review and assessment of existing reports and studies of law enforcement agencies, governmental agencies, public documents and private publications that focus exclusively on examining the ramifications of Stand Your Ground laws.

3. Assess the unique impact of Stand Your Ground laws on the law enforcement and prosecutorial function, including the potential endangerment of law enforcement personnel due to expanded circumstances wherein civilian use of deadly force maybe found justified in addition to the propensity for exploitation of Stand Your Ground protections by criminal offenders and vigilantes.

4. Conduct a quantitative study and investigative review of Stand Your Ground laws by examining the effects of racial or ethnic bias, implicit and explicit, on the perception of threat precipitating the use of force, including deadly force, in circumstances
to which Stand Your Ground laws apply. The Task Force will also examine the extent to which Stand Your Ground laws may exacerbate imbalance across racial and socio-economic lines within the justice system. Indeed, the National District Attorneys Association posits that one such negative consequence of this legislation is its “disproportionately negative effect on minorities, persons from lower socio-economic status, and young adults/juveniles.”

5. Conduct a series of four public hearings in regions across the country which will encompass states that have enacted Stand Your Ground statues. The regional public hearings will enable the Task Force to measure community awareness of Stand Your Ground laws, perceptions of equality in enforcement and application of Stand Your Ground law, opinions concerning the utility of Stand Your Ground laws, and reactions to individualized experiences involving interactions with Stand Your Ground laws. Each regional public hearing will solicit participation from community stakeholders, affected individuals, justice system participants, legal academicians and other legal experts.

6. Prepare a final report and recommendations that will: (i) detail the Task Force’s research and analysis undertaken, (ii) concisely summarize the testimony elicited at the corresponding public hearings, and (iii) state the official policy that the Task Force recommends the ABA adopt and actions that the ABA should undertake as it relates to Stand Your Ground laws. The Task Force intends to present its final report to the ABA House of Delegates for approval at the 2014 Annual Meeting.

The ABA is uniquely qualified to analyze the impact of Stand Your Ground laws and the implications the expansion of the justified use of deadly force by these laws has on protecting the integrity of the criminal justice system, communities and individual liberties, notably, ethnic and racial minorities.

For more information on the ABA National Task Force on Stand Your Ground Laws, please contact Rachel Patrick, Staff Director, ABA Coalition on Racial & Ethnic Justice, at (312) 988-5408 or via email at Rachel.patrick@americanbar.org.
Attachment A

CURRENT TASK FORCE ROSTER

I. Task Force Members

1. Co-Chair: Leigh-Ann Buchanan, Berger Singerman, Attorney
   (ABA Coalition on Racial and Ethnic Justice, incoming member)

2. Co-Chair: Jack Middleton, McLane, Graf, Raulerson & Middleton, Managing Partner
   (ABA Coalition on Racial and Ethnic Justice, member)

3. Jose Arroyo, Miami Dade State Attorney’s Office, Chief Assistant State Attorney
   (ABA Criminal Justice Section Task Force Appointee)

4. David Harris, University of Pittsburgh School of Law, Professor of Law & Associate
   Dean for Research

5. Joshu Harris, Philadelphia District Attorney’s Office, Associate District Attorney
   (ABA Young Lawyers Division Task Force Appointee)

6. Steven Jansen, Association of Prosecuting Attorneys, Vice-President and Chief
   Operating Officer

7. John Roman, Ph.D., Justice Policy Center of the Urban Institute, Senior Fellow /
   District of Columbia Crime Policy Institute, Executive Director

8. Joe Vince, Mount St. Mary’s University, Criminal Justice Advisor
   (International Association of Chiefs of Police Task Force Appointee)

9. Vacant
   (ABA Individual Rights & Responsibilities Section Task Force Appointee)

10. Vacant
    (ABA Standing Committee on Gun Violence Task Force Appointee)

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2 ** Confirmation of participation pending approval at next scheduled Task Force business meeting.
II. **ABA Co-sponsor Entity Liaisons**

1. **Hon. David Perkins**, Third Circuit Court of Wayne County Michigan, Juvenile Referee *(ABA Commission on Youth-at-Risk, Task Force Liaison)*

2. **Jared Hautamaki**, U.S. Environmental Protection Agency, Attorney Advisor *(ABA Diversity Center Task Force Liaison)*

III. **Official Task Force Reporter**

**Tamara Lawson**, St. Thomas University School of Law, Professor of Law

IV. **Task Force Advisory Committee Members**

1. **Mario L. Barnes**, University of California, Irvine, School of Law, Professor of Law

2. **Nora Demleitner**, Washington & Lee School of Law, Dean and Professor

3. **Cynthia Lee**, George Washington University School of Law, Charles Kennedy Poe Research Professor of Law

4. **Kim McLaurin**, Suffolk Law School, Associate Clinical Professor, Juvenile Justice Clinic

5. **Dan Levey**, Executive Director, National Organization of Parents of Murdered Children, Inc.

6. **Song Richardson**, University of Iowa College of Law, Professor of Law

7. **Rory D. Smith**, John Marshall School of Law, Associate Dean of Diversity

8. **Dr. Garen Wintemute**, University of California, Davis, Baker-Teret Chair in Violence Prevention

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3 The Task Force ABA co-sponsoring entities are the: *Coalition on Racial & Ethnic Justice, Center for Racial and Ethnic Diversity, Commission on Racial and Ethnic Diversity in the Profession, Council for Racial and Ethnic Diversity in the Educational Pipeline, Section on Individual Rights & Responsibilities, Criminal Justice Section, Young Lawyers’ Division, Standing Committee on Gun Violence, and Commission on Youth-at-Risk.*
A presidential Task Force on Minorities in the Justice system was created in 1992 in the aftermath of the Rodney King disturbances. Shortly thereafter, a report was issued with recommendations by the Task Force. In 1994 the Task Force was re-named the Council on Racial and Ethnic Justice (now the Coalition or COREJ). The Coalition was designed to implement the recommendations and develop partnerships among community groups, civil rights organizations, businesses, religious organizations, and bar associations for the purpose of eliminating racial and ethnic bias in the justice system. Its primary goal is to serve as a catalyst for eliminating racial and ethnic bias in the justice system with a focus on systemic change.

COREJ (1) assists with the development of educational programs; (2) provides public forums for dialogue between legal institutions and non legal groups; and (3) provides technical assistance and advice on how to implement specific programs, strategies, and partnerships that eliminate racial and ethnic bias.

Since its inception, COREJ has been on the cutting edge of social justice issues. It has focused on a number of substantive and diverse issues such as racial profiling, access to the justice system, overrepresentation of juveniles of color, indigent defense, racial profiling and the war on terrorism, teen violence, the impact of foreclosures on communities of color, voting disenfranchisement and the impact of technology, election protection, injustices and discrimination in Tulia, Texas and restoring justice and equity by providing strategies for disaster preparedness and response that reduce patterns of discrimination and unfairness in the delivery of disaster aid and services e.g. Katrina Project.

RECENT PROGRAMS

- Know Your Foreclosure Rights: There’s Hope (August 2012, Tampa, FL)
- Do or Die: Analysis of the Stand Your Ground Statutes (August 2012, Chicago, IL)
- Justice Equality and A More Perfect Union: Community Recovery and Restoration After A Crisis (February 2012, New Orleans, LA)
- Raising The Bar on Foreclosure Prevention Efforts – Implementing Pro Bono Programs To Help Michigan Homeowners, Hosted by Federal Reserve Bank of Chicago- Detroit Branch (October, 28, 2011, Detroit, MI)
- HELP! I Need A Housing LIFELINE! (October 29, 2011 , Detroit, MI)
- The War Against Foreclosures: Combating Foreclosures and Mortgage Crisis in Communities of Color (July 31, 2011, Baltimore, MD)
- Combating Foreclosures and the Mortgage Crisis in Communities of Color (February 12, 2011, Atlanta, GA)
- Stop Teen Violence: Time To Deliver (August 7, 2010, Golden Gate Law School, San Francisco, CA)
- Stop Teen Violence: Time To Deliver (May 3, 2010, Youthville Detroit, Detroit, MI)
- Stop Teen Violence: Time To Deliver (November 20, 2009, Chicago State University, Chicago, IL)
SIGNIFICANT PROJECTS

- Joint Project with the 10CORE Law Student Organization on Foreclosure

  - Overrepresentation of Juveniles of Color in the Juvenile Justice System
    After an alarming number of national studies and reports revealed evidence that there is an overrepresentation of juveniles of color in the juvenile justice system and the justice system, the Coalition implemented a two-prong attack on the problems confronting juveniles of color. The first prong focuses on strategies that prevent young people of color from being trapped in the justice system; and the second prong focuses on strategies that divert young people of color and prevent their initial entrance into the juvenile justice system. A complete listing of juvenile justice programs sponsored by COREJ is attached.

Election Protection Project
COREJ developed a partnership in conjunction with the Lawyers' Committee and five ABA sections, divisions and entities to remove barriers to the electoral process for citizens of color who sought to participate in the 2004 election. COREJ, along with the Section of Individual Rights & Responsibilities and the Election Law Committee renewed their partnerships for the 2008 Elections and broadened the scope of the Project.

The goals of the 2008 Election Protection Project were: (1) Safeguard voters’ rights before, during and after Election Day by giving voters the information and resources they needed to cast meaningful ballots; and (2) Provide a comprehensive support system for eligible voters across the country that included support for registration programs, developing voter education materials, and providing direct legal assistance to protect the rights of voters. A primary goal for COREJ was to train volunteer lawyers who worked with voters on a national and local level to monitor polling places, educate voters, facilitate dialogues with state and local election officials, provide legal support to poll monitors and help answer the Lawyers’ Committee Hotline.

The three primary ABA Partners for the Election Project developed a plan for recruiting volunteer lawyers and law students and the major activities began in June 2008. An Election Protection website was launched on the ABA website.

- Katrina Project
  The goal of the project was to educate, conduct outreach and coordinate resources and services across the country to assist those survivors that received disparate treatment in the midst and aftermath of Hurricane Katrina. These goals were accomplished by holding a national conference and three CLE programs, conducting outreach, and publishing a Report.

NATIONAL CONFERENCES

- Third National Conference – “Making the Invisible Visible: A Dialogue About Lessons Learned In the Aftermath of Katrina”

Conference Overview: The Coalition brought together approximately 200 judges, lawyers and their clients, health care workers, social workers, doctors, psychiatrists, psychologists, high school, college and law students, community groups, religious organizations, public and private leaders, survivors, responders and others who have devoted time to assisting victims of Katrina. The primary goals of the Conference: (1) conduct a productive dialogue among the survivors, planners (commissioners), and the participants; (2) produce a Report which identifies the type of problems that might emerge due to race
and ethnicity, how to avoid inequities based on race and ethnicity, and how to mitigate the problems; and (3) assist the survivors of Katrina with the rebuilding of their lives, restore justice and provide equity and respect to those victims that have been treated unjustly.

**Educational Programs**: Three successful panel presentations have been presented (1) ABA Midyear Meeting in Chicago, 2006 titled “Equity for Racial & Ethnic Survivors of Katrina;” (2) a jointly sponsored program with the National Bar Association as a Webcast Program “Hurricane Relief Seminar,” March, 2006 in Chicago; and (3) “Surviving Together; Healing Together” COREJ convened this special panel of experts in New Orleans to provide an in-depth status report of the communities that suffered disproportionately economically, legally, educationally and medically from Hurricane Katrina.

**Report**: The Final Report of the Conference contains specific recommendations from the speakers, participants and survivors. The Report titled “Making the Invisible Visible: A New Approach to Disaster Planning and Response,” contains an analysis of issues ranging from communications and language skills, to resource allocation, to pre-existing economic and social inequities. A number of excellent recommendations were received from the Conference. The recommendations were included in the Report that was issued in August 2007.

**Second National Conference on the Impact of Race and Ethnicity on the Justice System**

In March 2002, the Coalition held a highly successful conference in Baltimore. The conference was diverse, intergenerational, interactive and action-oriented. Recommendations from the Conference were used as blueprints for COREJ programs and projects. A report is available on the Conference.

- **First National Conference on the Impact of Race and Ethnicity on the Justice System**

In Los Angeles, CA 1999, after holding two “think tank” meetings, COREJ convened an extraordinary conference. Two reports are available: *Report on the Impact of Race and Ethnicity on the Justice System* provides a brief overview; and the *Draft of the National Conference Proceedings with Recommendations*.

Several major follow-up projects were developed from the 1999 conference:

1. Enhancing Access to the Justice System through Technology: Would Technology Have Changed the Outcome of the Vote in Florida?
2. Data Collection Project on Color/Racial Profiling: The Tulia, Texas Project
3. Friends of the Council

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The American Bar Association National Task Force on Stand Your Ground Laws gratefully acknowledges the following:

**SPONSORS**

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TASKFORCE 2013 REGIONAL PUBLIC HEARINGS

Southwest Regional Hearing
February 8, 2013
Dallas, TX

Midwest Regional Hearing
May 2, 2013
Chicago, IL

Northeast Regional Hearing
June 6, 2013
Philadelphia, PA

Western Regional Hearing
August 9, 2013
San Francisco, CA

CALL FOR TESTIMONY

If you have an interest in providing written testimony, please contact:

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