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WHY THE PEREMPTORY CHALLENGE SHOULD BE ABOLISHED

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INTRODUCTION

The peremptory challenge¹ has been described as "one of the most impor-

* Senior Judge, United States District Court of the Eastern District of Pennsylvania. Many of my law clerks over the past 21 years have contributed their thinking and research. I am most grateful to a recent law clerk, Michael T. Zeller, who is now in New York with Cravath, Swaine & Moore. After the completion of his clerkship, Mr. Zeller contributed many hours of his outstanding talents in helping me bring it all together.

1. The selection of a trial or petit jury serving in federal court is accomplished in five stages. First, each district court must "devise and place into operation" a written plan setting forth its method of selecting jurors. 28 U.S.C. § 1863(a) (1988). Second, the court creates a master jury wheel, which is a randomly drawn list of names that it uses to select jurors. *Id.* § 1863(b)(2). These names typically are derived from voter lists or driver's license records. *Id.*; see also FEDERAL JUDICIAL CENTER, HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS 11-12 (1989) [hereinafter FEDERAL JUDICIAL CENTER] (discussing sources of jury lists). Third, individuals who appear on the master wheel but are not qualified or required to serve are excluded. 28 U.S.C.

tant" of the criminal accused's privileges² and a "vital" appurtenance to the Sixth Amendment right to trial by an impartial jury.³ Nevertheless, it is not a privilege of constitutional dimension.⁴ Nor has the peremptory's utility in furthering the objective of a fair trial ever been demonstrated. Indeed, claims extolling the value of the peremptory challenge are predicated on nothing more than baseless speculation and courthouse apocrypha. The evils it propagates, however, are well-documented. The peremptory challenge is habitually employed to discriminate against citizens on the basis of invidious and atavistic classifications. It is used to affix marks of inferiority on historically disenfranchised

§ 1863(b)(5)(A)-(b)(6). The result is a "qualified jury wheel." *Id.* § 1863(b)(7). Fourth, the court selects prospective jurors at random from the qualified wheel and summons them for duty. *Id.* § 1866 (1988). Last, these individuals are assembled into panels, or venires, from which a petit jury for a particular case is impanelled after voir dire is conducted and after counsel exercises their challenges.

Voir dire is the process by which judges or lawyers question prospective jurors, or venire members, about their backgrounds. Its goal is to uncover whether any person in the panel entertains biases or prejudices that would render her unable to render an impartial verdict. The judge, counsel, or both may make inquiries of the prospective jurors, although the court usually conducts the voir dire in the federal system. FEDERAL JUDICIAL CENTER, *supra*, at 46.

Two types of challenges may be used to exclude venire members from serving on the petit jury. First, the judge may excuse a venire member for "cause." 28 U.S.C. § 1870 (1988). Challenges for cause allow the rejection of venire members "on narrowly specified, provable and legally cognizable bas[e]s of partiality," *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986), such as a personal relationship with a party, witness, or attorney in the litigation, or a biased state of mind concerning a party or issue in the case. The number of prospective jurors who may be excused for cause is unlimited, and the decision whether to exclude a venire member for cause is vested with the court. 28 U.S.C. § 1870.

Second, venire members may be barred from sitting on the petit jury by the use of peremptory challenges. In contrast to challenges for cause, peremptory challenges are exercised by the attorneys, who usually need not explain their reasons for excluding a given venire member. FEDERAL JUDICIAL CENTER, *supra*, at 51. Further, peremptories are circumscribed in number. The Federal Rules of Criminal Procedure afford the government and the defendant twenty peremptories each in capital criminal cases. FED. R. CRIM. P. 24(b). The government is allowed six peremptories in felony cases and three in misdemeanor cases, while the defendant is permitted ten and three, respectively. *Id.* In federal civil cases, the plaintiff and the defendant are each permitted three peremptory strikes. 28 U.S.C. § 1870. The court, in its discretion, may allow additional peremptory challenges when there are more than two parties to a suit. *Id.*; FED. R. CRIM. P. 24(b).

2. *Frazier v. United States*, 335 U.S. 497, 506 n.11 (1948) (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1893)).

3. James S. Crown, Comment, *A New Standard for Peremptory Challenges*: *People v. Wheeler*, 32 STAN. L. REV. 189, 189 (1979). *Accord Lewis v. United States*, 146 U.S. 370, 376 (1892) (noting that peremptory challenge is essential to fair jury trial).

The Sixth Amendment states, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

4. *Frazier*, 335 U.S. at 506 n.11 (to withhold peremptory challenge altogether wouldn't impair constitutional guarantees); *United States v. Wood*, 299 U.S. 123, 145 (1936) (nothing in Constitution requires peremptory challenges); *Stilson v. United States*, 250 U.S. 583, 586 (1919) (Constitution does not require "Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."); *Pointer v. United States*, 151 U.S. 396, 408 (1894) (peremptory challenges are based in statute); see also *Swain*, 380 U.S. at 219 (although Constitution doesn't require peremptory challenges, it is one of accused's most important rights).

groups. Its exercise subverts the representativeness of the petit jury.⁵ Its availability favors those, such as the government or the wealthy, who can commit substantial resources to lawsuits over those who cannot. Its utilization engenders costly litigation. In short, it stands as an anti-democratic artifact that countermands a century of civil rights legislation and without a substantial justification. In each of these ways, the peremptory challenge undermines not only the appearance of justice, but the cause and ends of justice itself.

The thesis of this article is that the peremptory challenge is offensive to both the federal Constitution and basic concepts of justice. Accordingly, the government's and the defendant's peremptory challenges in criminal trials should be eradicated from the American legal system. Although this article focuses on the use of the peremptory challenge in the criminal context, many of the conclusions it embraces warrant its abolition in civil cases as well.

Part I discusses the advent and death of the peremptory challenge in England. Part II summarizes the history of the peremptory challenge in this country through 1880. Part III summarizes the use of the peremptory challenge in this country after 1880. Part IV discusses the constitutionality of peremptory challenges. Part V discusses the "seat of pants" use of peremptory challenges. Part VI discusses the "experts" and the peremptory challenge. Part VII points out that peremptory challenges are an anathema to our democracy. Part VIII recommends that peremptory challenges should be abolished.

I. THE ADVENT AND DEATH OF THE PEREMPTORY CHALLENGE IN ENGLAND

Before 1305, the Crown not only selected those to be included on the jury list,⁶ but held an unlimited number of peremptories to strike individuals deemed unsuitable.⁷ Parliament, concluding that this method generated juries biased in favor of the government,⁸ rescinded the prosecutor's peremptory challenge and

5. The "petit" jury sits as the trier of fact in criminal or civil litigation. The modifier is used to distinguish it from the "grand" jury, which is the body that decides whether or not a criminal accused should be indicted and therefore be required to defend against criminal charges. As employed in this article, "jury" means the petit jury. See *infra* notes 136-45 and accompanying text for a discussion of how peremptories interfere with the representativeness of the jury.

6. LLOYD E. MOORE, *THE JURY* 37 (2d ed. 1988). The Assize of Clarendon (1166) provided for a trial by jury.

Both parties had a right to be present at the election [of the jurors] and challenge for good cause members of the proposed jury. . . . If it developed that the jurors testified under oath that they were unacquainted with the facts, other jurors were summoned until there were 12 who had knowledge and who agreed. Knowledge did not mean first-hand knowledge, but declarations of a juror's father or other equally reliable sources were sufficient. The jurors of this court were knights, and their decision was conclusive of the dispute.

Id. See also 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 614-31 (discussing juries before 1300).

7. MOORE, *supra* note 6, at 54. The Crown's lawyers simply had to assert "quid non bons sunt pro rege" to exercise their peremptories. J. PROFATT, *A TREATISE OF TRIAL BY JURY* § 155, at 211 (1877).

8. See SIR EDWARD COKE ON LITTLETON *156 (stating Parliament found prosecutor's peremptories "mischievous to the subject tending to infinite . . . danger"); JON M. VAN DYKE, *JURY*

allowed the Crown to remove only those prospective jurors for whom it could demonstrate a "Cause Certain."⁹ Parliament's design was quickly circumvented by the judicially created practice of "standing jurors aside."¹⁰ Under this procedure, the prosecutor initially assigns, without explanation, challenges for cause against members of the panel suspected of prejudice. The court orders those persons to "stand aside." If, as is almost always the case, a twelve-member jury of unchallenged individuals can be seated, the judge dismisses those previously directed to "stand aside" without inquiry into whether they could be impartial.¹¹

The English Legislature refused in 1305, however, to revise the common law permitting criminal defendants to excuse members of the panel peremptorily. This prompted Sir William Blackstone to observe that the peremptory challenge was a defendant's privilege. He denominated it "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous." Because "[a] prisoner should have a good opinion of his jury," the "law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for his dislike."¹²

Blackstone's often-quoted praise notwithstanding, over the centuries Parliament reduced the number of peremptories available to the defense. Although originally afforded thirty-five peremptory challenges,¹³ defendants were allowed only twenty (unless charged with treason) by 1530.¹⁴ This was decreased to

SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977) (in 1305, Parliament decided prosecution biased jury "obnoxious to justice").

9. An Ordinance for Inquests, 1305, 33 Edw. 1, Stat. 4.

He that challenges a Jury or Juror for the King shall shew his Cause. . . . [B]ut if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause Certain, and the truth of the same Challenge shall be enquired of according to the Custom of the Curt

Id.

10. PROFATT, *supra* note 7, at 212-13. Apparently this practice arose because English jurists "have assumed that cause existed whenever the crown wants to challenge a juror." VAN DYKE, *supra* note 8, at 148.

11. VAN DYKE, *supra* note 8, at 148. Contrary to the United States Supreme Court's intimation that the prosecutor's right to "stand aside" and the peremptory are identical, *Swain v. Alabama*, 380 U.S. 202, 213 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986), the two procedures are distinguishable. As one commentator has noted:

[A] juror directed to "stand-aside" may eventually be selected to serve on the jury; a juror peremptorily stricken is permanently excused and disqualified. Where jury selection was not completed because the defense used its peremptory challenges, or because the prosecutor exercised too many "stand asides," the "stand-aside" jurors would be recalled and could be removed only if the prosecutor showed "cause."

Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 10 n.34 (1990).

12. 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

13. James J. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528, 529.

14. For Abjurations and Sanctuaries, 1530, 22 Henry 8, ch. 14, § 6; For the Continuation of Certain Acts, 1540, 32 Henry 8, ch. 3.

seven and then, pursuant to the 1977 Criminal Justice Act, to three.¹⁵ Finally, under the 1988 Criminal Justice Act, Parliament abolished the defense's peremptory altogether.¹⁶ Concern that defense lawyers were manipulating the peremptory challenge to pack juries with biased individuals, thereby defeating the ability of random draw techniques to ensure a representative petit jury, supplied the impetus behind the revision.¹⁷

Interestingly, the slow demise of the peremptory in England has inspired calls for reviving the challenge for cause.¹⁸ The early English law entertained challenges for cause solely on the ground that a prospective juror held a specific bias, such as one arising from a relationship by blood or marriage to a litigant.¹⁹ When a party charged a juror with bias, the court appointed two "triers," who, after hearing evidence, determined whether the juror at issue should be excused.²⁰ Non-specific biases, such as hostility toward the defendant, were not cognizable, and counsel were not permitted to question jurors on these matters.²¹ After all, at that time jurors were expected to be personally familiar with the controversy and, having been handpicked by the Crown, to favor the prosecution in criminal cases.²² Under modern English practice, counsel may not (except when national security is implicated) conduct background checks of panel members, apparently because they are thought to be inimical to the principle of random selection.²³ Nor may attorneys cross-examine a prospective juror to develop a cause challenge, unless a prima facie case of bias has been shown by other means.²⁴ Accordingly, even today, challenges for cause are exceedingly

15. Gobert, *supra* note 13, at 529.

16. *Id.*; Sean Enright, *Reviving the Challenge for Cause*, NEW L.J., Jan. 6, 1989, at 9. Even before legislative abolition of the peremptory in England, its use was infrequent. As of 1979, the prosecution or the defense exercised the right of challenge "in no more than one trial in seven, and only exceptionally was there more than a single challenge in a case." JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS 92 (1979).

17. *Criminal Justice: Plans for Legislation*, Cmnd. 9658 (HMSO 1986). One barrister described the legislative action

as the result of a sustained campaign in Parliament and in the press alleging that defence counsel were systematically abusing it. In multi-handed trials, it was said, counsel were pooling challenges to "pack" juries with individuals who were likely to acquit. The Cyprus spy trial was often cited as an example. In that instance seven jurors were challenged by defence counsel acting together. The jury, all young and male, acquitted all seven defendants. This case more than any other represented a watershed in the campaign to abolish the challenge, even though critics overlooked the fact that the entire jury panel summoned for the trial had been vetted for the prosecution by Special Branch and MI5.

Enright, *supra* note 16, at 9.

18. See, e.g., Enright, *supra* note 16, at 9-10, 19; James Morton, *Jury Selection*, NEW L.J., June 19, 1987, at 561-62; *Jury Vetting* (editorial), NEW L.J., Jan. 25, 1985, at 69-70.

19. VAN DYKE, *supra* note 8, at 141.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Jury Vetting*, *supra* note 18, at 69-70.

24. Enright, *supra* note 16, at 10.

rare.²⁵

II. THE USE OF PEREMPTORY CHALLENGES IN THIS COUNTRY THROUGH 1880

American colonial courts accepted the defendant's authority to exercise peremptory strikes, then conferred by English statute, as part of the common law.²⁶ In 1789, when drafting the constitutional provision that would become the Sixth Amendment, the Select Committee of the House of Representatives first proposed that the amendment embrace "the right of challenge and other accustomed requisites."²⁷ This formulation was abandoned because the language securing the accused's right to an "impartial jury"²⁸ was considered sufficient to guarantee the right to question and challenge jurors.²⁹ Nevertheless, in 1790 Congress explicitly afforded the defense thirty-five peremptories when treason had been charged and twenty challenges in all other capital cases.³⁰

The government's power to excuse jurors peremptorily was much less settled in early America. Some colonies, including Pennsylvania and Georgia, permitted the "stand aside" procedure, while others did not.³¹ Because Congress did not confer peremptory challenges on the government and made no mention of "standing aside" in the 1790 statute, the judiciary was left to contemplate whether those practices were permitted in federal court. Justice Joseph Story appeared to resolve the question in 1827 when he stated, in dictum, that the prosecutor's right to stand aside was part of the inherited common law.³² In 1856, however, the Supreme Court held to the contrary in *United States v. Shackelford*,³³ and directed the district courts to follow the rule of the state in which they sat.³⁴ Because many states by then had provided for the prosecutor's peremptory challenge,³⁵ the effect of the Court's decision was somewhat muted. In 1865, presumably seeking to nullify *Shackelford*, Congress by statute granted

25. See *id.* (stating challenge for cause has been rendered "almost obsolete"); see also Morton, *supra* note 18, at 561-62.

26. VAN DYKE, *supra* note 8, at 148.

27. GAZETTE OF THE U.S., Aug. 29, 1789, at 158.

28. U.S. CONST. amend. VI.

29. S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 297-99 (1973).

30. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 30, 1 Stat. 119 (1790).

31. VAN DYKE, *supra* note 8, at 148-49. In addition, South Carolina and Georgia ratified the prosecutor's right to "stand aside" jurors during the colonial period. *Id.* Florida, Louisiana, and North Carolina later followed suit. *Id.* New York and Virginia, on the other hand, rejected the practice. *Id.*

32. *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483 (1827).

33. 59 U.S. (18 How.) 588 (1856).

34. *Id.* at 590.

35. See VAN DYKE, *supra* note 8, at 150, 171 n.57. By 1856, 14 states — Arkansas, Alabama, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Georgia, Mississippi, Missouri, North Carolina, Pennsylvania, and Tennessee — had permitted the prosecution to exercise peremptory strikes. Others, such as Connecticut, passed comparable legislation soon after *Shackelford*. See Colbert, *supra* note 11, at 11 n.39 (discussing states that adopted the peremptory challenge in 1800s).

the government five peremptory challenges in capital and treason cases and two in non-capital felonies.³⁶

This gradual establishment of the prosecution's ability to remove potential jurors peremptorily may have reflected, as one commentator has stated, the citizenry's "increasing acceptance of state power."³⁷ Whatever the underlying purpose originally animating this trend,³⁸ however, the peremptory soon was recognized — and indeed justified — as a powerful weapon to prohibit certain segments of the population from sitting as jurors. For example, in *Hayes v. Missouri*,³⁹ the Supreme Court considered a state statute that gave the prosecutor fifteen peremptory challenges in capital cases tried in cities with populations of over 100,000, but only eight peremptories in other areas.⁴⁰ While upholding the provision, the Court noted that the state had a legitimate interest in removing some elements from the jury:

In our large cities there is such a mixed population; there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors.⁴¹

Although other disfavored groups were the initial targets in the peremptory, African-Americans were not. This was because, by custom or law, they were excluded systematically from jury service altogether.⁴² Between 1777 and 1857, many northern states abolished slavery and dismantled the de jure impediments that denied blacks access to the legal system.⁴³ In particular, these states

36. Act Regulating Proceedings in Criminal Cases, ch. 86, § 2, 13 Stat. 500 (1865). By the same statute, those accused of capital crimes or treason were afforded twenty peremptories, while individuals charged with noncapital felonies were allowed ten. *Id.*

37. VAN DYKE, *supra* note 8, at 150.

38. See Colbert, *supra* note 11, at 11-12 (stating that 19th century "[a]dvocates of the prosecutor's peremptory challenge argued that it was necessary to overcome jury sympathy for the defendant").

39. 120 U.S. 68 (1887).

40. *Id.* at 69.

41. *Id.* at 70-71; accord *Swain v. Alabama*, 380 U.S. 202, 220-21 (1965) (exclusion of jurors based on religion, race, nationality, occupation, or affiliation allows counsel to procure unbiased panel), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

42. Generally, until a state compelled emancipation,

[a] slave had no legal standing. He could take no action to control his sale. He could not be party to a lawsuit. He could not offer testimony except against another Negro. . . . He could make no contract. . . . A slave had no privacy. Nor could more than five of them convene outside their cabins unattended by a white man without the meeting being deemed "unlawful assembly."

RICHARD KLUGER, *SIMPLE JUSTICE* 27 (1975).

43. Vermont, Rhode Island, and New Hampshire abolished slavery outright in 1777, 1784, and 1857, respectively. Other states, including New York, Connecticut, and New Jersey, followed the Pennsylvania model, which gradually outlawed slavery. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* 299-303, 310 (1978); KLUGER, *supra* note 42, at 35-37; ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 116-17, 119, 123, 192-93 (1967).

began to repeal statutes forbidding blacks from sitting as jurors⁴⁴ and testifying against whites.⁴⁵ Despite the demise of these laws, de facto discrimination prevented African-Americans from sitting on juries until 1860.⁴⁶

The Thirteenth Amendment, which outlawed slavery, was enacted in 1865.⁴⁷ Immediately afterward, every confederate state promulgated laws that imposed upon newly emancipated blacks the very restrictions that they had suffered under slavery.⁴⁸ Mississippi, for instance, simply reenacted its old slave codes.⁴⁹ Disenfranchisement was further accomplished by racial killings and

44. See Colbert, *supra* note 11, at 31 n.140 ("Juror eligibility was generally tied to voting," and by 1860 Maine, Massachusetts, Michigan, New Hampshire, New York, and Vermont had granted limited voting rights to African Americans, theoretically allowing qualifying African Americans to serve as jurors). Most states, however, divested free blacks of the vote. KLUGER, *supra* note 42, at 38.

Free blacks were generally denied political equality and were everywhere denied social equality. They were disenfranchised in Delaware in 1792, in Kentucky in 1799, in Maryland and Ohio in 1799, and in New Jersey in 1807. Between 1814 and 1861, they were either denied the vote or drastically restricted in their access to it in Connecticut, New York, Rhode Island, Tennessee, North Carolina, Pennsylvania, Indiana, Illinois, Michigan, Iowa, Wisconsin, Minnesota, and — after the bleeding there was over — Kansas. In New York, for example, free Negroes could vote only if they met a discriminatory property qualification of \$250; no such qualification was required of whites.

Id.

45. See Paul Finkleman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum South*, 17 RUTGERS L.J. 414, 424-26 (1986) (listing states first allowing blacks to testify against whites). Because blacks composed a small percentage of the population in New England, they enjoyed, virtually from the beginning of those states' entry into the Union, "the same judicial procedure and protection in criminal cases as did white persons," including the right to testify. LORENZO J. GREENE, *THE NEGRO IN COLONIAL NEW ENGLAND* 184 (1974). Cf. HIGGINBOTHAM, *supra* note 43, at 145-47 (describing New York legislation involving African-Americans' right to testify and sue between 1809 and 1827). By 1830, free blacks were no longer excluded from testifying against whites throughout New England, New Jersey, New York, and Pennsylvania. By 1860, Iowa, Michigan, Minnesota, Ohio, and Wisconsin guaranteed the right of blacks to give evidence against whites. By 1865, California and Oregon similarly repealed their laws barring black people from testifying against whites in court. Finkleman, *supra*, at 424-26.

46. GREENE, *supra* note 45, at 299; KLUGER, *supra* note 42, at 38; Colbert, *supra* note 11, at 31.

47. U.S. CONST. amend. XIII. Section 1 prohibits slavery and involuntary servitude within the United States and any place within the nation's jurisdiction. Section 2 enables Congress to enforce the amendment with appropriate legislation. Thus, other provisions of the Constitution protecting state control of slavery were abrogated. See, e.g., U.S. CONST. art. I, § 9, cl. 1 (barring congressional regulation of slave importation until 1888); U.S. CONST. art. IV, § 1, cl. 3 (fugitive slave clause).

48. See *Slaughter-house Cases*, 83 U.S. (16 Wall.) 36, 70 (1873) (Black Codes placed such "onerous disabilities and burdens" on African-Americans "that their freedom was of little value."). For descriptions of the various Black Codes, see CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); T. EISENBERG, *CIVIL RIGHTS LEGISLATION* 9 (1987) (discussing Black Codes); KLUGER, *supra* note 42, at 45-46 (discussing Black Codes and giving examples of laws); MILTON KONVITZ, *A CENTURY OF CIVIL RIGHTS* 14 & n.26 (1961) (discussing South Carolina Black Code); DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMAN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 1865-1868*, at 72-98 (1979) (discussing southern Black Codes); THEODORE BRANTER WILSON, *THE BLACK CODES OF THE SOUTH* 96-115 (1965) (discussing Black Codes of 1866).

49. See Act to Confer Civil Rights on Freedmen, 1865 Miss. Laws 82, 82-86.

mayhem perpetuated by the Ku Klux Klan and others, as well as widespread state refusals to protect the constitutional rights of their black citizens.⁵⁰

Congress countered this recalcitrance with a number of remedial devices designed to federalize civil rights.⁵¹ In order to effectuate the Thirteenth Amendment's promise of "removing every vestige of African slavery from the American Republic,"⁵² and to destroy the Black Codes,⁵³ Congress passed the Civil Rights Act of 1866.⁵⁴ The Act conferred citizenship upon all persons born in the United States and proscribed that blacks held the right "to full and equal benefit of all laws," including the right to sue and give evidence, "as is enjoyed by white citizens."⁵⁵

This, and other federal efforts, had mixed success in facilitating blacks' access to the judicial system. While the southern states revised their laws absolutely forbidding blacks from testifying against whites, they allowed such testimony only when one litigant to the action was black.⁵⁶ African-Americans initially did, however, win greater participation in jury service. As Professor Colbert has observed:

Although the 1866 Act did not specifically address the issue of the all-white jury, its guarantee that a person receive "the full and equal bene-

50. See, e.g., KLUGER, *supra* note 42, 58-60 (discussing violence in southern states against blacks to inhibit exercise of voting rights); Colbert, *supra* note 11, at 39-40 (same). Between 1865 and 1870, Ku Klux Klan violence was "so pervasive that local law enforcement authorities in several Southern states were unable to provide even the semblance of criminal law enforcement." ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS 1866-1876*, at 81 (1985).

51. See generally *Reed v. Ross*, 468 U.S. 1, 10 (1984) (recognizing Congress's provision of federal forum to review state prisoners' constitutional rights); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 503-07 (1982) (Congress provided federal forum to protect federal constitutional rights); *Zwicker v. Koota*, 389 U.S. 241, 247 (1967) (Congress intended federal courts to vindicate all constitutional rights and U.S. laws); *Brown v. Allen*, 344 U.S. 443, 499-500 (1953) (Act of 1867 allows federal courts to review state prisoner's habeas corpus claims); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1871) (Bradley, J., dissenting) (Civil Rights Bill of 1866 intended to give blacks equal rights and privileges), *rev'd sub nom.* *Golden v. Zwicker*, 394 U.S. 103 (1969); KLUGER, *supra* note 42, at 47 (Congress passed several acts and proposed constitutional amendment to eliminate Black Codes); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1325-26 (1952) (variety of congressional proposals to strike down Black Codes); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 584, 620 (1982) (Habeas Corpus Act of 1867 provided federal forum for state prisoners' federal claims).

52. CONG. GLOBE, 38th Cong., 2d Sess. 155 (1865) (statement of Rep. Davis). This goal included the right of blacks to sit on juries, *id.* at 289 (remarks of Rep. Kelley), much to the dismay of the amendment's opponents. See *id.* at 181 (remarks of Rep. Voorhees) (opposing black jurors); *id.* at 291 (remarks of Rep. Stiles) (stating party which favors blacks as jurors will be condemned in future).

53. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull) (stating purpose of the 1866 Act is to make laws that deny blacks equal rights illegal).

54. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (current version codified at 18 U.S.C. § 242 & 42 U.S.C. §§ 1981-1983, 1988 (1988)).

55. *Id.* § 1.

56. NIEMAN, *supra* note 48, at 25, 74, 94, 99-100, 109, 113; see also *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 598-99 (1872) (Bradley, J., dissenting); *Bowlin v. Commonwealth*, 65 Ky. (2 Bush) 10 (1867).

fit of all laws . . . for the security of person and property" significantly changed the southern trial jury's composition . . . [B]lack jurors began to appear in several southern states, including Georgia, Texas, North Carolina, South Carolina, and Louisiana. By 1870, the integrated jury was a common sight in those states.⁵⁷

Because escalating white mob violence between 1872 and 1876 soon imperiled this gain,⁵⁸ Congress devised the Civil Rights Act of 1875: modeled after the 1866 Act and calculated to preserve the right of blacks to serve as jurors in state judicial proceedings.⁵⁹ Although the statute still vested state officials with authority to determine whether a person possessed the necessary qualifications to sit as a juror, section four of the Act declared it a misdemeanor for a public official to disqualify any citizen from grand or petit jury service "on account of race, color or previous condition of servitude."⁶⁰

Five years later, the Supreme Court first addressed the de jure exclusion of blacks from jury service. In *Strauder v. West Virginia*,⁶¹ the defendant, who was black, had endeavored to remove the criminal action against him to federal court pursuant to federal statute.⁶² He contended that West Virginia's law restricting jury eligibility to "white male persons"⁶³ violated the 1875 Act and the Equal Protection Clause of the federal Constitution.⁶⁴ The state trial judge rejected the defendant's application, and he subsequently was convicted of murder by an all-white jury. Reversing, the Supreme Court held the state jury law was offensive to the Constitution.⁶⁵ The Court noted that the "common purpose" of the Thirteenth and Fourteenth Amendments⁶⁶ was to eradicate invidious dis-

57. Colbert, *supra* note 11, at 49-50 (footnotes omitted).

58. *Id.* at 62.

59. Civil Rights Act of 1875, ch. 114, 18 Stat., pt. 3, at 335 (§§ 1-2 declared unconstitutional by *United States v. Slingleton*, 109 U.S. 3 (1883); §§ 3-4 repealed by Act of June 24, 1948, ch. 645, § 21, 62 Stat. 862).

60. *Id.* § 4 (repealed by Act of June 24, 1948, ch. 645, § 21, 62 Stat. 862).

61. 100 U.S. 303 (1879).

62. *Id.* at 304. The defendant relied on the removal provision of the 1866 Act, which was substantially reenacted in the Enforcement Act of 1870. Act of May 31, 1870, ch. 114, §§ 16-18, 16 Stat. 140 (codified as amended at 18 U.S.C. §§ 241-242 & 42 U.S.C. §§ 1981, 1988 (1988)). The Enforcement Act created a federal mechanism to enforce the right of free suffrage, *id.* §§ 19-23, and provided for criminal sanctions for any person who hindered a citizen's exercise of a federal right. *Id.* §§ 4-7. It also permitted removal of actions initiated in state court.

When any civil suit or criminal prosecution is commenced in any State court for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, . . . such suit or prosecution may . . . be removed, before trial, into the next Circuit Court of the United States to be held in the district where it is pending.

Rev. Stat. § 641 (1875).

63. See 1872-73 W. Va. Acts 102 ("[a]ll white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as hereinafter provided.").

64. *Strauder*, 100 U.S. at 305-06.

65. *Id.* at 310-12.

66. U.S. CONST. amend. XIV. Adopted in 1868, section 1 provides:

tinctions, so prevalent previously, that had regarded blacks "as an inferior and subject race."⁶⁷ Accordingly, the statute's exclusion of blacks as jurors, by "implying [their] inferiority in civil society [and] lessening the security of their enjoyment of the rights which others enjoy," violated equal protection for blacks.⁶⁸ Apparently relying on both equal protection principles and the Thirteenth Amendment's prohibition against the maintenance of badges and incidents of slavery,⁶⁹ the Supreme Court wrote:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, . . . is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.⁷⁰

On the same day that *Strauder* was handed down, the Supreme Court issued its opinion in *Virginia v. Rives*.⁷¹ In *Rives*, the defendant posited, as grounds to remove his state prosecution to federal court, that no black had ever served as a juror in the county where he was tried. The Court held that removal was not available when the practice of state officials, rather than state statute, occasioned the exclusion of blacks from jury service.⁷² Because "it ought to be presumed" that state courts can redress an official's action to deprive an accused of a right afforded by state statute, the Supreme Court wrote, "it can hardly be said that [the defendant] is denied, or cannot enforce, 'in the judicial tribunals of

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. § 1.

67. *Strauder*, 100 U.S. at 306.

68. *Id.* at 308.

69. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968) (Thirteenth Amendment intended to remove badges and incidents of slavery); *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 601 (1872) (Bradley, J., dissenting) (same); *United States v. Cruikshank*, 25 F. Cas. 707, 711, 713 (C.C. La. 1874) (No. 14,897) (Bradley, J.) (Thirteenth and Fourteenth Amendments allow congress to prohibit discrimination based on race, color, or previous condition of servitude), *aff'd*, 92 U.S. 542 (1875). In *Jones*, Justice Douglas enumerated the exclusion of blacks from juries "solely on account of their race" as one of the badges of slavery prohibited by the Thirteenth Amendment. 392 U.S. at 445 (Douglas, J., concurring).

70. *Strauder*, 100 U.S. at 308.

71. 100 U.S. 313 (1879). The last case in this trilogy was *Ex Parte Virginia*, 100 U.S. 339 (1879). There, the Court affirmed the conviction of a state judge for failing to select qualified blacks as grand or petit jurors, in violation of § 4 of the 1875 Act. *Id.* at 344-49. The Court noted that the objective of the Thirteenth and Fourteenth Amendments was "to take away all possibility of oppression by law because of race or color" and thereby "raise the colored race from that condition of inferiority and servitudes in which most of them had previously stood." *Id.* at 344-45. The 1875 Act, which assured "an impartial jury trial by jurors indifferently selected or chosen," *id.* at 345, was declared to be appropriate legislation designed to enforce the Fourteenth Amendment. *Id.* at 344-45.

72. *Rives*, 100 U.S. at 320.

the State, the rights which belong to him.' ”⁷³ The Court additionally rejected the defendant’s argument that he had, under the Fourteenth Amendment, the right to have a jury partially composed of blacks. “A mixed jury in a particular case is not essential to the equal protection of the laws.”⁷⁴

The *Rives* Court’s eagerness to entertain the apparently irrebuttable presumption that state courts adequately would protect the rights of blacks⁷⁵ was incompatible with the rationale undergirding the civil rights legislation enacted during Reconstruction, including the removal portion of the 1875 jury anti-discrimination statute. For example, the Habeas Corpus Act of 1867⁷⁶ authorized federal courts to review the legality of the detention of state prisoners.⁷⁷ Like other post-Civil War legislation pertaining to Article III courts, the 1867 Act reflected congressional attempts to channel federal rights litigation into federal tribunals.⁷⁸ This desire stemmed from a deep mistrust of the willingness or ability of state courts to administer federal mandates vigorously.⁷⁹ Similarly, the

73. *Id.* at 321 (quoting § 651 of the Revised Statutes).

74. *Id.* at 323.

75. *See, e.g.,* *Kentucky v. Powers*, 201 U.S. 1, 30 (1906) (deprivation of defendant’s rights by state officer does not justify removal; presumed that state court will remedy the violation); *Williams v. Mississippi*, 170 U.S. 213, 219 (1898) (removal justified only where violation of rights stems from Constitution or statute, not administrative conduct); *Murray v. Louisiana*, 163 U.S. 101, 105 (1896) (remedy for denial of rights arising from judicial action during trial lies with state court power); *Smith v. Mississippi*, 162 U.S. 592, 600 (1896) (removal petition properly denied where defendant not denied equal protection or forum for suit); *Bush v. Kentucky*, 107 U.S. 110, 116 (1883) (removal denied because remedy lies within state court’s power). *Compare* *City of Greenwood v. Peacock*, 384 U.S. 808, 825 (1966) (removal not permitted where defendant alleged deprivation or rights under First Amendment) *with* *Georgia v. Rachel*, 384 U.S. 780, 805 (1966), (removal permitted where defendants alleged deprivation of rights under Civil Rights Act of 1964).

76. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. §§ 2241-2243, 2251-2252 (1988)).

77. *See* CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (remarks of Rep. Lawrence); *id.* at 4229 (remarks of Sen. Trumbull); *see also* *In re Ah Lee*, 6 Sawyer 410, 5 F. 899, 901-02 (D. Or. 1880); *Ex Parte Bridges*, 4 F. Cas. 98, 106 (C.C.N.D. Ga. 1875) (No. 1,862); *Ex Parte McCready*, 15 F. Cas. 1345, 1346 (C.C.E.D. Va. 1874) (No. 8,732).

78. Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 828-42 (1965); Peller, *supra* note 51, at 619.

79. Amsterdam, *supra* note 78, at 818, 828. According to Professor Amsterdam, the Thirty-Ninth Congress utterly repudiated the pre-bellum assumption that state courts, except in “narrow instances where they affirmatively demonstrated themselves unfit,” were the proper fora for the adjudication of federal rights. *Id.* at 828. For statements that the Reconstruction Congress intended to federalize civil rights, see *Reed v. Ross*, 468 U.S. 1, 10 (1984) (Congress enacted 28 U.S.C. § 2254 to provide federal forum for state prisoners); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 503-07 (1982) (explaining that Civil Rights Act of 1871 was designed to protect people from unconstitutional state action); *Zwickler v. Koota*, 389 U.S. 241, 246-47 (1967) (made article III judges principal executors of federal law, concluding Congress with the Act of March 3, 1895); *Brown v. Allen*, 344 U.S. 443, 499-500 (1953) (Frankfurter, J., separate opinion) (discussing Habeas Act of 1867 as giving federal courts habeas corpus jurisdiction); *Blyew v. United States*, 80 U.S. 581, 595-96 (1872) (Bradley, J., dissenting) (discussing Civil Rights Bill, Act of 1866 as intended to “counteract” discriminatory state action); *see generally* KLUGER, *supra* note 42, at 47 (discussing Reconstruction legislation’s alteration of division of powers between state and federal government); Gressman, *supra* note 51, at 1325-26 (discussing 1866 Act and Thirteenth and Fourteenth Amendments as federal

Civil Rights Act of 1871, also known as the Klan Act,⁸⁰ vested federal courts with the paramount role in safeguarding constitutional liberties precisely because Congress perceived that state courts would not do so.⁸¹

At about the same time, the Supreme Court also retracted any meaningful constitutional basis for objecting to de facto discrimination in jury selection procedures. In *Neal v. Delaware*,⁸² the Supreme Court held that a prima facie equal protection violation was presented only if a defendant could demonstrate the total exclusion of blacks from the jury over a substantial period of time.⁸³ The *Neal* standard, which was echoed almost a century later in the much criticized *Swain v. Alabama*⁸⁴ decision, was virtually impossible to satisfy. This was not simply because the test itself was so stringent, but also because lower courts construing *Neal* would act only when state officials admitted that they had purposely kept blacks off the juries.⁸⁵

Because *Rives* and *Neal* in tandem effectively placed beyond federal reach state officials who, by custom, excluded blacks from jury duty, and because Congress's finding that state officials would not conform to federal strictures was well-founded, the 1875 Act and the promise of *Strauder* were rendered moot. Stated differently, *Rives*, *Neal*, and *Strauder* stood for the proposition that the states were free to exclude blacks from the venire if they did not do so by imple-

means of protecting rights of blacks); Peller, *supra* note 51, at 584, 620 (noting Reconstruction Congress's distrust of state fora); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1027 (1985) (stating Reconstruction reordered federalism principles).

80. The Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985(3), 1986 (1988)). Section 1 of the Act established criminal and civil liability for those who, under color of law, deprive another of federally protected rights. Section 2 prohibited the going about in disguise or conspiring to deprive another of federal rights.

81. See CONG. GLOBE, 42d Cong., 1st Sess. 321 (1871) (remarks of Rep. Stoughton) (concluding local courts unable or unwilling to protect rights); *id.* at 374 (remarks of Rep. Lowe) (indicating local governments inadequate or unwilling to remedy deprivations); *id.* at 459 (remarks of Rep. Coburn) (civil rights inadequately protected by states); *id.* at 609 (remarks of Sen. Edmunds) (same); *id.* at app. 185 (remarks of Rep. Platt) (citing instances of discrimination in states); see also *id.* at 244 (message of President Grant) (contending that state authorities powerless to protect constitutional rights); *id.* at app. 210 (resolution of Sen. Sherman) (same); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 506 (1982) (mistrust of state's fact-finding ability). Indeed, opponents condemned the Act as evincing a lack of confidence in state courts. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 361 (1871) (remarks of Rep. Swann) (stating Act shows contempt for state authority); *id.* at 397 (remarks of Rep. Rice) (Act shows lack of confidence in state authority); *id.* at 429 (remarks of Rep. McHenry) (same); *id.* at 454 (remarks of Rep. Cox) (denouncing Act); *id.* at app. 216 (remarks of Sen. Thurman) (Act disparages state courts).

82. 103 U.S. 370 (1880).

83. *Id.* at 397. The *Neal* defendant's showing that no black had ever served as a juror in the state, even though 20 percent of its population was black, was held to establish an equal protection violation. *Id.*

84. 380 U.S. 202 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

85. See, e.g., *State v. Thomas*, 157 S.W. 330, 334 (Mo. 1913) (challenge to jury panel rejected where jury commissioners denied discriminating against black); *Ransom v. State*, 96 S.W. 953-56 (Tenn. 1906) (evidence that no blacks had served as jurors in 12 years insufficient to prove race discrimination); *Hanna v. State*, 105 S.W. 793, 794 (Tex. Crim. App. 1907) (exclusively white jury commission, grand jury, and petition jury insufficient to prove race discrimination).

menting absolute statutory impediments to jury service because of race.⁸⁶ As we shall see in the next section, state officials, including prosecutors, systematically deprived blacks and other citizens of their right to sit as jurors and thereby participate in civic affairs. This end was accomplished by the employment of discretionary jury qualification standards and by the discriminatory use of the peremptory challenge. What is even more regrettable is that, almost seven centuries after Parliament recognized the inherent perniciousness of the peremptory challenge, it remains as a tool of discrimination.

III. PEREMPTORY CHALLENGES IN THIS COUNTRY AFTER 1880

After 1880, state legislative bodies, emboldened by *Rives* and *Neal*, began to devise methods to ensure that blacks and members of other disfavored groups did not appear on the venire.⁸⁷ The most common strategy had two components. Eligibility for inclusion on the jury list was typically contingent on satisfying voting requirements. Thus, the states' endeavors to discourage and intimidate minorities from participating in the nation's political arena at large had the ancillary effect of eliminating most blacks from the venire.⁸⁸ The welter of prohibitive education, property, and residence prerequisites manufactured by many states, in conjunction with gerrymandering and other deceptive election devices, were so successful by 1910 that they reduced "the black man to a political cipher."⁸⁹

The other component used to restrict participation in the judicial system, at both the federal and state level, involved granting a few officials discretion to select jurors on the basis of endlessly malleable standards, such as their "good character," "intelligence," or "approved integrity."⁹⁰ Often, the officials to whom this duty was delegated would rely upon prominent or "key men" in the community, such as municipal "officials, school authorities, ministers, doctors,

86. See *Gibson v. Mississippi*, 162 U.S. 565, 580-83 (1896) (holding, pursuant to *Neal*, *Rives*, and *Strauder*, that evidence of blacks' exclusion from jury service, in absence of state law mandating that result, insufficient to warrant removal); *Smith v. Mississippi*, 162 U.S. 592, 600 (1896) (same).

87. Colbert, *supra* note 11, at 75-78, 81.

88. JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM* 334 (3d ed. 1969); KLUGER, *supra* note 42, at 9, 60, 62, 64, 67-68 & 137-38; Colbert, *supra* note 11, at 75-78.

89. KLUGER, *supra* note 42, at 68.

90. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT TO THE JUDICIAL CONFERENCE OF THE COMM. ON SELECTION OF JURORS 13-15, 17 (1942) [hereinafter KNOX REPORT]; Committee on the Operation of the Jury System of the Judicial Conference of the United States, *The Jury System in the Federal Courts*, 26 F.R.D. 409, 425, 513-14 (1960) (use of "key men" in juror selection process); *Cassell v. Texas*, 339 U.S. 282, 287-88 (1950) (jury commissioners chose only from among personal acquaintances in selection of grand jurors); *Ballard v. United States*, 329 U.S. 187 (1946); *Rabinowitz v. United States*, 366 F.2d 34, 51 (5th Cir. 1966) (jury commissioners employed standards of good character and intelligence); KLUGER, *supra* note 42, at 150-154 ("substantial citizen" standard used to select grand jurors); Colbert, *supra* note 11, at 76-78 (Mississippi selected jurors on basis of intelligence, character, and judgment); Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 247-51 (1973) (use of "key men" and other procedures resulted in unrepresentative juries); Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80, 82-84 (1973) (key man and public list methods discriminate against minorities).

and leading business men,"⁹¹ to compile lists of potential jurors.⁹² Although the Supreme Court validated these procedures by concluding that "it has not been shown that their actual administration was evil, only that evil was possible under them,"⁹³ the combined result of these selection methods ensured that, by 1910, few blacks made it even to the venire stage.⁹⁴ These methods also guaranteed that virtually no group besides middle-aged, middle-income, or affluent white males were represented through the first half of this century.⁹⁵ Indeed, just before *Ballard v. United States*⁹⁶ in 1946, in which the Supreme Court condemned the practice of excluding an individual woman from the venire unless she affirmatively sought to serve, women were disqualified from the jury altogether in twenty-one states, and could decline to serve because they were women in fifteen other states and the District of Columbia.⁹⁷

Between 1935 and 1970, the Supreme Court and Congress made efforts, with varying degrees of intensity and success, to make the venire more representative. *Norris v. Alabama*,⁹⁸ in which nine black men were accused of raping two white women, comprised the first step. The uncontroverted evidence showed that during the prior fifty years no black had served on either a grand or petit jury in the two relevant Alabama counties.⁹⁹ As one jury commissioner acknowledged, juries had been all-white for "the entire history of th[e]

91. KNOX REPORT, *supra* note 90, at 17.

92. Imlay, *supra* note 90, at 247; Potash, *supra* note 90, at 82.

93. *Williams v. Mississippi*, 170 U.S. 213, 225 (1898).

94. GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 340-41 (1910); Colbert, *supra* note 11, at 78, 89-90.

95. See, e.g., *Hearings on Proposals to Improve Judicial Machinery for the Selection of Federal Juries Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 128, 207-08, 211-12 (1967); *Moore v. New York*, 333 U.S. 565, 570 (1948) (Murphy, J., dissenting) ("blue ribbon" jury system used to select jurors based on superior intelligence and economic status upheld); *Fay v. New York*, 332 U.S. 261, 272-73 (1947) ("blue ribbon" system excluded women and laborers from special jury panels); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 222-24 (1946) (jury commissioners intentionally excluded daily wage earners); *United States v. Guzman*, 468 F.2d 1245, 1247 (2d Cir. 1972) (use of voter registration lists resulted in underrepresentation of young jurors), *cert. denied*, 410 U.S. 937 (1973); *United States v. James*, 453 F.2d 27, 29 (9th Cir. 1971) (use of voter registration lists excluded blacks and "poor people"); *United States v. Tijerina*, 446 F.2d 675, 679-80 (10th Cir. 1971) (voter registration selection process excluded manual laborers, wage earners, and non-English speaking poor people); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970) (voter registration lists result in underrepresentation of young and very old people, women, and less educated), *overruled on other grounds*, *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986); Imlay, *supra* note 90, at 249-50, 251 (typical juror under key man system was middle-aged, middle income, white male); Laura Rose Handman, Comment, *Underrepresentation of Economic Groups on Federal Juries*, 57 B.U. L. REV. 198, 200 (1977) (key man system resulted in underrepresentation of minorities and persons of low income).

96. 329 U.S. 187 (1946).

97. See KNOX REPORT, *supra* note 90, at 23.

98. 294 U.S. 587 (1935). *Norris* stemmed from the impending retrial of the defendants following the Supreme Court's previous reversal of their convictions and death sentences in *Powell v. Alabama*, 287 U.S. 45 (1932), where the Court held that due process guarantees defendants the right to counsel in state capital cases. *Id.* at 71.

99. *Norris*, 294 U.S. at 591, 596-97.

county.”¹⁰⁰ Officials, however, sought to justify the total exclusion by stating that there were no suitable blacks in the counties.¹⁰¹ As previously in *Neal*,¹⁰² the Court refused to accept the sweeping claim that every black was unqualified.¹⁰³ More importantly, the *Norris* Court abandoned its willingness, articulated in *Rives*, to accept without question the self-serving statements by officials that racial discrimination was not responsible for the total elimination of blacks from the venire. If “mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service,” the Court wrote, the Equal Protection Clause “would be but a vain and illusory requirement.”¹⁰⁴

Although the Supreme Court frequently reaffirmed its “solemn duty to make independent inquiry” into whether purposeful racial discrimination was behind the complete exclusion of blacks from the venire,¹⁰⁵ the peremptory challenge ensured that *Norris* did little to further minority representation on the petit jury itself. In response to *Norris*, jury commissioners would allow only a few blacks to be included in a series of grand juries or venire panels.¹⁰⁶ As pointed out in *Cassell v. Texas*, until 1950 the Supreme Court adhered to its prior holdings that a prima facie equal protection violation was stated only when the exclusion of blacks from the venire was total over a long period of time,¹⁰⁷ and refused to curtail this practice of tokenism.¹⁰⁸ The circumscribed number of blacks who were called for jury duty were easily precluded from reaching the jury box by use of peremptory challenges.

It is not surprising that the peremptory was invested with this racially discriminatory purpose. After all, Parliament previously had recognized and the Supreme Court had praised the ability of the peremptory challenge to extirpate from the petit jury those deemed undesirable, and blacks long had been the target of racial animus. What was most remarkable was the speed and uniformity with which litigants began to employ the peremptory to deny blacks the right to participate in the legal system as actual jurors. Only seven months after *Norris* was issued, a newspaper reporter observed that “Negroes are just about as suc-

100. *Id.* at 591.

101. *Id.* at 598-99.

102. *Neal v. Delaware*, 103 U.S. 370, 397 (1881). See *supra* notes 82-86 and accompanying text for a discussion of *Neal*.

103. *Norris*, 294 U.S. at 599.

104. *Id.* at 598.

105. *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939); accord *Eubanks v. Louisiana*, 356 U.S. 584, 587-88 (1958); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Hernandez v. Texas*, 347 U.S. 475, 481-82 (1954); *Patton v. Mississippi*, 332 U.S. 463, 466 (1947); *Hill v. Texas*, 316 U.S. 400, 404 (1942); *Smith v. Texas*, 311 U.S. 128, 129-32 (1940); *Hale v. Kentucky*, 303 U.S. 613, 614-16 (1938); *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (per curiam).

106. See *Cassell v. Texas*, 339 U.S. 282, 286 (1950) (jury commissioners limited number of blacks on grand jury to one); *Akins v. Texas*, 325 U.S. 398, 406 (1945) (number of blacks permitted to serve on grand jury limited to one); KLUGER, *supra* note 42, at 297 (practice in Charleston was to place only token number of blacks on venire).

107. *Cassell*, 339 U.S. at 289-90; *Akins*, 325 U.S. at 403-04.

108. See *Akins*, 325 U.S. at 406 (finding no evidence of intentional discrimination notwithstanding jury commissioners' statements that they sought only one black on grand jury).

cessfully and consistently excluded from jury duty in th[e deep] South today as they were before" the Court's decision.¹⁰⁹ "It is a long cry from the jury roll to a jury room, and thus far few Negroes have made it," precisely because in both criminal and civil cases blacks "can be — and are — easily eliminated by one or both sides through the striking privilege."¹¹⁰ The result was the same in the North and Southwest as well.¹¹¹ As one Los Angeles attorney recalled, "[V]ery few blacks were on jury panels . . . , and with the use of peremptory challenges, it was unusual for a black person to be on a jury in most cases between 1933-1943."¹¹²

The evidence is convincing that from 1930 to 1965 and beyond, prosecutors utilized the peremptory widely and systematically to bar blacks from sitting on the petit jury.¹¹³ Defense attorneys also, by tacit or explicit agreements with prosecutors, regularly used their peremptories to strike blacks.¹¹⁴ The Supreme Court of Alabama, in 1963, summed up almost thirty years of American history with one simple line. "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury."¹¹⁵

This, then, was the context in which the Supreme Court first addressed the invidiously discriminatory use of the peremptory challenge. In *Swain v. Alabama*,¹¹⁶ the defendant, a nineteen-year-old black man, was convicted and condemned to death for the rape of a white woman. In Talladega County, where Swain was tried, no African-American had served on a petit jury for at least

109. John Temple Graver, *Alabama Seeks End of Scottsboro Case*, N.Y. TIMES, Nov. 17, 1935, § 4, at 7.

110. *Id.*; see also CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 333 (1940) (use of striking privilege to keep blacks off jury panels); Willard L. Eckhardt, *Comments on Recent Cases*, 24 ILL. B.J. 233, 234 (1936) (Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 45 (1932), will have little effect because blacks may be barred by peremptory or for cause).

111. Colbert, *supra* note 11, at 88-93.

112. *Id.* at 92 n.451 (quoting letter from John McTernan to Douglas Colbert (Oct. 7, 1988)).

113. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 103-04 (Marshall, J., concurring) (summarizing cases showing that prosecutors routinely strike blacks); VAN DYKE, *supra* note 8, at 154-57 (same); see generally Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 206-09 (1978) (prosecutorial abuse of peremptory challenge warrants its elimination); Colbert, *supra* note 11, at 83-93 (discusses northern practice of excluding black jurors); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 509 (1986) (stating that disproportionate number of blacks excluded by peremptories); Honorable George Bundy Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOW. L.J. 1571, 1582-84 (1984) (legislation needed to curb prosecutorial abuse of peremptories); Beverly A. Chin, Note, *Limiting the Defense's Use of Peremptory Challenges*, 8 B.C. THIRD WORLD L.J. 103, 106 (1988) (prosecutorial use of peremptory challenges to exclude minorities).

114. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 225 n.31 (1965) (agreement between prosecutor and defense counsel to strike black jurors first) *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986); *id.* at 235 (Goldberg, J., dissenting) (prosecutors arranged agreements with defense counsel to exclude blacks); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 406-07 (1959) (statement by public defender as to former practice of excusing blacks by agreement).

115. *Swain v. State*, 156 So. 2d 368, 375 (Ala. 1963), *aff'd*, 380 U.S. 202 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

116. 380 U.S. 202 (1965).

fifteen years, even though black males over twenty-one constituted one-quarter of all male residents and seven blacks on average appeared on each jury list, which usually contained one hundred individuals.¹¹⁷ Eight blacks were on the defendant's venire, two of whom were excused. The prosecutor used his peremptories to remove the remaining six blacks.¹¹⁸ The prosecutor subsequently testified that he used his strikes "depend[ing] on the race of the defendant and the victim of the crime."¹¹⁹ He also stated that he sometimes asked opposing counsel if the defense wanted blacks on the petit jury, and, if not, both counsel would employ their peremptories to exclude blacks first.¹²⁰

The Supreme Court, speaking through Justice White, held that because the record did not establish purposeful discrimination, no equal protection violation had been demonstrated.¹²¹ The Court stressed that the peremptory was a "necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."¹²² Despite an earlier Court decision holding that "[j]ury competence is an individual rather than a group or class matter,"¹²³ the *Swain* Court stated that prosecutors, in ostensible pursuit of impartiality, were entitled to strike prospective jurors solely on the basis of their group affiliations, "whether they be Negroes, Catholics, accountants or those with blue eyes."¹²⁴ Invoking the *Hayes* premise that the peremptory challenge performed the desirable function of keeping certain segments off the petit jury, Justice White wrote: "In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society."¹²⁵

The Supreme Court did conclude, however, that the Fourteenth Amendment limits, at least in theory, a prosecutor's authority to strike blacks on the basis of race.¹²⁶ Justice White first erected a presumption that in any particular case the state was utilizing its peremptories to achieve a fair and impartial jury.¹²⁷ This presumption could not be defeated solely because a prosecutor peremptorily challenged all blacks on a given venire.¹²⁸ But when a prosecutor

117. *Id.* at 205.

118. *Id.*

119. *Id.* at 225.

120. *Id.* at 225 n.31.

121. *Id.* at 227-28.

122. *Id.* at 212.

123. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

124. *Swain*, 380 U.S. at 212.

125. *Id.* at 218. The *Swain* Court similarly noted:

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of the jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case.

Id. at 222. See *supra* notes 39-41 and accompanying text for a discussion of *Hayes v. Missouri*, 120 U.S. 68 (1887).

126. *Swain*, 380 U.S. at 223-24.

127. *Id.* at 222.

128. *Id.*

in a county,

in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted.¹²⁹

Swain, the Supreme Court found, failed to discharge this burden since he did not demonstrate under what circumstances the state had struck blacks from the venire.¹³⁰

Several courts and commentators vigorously condemned the *Swain* decision on a variety of grounds. First, and most prevalently, they objected that the burden of proving purposeful discrimination, especially because few jurisdictions maintained records of peremptory challenge use, was "virtually impossible" to satisfy.¹³¹ Second, the *Swain* Court placed its imprimatur on the arbitrary exclusion of persons from the petit jury in a particular trial solely on the assumption that group affiliations would interfere with certain jurors' ability to be impartial.¹³² Third, and as Justice Goldberg's dissent in *Swain* pointed out, the Court turned established legal priorities on their heads. It exalted the peremptory, which is not constitutionally required, over equal protection and fair cross-section principles.¹³³ In particular, because the *Swain* test required a showing of "systematic exclusion," defendants' ability to vindicate their constitutional rights turned on the fortuity of whether they were the first or final victims in the prosecutor's series of racially discriminatory peremptory challenges.¹³⁴ Last, by entertaining the presumption that states were utilizing the peremptory in a legally appropriate manner, the Supreme Court ignored years of well-documented

129. *Id.* at 223-24.

130. *Id.* at 224-25. The Court stated: "The difficulty with the record before us . . . is that it does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County." *Id.* at 224.

131. *Brown*, *supra* note 113, at 197; *accord* *Batson v. Kentucky*, 476 U.S. 79, 92 n.17 (1986); *McCray v. Abrams*, 750 F.2d 1113, 1120 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1001 (1986); *People v. Wheeler*, 583 P.2d 748, 768 (Cal. 1978); *Colbert*, *supra* note 11 at 94; *Massaro*, *supra* note 113 at 540-41; *Smith*, *supra* note 113, at 1575; Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 240 (1986); Note, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions: The Case for Striking Peremptory Strikes*, 4 REV. LITIG. 175, 214 (1984).

132. *See, e.g.*, *Smith*, *supra* note 113, at 1576 (rationale behind total exclusion of particular groups unsupportable).

133. *Swain*, 380 U.S. at 243-44 (Goldberg, J., dissenting); *Massaro*, *supra* note 113, at 539.

134. *See, e.g.*, *McCray v. Abrams*, 576 F. Supp. 1244, 1247 (E.D.N.Y. 1983) (*Swain* precludes any remedy for first victim of discrimination), *aff'd in part, vacated in part*, 750 F.2d 1113 (2d Cir. 1984), *and vacated on other grounds*, 478 U.S. 1001 (1986); *People v. Wheeler*, 583 P.2d 748, 767 (Cal. 1978) (same); *People v. Crespin*, 612 P.2d 716, 717 (N.M. Ct. App. 1980) (same).

discrimination by prosecutors and defense attorneys alike.¹³⁵

In the years following *Swain*, Congress and the judiciary endeavored to ensure that a broader spectrum of society would participate in the jury system. The Sixth Amendment long had been interpreted to mandate that a criminal jury be drawn from a fair cross-section of the community.¹³⁶ To eradicate the "key men" method of compiling jury lists from the federal courts and to meaningfully effectuate the Sixth Amendment's command, Congress promulgated the Jury Selection and Service Act of 1968.¹³⁷ The Act, which requires the clerks of the federal district courts to select prospective jurors on a random basis from a fair cross-section of the entire district in which the court is located,¹³⁸ recognized that jury composition implicated the interests of both the public and the parties to lawsuits. It declared that all litigants entitled to trial by jury "shall have the right to grand and petit juries selected at random from a fair cross-section of the community" and that all otherwise qualified citizens "shall have the opportunity to be considered for service on grand and petit juries" in the district courts.¹³⁹ The Act unmistakably prohibited exclusion "from service as a grand or petit juror" in the district courts "on account of race, color, religion, sex, national origin, or economic status."¹⁴⁰

In 1976, the United States Supreme Court, acting on a recommendation by the Advisory Committee on Criminal Rules,¹⁴¹ submitted an amendment to Federal Rule of Criminal Procedure 24(b) that would have reduced the number of peremptories afforded a federal criminal defendant from twenty to twelve in capital cases, from ten to five in felony trials, and from three to two in misdemeanor cases.¹⁴² The proposed revision also sought to equalize the available

135. *Batson v. Kentucky*, 476 U.S. 79, 103 (1986).

136. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 364-70 (1979) (Sixth Amendment mandates juries drawn from cross-section of community); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (same); *Carter v. Jury Comm'n*, 396 U.S. 320, 332-33 (1970) (same); *Brown v. Allen*, 344 U.S. 443, 474 (1953) (same); *Glasser v. United States*, 315 U.S. 60, 85-86 (1942) (same); *cf. Ballard v. United States*, 329 U.S. 187, 191 (1946) (federal Judicial Code designed to create juries reflecting cross-section of community); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (American tradition contemplates jury drawn from community cross-section). As Justice Black wrote in *Smith v. Texas*, 311 U.S. 128 (1940):

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Id. at 130 (citation omitted). Three years after *Swain*, the Court held that a criminal defendant's right to a fair and impartial jury was applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

137. 28 U.S.C. §§ 1861-1878 (1988).

138. *Id.* § 1861.

139. *Id.* Restrictions on jury service, such as minimum age, literacy, and mental and physical qualifications, and excusals based on undue hardship are set forth in §§ 1863(b)(5)(B)-(b)(6), and 1864-1865 of Title 28.

140. *Id.* § 1862.

141. *See* H.R. Doc. No. 464, 94th Cong., 2d Sess. (1976).

142. *See id.* at 12-13.

peremptory challenges assigned to the government and the defense.¹⁴³ The reasoning behind the amendment was two-fold. First, lowering the number of challenges was perceived to resolve a conflict between the dictates of the Jury Selection Act and the ability of the peremptory to diminish or destroy the representativeness of the jury.¹⁴⁴ Although the amendment's proponents did not question the value of the peremptory in assuring a fair trial, they argued that allowing fewer challenges would prevent their misuse as a method of systematically eliminating certain groups from the jury.¹⁴⁵ Second, the Advisory Committee noted that reducing the number of peremptories would accelerate the voir dire process and permit the use of smaller venires.¹⁴⁶ Congress rejected the amendment.¹⁴⁷ The legislature's refusal to acquiesce in the revision stemmed from its concern that in the federal system, where the trial judge usually conducts the voir dire, counsels' circumscribed ability to interrogate panel members hindered their capacity to develop grounds for cause challenges.¹⁴⁸

143. *Id.*

144. *Id.* at 14; JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMM. ON THE OPERATION OF THE JURY SYSTEM 1, 5 (Oct. 1971) [hereinafter JURY SYSTEM REPORT].

145. H.R. DOC. NO. 464, at 14-15; JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE SUBCOMM. ON THE CONDUCT OF THE VOIR DIRE EXAMINATION 11 (1978); JURY SYSTEM REPORT, *supra* note 144, at 5.

146. H.R. DOC. NO. 464, at 14.

147. Act of July 30, 1977, Pub. L. No. 95-78, § 2(c), 91 Stat. 319; *see also* Act of July 8, 1976, Pub. L. No. 94-349, § 1, 90 Stat. 822 (postponing effective date of amendment to allow for further study).

148. The Senate Judiciary Committee stated:

The proposed amendment by the Supreme Court to the rule would change it in a significant way. Of all the proposed amendments, it probably drew the most vigorous criticism in the House hearing and in the correspondence received by this Committee. . . .

The Committee has concluded that changes to Rule 24 should be studied further by the Judicial Conference. The basic problem seems to be in the *voir dire* procedures. The testimony before the House Subcommittee on Criminal Justice indicates that in most Federal courts the judge conducts *voir dire*. Only rarely are counsel permitted to question prospective jurors directly. Witnesses indicated that this makes it difficult for counsel to identify biased jurors and develop grounds to challenge for cause. The Committee believes the Judicial Conference should have the benefit of the comments that have been made on this rule since it was submitted to Congress in deciding whether to make such a change in the future.

S. REP. NO. 354, 95th Cong., 1st Sess. 9 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527.

The proposal was not resubmitted to Congress. In its report to the Committee on the Operation of the Jury System, the Subcommittee on the Conduct of the Voir Dire Examination declined to recommend further amendments to limit the number of peremptories. It posited that a reduction in peremptory challenges would do little to ensure representative juries and would interfere with the defendant's right to a fair trial.

Although the Jury Committee, in its 1971 recommendation to reduce peremptory challenges, stated that the continued availability of a large number of such challenges would be contrary to the cross-sectional philosophy of the Jury Selection and Service Act of 1968, your subcommittee believes that any such effect arising out of the exercise of peremptory challenges upon the cross-sectional makeup of the resulting jury would be *de minimis* in its impact. While the Jury Committee's 1971 recommendation also advocated equality in the number of peremptory challenges available to prosecution and defense, an argument can nevertheless be made that the common law tradition of according to a criminal defendant

Nevertheless, *Swain's* infirmities led some courts to limit the use of the peremptory challenge by relying on fair cross-section principles, which had been infused with new vitality in *Taylor v. Louisiana*.¹⁴⁹ In *Taylor*, the Supreme Court reversed the conviction of a male defendant on the ground that a state law exempting a woman from jury service unless she made a written declaration of her wish to serve violated the Constitution's fair cross-section requirement.¹⁵⁰ The Court reaffirmed that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial."¹⁵¹ The Court expressed concern that prohibiting certain classes from jury service subverted the legitimacy of the criminal justice system.

Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial.¹⁵²

Taylor, however, did not extend the Sixth Amendment requirement that the venire embrace a fair cross-section to the petit jury itself.¹⁵³

Likewise, the Supreme Court of California, since 1954, has recognized a

every advantage and presumption in the interest of fairness may justify the retention of additional such challenges for availability to the defense. . . . Finally, while it is recognized that a reduction in peremptory challenges is appealing from a standpoint of further juror utilization, we cannot responsibly weigh this factor, however desirable it may be, nearly so heavily as the requirement for fundamental fairness in criminal proceedings. Retaining the current number of peremptory challenges would be helpful in offering the best possible assurance of an unbiased jury, while the selection and qualification scheme mandated that the Jury Selection and Service Act has proved successful in producing federal juries which are representative of their communities.

Report of the Subcomm. on the Conduct of the Voir Dire Examination at 11-12 (1978); see also S. REP. NO. 990, 94th Cong., 2d Sess. 4 (1976) (committee members expressing reservations about reducing number of peremptories).

149. 419 U.S. 522 (1975).

150. *Id.* at 524-25.

151. *Id.* at 528.

152. *Id.* at 530.

153. *Id.* at 538. The Court noted:

[I]n specifically holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition; . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Id.; see also *United States v. Childress*, 715 F.2d 1313, 1319-20 (8th Cir. 1983) (recognizing that *Taylor* Court specifically declined to extend its holding to petit juries), *cert. denied*, 464 U.S. 1063 (1984); Martha Craig Daugherty, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1, 69 (1975) (noting that *Taylor* Court carefully clarified that proportional representation is not required on petit juries).

constitutional guarantee to an impartial jury¹⁵⁴ as dictating that the venire be drawn from a representative cross-section of the community.¹⁵⁵ In *People v. Wheeler*,¹⁵⁶ the California Supreme Court, rejecting *Swain's* equal protection rubric¹⁵⁷ and applying the cross-section doctrine to the petit jury,¹⁵⁸ held that a prosecutor's use of the peremptory in a single trial to remove all black venire members created a prima facie violation of the state constitution.¹⁵⁹ In the *Wheeler* court's view, a representative jury is one that "is as near an approximation of the ideal cross-section of the community as the process of random draw permits."¹⁶⁰ A jury composed in this manner yields an impartial decision because it ensures the interaction of diverse viewpoints in the deliberation room,¹⁶¹ while striking members of the panel solely on the basis of group affiliation frustrates this end.¹⁶² The *Wheeler* court noted, however, that the right to an impartial factfinder does not necessitate that the composition of any given jury precisely reflect the demographic contours of the community.¹⁶³ Rather, by protecting panel members from invidious discrimination, the system as a whole would better mirror the community.¹⁶⁴

Unlike the English Parliament, the *Wheeler* court did not discern the fair cross-section principle and the peremptory to be inherently incompatible. It stated that only peremptory challenges predicated on "specific" biases, which do not rely on racial or other pernicious classifications, and which relate to the particular case at hand, were permissible.¹⁶⁵ Rooting out these types of biases, the *Wheeler* court stated, eliminated the "extremes of potential prejudice" present on the venire and therefore furthered the goal of securing an impartial jury.¹⁶⁶

To detect which strikes contravene the constitutional standard, *Wheeler* outlined a multistep procedure. When the prosecutor or an attorney for the defendant believes that opposing counsel is abusing the peremptory, counsel must make out a prima facie case of discrimination against a group of potential jurors. The prima facie case has three components: first, the moving attorney must show that opposing counsel has excluded jurors sharing an identifiable group characteristic. Second, counsel must demonstrate that the challenged ju-

154. The California constitutional analogue to the Sixth Amendment states: "Trial by jury is an inviolate right and shall be secured to all." CAL. CONST. art. 1, § 16.

155. *People v. White*, 278 P.2d 9 (Cal. 1954).

156. 583 P.2d 748 (Cal. 1978).

157. *Id.* at 768. In *Wheeler*, the Court emphasized that *Swain* had proven ineffective in halting the "pernicious practice" of employing peremptory challenges in a racially discriminatory fashion. *Id.* at 767-68.

158. *Id.* at 761-62.

159. *Id.*

160. *Id.* at 762.

161. *Id.* at 761.

162. *Id.*

163. *Id.* at 762.

164. *Id.*

165. *Id.* at 761.

166. *Id.* at 760.

rors are members of a cognizable group. Lastly, counsel must prove that there is a strong likelihood that opposing counsel struck the venire members because of their group affiliation.¹⁶⁷ If the trial judge agrees that a prima facie case has been established, opposing counsel is afforded an opportunity to dispel the inference of illegal discrimination.¹⁶⁸ The rebuttal typically will consist of an explanation that the excused panel members evinced specific biases.¹⁶⁹

The *Wheeler* court acknowledged, however, that intuition or unfavorable impressions "conceive[d] upon the bare looks and gestures" of potential jurors might justify the exercise of peremptory challenges.¹⁷⁰ Nevertheless, if the judge finds the proffered explanation unconvincing, the entire venire would be dismissed, a new one assembled, and jury selection would begin anew.¹⁷¹

Several courts, interpreting their state constitutions or the Sixth Amendment, embraced *Wheeler's* general thesis and its procedure.¹⁷² The United States Supreme Court, in *Batson v. Kentucky*,¹⁷³ adopted a similar scheme, but it relied instead on the Equal Protection Clause to limit the prosecution's latitude in barring African-Americans from the jury. The Court first disavowed *Swain's* "crippling" evidentiary burden by holding that discriminatory exclusion in even one case was enough to constitute an equal protection violation.¹⁷⁴ Thus, a defendant, rather than being compelled to show that prosecutors had pursued an ongoing practice of selecting a particular group from the petit jury,¹⁷⁵ now could "establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."¹⁷⁶

167. *Id.* at 764.

168. *Id.* at 764-65.

169. *Id.* at 765.

170. *Id.* at 760-61.

171. *Id.* at 765.

172. The following cases adopted *Wheeler* in construing state constitutional counterparts to the Sixth Amendment: *State v. Superior Court*, 760 P.2d 541, 546 (Ariz. 1988), *cert. denied*, 111 S. Ct. 1638 (1991); *Riley v. State*, 496 A.2d 997, 1013 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984); *Commonwealth v. Soares*, 387 N.E.2d 499, 516-17 (Mass.), *cert. denied*, 444 U.S. 881 (1979); *State v. Gilmore*, 489 A.2d 1175, 1185-86 (N.J. Super. Ct. App. Div. 1985), *aff'd*, 511 A.2d 1150 (N.J. 1986). Many courts, however, declined to follow *Wheeler*. See, e.g., *State v. Steward*, 591 P.2d 166, 172 (Kan. 1979); *State v. Sims*, 639 S.W.2d 105, 109 (Mo. Ct. App. 1982); *State v. Raymond*, 446 A.2d 743, 745 & n.3 (R.I. 1982); *State v. Grady*, 286 N.W.2d 607, 611-12 (Wis. Ct. App. 1979).

Courts adopting *Wheeler* in construing the Sixth Amendment include: *Booker v. Jabe*, 775 F.2d 762, 772-773 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker*, 478 U.S. 1001, *reinstated per curiam*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983), *aff'd in part, vacated in part*, 750 F.2d 1113 (2d Cir. 1984); *People v. Payne*, 436 N.E.2d 1046, 1050-51 (Ill. App. Ct. 1982), *rejected in* *People v. Williams*, 454 N.E.2d 220 (Ill. 1983), *cert. denied*, 466 U.S. 981 (1984). After *Holland v. Illinois*, 493 U.S. 474 (1990), decisions applying the Sixth Amendment cross-section requirement to the petit jury are no longer valid law. See *infra* notes 203-14 and accompanying text for a discussion of *Holland*.

173. 476 U.S. 79 (1986).

174. *Id.* at 92-93, 96.

175. *Id.* at 95.

176. *Id.* at 96.

Although the Court declined to formulate any "particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges,"¹⁷⁷ it did enunciate a general method of inquiry. After an objection is lodged, the trial court first must decide whether the defendant has stated the requisite *prima facie* case of purposeful discrimination by the prosecution against a "cognizable racial group,"¹⁷⁸ which *Batson* impliedly defined as a "recognizable, distinct class singled out for different treatment under the laws."¹⁷⁹ In making this determination, the trial court should consider all relevant circumstances.¹⁸⁰ "For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his [or her] challenges may support or refute an inference of discriminatory purpose."¹⁸¹

Once the defendant tenders a valid *prima facie* showing of discrimination, the burden shifts to the prosecutor to "come forward with a neutral explanation" for challenging the particular jurors.¹⁸² The Court stressed that the justification need not rise to the level required for a challenge for cause,¹⁸³ but it also noted that the rebuttal could not rest on an assertion that the excluded jurors would be partial to the defendant because of their shared group membership or affiliation.¹⁸⁴ Rather, the neutral explanation must be "related to the particular case to be tried."¹⁸⁵

This rationale repudiated the assumption in *Swain* that the government legitimately could wield its peremptories even for the supposedly trial-related reason that the common race of the defendant and venire member would render the latter less receptive to the government's evidence.¹⁸⁶ In rejecting this assumption, *Batson* identified three distinct harms that stem from the discriminatory use of peremptories. First, such discrimination impairs the defendant's right to be tried by a jury "whose members are selected pursuant to nondiscriminatory criteria."¹⁸⁷ Although the Court denominated this right to be one secured by the Equal Protection Clause,¹⁸⁸ it couched much of its reasoning in Sixth Amendment terms.¹⁸⁹ Second, the Court found that the racially discriminatory use of peremptories violates the excluded venire member's equal protection right

177. *Id.* at 99.

178. *Id.* at 96-97.

179. *Id.* (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)).

180. *Id.*

181. *Id.* at 97.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 98.

186. *Id.* at 97.

187. *Id.* at 85-86.

188. *Id.* at 86.

189. *Id.* at 85 n.6 (Sixth Amendment requires that petit jury selection be from pool representing cross-section of community); *id.* at 86 n.8 (discriminatory jury selection prevents jury from fulfilling Sixth Amendment function because officials can use such juries to oppress individuals).

to participate in civic life as a juror.¹⁹⁰ In contrast to the *Swain* Court's statement that venire members may be challenged on the basis of their group affiliations,¹⁹¹ *Batson* notably began with the premise that "[a] person's race simply 'is unrelated to his fitness as a juror.'"¹⁹² Last, *Batson* declared that discriminatory jury selection methods undermine the community's confidence in the fairness of the justice system and legitimizes racial prejudice in other arenas of human endeavor.¹⁹³

Justice Marshall, concurring in *Batson*, agreed with the Court's analysis, but expressed little optimism that its remedial procedures would end the invidiously discriminatory use of peremptories.¹⁹⁴ He identified two weaknesses in the majority's approach. First, defendants could prevail only when "flagrant" violations of the Equal Protection Clause have transpired.¹⁹⁵ "Prosecutors are left free to discriminate against blacks in jury selection provided they hold that discrimination to an 'acceptable' level."¹⁹⁶ Second, the Court's focus on the subjective motivations of prosecutors in the exercise of their peremptories guaranteed frequent circumvention of its holding.¹⁹⁷ "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."¹⁹⁸ Justice Marshall suggested that even absent "outright prevarication" by prosecutors, conscious or unconscious racism harbored by attorneys and judges would render them more susceptible to manufacture or accept unmeritorious explanations for striking some jurors and thereby hinder effective administration of the constitutional mandate.¹⁹⁹

Justice Marshall concluded that because the peremptory's "inherent potential" for abuse conflicted with the requirements of equal protection, the only way for the Court to terminate racial discrimination in the exercise of peremptories

190. *Id.* at 87.

191. *Swain v. Alabama*, 380 U.S. 202, 220-22 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 976 U.S. 79 (1986).

192. *Batson*, 476 U.S. at 87 (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

193. *Id.* at 87-88.

194. *Id.* at 102-03.

195. *Id.* at 105 (Marshall, J., concurring).

196. *Id.* (Marshall, J., concurring).

197. *Id.* at 105-06 (Marshall, J., concurring).

198. *Id.* at 106 (Marshall, J., concurring).

199. *Id.* (Marshall, J., concurring). Justice Marshall wrote:

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." A prosecutor's own conscious or unconscious racism may lead him easily 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 identically. A judge's own conscious or unconscious racism may lead him to accept such a complaint as well supported. . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels — a challenge I doubt all of them can meet.

Id. (Marshall, J., concurring) (quoting *King v. County of Nassau*, 581 F. Supp. 493, 502 (E.D.N.Y. 1984)).

would be to ban them altogether from the criminal justice system.²⁰⁰ He argued that abolishing the government's challenge without concomitantly eradicating the defense's was an unacceptable solution for two reasons. First, Justice Marshall perceived that continuation of the defendant's peremptories while depriving the prosecution of their use would upset the balance between the parties.²⁰¹ Second, given that the potential for prejudice reposes "in the defendant's challenge as well," the statutory privilege must yield to superior constitutional values.²⁰²

Standing as a microcosm of the judiciary's expanding supervision over the peremptory, the Supreme Court increasingly has focused its attention on some issues unresolved by *Batson*. In *Holland v. Illinois*,²⁰³ the Supreme Court announced that the Sixth Amendment's fair cross-section requirement did not restrict the racially discriminatory exercise of peremptories. Speaking for the five-member majority, Justice Scalia noted that none of the Court's previous cases had applied the cross-section principle to selection procedures for the petit jury.²⁰⁴ In fact, each decision had stressed that, in contrast to the venire, the petit jury actually chosen need not mirror the community or reflect the distribution of various distinctive groups represented in the population.²⁰⁵ This result inheres in the Sixth Amendment itself, the majority reasoned, because it seeks to ensure only that the government does not devise its jury lists to produce venires that disproportionately favor the government, thus generating petit juries that would share the same disposition.²⁰⁶ Accordingly, the Sixth Amendment's requirement of a fair cross-section "on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)."²⁰⁷

The majority then explained that the peremptory furthers the interest in obtaining impartial juries. Justice Scalia wrote that the Sixth Amendment's "impartial jury" stricture arguably compels provision of the peremptory.²⁰⁸ Although precedent did not support the proposition, he noted that any other interpretation of the Sixth Amendment would "cripple" the peremptory, and substantially hinder its end of generating unbiased juries through "eliminat[ing] the extremes of partiality on both sides."²⁰⁹ Thus, the *Holland* Court reasoned that applying the Sixth Amendment to peremptory challenges would lead to their destruction and undermine fair trial values. As Justice Scalia stated: "If the goal of the Sixth Amendment is representation of a fair cross-section of the community on the petit jury, then intentionally using peremptory challenges to

200. *Id.* at 107-08 (Marshall, J., concurring).

201. *Id.* (Marshall, J., concurring).

202. *Id.* at 108 (Marshall, J., concurring).

203. 493 U.S. 474 (1990).

204. *Id.* at 482-83.

205. *Id.*

206. *Id.* at 480-81.

207. *Id.* at 480.

208. *Id.* at 481-82.

209. *Id.* at 484 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 496 U.S. 79 (1986)).

exclude *any* identifiable group should be impermissible — which would . . . 'likely require the elimination of peremptory challenges.' ”²¹⁰

Dissenting in *Holland*, Justice Marshall, joined by Justices Brennan and Blackmun, rejected the majority's claim that impartiality of the venire is the sole end of the fair cross-section mandate.²¹¹ Justice Marshall discerned two distinct commands emanating from the Constitution: (1) the jury must represent a fair cross-section of the population and (2) it must be impartial.²¹² The former requirement, he noted, ensures that the community's common-sense judgment will operate to check governmental abuses, preserves public confidence in the fairness of the justice system as a whole, and furthers individual participation in the administration of justice — an important aspect of civil life and responsibility.²¹³ Excluding persons on the basis of immutable and legally irrelevant characteristics impairs each of these goals, Justice Marshall concluded, and whether it occurs at the venire or peremptory stage is immaterial.²¹⁴

In *Powers v. Ohio*,²¹⁵ the Court held that a criminal accused, regardless of his or her race, has standing to object to a prosecutor's race-based use of peremptory challenges against prospective jurors.²¹⁶ Justice Kennedy, writing for the seven member majority, emphatically reaffirmed *Batson's* premise that the Constitution prohibits the use of skin color as a test for juror bias or competence.²¹⁷ In doing so, however, Justice Kennedy focused on the equal protection rights of the excluded jurors not to be improperly divested of their right to serve, rather than on defendants' *Strauder*-type equal protection rights not to be tried before juries from which members of their own race have been systematically excluded.²¹⁸

Accordingly, *Powers* represented a significant amplification of what previously lay dormant in *Batson* and even in *Strauder*: The Equal Protection Clause contains two distinct prohibitions against race-based peremptory challenges. The first guarantees that the state will not arbitrarily exclude members of the defendant's race from the venire.

[A] defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct. . . . Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race,' he or she does have the right to be tried by a jury whose members are selected by non-discriminatory criteria.²¹⁹

210. *Id.* (quoting *Lockhart v. McCree*, 476 U.S. 162, 178 (1986)).

211. *Id.* at 493 (Marshall, J., dissenting).

212. *Id.* at 494 (Marshall, J., dissenting).

213. *Id.* at 495 (Marshall, J., dissenting).

214. *Id.* at 496 (Marshall, J., dissenting).

215. 111 S. Ct. 1364 (1991).

216. *Id.* at 1366.

217. *Id.*

218. *See id.* at 1370. *See supra* notes 61-70 and accompanying text for a discussion of *Strauder v. West Virginia*, 100 U.S. 303 (1880).

219. *Id.* at 1367 (quoting *Strauder*, 100 U.S. at 305). The Court's comment that a defendant "does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria"

The second equal protection right devolves upon those summoned for jury duty and forbids the state from inflicting public humiliation upon prospective jurors by implicitly declaring them unfit to serve on account of race.²²⁰ Discriminatory jury selection techniques propagate a uniquely acute level of stigmatic harm to those excluded, the Court suggested, because jury service is a basic incident of citizenship and a basic form of participation, nearly on par with voting, in our democratic scheme of government.²²¹ "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."²²²

Thus, the balance of the *Powers* decision involved whether the defendant, a white, had standing to assert the equal protection rights of black jurors who were struck. In answering this question in the affirmative, the Supreme Court applied its usual test for third-party standing.²²³ The litigant must demonstrate that she has suffered an injury-in-fact, that she has a close relationship to the third party whose rights she seeks to enforce, and that the third party is, as a practical matter, unable to protect his or her own interests.²²⁴ *Powers* recognized that a defendant realizes a cognizable injury stemming from the state's challenges against black venire members, and that the defendant has a "concrete interest" in "neutral jury selection procedures."²²⁵ The prosecutor's racial discrimination interjects a demonstrable illegality into this process. "The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."²²⁶

Subsequently, in *Edmonson v. Leesville Concrete Co.*,²²⁷ the Supreme

apparently cannot be understood to apply literally to peremptories. Otherwise, the Court would not have needed to decide the third-party standing issue.

220. *Id.* at 1368-70, 1372.

221. *Id.* at 1368-69.

Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people. . . . Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process. . . . "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."

Id. at 1369 (citing *Green v. United States*, 356 U.S. 165, 215 (1958) (Black, J., dissenting) and quoting *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970)).

222. *Id.* at 1370.

223. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (beer vendor who suffered injury from law barring beer sales to males age 18-20 could advance constitutional claim on behalf of males affected); *Singleton v. Wulff*, 428 U.S. 106, 112-16 (1976) (party litigating matter must have suffered injury; litigant's rights must be closely related to third-party; and third-party must be impeded from enforcing own rights); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (medical personnel charged with aiding married couple to obtain contraceptives had standing to represent married couple's rights to use contraceptives).

224. *Powers*, 111 S. Ct. at 1370-71.

225. *Id.* at 1371 (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986)).

226. *Id.*

227. 111 S. Ct. 2077 (1991).

Court, again speaking through Justice Kennedy, held that a civil litigant's racially discriminatory use of peremptory strikes violates the equal protection rights of the challenged jurors.²²⁸ The Court easily concluded that invidious discrimination was no less damaging to the excluded venire member in the civil context than in a criminal case. In both instances, "race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice."²²⁹

Because the equal protection components of the Fourteenth and the Fifth Amendments do not restrict the conduct of non-governmental entities,²³⁰ however, the primary dispute in *Edmonson* was whether the employment of peremptories by a private party's attorney constituted state action regulated by those provisions. As it had in previous cases, the Court utilized a two-part framework to answer this question. First, the Court determined that the asserted constitutional deprivation stemmed from the exercise of a privilege having its source in state authority because the peremptory today is solely a creature of statute.²³¹ Second, the Court found that private litigants could fairly be deemed government actors in using the peremptory challenge.²³²

In reaching the latter conclusion, Justice Kennedy initially detailed the parties' extensive use of state procedures, facilitated by "the overt, significant assistance of state officials," in effectuating their discriminatory animus.²³³ Private litigants, without the active participation of court personnel, including judges, would be powerless to exercise their peremptories at all. The *Edmonson* Court then posited its most innovative thesis. The peremptory challenge, it noted, determines the selection of the petit jury, which is "a quintessential governmental body, having no attributes of a private actor."²³⁴ Drawing on the primary-election cases that subjected private organizations to constitutional dictates when the state's electoral apparatus grants those organizations the ability to choose officials,²³⁵ the Court ruled that the peremptory effectively delegated to private parties the traditional function of government to constitute juries.²³⁶

228. *Id.* at 2080.

229. *Id.* at 2082.

230. *Id.*; accord *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (Fourteenth Amendment offers no protection against even most unfair private conduct); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (federal power limited against private action); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (Fourteenth Amendment violation must be "attributable" to state); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (state deprivation of rights is covered by Fourteenth Amendment; private acts are not); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 172 (1972) (Fourteenth Amendment is implicated only if state enforces private discrimination).

231. *Edmonson*, 111 S. Ct. at 2083.

232. *Id.* at 2083-87.

233. *Id.* at 2084 (quoting *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)).

234. *Id.* at 2085.

235. *Id.* at 2085-86. In particular, the Court gleaned from *Terry v. Adams*, 345 U.S. 461, 481 (1946) (Clark, J., concurring), the principle that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's constraints." *Edmonson*, 111 S. Ct. at 2085.

236. *Edmonson*, 111 S. Ct. at 2086.

If race-based peremptory challenges in civil actions could evade judicial scrutiny, "persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation."²³⁷

IV. PEREMPTORY CHALLENGES AND THE CONSTITUTION

Given the peremptory's "very old credentials,"²³⁸ to argue that the challenge is unconstitutional may appear, at first blush, quixotic. Yet, it is equally difficult to deny that the Equal Protection Clause, the Thirteenth Amendment, and the Sixth Amendment each express values that are wholly inimical to the very existence of the peremptory challenge. As even its defenders acknowledge, the peremptory is a device that in purpose and effect allows attorneys, activated by their own "crud[e]," and "hopelessly mistaken" stereotypes,²³⁹ to exclude their fellow citizens from fully participating in civic affairs. It is also an instrument that undermines society's evolving attempts to ensure that juries fairly represent the judgment of the community.

A. Equal Protection and the Fourteenth Amendment

Although the Equal Protection Clause of the Fourteenth Amendment restricts only actions undertaken by the several states, the Supreme Court has construed the Due Process Clause of the Fifth Amendment to incorporate essentially the same standards of review for federal legislation.²⁴⁰ Broadly stated, equal protection dictates that governmental entities may not, without an adequate explanation, unequally allocate benefits and burdens among similarly situated individuals. A classification subject to equal protection analysis may be created explicitly by legislative act or may arise out of the application of a statute that on its face contains no illegitimate distinctions. Thus, a facially neutral law may offend equal protection principles if it either in purpose and effect²⁴¹ or in administrative enforcement²⁴² establishes an impermissible classification.

Of course, the Equal Protection Clause does not forbid the state from manufacturing legal classifications of persons altogether. It does command, however, that any distinctions made must be justified. Courts employ three

237. *Id.* at 2087.

238. *Swain v. Alabama*, 380 U.S. 202, 212 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

239. *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

240. *See, e.g.*, *United States v. Kras*, 409 U.S. 434, 440-50 (1973) (Fifth Amendment challenge to filing fee in federal bankruptcy analogized to Fourteenth Amendment challenge to state filing fee); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (equal protection and due process, while not interchangeable, require similar analysis).

241. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (court will examine evidence of intent and effect of statute to determine whether legislature improperly motivated by race considerations).

242. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (regardless of ordinance's original intent, its application was a "practical denial" of equal protection).

standards in testing the validity of any discerned classification. First, if the classification implicates fundamental rights or is based on race, alienage, or national origin, the state must demonstrate that the classification is necessary to advance a compelling governmental interest.²⁴³ Second, if the law creates distinctions between persons on the basis of sex, religion, or birth status, the state must prove that the law bears a substantial relationship to an important governmental interest.²⁴⁴ Last, courts will uphold all other classifications, such as age or living arrangements, unless the challenger shows that the statute does not comprise rational means to serve a legitimate end.²⁴⁵

Batson, *Powers*, and *Edmonson* rightly centered on the equal protection rights of venire members who are struck from jury service on the basis of race or other invidious distinctions. The discriminatory exercise of peremptories works an injury of constitutional magnitude upon prospective jurors by classifying them in an irrelevant and illegitimate manner. Attorneys, by using the strikes in such a fashion, and the judiciary, by permitting this practice to continue unabated, place a judicial imprimatur on discrimination. As the dissenters in *Batson* seemed to recognize, once one applies "unadulterated" equal protection analysis to the peremptory, it cannot continue to exist.²⁴⁶ It is, by definition,

243. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (if classification harms suspect class or limits fundamental right, state must show compelling government interest); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) ("alien" classification in state law "subject to close judicial scrutiny"); *Hunter v. Erickson*, 393 U.S. 385, 391-92 (1969) (core of Fourteenth Amendment is prohibition of "unjustified" race-based classifications); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (denial of fundamental rights to marry based on racial classifications is "directly subversive" of due process and equal protection); *Reitman v. Mulkey*, 387 U.S. 369, 377 (1967) (state constitutional amendment allowing discrimination in housing violates federal constitution).

244. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 468-69 (1981) (gender classifications must bear substantial relationship to important governmental objectives); *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (gender classifications valid when based on situations where men and women are not similarly situated); *Orr v. Orr*, 440 U.S. 268 (1979) (gender classifications invalid under Equal Protection Clause unless necessary and substantially related to important governmental objectives); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (law preventing cause of action for wrongful death of mother by illegitimate children based on irrational classification bore "no relation to the nature of the wrong allegedly inflicted on the mother").

245. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (government limitation on living arrangements of mentally retarded subject to rational basis test); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976) (statute mandating retirement of state troopers at age 50 upheld under rational basis standard because elderly do not require "extra protection"); *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (statute prohibiting unrelated people sharing household from receiving food stamps unconstitutional because classification "clearly irrelevant to law's purpose").

246. *Batson v. Kentucky*, 476 U.S. 79, 123-25 (1986) (Burger, C.J., dissenting). Of course, this claim led the Chief Justice to conclude that the peremptory, apparently because of its long history, occupies an enclave independent of the Equal Protection Clause. *Id.* at 125 (Burger, C.J., dissenting). He also suggested that the state interest in maintaining the peremptory as a means to secure impartial juries is "substantial, if not compelling." *Id.* (Burger, C.J., dissenting).

“ ‘an arbitrary and capricious right’ ”²⁴⁷ designed to allow exclusion of venire members upon the “ ‘sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.’ ”²⁴⁸ It is a vehicle to effectuate the unarticulated, and usually inarticulatable, prejudices of governmental actors.

The Equal Protection Clause, in contrast, forbids arbitrary or irrational governmental conduct or distinctions. That is, it requires the state to be able to justify its classifications in terms of advancing a public purpose, although the requisite strength of its interest and the necessary degree to which its means and ends must correlate will depend on the nature of that classification. Even minimal constitutional guarantees demand that the state's proffered rationale must be more than the product of “strained imagination.”²⁴⁹ Rather, the connection between the method selected and the goal to be promoted conceivably must have “some objective basis.”²⁵⁰ The peremptory, however, is always employed on subjective grounds not amounting to an objectively persuasive determination that the targeted venire member is biased or otherwise unfit to serve as a juror. If the contrary were true, the prospective juror would be excused for cause. Thus, although the state's interest in securing a fair trial is undoubtedly a “substantial, if not compelling” one,²⁵¹ the peremptory, by its very nature, cannot in any way advance that end. This absence of any demonstrable countervailing governmental interest furthered by the concededly arbitrary and impressionistic exercise of authority represented by the peremptory results in the inevitable conclusion that it cannot survive any level of equal protection scrutiny, no matter how lenient.²⁵²

The equal protection components of the Fourteenth and Fifth Amendments limit only state action.²⁵³ The conclusion of the Supreme Court that the govern-

247. *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

248. *Lewis v. United States*, 146 U.S. 370, 376 (1892) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *353).

249. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., separate opinion) (plurality opinion).

250. *Id.*

251. *Batson v. Kentucky*, 476 U.S. 79, 125 (1986) (Burger, C.J., dissenting). A variation on the argument that the peremptory ensures a fair trial by eliminating the “extremes of partiality” from the petit jury, *Swain*, 380 U.S. at 219, is that the peremptory can rectify an unrepresentative panel by devising a petit jury that more accurately mirrors the community or can be used to assure a racially diverse jury. See, e.g., *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting) (restricting peremptories may hinder minorities “in obtaining racially diverse juries”); Gobert, *supra* note 13, at 532-33 (peremptories can increase chance of minority representation where minorities are absent from first panel of jurors). To be sure, this is a possibility, and if that were the purpose or effect of the peremptory, it could well occupy a legitimate place in trial procedure. A regrettable century of blatant discrimination in order to disrupt the composition of juries, however, conclusively dispels any such hope.

252. Cf. *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting) (“unadulterated equal protection analysis requires the government to prove rationality of its actions, while peremptory challenges are inherently” arbitrary and capricious).

253. See *supra* note 230 and text for a discussion of how the equal protection components of the Fourteenth and Ninth Amendments do not restrict the conduct of non-governmental entities.

ment's peremptory exclusion of members of the venire from the petit jury violates equal protection guarantees held by the challenged jurors did not settle the issue as to whether the same conduct by defense attorneys violates equal protection guarantees. The Court recently heard arguments in *Georgia v. McCollum*, a case which is expected to determine this issue.²⁵⁴

The argument that defense attorneys may operate independent of equal protection strictures postulates that they represent private parties and perform functions adversarial to the state,²⁵⁵ while courts, when giving effect to defense counsel's peremptory strikes, engage in nothing more than a ministerial function.²⁵⁶ *Edmonson* disposed of much of this claim. The Court plainly rejected the contention that private litigants do not act together with or obtain "significant aid from state officials" in the exercise of their peremptories.²⁵⁷ Although the logical compass of *Edmonson* easily embraces the conclusion that the discriminatory use of peremptories by defense attorneys is fairly attributable to the government and therefore restricted by equal protection principles,²⁵⁸ the Court gave at least a hint that this might not be so. The state action inquiry is a fact sensitive one.²⁵⁹ As noted in *Edmonson*, the Court previously has highlighted one factual distinction between defense counsel and other attorneys that may be determinative.²⁶⁰

In *Polk County v. Dodson*,²⁶¹ the Supreme Court held that a public defender, when representing a criminal accused, did not act under color of state

254. 405 S.E. 2d 688, 689 (Ga. 1991), *rev'd*, No. 91-372, 1992 W.L. 132446 (U.S. June 18, 1992). See also *United States v. De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (holding that equal protection principles prohibit criminal defendant from peremptorily striking venire persons on basis of gender).

255. See *Polk County v. Dodson*, 454 U.S. 312, 320 (1981) (state employment of public defender does not bring defender's actions under color of state law).

256. Compare *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 221 (5th Cir. 1990) (judicial role in civil peremptories "merely ministerial"), *rev'd*, 111 S. Ct. 2077 (1991); Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 811-20 (1989) (same); John J. Hoeffner, Note, *Defendant's Discriminatory Use of the Peremptory Challenge After Batson v. Kentucky*, 62 ST. JOHN'S L. REV. 46, 54-55, 57 (1987) (state only allows private parties to select jurors) with *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2079 (1991) (judge exercises substantial control over *voir dire*); *United States v. DeGross*, 913 F.2d 1417, 1424 (9th Cir. 1990) (judicial dismissal of juror reinforces a discriminating peremptory), *rev'd and remanded*, 960 F.2d 1433 (9th Cir. 1992); *Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir.) (same), *cert. denied*, 493 U.S. 872 (1989); *State v. Levinson*, 795 P.2d 845, 850 (Haw. 1990) (same); *People v. Kern*, 554 N.E.2d 1235, 1246 (N.Y. 1990) (same), *cert. denied*, 111 S. Ct. 77 (1990); E. Vaughn Dunnigan, Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 361 (1988) (defense counsel performing public function).

257. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

258. See *Edmonson*, 111 S. Ct. at 2095 (Scalia, J., dissenting) (majority decision will require elimination of defense peremptories).

259. *Id.* at 2083; *Lugar*, 457 U.S. at 939; *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961).

260. *Edmonson*, 111 S. Ct. at 2086.

261. 454 U.S. 312 (1981).

law for section 1983 purposes,²⁶² which is coextensive with contours of the state action requirement.²⁶³ The Court reasoned that

[I]t is the function of the public defender to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities.

....

...[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.²⁶⁴

Dodson stands for the proposition that the existence of an employment relationship between a defense attorney and the government does not convert the lawyer into a state actor — not that defense counsel is never deemed a state actor.²⁶⁵ *Dodson* also does not dispositively answer the question whether the peremptory's inherent incompatibility with the equal protection rights of potential jurors necessitates abolition of defense challenges. Thus, there is some utility in examining more closely whether a defense attorney becomes a governmental actor for the limited purpose of exercising peremptories during jury selection.

The first aspect of the state action test is indisputably met. In criminal cases, the deprivation of venire members' equal protection rights stems from defense counsel's exercise of a privilege that finds its source in state and federal statutes alone. The second part of the inquiry, whether defense attorneys fairly could be deemed government actors in utilizing the peremptory challenge, is of course where controversy arises. In resolving this dimension of its standard, the Court has examined the extent to which the ostensibly private actor relies on governmental assistance and benefits, whether that party is performing a traditional governmental function, and whether the injury inflicted "is aggravated in a unique way by the incidents of governmental authority."²⁶⁶

Edmonson's analysis of the foregoing principles, which determined that civil litigants were state actors when using the peremptory, applies with equal force to defense attorneys. The Court's conclusion that the peremptory dele-

262. *Id.* at 325.

263. *Lugar*, 457 U.S. at 929.

264. *Dodson*, 454 U.S. at 320-21 (citation omitted).

265. *Id.* at 324-25; *see also Edmonson*, 111 S. Ct. at 2086 (characterizing *Dodson* as holding "a public defender is not a state actor in his general representation of a criminal defendant, *even though he may be in his performance of other official duties.*") (emphasis added); *Branti v. Finkel*, 445 U.S. 507, 519 (1980) (primary, but not exclusive, job of public defender is to represent criminal defendant).

266. *Edmonson*, 111 S. Ct. at 2083; *accord* *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544-45 (1987); *Lugar*, 457 U.S. at 937; *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 726 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948); *Marsh v. Alabama*, 326 U.S. 501, 505-09 (1946).

gates to private parties the traditional function of government to configure juries is not altered by the status of the attorneys working to constitute that body. The first and third factors, which regard the degree of state aid involved in the nature of the injury, blend together and provide in some ways an even stronger justification for declaring defense counsel to be state actors when exercising their peremptories than civil attorneys.

The forum in which defense lawyers exercise the peremptory challenge is a paradigmatically public one. Pursuant to detailed statutes and jury plans, government officials compel potential jurors, upon pain of criminal sanction, to serve.²⁶⁷ In many jurisdictions, attorneys scrutinize juror data collected and compiled by officials to determine whom to strike.²⁶⁸ From the seal of the court emplaced over the bench, to the activities of a robed judge, to the presence of marshals and other employees, the courtroom is infused with symbols of the state's imprimatur. The judge holds extensive supervisory power over the number and exercise of peremptories,²⁶⁹ and, backed by the state's coercive power, enforces the litigant's discriminatory decision.²⁷⁰ Thus, as with counsel for private civil litigants, defense attorneys "could not exercise [their] peremptory challenges absent the overt, significant assistance of the court."²⁷¹

Given that the state's authority is inexorably linked to the origin, scope, use, and enforcement of the peremptory, it seems odd indeed to assert that its discriminatory application by a defense attorney is merely a private affair. For within this environment, challenged members of the venire, many of whom will

267. 28 U.S.C. § 1864 (1988).

268. There is no uniform disclosure practice. Under 28 U.S.C. § 1863(b)(7), each district court's jury plan may regulate when and how much juror information is furnished to counsel and may permit its judges to keep names of jurors and other information confidential altogether if necessary. See JURY SYSTEM REPORT, *supra* note 144, at 4-5. One fairly dated survey, conducted by Judge E. Gordon West, found that

31 of the responding courts by rule or established practice prohibit the disclosure of juror venire lists prior to the day of trial, while 51 courts permit this disclosure at varying times prior to such day. . . . [A] similar variation existed in the practices of the district courts as to the time at which litigants and attorneys are first informed as to the identity of prospective jurors.

Id. at 5.

269. See FED. R. CRIM. P. 24(b) (granting trial judge discretion to enlarge number of strikes in criminal cases when there are more than two parties); *Sawyer v. United States*, 202 U.S. 150, 165 (1906) (stating supervisory power of court extends to manner in which peremptory challenges are exercised); *United States v. Leslie*, 759 F.2d 366, 373-75 (5th Cir. 1985) (declining to follow *Swain* pursuant to court's supervisory power), *vacated*, 479 U.S. 1074 (1987). *United States v. McDaniels*, 379 F. Supp. 1243, 1248-50 (E.D. La. 1974) (holding *Swain* standard not violated where prosecutor employed peremptory challenges to remove six of seven blacks from venire, but new trial granted in interests of justice); see also *Gomez v. United States*, 490 U.S. 858, 873 (1989) ("Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice."). Moreover, the court's authority to supervise the parties' use of peremptories is implicit in *Swain* and explicit in *Batson* and its progeny. See *supra* notes 116-30 and accompanying text for a discussion of *Swain v. Alabama*, 380 U.S. 202 (1965) and *supra* notes 173-202 and accompanying text for a discussion of *Batson v. Kentucky*, 476 U.S. 79 (1986).

270. *Edmonson*, 111 S. Ct. at 2084-85.

271. *Id.* at 2084.

have no other contact with the judiciary, cannot help but conclude that both the parties and the judge, who appears to control the proceedings and act on behalf of the justice system, have deemed them unworthy to serve as jurors on account of a legally irrelevant attribute, such as race, gender, religion, sexual orientation, or socioeconomic status. This "overt wrong, often apparent to the entire jury panel,"²⁷² is grossly amplified by the apparatus of government authority in which it transpires. As the Court has noted in a different context, "[A] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character."²⁷³ Of course, it was the state that commanded the juror to publicly expose herself to such contemptuous treatment in the first place. The insult is accentuated by the Court's inaction, which must be perceived as at least tacit approval of the discrimination, and by other, more subtle conduct by the judge, such as giving due regard or respect to the defense attorney who made the challenge. Further, a refusal to extend *Edmonson* to criminal defense attorneys would carry its own special affront. It would broadcast to the struck juror: "This is a criminal matter. Although we may allow you to decide a mere civil dispute, this case is far too serious and important to entrust to your kind."

The *Dodson* Court's observation that defense attorneys fulfill an "adversarial function" when advancing the cause of their clients, thus, is insufficient to free those attorneys from observing the equal protection rights of venire members. First, state power and official prestige is so insinuated into the use of the peremptory that the adversarial function of the defense, standing alone, does not demand a result contrary to *Edmonson*. Both *Powers* and *Edmonson* emphasized the perceptions of racial offense and systemic harms that are generated by racial discrimination in the courtroom. These, and other forms of discrimination, are not abated by the identity of the attorney who initiates the discriminatory act.

Second, *Edmonson* signaled a distinction between the situation presented in *Dodson* and the problem of race-based challenges by counsel for the criminal accused. *Edmonson* formulated the state action question at a middle level of generality. The Court did not ask if the role of private parties is a governmental one during all phases of the trial process. Unlike the dissenters, the majority also did not phrase the pertinent state action issue very narrowly, that is, as whether the government substantially encouraged litigants to use their strikes in a discriminatory manner.²⁷⁴ Instead, the Court asked whether "a private entity becomes a government actor for the limited purpose of using peremptories during jury selection."²⁷⁵ The Court answered in the affirmative, reasoning that: "The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of

272. *Powers v. Ohio*, 111 S. Ct. 1364, 1371 (1991).

273. *Id.* at 1372.

274. *Edmonson*, 111 S. Ct. at 2091 (O'Connor, J., dissenting).

275. *Id.* at 2086.

race.”²⁷⁶ Given that the Court also characterized *Dodson* as holding that “a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties,”²⁷⁷ the Court essentially rendered *Dodson* inapplicable to the state action inquiry in the context of peremptories.

Even if defense attorneys are not state actors within the meaning of the Constitution’s equal protection strictures when exercising their peremptories, the Thirteenth Amendment nevertheless precludes them, as well as civil counsel, from striking black venire members solely on account of race. As Justice Kennedy explicitly noted in *Edmonson*, the Thirteenth Amendment applies to purely private conduct.²⁷⁸ An indispensable feature of slavery and the Black Codes, which the Thirteenth Amendment targeted specifically, was the de jure exclusion of blacks from most aspects of the legal system, including the ability to serve as jurors. The Court has recognized that denying blacks the right to participate as jurors on the basis of color is “an assertion of their inferiority” and affixes the brand of slavery upon them.²⁷⁹ Although wielding the peremptory against jurors solely because of their skin color may differ in procedural detail from outright statutory exclusion, the two methods are identical in substance, purpose, and effect as far as the struck juror is concerned.²⁸⁰

276. *Id.*

277. *Id.*

278. *Id.* at 2082.

279. *Rose v. Mitchell*, 443 U.S. 545, 551 (1979); *Strauder v. West Virginia*, 1100 U.S. 303, 308 (1880).

280. *But cf.* *United States v. Leslie*, 783 F.2d 541 (5th Cir. 1986), *judgment vacated*, 479 U.S. 1074 (1987), *remanded*, 813 F.2d 658 (1987). In *Leslie*, the Fifth Circuit attempted to distinguish the practices:

Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case* than others on the same venire.

Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is *racially insulting*. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not.

Id. at 554 (emphasis in original).

This argument sounds reasonable in part, but it fails altogether to come to grips with the traditional and present use of the peremptory to perpetuate in the legal system the fact and vestiges of racial discrimination. Moreover, not only is the contention completely incompatible with the reasoning of *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, the Court twice specifically dismissed it in *Powers v. Ohio*, 111 S. Ct. 1364 (1991). First, the Court wrote that “[t]he suggestion that racial classifications may survive when visited upon all persons is no more authoritative today

B. The Sixth Amendment

Rather than promote fair trials, there is every reason to conclude that the peremptory undermines them. We begin by identifying the main infirmities in the *Batson-Holland* axis. *Batson* suggests that the defendant has an equal protection right in the nondiscriminatory selection of the petit jury that is independent of the venire person's equal protection right not to be excluded from the jury for invidious reasons. The *Holland* majority claims that the fair cross-section principle applies only to the methods of configuring the venire and is no restraint to proceedings occurring at the voir dire.

As related earlier, *Batson* and its progeny mandate that the defendant possesses an equal protection right "to be tried by a jury whose members are selected by nondiscriminatory criteria."²⁸¹ This right of an accused cannot be harmonized with the existence of a peremptory challenge which serves to effectuate every conceivable discriminatory classification. There would have been no need to decide, as the Court did in *Powers*, whether a criminal defendant has third-party standing to assert the equal protection rights of excluded jurors.²⁸² If the Constitution guarantees to the defendant that the jury will be composed without reliance on discriminatory selection methods, that right alone should suffice to invalidate the state's race-based exclusion of prospective jurors, without regard to the impact on excluded venire persons.

The defendant's own identified interest in the fairness of selection methods stems not from the Equal Protection Clause, but from the Sixth Amendment. Cases such as *Powers* rely on *Strauder*, which unquestionably held that a defendant is denied equal protection of the laws when tried by a jury from which members of his or her own race have been purposefully excluded by the state. The defendant's right not to be tried by a jury from which certain groups are excluded most directly emanates from the Sixth Amendment's guarantee that the jury will be drawn from a fair cross-section of the community. As Justice Stevens stated in his dissent in *Holland*:

In my opinion, it is appropriate to review petitioner's equal protection claim, because a showing that black jurors have been eliminated solely on account of their race not only is sufficient to establish a violation of the Fourteenth Amendment but also is sufficient to establish a violation of the Sixth Amendment. A jury that is the product of such a racially discriminatory selection process cannot possibly be an "impartial jury" within the meaning of the Sixth Amendment.²⁸³

For instance, in *Witherspoon v. Illinois*,²⁸⁴ the Supreme Court reviewed a

than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537 (1896)." *Id.* at 1370. Second, in response to the argument that no racial insult is inflicted if a prosecutor uses color or ancestry to determine a juror's "objectivity or qualifications," the Court answered, "[w]e do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles." *Id.*

281. *Powers*, 111 S. Ct. at 1367; *Batson*, 476 U.S. at 85-86.

282. *Powers*, 111 S. Ct. at 1370.

283. *Holland v. Illinois*, 493 U.S. 474, 506 (1990) (Stevens, J., dissenting).

284. 391 U.S. 510 (1968).

statute that permitted "a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment or that he is opposed to the same."²⁸⁵ The trial judge removed for cause forty-seven venire persons, most without any questioning whether their beliefs would interfere with their ability to apply the law to the facts in an impartial manner.²⁸⁶ The Supreme Court declared that the state violated the Sixth and Fourteenth Amendments by using the challenge for cause to exclude an entire class of individuals who expressed reservations about capital punishment without determining whether they could uphold their oath as jurors.²⁸⁷ A jury composed in such a fashion, the Court observed, could not possibly act as the conscience of the community.²⁸⁸

Recently, the Third Circuit Court of Appeals held that the perfunctory removal of potential jurors for cause on the ground that they knew the defendant, without attempting to ascertain whether their bare acquaintance rendered them sufficiently biased to warrant excusal, violated the Jury Selection and Service Act's fair cross-section requirement.²⁸⁹ The Court noted that whether these persons were excused when compiling the jury list or during voir dire is irrelevant because presuming partiality at any stage of the proceeding detracted from the representativeness of the venire.²⁹⁰

Understood in this light, *Holland* misstated the question. To the extent the issue is whether any given petit jury must accurately mirror the demographics of the community, courts justifiably have answered it in the negative.²⁹¹ That conclusion, however, does not elucidate whether the Sixth Amendment distinguishes between the manner in which systematic exclusion of certain groups from the venire is accomplished. Certainly nothing in the amendment's language militates in favor of such a distinction. It speaks of trial by "impartial jury," not by impartial venire. Whether litigants skew the representativeness of the jury prior to drawing up the venire or prior to empaneling the petit jury is simply not pertinent. Both purposely deny the criminal accused the right to be tried by a "jury" drawn from a fair cross-section of the community. Moreover, if the overbroad for-cause exclusion of venire persons from the petit jury results

285. ILL. REV. STAT., ch. 38, § 743 (1959).

286. *Witherspoon*, 391 U.S. at 514-15. *But see Holland*, 493 U.S. at 483-84 (if representative jury is goal of Sixth Amendment, "using peremptory challenges to exclude *any* identifiable group" is improper); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (stating that Court has not previously "invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges")

287. *Witherspoon*, 391 U.S. at 518, 520.

288. *Id.* at 520.

289. *United States v. Calabrese*, 942 F.2d 218, 226 (3d Cir. 1991).

290. *Id.*

291. *Holland v. Illinois*, 493 U.S. 474, 482-83 (1990) (quoting *Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (Court has never required that petit juries "reflect the composition of the community at large."); *Duren v. Missouri*, 439 U.S. 357, 364 n.20 (1979) (noting that fair cross-section "requirement does not mean 'that petit juries actually chosen must mirror the community.'"); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.")). See *supra* notes 203-14 and accompanying text for a discussion of *Holland*.

in an impermissibly unrepresentative jury, it is difficult indeed to discern any principled reason why using the peremptory in such a manner does not do so as well. Both are exercised after the venire is called, and both upset its representativeness and hence its impartiality.

Even the *Holland* Court had to acknowledge implicitly that the Sixth Amendment does not turn on distinctions between representativeness and impartiality, between peremptory or for-cause challenges, or between the venire and the petit jury. The Court reasoned that without the fair cross-section requirement,

the State could draw up jury lists in such a manner as to produce a pool of prospective jurors disproportionately *ill disposed* towards one or all classes of defendants, and *thus more likely to yield petit juries* with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the pool in its favor.²⁹²

Embedded in this statement is a recognition that the ostensibly differing concepts identified by the Court overlap and elide into one another.

The process of inclusion or exclusion of venire persons during voir dire necessarily affects the make-up of the petit jury, and an impartial jury is effectively synonymous with a representative one selected within the confines of the random-draw and for-cause challenge processes.²⁹³ Thus, peremptorily excluding venire members from participating in the petit jury either because they belong to a particular class²⁹⁴ or because they possess unique viewpoints which do not interfere with their ability to be impartial,²⁹⁵ which we expect them to bring to the case in order to express part of the community's common-sense judgment, undermines the very concept of trial by impartial jury envisioned by the Sixth Amendment. That is not to say, of course, that the fair cross-section dictates of the Sixth Amendment are precisely coextensive with impartiality or are fully discharged by assembling a representative petit jury. After all, the prevailing view of the population, such as through exposure to pre-trial publicity, might be that the defendant is guilty regardless of the facts. Yet, after a representative panel is convened and after members who are unable to adhere to basic fair trial commands are purged for cause, the Sixth Amendment is satisfied. Any further action designed to mute the diversity of the panel is done only at the expense of

292. *Holland*, 493 U.S. at 480-81 (emphasis added).

293. Morton, *supra* note 18, at 562; Gurney, *supra* note 131, at 244-53; Robert Mork, Comment, *The Sixth Amendment: Limiting the Use of Peremptory Challenges*, 16 J. MARSHALL L. REV. 349, 360 (1983).

294. See *Lockhart*, 476 U.S. at 175. The Court wrote that barring groups such as blacks, women, and Mexican-Americans from jury participation "raise[s] at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community" and "undeniably [gives] rise to an 'appearance of unfairness.'" *Id.*

295. Gurney, *supra* note 131, at 248 ("Once the jurors are in the jury room, they must deliberate and negotiate to reconcile their contrary viewpoints and reach a verdict. This process ensures that the verdict will rest on shared values. . . . Hence, peremptorily eliminating jurors *because they have biases* destroys the very impartiality which the peremptory challenge is thought to preserve.") (emphasis in original).

the Sixth Amendment.²⁹⁶

It is because this result so plainly follows that the *Holland* Court, itself noting that application of the Sixth Amendment cross-section requirement to the peremptory would lead to its abolition,²⁹⁷ is ultimately reduced to calling the claim "implausible" in light of the peremptory's "venerable" history.²⁹⁸ That is not an argument born of logic and is contrary to the terms and purpose of the Sixth Amendment. Moreover, where the peremptory is at issue, the past is a double-edged sword. It is true that it is an instrument of ancient origin, but it is also undeniable that it has served, far more often than not, the very end of altering the random distribution of various viewpoints in order to defeat the panel's representativeness and thus the possibility of producing a verdict reflecting the community's judgment.

V. "SEAT OF THE PANTS" USE OF PEREMPTORY CHALLENGES

In all the literature and case law on the peremptory challenge, no one has set forth any actual evidence that the peremptory effectively encourages fair trial values by eliminating biased venire members or any detailed argument how it could do so. Instead, its supporters confess that it permits the rejection of jurors for "real or imagined partiality,"²⁹⁹ which has no substantial basis in fact.³⁰⁰ The use of peremptories, they admit, is predicated on "seat-of-the-pants instincts" that may be "crudely stereotypical" and in many cases are "hopelessly

296. As one commentator has urged:

The logical, and desirable, way to impanel an impartial and representative jury — and the method chosen by Congress — is to put together a complete list of eligible jurors and select randomly from it, on the assumption that the laws of statistics will produce representative juries most of the time. This approach safeguards the selection process from possible manipulation and ensures the independence of the jury. Such a randomly selected jury will not necessarily be "impartial" in the strict sense of that term, because the jurors bring to the jury box prejudice and perspectives gained from their lifetimes of experience. But they will be impartial in the sense that they will reflect the range of the community's attitudes, which is the best we can do. . . . [I]t also ensures that the diversity within our society is reflected on our juries because each population group is represented insofar as possible in proportion to its strength in population.

VAN DYKE, *supra* note 8, at 18.

297. *Holland v. Illinois*, 494 U.S. 474 (1990). The *Holland* Court stated: "if the goal of the Sixth Amendment is representation of a fair cross-section of the community on the petit jury, then intentionally using peremptory challenges to exclude *any* identifiable group should be impermissible — which would, as we said in *Lockhart*, 'likely require the elimination of peremptory challenges.'" *Id.* at 483-84 (quoting *Lockhart v. McCrae*, 476 U.S. 162, 173 (1986)).

298. *Id.* at 481-82.

299. *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

300. *Batson*, 476 U.S. 79. Dissenting, Chief Justice Burger stated that [P]eremptory challenges are often lodged, of necessity, for reasons 'normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.' Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch.

Id. at 123 (Burger, C.J., dissenting) (quoting *Swain*, 380 U.S. at 220).

mistaken.”³⁰¹ The primary claim in support of the peremptory’s efficacy is that class or group membership is an appropriate proxy for “potential” partiality.³⁰² This “assumption or belief” that a particular characteristic may render a venire member “more likely” to harbor unknown biases,³⁰³ we are told, is warranted by “[c]ommon human experience, common sense, psychosociological studies, and public opinion polls.”³⁰⁴ Another commentator, shying away from even this profoundly weak justification, was ultimately reduced to stating merely, that “race matters” in shaping people’s experiences, attitudes, and perceptions.³⁰⁵

Exercise of the peremptory challenge is typically misdirected at the outset. It would be remarkable indeed if the peremptory challenge could work its objective of rooting out venire members who are actually too partial to serve on the petit jury. It is in this sense that the peremptory’s proponents altogether fail to address the salient issue. The question is not whether socioeconomic status, race, education, religion, vocation, age, and other associations affect, as a factual matter, one’s view of the case. Nor is it whether a given venire contains persons clinging to secret biases or unconscious prejudices. Rather, the issue is whether attorneys or their clients, with imperfect knowledge and in spite of their own prejudices, should have the prerogative of using peremptory challenges to deny persons the constitutional right to be jurors in order to accomplish their objective of obtaining, not an impartial jury, but a jury which would be partial.

The proxy argument itself is thoroughly defective in other ways as well. First, even if accepted in full, it could not supply a sufficient quantum of “reasonable suspicion” to warrant even an automobile stop. It is nevertheless permitted for the purposes of divesting a person of a valuable incident of citizenship. Second, based on the unremarkable premise that race is factually pertinent to one’s psychological make-up, proponents of the proxy argument conclude that race is therefore sufficiently determinative of enough individual group members’ fitness to sit as impartial jurors that all members of the group may be excluded.³⁰⁶ If this argument were correct, then one should ask why

301. *Id.* at 138 (Rehnquist, J., dissenting).

302. *Id.* (Rehnquist, J., dissenting) (citing *Swain*, 380 U.S. at 220-22; *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir. 1986) (en banc); *United States v. Carter*, 528 F.2d 844, 848-49 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976)); accord *Barbara Allen Babcock*, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 553-54 (1975); Goldwasser, *supra* note 256, at 834-38.

303. *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

304. *Babcock*, *supra* note 302, at 553.

305. Goldwasser, *supra* note 256, at 834 n.165.

306. Stated more simply, defenders of the peremptory and others confuse the attitudes and life experiences that jurors inevitably bring to the case with the biases that do indeed impair a litigant’s right to receive a fair trial. See, e.g., Jim Dejer, *Jurors Take Their Biases to Court, Two Studies Report*, PHILA. INQUIRER, Feb. 20, 1990, at A10 (studies show 10-15% of jury verdicts based on personal biases). Contrary to some lawyers’ condescending belief that those who survive the peremptory stage are blissfully empty automatons anxious for orders, impartiality does not mean that jurors are void of any preconceived notions. Instead, the Sixth Amendment’s fair trial requirement commands that juries be composed of individuals whose opinions will not prevent or substantially impair their ability to apply faithfully the law to the facts adduced at trial. *Wainwright v. Witt*, 469 U.S. 412, 434 (1985); *Irvin v. Dowd*, 366 U.S. 717, 723 (1963); *Beck v. Washington*, 369 U.S. 541, 557 (1962); *United States v. Casey*, 835 F.2d 148, 151 (7th Cir. 1987); *United States v. Salamone*,

middle-aged, middle-income, or affluent white males, who have been grossly over-represented through much of this century, comprise the only group peculiarly immune from this inability to set aside parochial concerns and judge cases fairly. Third, the proxy argument requires one to hold that group or racial stereotypes, although irrelevant and forbidden in all other areas of the law, suddenly take on a "core of truth" in the courtroom and are an appropriate criterion in the jury selection context.³⁰⁷ This mysterious conversion process is unexplained by its advocates. It is further inconsistent with the *Batson* Court's observation that racial discrimination in the justice system is not so easily and neatly contained.³⁰⁸ If attorneys may exclude individuals from jury service solely on reliance of an alleged truth value of stereotypes, it is difficult to understand why state officials likewise cannot use the same reasoning to withhold all manner of benefits from the members of certain groups, or why private employers, who too often must operate with inexact information, cannot legally use such stereotypes in employment decisions.

Moreover, racial categorizations have never been known for their incisiveness. Although stereotypes may be quite revealing about those who embrace them, they are devoid of informational content about their subjects. Generalizations adopted by some trial attorneys as the basis for their use of peremptory challenges make this clear:

"Avoid all women in all defense cases," (Darrow); "Women are sympathetic and extraordinarily conscientious," (Goldstein); "Females are good for all defendants except attractive female defendants," (Katz and Karcher); "On emotionalism — ethnically high to low, Irish, Jewish, Italian, French, Spanish, and Slavic," (Goldstein); "Take smiling jurors, especially if they smile at the attorney," (Darrow); "Be wary of smiling jurors who are trying to disarm attorneys [sic]," (Harrington & Dempsey); "Presbyterians are too cold; Baptists are even less desirable . . . [K]eep Jews, Unitarians, Congregationalists, and agnostics," (Darrow); "Information on religion is not usually helpful," (Appleman).³⁰⁹

800 F.2d 1216, 1226 (3d Cir. 1986). As one pair of commentators has explained, "All jurors' experiences have shaped their values and attitudes, and these, in turn, are likely to shape jurors' perceptions of the trial evidence and hence their votes. In this sense, 'prejudice' is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to the trial." Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978).

307. Babcock, *supra* note 302, at 553-54. "[T]he peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . [and] allows the covert expression of what we dare not say but know is true more often than not." *Id.* See also Goldwasser, *supra* note 256, at 837 ("Because litigants do not know prospective jurors personally and are provided with only limited information about the jurors during voir dire, they often have no choice but to exercise peremptories on the basis of stereotypes. . . . But it is also true that certain experiences and perspectives can actually be identified with certain groups. In other words, not all stereotypes are inaccurate.").

308. *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986).

309. Quoted in Morton, *supra* note 18, at 562; see also MELVIN BELL, 3 MODERN TRIALS §§ 51.6-51.68, at 446-47 (2d ed. 1982) (stating that "a male juror is more sound than a woman

Available empirical evidence does not support the thesis that peremptories advance fair trial goals in the least. According to one English survey, conviction rates actually *increased* by seven percent when *defense* attorneys exercised their peremptory strikes.³¹⁰ In another study, Professors Hans Zeisel and Shari Seidman Diamond, analyzing twelve criminal cases tried in federal court, found little benefit in the peremptory.³¹¹ The study found that counsel's overall performance in striking biased venire members was "not impressive."³¹² Jurors removed by peremptory challenges produced essentially the same proportion of guilty votes as the real jurors who had escaped the strikes.³¹³ Prosecutors used approximately as many accurate challenges as bad ones, while defense lawyers did only "slightly better" on the whole.³¹⁴ The authors cautioned that even these averages, however, were misleading because the performance from attorney to attorney was "highly erratic."³¹⁵ These results, they concluded, indicate that counsel were unable to identify prejudiced jurors.³¹⁶

VI. PEREMPTORY CHALLENGE AND THE EXPERTS

The inherent perniciousness of the peremptory's ability to vitiate the Sixth Amendment's promise of trial by impartial jury is aggravated by the modern trend toward using sociological studies, opinion polls, and even psychics or astrological charts to further upset the representativeness of the panel. In one well-known case, several social scientists offered their services in defense of Joan Little, a young black woman who was accused of murdering a white male jail guard. He died from ice pick puncture wounds, and semen was found on his leg. She successfully contended at trial that the deceased guard had raped her.³¹⁷

Three of the social scientists who contributed to the defense of the case

juror" and describing women as, among other things, "severest judges of their own sex" and "more acutely opinionated" than men).

310. Gobert, *supra* note 13, at 531.

311. Zeisel & Diamond, *supra* note 306, at 513-18.

312. *Id.* at 517.

313. *Id.* at 513. Zeisel and Diamond's study is unique, since normally any correlation between the exercise of peremptory challenges and success at trial cannot be determined:

Because the excused jurors do not attend the trial, there is no way of knowing how they would have voted had they not been removed. Our experiment attempted to secure this missing information by asking the peremptorily excused jurors to remain as shadow jurors in the courtroom and to reveal at the end of the trial how they would have voted in the case. This allowed us to become retrospectively clairvoyant — to see how well the prosecutor and defense counsel performed in their attempts to eliminate hostile jurors.

Id. at 492.

314. *Id.* at 517.

315. *Id.*

316. *Id.* at 518, 528. Professors Zeisel and Diamond also noted that when the attorneys performed at opposite extremes of one another in use of peremptories, the outcome of the trial likely was altered. *Id.* at 518-19, 524, 528-29. That, of course, suggests not that a fair jury has been selected, but rather that a serious miscarriage of justice has occurred at the hands of partial jurors.

317. John B. McConahay et al., *The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROBS. 205, 205-06 (1977).

employed the following six factors in the decision whether to accept or strike a venire person. First, on the basis of a random sample survey of Wake County we had developed a mathematical model of the juror who would be ideal for the defense. Second, we observed the behavior of the potential juror during the voir dire and rated him or her on a psychological characteristic known as authoritarianism. Third, we observed the "body language" including both kinesic and paralinguistic behavior in order to determine the degree to which a potential juror was defense or prosecution oriented. Fourth, the attorneys drew upon their voir dire experience and common sense. Fifth, we had a psychic who observed the potential jurors and advised us of their aura, "karma," and psychic vibrations. Finally, Ms. Little was asked how she felt about any juror whom we were seriously considering accepting.³¹⁸

The "most important scientific tool," the mathematical model, they noted, was constructed at a cost of \$35,000 in 1975 dollars.³¹⁹ Its purpose was to predict "the likelihood that a potential juror would be willing to vote Joan Little not guilty before hearing any of the evidence."³²⁰ In the end, notwithstanding the trial judge's observation that the prosecution's case was "one of the weakest he had seen in more than twenty years on the bench," the team asserted that application of these data in utilizing the defendant's peremptories "made a difference in the outcome of the Little trial."³²¹

Despite the veneer of objectivity, many of the observations posited by social scientists are tendered in the form of sweeping generalizations akin to the offensive stereotypes heartily embraced by some trial lawyers and upon which proponents of the peremptory build their proxy argument. One key concept of social scientists is that of authoritarianism, which they describe as a personality trait held by "rigid, racist, anti-semitic, sexually repressed, politically conservative, highly punitive individuals who will accept the word of an authority figure over that of a lesser person."³²² Group dynamics literature defines authoritarians as "men, whites, those with prestige occupations, higher education, and age."³²³ This is nothing but the same old specious reasoning which some prosecutors used for decades to justify striking blacks from venires whatever the race of the defendant.³²⁴

Many findings, recast in impressive jargon and particularly once they trickle down to lawyers or jury selection "consultants," closely track the

318. *Id.* at 214.

319. *Id.*

320. *Id.* at 216.

321. *Id.* at 224.

322. *Id.* at 217. *Accord* T. W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* 224-42 (1950); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 84-85 (1982); *see also* J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 776 (1988) (discovery of juror bias through psychological methods improves justice system by identifying biases and allowing lawyers to develop strategies to counter them).

323. HANS & VIDMAR, *supra* note 322, at 85.

324. Albert W. Alshuler, *The Supreme Court and the Jury Voir Dire: Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 187 (1989).

unexpurgated writings of Clarence Darrow. The social psychologists leading the jury selection research for the Harrisburg Seven defense eventually came up with these criteria: "Certain religious categories — e.g., Episcopalians, Presbyterians, Methodists, and fundamentalists — warranted exclusion from the jury and Catholics, Brethren, and Lutherans warranted inclusion."³²⁵ Following Darrow's "take smiling jurors" dictum, another advises that a prospective juror "who leans forward toward counsel, smiles and whose legs are not crossed is suggesting that they [sic] are friendly and responsive to counsel's questions."³²⁶ A psychologist compiling data from the Berrigan Brothers and Vietnam Veterans Against the War trial concluded, "Women in the North were more likely than men to be open-minded toward the antiwar defendants, but in the South were less open-minded than men."³²⁷

Such psychological or social scientific research, particularly as depicted in the legal trade journals, reinforces demeaning stereotypes and gives tremendous comfort to attorneys, who appear to need too little prompting, to act on those assumptions in the courtroom in their effort to circumvent *Batson*.³²⁸ Like other investigatory techniques and like the folklore beloved by some trial lawyers, scientific jury selection tools undermine the random draw techniques mandated by Congress and the Constitution, and subject prospective jurors to a stigma that is all the more hurtful because it has been affixed by "experts." The concern here is not only that these selection techniques are discriminatory, but also that such methods simply magnify the expense of a legal system which al-

325. Eugene I. Pavalon, *Jury Selection Theories*, TRIAL, June 1987, at 26, 29. See *supra* text accompanying note 309 quoting some of Darrow's views regarding desirability of jurors within certain religious backgrounds.

326. Ralph W. Gallagher, *The Use of a Consultant in Voir Dire*, TRIAL DIPL. J., Winter 1984, at 24, 26.

327. HANS & VIDMAR, *supra* note 322, at 83 (emphasis deleted).

328. The point is not to condemn an entire profession. As Professors J. Alexander Tanford and Sarah Tanford note, legitimate psychologists and psycholegal research in fact could assist in abating reliance on stereotypes. Tanford & Tanford, *supra* note 322, at 777. Unfortunately, an examination of the literature written for lawyers demonstrates that what may be valid scientific findings are not only translated into simplistic, stereotypical terms but, worst yet, are expressed in insidiously neutral language and typically are conjoined with claims that adherence to the advice will produce a winning case. See *id.* at 752-53, 779. Moreover, when lawyers attempt to incorporate psychology's insights into their cases, such as by using evidence on the unreliability of eyewitness testimony, see *id.* at 749, they degenerate their already simplistic understanding of the research even further into gross racial insult.

Nor should one conclude that sociological research has no place at all in the legal system. For example, in a high profile case, the results of telephone surveys of citizens from the area where the trial is to be held may be useful in ascertaining whether venue should be changed. See McConahay, *supra* note 317, at 209-13. The problem emerges when neutral sounding "demographic" information, that pertaining to "age, gender, race, education, occupation, religion, and political party," HANS & VIDMAR, *supra* note 322, at 82, is employed to construct profiles of "good" and "bad" jurors along these "demographic" lines. These do nothing but employ suspect classifications — used because of their claimed influence on attitudes — as criteria for jury qualification. That is to say, they use these classifications as a proxy for jury fitness, just as lawyers have for generations. Substituting one stereotype for another, particularly one obscured by professional idiom, cannot erase the fact that such generalizations are and should be legally irrelevant.

ready is too costly and which tends to favor the party, usually the state, with the greater resources.³²⁹ Rare is the criminal defendant who can afford to retain consultants or whose case is sufficiently noteworthy to attract volunteers.

Of course, some will protest that the psychological or sociological portraits of particular groups, though distasteful, are scientifically valid and contain much truth.³³⁰ Even if they are correct, advocates of this argument again miss the issue. The question is not whether as an empirical proposition "certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases."³³¹ Rather, it is whether the legal and political structure of a pluralistic democracy should be shaped and ordered in accordance with such claims. The question is whether political burdens, benefits, and opportunities should be allocated pursuant to a scheme that accepts such information as relevant. It is whether the public sphere should be permitted to consider immutable characteristics in reaching determinations about the worth, qualifications, and value of persons. Obviously, the Constitution already has answered each of these questions in the negative.³³²

VII. PEREMPTORY CHALLENGE AND DEMOCRACY

Independent of the specific provisions of the federal Constitution and whether private parties are constrained by them, there are other reasons that warrant the legislative abolition of peremptory challenges. Initially, the peremptory challenge violates a basic tenet of our democracy and stands as an anomaly in the configuration of our justice system. Stated simply, the fundamental postulate of equality undergirding our society is that human beings have a right to equal concern and respect in the design and operation of our political institutions.³³³ Although this principle finds partial expression in the equal protection

329. See, e.g., *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95 Cong., 1st Sess. 72-73 (1977) (Statement of Richard Thornburgh, Acting Deputy Attorney General); HANS & VIDMAR, *supra* note 322, at 93-94; Amitai Etzioni, *Creating an Imbalance*, TRIAL, Winter 1984, at 28; McConahay, *supra* note 317, at 228.

330. See, e.g., Goldwasser, *supra* note 256, at 834-38 nn. 165, 173 (stereotype based on race and other generalization are valid determiners of juror biases).

331. Babcock, *supra* note 302, at 553; see also Goldwasser, *supra* note 256, at 837 ("But it is also true that certain experiences and perspectives can actually be identified with certain groups. In other words, not all stereotypes are inaccurate.").

332. But see Goldwasser, *supra* note 256, at 835-38. Professor Goldwasser repeatedly states that the prohibition against racially discriminatory peremptories is merely "aspirational" and is based on solely "an ideal," not reality. *Id.* She reaches this conclusion only by failing to distinguish between what she considers to be a fact of everyday life as confirmed by behavioral studies and what the Constitution commands in the arrangement of our legal and political institutions. In regard to the latter, there is nothing precatory in the Fifth, Thirteenth, Fourteenth, or Fifteenth Amendments.

333. See, e.g., ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 469-73 (1981) (participation in moral discourse demonstrates mutual respect between all parties involved); JOHN RAWLS, *A THEORY OF JUSTICE* 511 (1971) (equality of respect, regardless of social states, is a fundamental basis for morality of human beings); Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761 (1989) (democratic pluralism allows participation by those with different, and even contradictory, ways of life).

components of the Constitution, it is more abstract and inheres in the very idea of equality and democracy. There are two crucial aspects to this right. The first is the right to equal treatment, that is, to the same distribution of political "goods or opportunities as anyone else has or is given," even if a differential apportionment might work for the general welfare.³³⁴ The other right is to treatment by the government as an equal, which may be described as "the right to equal concern and respect in the political decisions about how these goods and opportunities are to be distributed," or the right to be taken into account when the interests of the community are weighed.³³⁵

The peremptory challenge is altogether inconsistent with the former premise of equality. Indeed, the peremptory has no parallel in our democratic form of government. It entrusts to private individuals the distribution of the goods of political participation. That this device allows allocation of the opportunity to serve in civic life based on litigants' bare preferences,³³⁶ on the basis of stereotypes, and rarely in furtherance of any public interest, accentuates its anti-egalitarian character. Because the peremptory constitutes a governmental delegation of authority to enforce, by law, demeaning and specious categorizations or raw capriciousness, it cannot be said that the government is treating its citizens with respect, let alone equal respect, in the design and management of a fundamental political institution. One could imagine the response if the elective franchise, which is the only other significant occasion for most people to share actively in the political destiny of their community, were allocated today in such a manner.

The peremptory is a renegade in this nation's trial procedures. The legitimacy of the judiciary rests predominantly on how closely it conforms to the ideals that support it, and people will accept the decrees of courts only so long as the institution is perceived to be both unbiased and governed by the "quiet rationality" that is its distinction.³³⁷ It uses reason to confront disputes that are some of the most intractable, frightening, and emotion-laden that society has to offer. In the courtroom, the dispassion of the rule of law ideally answers hysteria and rumor. Every accusation or idea is tested by discourse and evidence. The logic of the court's decision-making is laid bare to the litigants, other judges, scholars, the media, and the community. The trial itself must unfold in public view.³³⁸

334. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273 (1977).

335. *Id.*

336. *See id.* Professor Dworkin distinguished between personal preferences, which relate to one's "own enjoyment of some goods or opportunities," and external preferences, which pertain to "the assignment of goods and opportunities to others." *Id.* at 234. The latter preference, which the peremptory effectuates, should not be accorded any weight in political decision making. *See* Ronald Dworkin, *A Reply by Ronald Dworkin*, in *RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE* 247, 282-86 (M. Cohen ed., 1983) (bestowing benefits on one type of person more than others "defeats the egalitarian cast" of an apparently neutral Constitution); *cf.* Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 *POL. STUD.* 123, 131 (1978) (only those external preferences inconsistent with concern and respect for persons should be excluded from system).

337. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2088 (1991).

338. Many commentators who have addressed the adversary system and its acceptance by the public emphasize that these features are indispensable for its success. *See, e.g.*, Peter Arnella, *Re-*

In contrast stands the peremptory challenge. It functions as a repository of the unexamined fears, suspicions, and hatreds held by attorneys and their clients. With the few exceptions now interposed by courts, the peremptory is exercised secretly, for any or no reason at all, unchecked by inquiry or debate. It is the apparatus whereby we are alleged to "allo[w] the covert expression of what we dare not say but know is true more often than not."³³⁹

Although such a duplicitous practice may have been fondly regarded in the Star Chamber, it represents the antithesis of the open discussion that characterizes all other phases of American trial proceedings and that secures its integrity. Indeed, those preconceptions and stereotypes that have animated the peremptory's history are shielded from view not because they are impolite, but precisely because they could not survive public dissection if revealed. They, like all infirm ideas, thrive only when not exposed to the light of reasoned examination. Sounding a similar theme, Justice Kennedy has written:

Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror. And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.³⁴⁰

This passage also intimates what may be the peremptory's greatest conflict with modern values. If we cannot abide by the simple imperatives of respect and reasoned treatment of our fellow citizens who have been ordered to serve the public good in an institution legitimized by its commitment to rationality, but instead must resort to insult and exclusion for purposes unrelated to objective qualifications, then we should carry little hope for the continued existence of our pluralistic democracy.

Failure to adhere to the mandate of equality erodes community trust in the fairness and neutrality of our judicial system. Groups consistently excluded from participation cannot help but conclude that law enforcement processes classify them in demeaning ways and are unresponsive to their concerns.³⁴¹ As

thinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 GEO. L.J. 185, 200-08 (1983); Robert Clinton, *Judges Must Make Law; A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711 (1982); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 372-85 (1978); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 2-3, 32 (1986); Allan Lind et al., *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271, 272, 282 (1976); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 123-25 (1980-81); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 542 (1978); John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 401 (1972).

339. Babcock, *supra* note 302, at 554.

340. Edmonson, 111 S. Ct. at 2088.

341. Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 246 (1968). Professor Kuhn states:

To the extent that there is imbalance on juries, then, the underrepresented group will less

the widely publicized riots following an all-white jury's acquittal of a white Miami police officer in the death of a black man demonstrate,³⁴² this threat is not academic or hypothetical. It further answers the often repeated claim that the peremptory advances confidence in the legal system by producing juries of which the litigants approve because they had a role in selecting them.³⁴³ This argument ignores the peremptory's countervailing ability to diminish the public's overall estimation of the judiciary's fairness. Also, to urge that criminal defendants secure juries of which they hold a good opinion, in the face of historical evidence that state's attorneys systematically have excluded from jury service members of an individual defendant's own race, is totally unpersuasive.

Abolishing the peremptory also would assist in safeguarding the privacy of venire persons. A common practice in jurisdictions that release venire lists sufficiently in advance of trial involves the direct investigation of potential jurors. This usually entails checking public (or even confidential) records, interviewing venire members' neighbors or co-workers, or staking out their homes to observe personal habits.³⁴⁴ Even apart from the obvious dangers of bribery and other forms of tampering³⁴⁵ or the implicit threat to physical safety that such contact may carry, investigation damages the privacy interests of prospective jurors and thereby undermines the integrity of the jury system. More than sixty years ago the Supreme Court observed:

The most exemplary [jurors] resent having their footsteps dogged by private detectives. . . . The mere suspicion that [a juror], his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility.³⁴⁶

readily accept their decisions and will rarely feel the ameliorating effect which is one of the supposed advantages of the jury system.

Another primary objective of the jury system is to increase confidence in and support for the law-enforcement process. . . . Selection which is or even appears to be discriminatory . . . destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness.

Id.

342. See, e.g., James R. Jorgenson, *Back to the Laboratory With Peremptory Challenges: A Florida Response*, 12 FLA. ST. U. L. REV. 559, 579-80 (1984) (reduction in peremptory challenges and more careful review of challenge for cause would enhance minority participation in trials).

343. BLACKSTONE, *supra* note 12, at *353; *Batson v. Kentucky*, 476 U.S. 79, 128-29 (1986) (Burger, C.J., dissenting); Goldwasser, *supra* note 256, at 829-30, 840.

344. See, e.g., *United States v. Barnes*, 604 F.2d 121, 172 (2d Cir. 1979) (defendant should be permitted to examine background of potential jurors) (Meskill, J., dissenting); see generally HANS & VIDMAR, *supra* note 322, at 83-84; Joshua Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1968).

345. *Barnes*, 604 F.2d at 134 n.3 (collecting incidents).

346. *Sinclair v. United States*, 279 U.S. 749, 765 (1929).

Like the peremptory, the existence of which fosters the use of such investigations, this intrusive device is used by too many attorneys to manifest their contempt for potential jurors by treating them not as fellow citizens who have shouldered an important public service, but rather as mere instruments for counsel's own ends.

Of course, suffering the costs exacted by maintenance of the peremptory challenge would be warranted if it comprised a constitutional right or if it had a utility demonstrably greater than its disadvantages. Neither, however, is so. Nor can the *Batson* regime's prohibition against invidiously discriminatory challenges inhibit the full range of evils engendered by the peremptory.

VIII. PEREMPTORY CHALLENGES SHOULD BE ABOLISHED

For more than two-hundred years, we have taken great pride in the protections guaranteed to all of us by our federal Constitution. During all these years, however, in selecting a jury, parties were given the right to use peremptory challenges to exclude qualified citizens without having to give a reason for the disqualification. As heretofore pointed out, the unreported reason for the strike was generally because of the potential juror's race, gender, religion, ethnic origin, or some other reason having no relevance to the potential juror's ability to be impartial. Despite the advances represented by *Batson*, the peremptory challenge had been, and will continue to be, used to discriminate in our citadels of justice — our court rooms.³⁴⁷

In 1986, our Supreme Court in *Batson* recognized for the first time that peremptory challenges were being used to discriminate in our court rooms immune from constitutional scrutiny.³⁴⁸ In his concurring opinion in *Batson*, Justice Marshall was the first Supreme Court Justice to point out that the only way to solve the apparent conflicts between the use of peremptory challenges and the constitutional right to equal protection and an impartial jury was to eliminate the peremptory challenge entirely. Justice Marshall stated:

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167-169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that "[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." 380 U.S. at 244, 85 S.Ct. at 849. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory

347. See *supra* notes 89-237 and accompanying text for discussion of discriminatory use of peremptory challenges.

348. See *supra* notes 173-202, 246-48 and accompanying text for a discussion of *Batson* v. Kentucky, 476 U.S. 79 (1986).

challenges entirely in criminal cases.³⁴⁹

In its 1990 term, the Supreme Court appears to have paved the way for the total elimination of peremptory challenges. In *Powers* it extended the *Batson* limitation on the use of peremptories by holding that a defendant need not be of the same race as the excluded potential juror to challenge race-based use of peremptories.³⁵⁰ In *Edmonson*, the Court extended *Batson* to all civil jury trials.³⁵¹ Dissenting in *Edmonson*, Justice Scalia made some cogent observations, even suggesting that an alternative solution to the peremptory's conflicts with constitutional values may be to abolish it. Justice Scalia wrote:

Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case. Judging by the number of *Batson* claims that have made their way even as far as this Court under the *pre-Powers* regime, it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will certainly suffer. Alternatively, of course, the States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion.³⁵²

Although the *Batson* regime is certainly preferable to *Swain*'s judicial tolerance of invidious discrimination in the courtroom, *Batson* and its progeny unquestionably require lawyers and judges to expend increasing amounts of time in litigating whether the reason given by the trial lawyer for striking the potential juror was not a "pretext for discrimination." As Justice Scalia points out, this "sideshow" inevitably detracts from the merits of the case.³⁵³ The cost to society in the use of trial time for procedures which accomplish no justiciable purpose, except perhaps to rescue the peremptory from the extinction it deserves, is certainly another reason to abolish peremptory challenges.

More fundamentally, *Batson* does not and cannot abate the discriminatory use of the peremptory.³⁵⁴ Judge Higginbotham, former Chief Judge of the Third Circuit Court of Appeals, has observed:

I have been similarly disturbed in the past year by a series of other cases where the *Batson* issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted.³⁵⁵

349. *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

350. *Powers v. Ohio*, 111 S. Ct. 1364 (1991). See *supra* notes 215-26 and accompanying text for discussion of *Powers*.

351. *Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077, 2089 (1991). See *supra* notes 227-37 and accompanying text for a discussion of *Edmonson*.

352. *Edmonson*, 111 S. Ct. at 2096 (Scalia, J., dissenting).

353. *Id.* (Scalia, J., dissenting).

354. *People v. Bolling*, 591 N.E.2d 1136 (N.Y. 1992) (wherein three judges of the Court of Appeals of New York called upon the New York Legislature to eliminate all peremptory challenges: "Peremptories have outlived their usefulness and, ironically, appear to be disguising discrimination — not minimizing it.").

355. *United States v. Clemmons*, 892 F.2d 1153, 1159 (3d Cir. 1989) (Higginbotham, J., con-

This is at least in part due to courts' inability or unwillingness to engage in the difficult and distasteful task of determining whether a member of the bar is telling the truth about his or her motivations. In a sense, courts have replaced their earlier practice of accepting at face value the assertions of jury commissions that no discrimination has occurred with the assertions of attorneys to the same effect. Such unquestioning reliance now, as then, reduces the Equal Protection Clause to a "vain and illusory requirement."³⁵⁶

The *Batson* procedure is also inherently underinclusive. Proper judicial oversight may curtail some discriminatory peremptory challenges in cases where potential jurors are stricken on the basis of their race or gender since these characteristics are generally apparent.³⁵⁷ The *Batson* limitation can do little, if anything, however, to curtail strikes based on the religious beliefs or ethnic origins of potential jurors, because these characteristics are usually not cognizable.

The total elimination of peremptory challenges can be expected to increase the use of challenges for cause and require the trial judge to determine whether the potential juror will be biased or fair. The greater resort to challenges for cause is a small price to pay for the elimination of a procedure which has permitted officers of the court to exclude citizens who may be well-qualified jurors from exercising their constitutional right to serve on the jury. Since the challenge for cause is made on the record and must be ruled on by the trial judge in open court, exclusions for cause are subject to public view and appellate review. The increased use of challenges for cause will provide no assurance that some jurors partial to one side or the other will not be seated on the jury. The increased use of challenges for cause and the elimination of peremptory challenges will, however, terminate a procedure which has violated the constitutional right of venirepersons to serve on the jury.

Those with a strong attachment to the status quo may oppose the total elimination of peremptory challenges from a system of justice which has, for the most part, served our country well. Our Supreme Court has awakened us, however, to the fact that the use of peremptory challenges, which have enjoyed an exemption from judicial review, have fostered discrimination in our courtrooms for more than two-hundred years. This flaw in our judicial fabric must be eliminated. The *Batson* procedures may alleviate some forms of discrimination, but they will not totally eliminate the discriminatory use of the peremptory challenge.

Jury trials are barometers used by our democratic society to evaluate the fairness of our judicial system. We must make reasonably certain that our juries represent the conscience of the community and that no citizen, on the basis of invidious discrimination, will ever be excluded from participating in this most important responsibility of citizenship — service on a jury. As judges and law-

curing), *cert. denied*, 110 S. Ct. 2623 (1990); *cf.* *United States v. Casper*, 956 F.2d 416, 418 (3d Cir. 1992) (prosecution's explanation for excluding minority venire persons need not rise to level of just cause, nor be quantifiable).

356. *Norris v. Alabama*, 294 U.S. 587, 598 (1935).

357. *See United States v. De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (holding "*Batson's* rationale applies equally well to gender-based peremptory strikes").

yers, we must provide the vital force to bring about the total elimination of the peremptory challenge.

EPILOGUE—RECENT DEVELOPMENTS OF INTEREST

The United States Supreme Court, in *Georgia v. McCollum*,³⁵⁸ held: “. . . the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”³⁵⁹ Justice Blackmun, in the majority opinion, also stated:

Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens’ confidence in it.³⁶⁰

Justice Marshall recently reiterated his opposition to peremptories in an interview in the American Bar Association’s Journal, stating: “I would not use them, . . . I would be opposed to them. They are there, and I have used them, but I have talked to a hundred prominent, practicing lawyers who quietly will tell you they are willing to take the first 12.”³⁶¹

358. No. 91-372 (U.S.S.Ct. June 18, 1992).

359. *Georgia v. McCollum*, No. 91-372, slip op. at 31.

360. *Id.* at 14.

361. Gary A. Hengstler, *Justice Thurgood Marshall: Looking Back—Reflections on a Life Well Spent*, A.B.A. J., June 1992, at 59.

