

# The Unconstitutionality of Criminal Jury Selection

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# THE UNCONSTITUTIONALITY OF CRIMINAL JURY SELECTION

Brittany L. Deitch\*

The criminal defendant's right to a jury trial is enshrined within the U.S. Constitution as a protection for the defendant against arbitrary and harsh convictions and punishments. The jury trial has been praised throughout U.S. history for allowing the community to democratically participate in the criminal justice system and for insulating criminal defendants from government oppression. This Article asks whether the jury selection process is consistent with the defendant-protection justification for the Sixth Amendment right to a trial by jury. Currently, the prosecution and defense share equal control over jury selection. Looking to the literal text of the Sixth Amendment, the landmark case on the right to a jury trial, and the Federal Rules of Criminal Procedure for guidance, this Article explains that jury selection procedures undermine the defendant-protection rationale for the Sixth Amendment right to a jury trial. Because the Sixth Amendment grants this right personally to the defendant and the Supreme Court has construed this right as intending to protect the defendant from governmental overreach, the prosecution should not be entitled to select the very jury that is supposed to serve as a check against its power. After concluding that symmetrical power in jury selection undermines the constitutional purpose of the jury trial, this Article proposes two possible remedies.

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## INTRODUCTION

I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.<sup>1</sup>

The Sixth Amendment guarantees the right to a trial by an impartial jury to those criminally accused.<sup>2</sup> As with every provision in the Bill of Rights, the Sixth Amendment right to a jury trial serves to protect the individual from the government.<sup>3</sup> This right is among those that the Supreme Court has deemed fundamental and incorporated to the states.<sup>4</sup> It constitutes an especially important barrier between the government and the individual, because it grants members of the community the authority to participate as a check and balance against governmental prosecution of another member of the community.<sup>5</sup> The importance of the jury trial right in criminal cases is especially evident when contrasted with the Seventh Amendment right to a jury trial in civil cases.<sup>6</sup> The Seventh Amendment right to a jury trial has not

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<sup>1</sup> Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 3 THE WRITINGS OF THOMAS JEFFERSON 69, 71 (H. A. Washington ed., 1853) [hereinafter Jefferson Letter to Thomas Paine].

<sup>2</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”). Article III of the Constitution establishes the criminal jury trial, but does not confer a right to a jury trial and is thus outside the scope of this Article. *See* U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

<sup>3</sup> *See* Address at the National Archives Dedicating the New Shrine for the Declaration of Independence, the Constitution, and the Bill of Rights, 1952–53 PUB. PAPERS 347 (Dec. 15, 1952) (“[The Bill of Rights is] the only document in the world that protects the citizen against his Government.”); *see also* *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”).

<sup>4</sup> *See Duncan*, 391 U.S. at 154 (“[T]he right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction.”).

<sup>5</sup> *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. . . . Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.” (citation omitted)).

<sup>6</sup> U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

been incorporated to the states.<sup>7</sup> More tellingly, a jury trial is the default in serious criminal cases;<sup>8</sup> by contrast, a party in a civil case must affirmatively request a jury trial.<sup>9</sup>

Despite the clear importance of the criminal jury trial, two disturbing trends have emerged in criminal adjudications. First, criminal defendants waive this right in the vast majority of criminal cases.<sup>10</sup> By resolving their cases through plea bargaining, criminal defendants willingly submit themselves to the government and forgo the opportunity to allow their peers to participate in the adjudication.<sup>11</sup> Second, of the cases that go to trial, defendants are counterintuitively more likely to be convicted in a jury trial than in a bench trial.<sup>12</sup> The comparative infrequency of the jury trial and of acquittals in those atypical cases presented before juries contradicts the Founders' vision of juries as a vital protection for the defendant against the government. The aim of this Article is not to explain this inconsistency, but instead is to expose a conflict between the Founders' intentions and the practical reality of the jury trial in criminal cases. This Article contends that jury selection procedures, which grant the prosecution equal control with the defendant, undermine the defendant-protection rationale of the Sixth Amendment. Resolution of this problem has the potential to resolve the waiver and conviction issues by encouraging the defendant to assert his Sixth Amendment right and by reducing the jury conviction rate.

Although jury trials in criminal cases are the exception, jury selection procedures have given rise to many constitutional claims.<sup>13</sup> Presently, these procedures grant

<sup>7</sup> See 47 AM. JUR. 2D *Jury* § 5 (2017) (explaining that the right to a trial by jury in federal courts under the Seventh Amendment has not been extended to the states through the Fourteenth Amendment); Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 WM. & MARY BILL RTS. J. 235, 275 (2016) (“Unlike the Sixth Amendment Criminal Jury Trial Clause, the Seventh Amendment Civil Jury Trial Clause has not been deemed fundamental or applicable against the states.”).

<sup>8</sup> See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”); FED. R. CRIM. P. 23(a) (“If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.”).

<sup>9</sup> See FED. R. CIV. P. 38(b) (describing the procedures for demanding a jury trial); FED. R. CIV. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed.”).

<sup>10</sup> See *Criminal Cases*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> [https://perma.cc/2Y8U-479S] (last visited Apr. 12, 2018) (“More than 90 percent of defendants plead guilty rather than go to trial.”).

<sup>11</sup> See *Brady v. United States*, 397 U.S. 742, 748–49, 756 (1970) (adopting a standard the Court will apply to determine whether a plea was made voluntarily, knowingly, and intelligently); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (requiring that guilty pleas be knowing and voluntary because they waive constitutional rights, including the Sixth Amendment right to a trial by jury).

<sup>12</sup> See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 152 (2005) (discussing possible reasons for the “conviction gap” between bench and jury trials, where over a fourteen-year period, the jury trial conviction rate for federal criminal defendants was 84% and the bench trial conviction rate was 55%).

<sup>13</sup> See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–46 (1994) (prohibiting use

defendants and prosecution equal control over jury selection.<sup>14</sup> Each side is entitled to unlimited for-cause challenges, which allow them to strike prospective jurors who demonstrate bias or partiality,<sup>15</sup> and a limited number of peremptory challenges, which allow the parties to exclude prospective jurors for any reason or no reason.<sup>16</sup> Perhaps the most extensively debated aspect of jury selection is the discriminatory use of peremptory challenges.<sup>17</sup> However, focus on the Equal Protection rights of the prospective jurors overlooks the core problem with jury selection procedures because it deflects the attention from the person whom the jury is designed to protect: the defendant.

This Article submits that the more fundamental constitutional issue with prosecutorial peremptory challenges, and with jury selection more broadly, is that allowing prosecutors to participate equally in jury selection undermines the rationale for the defendant's Sixth Amendment right to a jury. Curing this problem requires revision of United States jury selection procedures with the language and purpose of the Sixth Amendment in mind. The right to a jury trial belongs exclusively to the criminal defendant,<sup>18</sup> and its purpose is to protect the defendant from governmental

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of peremptory challenges on the basis of sex); *Georgia v. McCollum*, 505 U.S. 42, 44, 59 (1992) (holding that criminal defendants may not use peremptory challenges discriminatorily in violation of the Equal Protection Clause); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (expanding *Batson* to civil cases); *Batson v. Kentucky*, 476 U.S. 79, 95–100 (1986) (holding that prosecutors may not use peremptory challenges to exclude prospective jurors solely on the basis of race); *Taylor v. Louisiana*, 419 U.S. 522, 537–38 (1975) (holding that women, as a class, may not be excluded from the venire, or jury pool); *United States v. Salamone*, 800 F.2d 1216, 1229 (3d Cir. 1986) (holding that prospective jurors may not be dismissed solely based on their membership in an organization).

<sup>14</sup> See FED. R. CRIM. P. 24(b) (giving both the defense and prosecution the same amount of peremptory challenges).

<sup>15</sup> See *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (“[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality . . . .”); see also 2 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 385 (4th ed. 2017) (“A party has no right to an unlimited number of peremptory challenges, unlike challenges for cause. The number allowed can be and is controlled by statute or, in federal criminal cases, by rule, and there is no constitutional right to peremptory challenges.” (footnotes omitted)).

<sup>16</sup> See *Swain*, 380 U.S. at 220 (“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”); see also WRIGHT ET AL., *supra* note 15, § 385.

<sup>17</sup> See, e.g., Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 810 (1997) (discussing the debate on peremptory challenges and arguing that “the benefits of the peremptory challenge system are outweighed by the damage which that system causes to the most basic principles of an impartial jury”).

<sup>18</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”); see also *Faretta v. California*, 422 U.S. 806, 819–20 (1975) (“The Sixth Amendment . . . grants to the accused personally the right to make his defense. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”).

overreach.<sup>19</sup> Allowing the prosecution to actively participate in selecting the jury infringes on the defendant's Sixth Amendment right. Simply stated, the government should not be entitled to select the very jury that is supposed to serve as a check against its power. Restoring the integrity of the defendant's right to a jury trial requires more than just increasing the prevalence of the jury trial or prohibiting discrimination. Jury selection procedures must give defendants greater control of their rights. This Article proposes two possible selection processes that limit the prosecution to a more passive role. Effectuating any change designed to grant the defendant more control over selecting his jury would not only better reflect American constitutional history and values, but also may result in more criminal defendants electing to "enjoy"<sup>20</sup> their right to a jury trial.

This Article progresses in three parts. Part I provides a background on jury selection in criminal cases, discussing the underlying rationales for the Sixth Amendment right to a trial by jury and describing modern jury selection procedures. Part II explains the conflict between the rationales and the procedures that grant symmetrical authority between the prosecution and the defendant. Part III proposes two possible revised procedures that better reflect the purpose of the Sixth Amendment by granting the defendant greater control over jury selection.

## I. BACKGROUND ON THE JURY IN CRIMINAL TRIALS

There are two primary justifications for trial by jury in the United States. First, the jury trial allows the community to participate in the criminal justice system as part of democracy.<sup>21</sup> Second, it protects criminal defendants from government overreach by giving them a screen of community members to check the government's power.<sup>22</sup>

### A. Historical Rationales for a Jury Trial

A discussion of the Founders' views on the importance of the jury is necessary to understand the rationales underlying the Sixth Amendment. Briefly stated, before America's founding, British courts and colonial courts operated differently, even though both judicial systems had jury trials.<sup>23</sup> In Britain, judges took an inquisitorial

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<sup>19</sup> See *Duncan*, 391 U.S. at 156 ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

<sup>20</sup> U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

<sup>21</sup> See DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 32 (2016).

<sup>22</sup> See *id.*; see also *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (describing the jury's purpose to prevent arbitrary exercise of government power in the criminal justice system).

<sup>23</sup> See Jon P. McClanahan, *The 'True' Right to Trial by Jury: The Founders' Formulation and Its Demise*, 111 W. VA. L. REV. 791, 799 (2009) (explaining the divergence in the amount of power judges had over juries in Colonial America compared to Britain).

role and held considerably more power than juries.<sup>24</sup> British judges would exercise their authority over the jurors by compelling juries to reconsider their verdicts when the outcome diverged from the result that the judge would have reached.<sup>25</sup> By the seventeenth century, though, *Bushell's Case*<sup>26</sup> forbade judges from retaliating against jurors through imprisonment for rendering verdicts with which the judge disagreed.<sup>27</sup> By contrast, colonial judges played a much less active role in trials and had very little control over the jury.<sup>28</sup> Colonial juries used this power to refuse to render verdicts that were favorable to Britain.<sup>29</sup> Britain attempted to limit the power enjoyed by colonial juries by restricting the types of cases that were eligible for jury trial and by giving Britain jurisdiction over certain cases.<sup>30</sup> However, these efforts backfired by increasing hostility between Britain and the Colonies and may have advanced the American Revolution.<sup>31</sup>

Perhaps the U.S. Constitution's most notable feature is its brevity.<sup>32</sup> Each word, phrase, and provision serves a purpose and provides insight into the Founders' intent. In drafting the Constitution and the Bill of Rights,<sup>33</sup> the Founders sought to

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<sup>24</sup> *Id.* at 797 (“In the British courts, judicial control over the proceeding and the jury was initially quite strong, with the judge taking an inquisitorial role in questioning the witnesses . . .”).

<sup>25</sup> *Id.* at 797–98 (explaining that judges in Britain employed direct and indirect methods of compelling jurors to reconsider their decisions, and that these methods were coercive).

<sup>26</sup> *Bushell's Case* (1670) 124 Eng. Rep. 1006.

<sup>27</sup> *Id.* at 1013.

<sup>28</sup> *See, e.g.*, Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939) (“The judges in Rhode Island held office ‘not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury.’” (citation omitted)).

<sup>29</sup> *See* McClanahan, *supra* note 23, at 803 (“Thus, juries in colonial America had even more power than their British counterparts to render verdicts in accordance with their own views of the law. Colonial jurists sometimes used this power to rebel against oppressive British control . . .”).

<sup>30</sup> *Id.* at 802–03.

<sup>31</sup> *Id.* at 803 (“British attempts to curtail [juries'] power only heightened the already considerable tension between themselves and the colonists, and it ultimately played a part in the American revolution.”); *see also* THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776) (citing “depriv[ation] . . . of the benefits of trial by jury” as a reason for declaring independence from England).

<sup>32</sup> *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1653 (2014) (“From a comparative perspective, the US Constitution is among the shortest in the world. . . . The average constitution comprises 21,960 words, which is about three times as many as the US Constitution contains.”).

<sup>33</sup> Thomas Jefferson objected to the original drafting of the Constitution for failing to include a bill of rights. *See* Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), *in* THE WRITINGS OF THOMAS JEFFERSON, *supra* note 1, at 459, 463 (“[M]y objection to the Constitution was, that it wanted a bill of rights securing freedom of religion, freedom of the press, freedom from standing armies, [and] trial by jury . . . . The sense of America has approved my objection and added the bill of rights . . . .”); *see also* *Duncan v. Louisiana*, 391

limit the government's power through checks and balances among the branches and between the community and the government.<sup>34</sup> By enshrining the right to a jury trial into the Constitution,<sup>35</sup> the Founders demonstrated that they “staunchly believed that juries played an essential role in the success of a democracy, by protecting against governmental overreaching, by enabling citizens to participate in the democratic process, and by operating as a central figure in the administration of justice.”<sup>36</sup>

The Founders believed that juries should be entitled to serve these functions by applying their commonsense judgment in rendering verdicts; for example, John Adams wrote in 1771, “It is not only [the juror’s] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”<sup>37</sup> Likewise, Thomas Jefferson praised the trial by jury as “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”<sup>38</sup> Thus, the jury advanced two principle objectives of the Founders: (1) checking government powers, and (2) promoting community participation in governmental functions.<sup>39</sup> The inclusion of the word “public” in the Sixth Amendment<sup>40</sup> also reinforces that the Founders intended the

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U.S. 145, 153 (1968) (“Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment . . .”). Thus, the Bill of Rights was drafted to supplement the Constitution in response to objections to the originally drafted Constitution for not including an enumeration of rights. *See id.* The Sixth Amendment was included in the Bill of Rights to guarantee that a criminal defendant would have a right to a jury. *See id.*

<sup>34</sup> *See, e.g.,* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1260–61 (1996); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 640–42 (1996).

<sup>35</sup> Article III of the Constitution also provides for a jury trial in criminal cases: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .” U.S. CONST. art. III, § 2, cl. 3. However, this provision is not understood as granting a right upon the people, so the Founders found this jury provision insufficient and refused to ratify the Constitution until the right to a jury was provided for in a bill of rights. *See supra* note 33; *see also* Suja A. Thomas, *Blackstone’s Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1199 (2014) (“Many were concerned about this omission and the Supreme Court’s retention of appellate jurisdiction over law and fact in Article III, so ratification was delayed. Ultimately the Constitution was enacted based on a promise of a Bill of Rights with additional jury protections.” (footnotes omitted)).

<sup>36</sup> McClanahan, *supra* note 23, at 803.

<sup>37</sup> John Adams, *Diary*, in 2 THE WORKS OF JOHN ADAMS 252, 255 (Charles C. Little & James Brown eds., 1850).

<sup>38</sup> Jefferson Letter to Thomas Paine, *supra* note 1, at 71.

<sup>39</sup> *See* HALE, *supra* note 21, at 32 (“The jury would both check governmental power and allow the people to participate in government; in this way, the people would be able to learn the principles of a republican political order.”).

<sup>40</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).



jury trial to serve as a check on the government.<sup>41</sup> By making criminal trials public, the government would be less able to strong-arm defendants and juries in the way that British judges did.<sup>42</sup>

The Supreme Court, in *Duncan v. Louisiana*,<sup>43</sup> relied on the history of the Sixth Amendment to find that the accused's right to a jury trial is fundamental and, thus, applicable to the states.<sup>44</sup> In so holding, it enumerated several rationales in support of the jury trial.<sup>45</sup> According to the *Duncan* Court, the principal justifications for trial by jury include protecting the defendant from unfounded charges; judges who are insufficiently independent from the prosecution; arbitrary judicial actions; overzealous prosecution; compliant, biased, or eccentric judges; and enforcement of harsh laws.<sup>46</sup> Each of these justifications supports the first of the Founders' two objectives: checking government powers.<sup>47</sup> Further, the jury trial has been so universally embraced as a means of defending individual liberties against government intrusion that every state has guaranteed criminal defendants the right to a jury trial through their respective state constitutions.<sup>48</sup>

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<sup>41</sup> See Thomas, *supra* note 35, at 1203 ("The public nature of the criminal jury trial contributed to the role of the jury as a check on government. People could observe the government in action in court.").

<sup>42</sup> See HALE, *supra* note 21, at 32; Thomas, *supra* note 35, at 1203.

<sup>43</sup> 391 U.S. 145 (1968).

<sup>44</sup> See *id.* at 155–58.

<sup>45</sup> See *id.*

<sup>46</sup> Specifically, Justice White penned:

A right to jury trial is granted to criminal defendants in order to *prevent oppression* by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against *unfounded criminal charges* brought to eliminate enemies and against *judges too responsive* to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against *arbitrary action*. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the *corrupt or overzealous prosecutor* and against the *compliant, biased, or eccentric judge*. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. *Fear of unchecked power*, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon *community participation* in the determination of guilt or innocence.

*Id.* at 155–56 (emphases added) (footnote omitted).

<sup>47</sup> See *supra* notes 37–42 and accompanying text.

<sup>48</sup> See *Duncan*, 391 U.S. at 153 ("The constitutions adopted by the original States guaranteed

*B. Modern Jury Selection Procedures*

The phrase “jury selection” might be a misnomer, because “selection” suggests affirmatively choosing good jurors. Instead, jury selection is designed to exclude problematic jurors.<sup>49</sup> For this reason, the jury selection process has been analogized to weeding a garden.<sup>50</sup> Jury selection procedures vary by jurisdiction, but this weeding generally occurs in three stages.<sup>51</sup> First, the jury pool is drawn from the community at large.<sup>52</sup> Second, the judge—or, less often, the parties—conducts voir dire to detect bias.<sup>53</sup> Third, the parties exercise their for-cause and peremptory challenges.<sup>54</sup> For-cause challenges usually occur during voir dire, and peremptory challenges immediately follow voir dire.<sup>55</sup> The petit jury is composed of the remaining jurors, who are empaneled by taking an oath<sup>56</sup> to do justice in accordance with the law.<sup>57</sup> This Part

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jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.”).

<sup>49</sup> See, e.g., Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 706 (1998) (“Juries are chosen through a process of negative selection intended to eliminate partial individuals.”).

<sup>50</sup> See Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 166 (2005) (citation omitted).

<sup>51</sup> See Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 377 (2010).

<sup>52</sup> See *id.* at 166 & n.41; Jefferson Edward Howeth, Note, *Holland v. Illinois: The Supreme Court Narrows the Scope of Protection Against Discriminatory Jury Selection Procedures*, 48 WASH. & LEE L. REV. 579, 580 & n.13 (1991); cf. Adams & Lane, *supra* note 49, at 715 (stating that jury selection proceeds in two stages, but that the potential jury pool is comprised of eligible members of the community).

<sup>53</sup> See Lauren R. Deitrich, Note, *Transgender and the Judiciary: An Argument to Extend Batson Challenges to Transgender Individuals*, 50 VAL. U. L. REV. 719, 724–25 (2016); Howard, *supra* note 51, at 378; Howeth, *supra* note 52, at 580–81.

<sup>54</sup> See Deitrich, *supra* note 53, at 724–25; Howard, *supra* note 51, at 377, 379, 380–81; Howeth, *supra* note 52, at 580–81.

<sup>55</sup> See Deitrich, *supra* note 53, at 724–25; Howard, *supra* note 51, at 377–81; Howeth, *supra* note 52, at 580–81.

<sup>56</sup> The juror oath has never been required through any means of codification or procedure, but some scholars argue that it is an implicit constitutional requirement. As a practical matter, the juror oath is a long-standing tradition. See, e.g., Kathleen M. Knudsen, *The Juror’s Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?*, 32 TOURO L. REV. 489, 490–91 (2016) (“[T]he trial procedure of swearing the jury, with its long judicial tradition and explicit functional significance for constitutional rights, is an implied constitutional requirement.” (footnote omitted)); see also Howard, *supra* note 51, at 377.

<sup>57</sup> See Robin Reed, *Jury Simulation: The Impact of Judge’s Instructions and Attorney Tactics on Decisionmaking*, 71 J. CRIM. L. & CRIMINOLOGY 68, 68 (1980) (“After jury selection has taken place, jurors take an oath. In this oath they promise to do two things: 1) to decide the case solely on the facts as developed from the evidence and 2) to uphold the law as it is given to them by the court.”).

discusses each step, devoting particular attention to the third step, because peremptory challenges stir the most constitutional controversy.<sup>58</sup>

The venire is sometimes referred to as the “jury panel” or “jury pool.”<sup>59</sup> The venire must be drawn from a fair cross section of the community.<sup>60</sup> Because the petit jury will only consist of twelve people, applying the fair cross-section requirement to the empaneled jury is impractical.<sup>61</sup> Satisfying the fair cross-section requirement has proven challenging for courts, because they must choose sources from which to draw the names of prospective jurors without systematically excluding jurors on the basis of belonging to an economic, social, religious, racial, political, or geographic group.<sup>62</sup> Traditionally, voter registration lists were used to identify eligible citizens in the jurisdiction.<sup>63</sup> However, using voter lists to compile names of potential jurors led to an underrepresentation of racial and ethnic minorities.<sup>64</sup> In response to this problem, Congress imposed upon federal courts a multiple source requirement through the enactment of the Jury Selection and Service Act, under which courts must utilize a source of names other than voter lists.<sup>65</sup> From compiled lists, the court mails a

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<sup>58</sup> See, e.g., Howeth, *supra* note 52, at 581 & n.17.

<sup>59</sup> See Joshua S. Press, *Untruthful Jurors in the Federal Courts: Have We Become Comfortably Numb?*, 21 ST. THOMAS L. REV. 253, 256 (2009); Howeth, *supra* note 52, at 580.

<sup>60</sup> 28 U.S.C. § 1861 (2012) (“It is the policy of the United States that all litigants in Federal courts 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 in the district or division wherein the court convenes.”); *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (“[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”).

<sup>61</sup> See Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CALIF. L. REV. 101, 102 (1996) (“Given their limited size, juries cannot fully replicate the diversity of the communities from which they are drawn.”).

<sup>62</sup> See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . [P]rospective jurors shall be selected by court officials without systematic and intentional exclusion of any [economic, social, religious, racial, political, and geographic] groups.” (internal citation omitted)); cf. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761 (2011).

<sup>63</sup> Cf. Zuklie, *supra* note 61, at 104. The Jury Selection and Service Act, which Congress passed in 1968, permits federal courts to select potential jurors from voter lists. *Id.* at 102, 104.

<sup>64</sup> *Id.* at 104–05 (“[V]oter lists typically underrepresent racial and ethnic minorities and low-income persons.”).

<sup>65</sup> See 28 U.S.C. § 1863(b)(2) (2012) (stating that each district court must “prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights [against discrimination] secured by sections 1861 and 1862 of this title”); see also 28 U.S.C. § 1862 (2012) (“No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.”); Zuklie, *supra* note 61, at 102, 104–05.

questionnaire to prospective jurors designed to determine their eligibility to serve.<sup>66</sup> After those questionnaires are returned, the court issues summonses for jury service.<sup>67</sup>

Voir dire<sup>68</sup> is the process by which the venire is narrowed. Traditionally, attorneys actively participated in voir dire.<sup>69</sup> Skepticism arose among scholars who advocated for jury reform, because attorneys abused voir dire to create a biased jury in their favor.<sup>70</sup> In the modern process, the judge will typically ask the venirepersons questions intended to detect bias or prejudice.<sup>71</sup> Sometimes bias is actual,<sup>72</sup> such as when a prospective juror expressly indicates that he or she would be unable to remain neutral in a particular type of case.<sup>73</sup> Other times, bias is implied, such as when there is a foundation in law to presume the juror is partial, despite any contrary assurances.<sup>74</sup> Because the Sixth Amendment qualifies the defendant's right to a jury with

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<sup>66</sup> 28 U.S.C. § 1864(a) (2012) (describing the procedure for randomly drawing names and sending juror qualification forms).

<sup>67</sup> See Zuklie, *supra* note 61, at 105–06 (explaining that, based on the responses from the questionnaires, the court creates a list of qualified jurors and then “selects a list of prospective jurors to summon to the courthouse”); see also 28 U.S.C. § 1863(b)(4) (describing the mechanics of the “master jury wheel” from which names of eligible jurors are randomly drawn); 28 U.S.C. § 1863(b)(5)–(6) (permitting persons with certain occupations to be excused from jury service); 28 U.S.C. § 1864(a) (describing the process for selection of jurors from the master jury wheel); 28 U.S.C. § 1865(b) (2012) (enumerating grounds for disqualification, including citizenship, age, linguistic, and capacity requirements); 28 U.S.C. § 1866(b) (2012) (describing service requirements for summonses).

<sup>68</sup> “Voir dire,” translated from French, means “to speak the truth” or “to see them talk.” See David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 245 (1981).

<sup>69</sup> See HALE, *supra* note 21, at 314.

<sup>70</sup> See *id.* (“For many twentieth-century jury reformers, this was a problem: attorneys had too much control over voir dire (especially in state courts), allowing them to *plant* certain biases rather than uncover them.”).

<sup>71</sup> See Pam Frasher, Note, *Fulfilling Batson and Its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 IOWA L. REV. 1327, 1348 (1995).

<sup>72</sup> See *Bias*, BLACK'S LAW DICTIONARY (5th ed. 1979) (“*Actual bias* consists in the existence of a state of mind on the part of the juror which satisfies the court, in the exercise of a sound discretion, that the juror cannot try the issues impartially and without prejudice to the substantial rights of the party challenging.”); see also Howard, *supra* note 51, at 380 & n.55.

<sup>73</sup> See Dru Stevenson, *Jury Selection and the Coase Theorem*, 97 IOWA L. REV. 1645, 1663 (2012) (“‘For cause’ strikes must be based either on a statutory exclusion of the juror . . . or based on actual bias, as demonstrated during voir dire; or ‘implied bias,’ a legal presumption covering relatives and other close associates of the parties themselves.” (footnotes omitted)); see also Howard, *supra* note 51, at 380 & n.55. For a discussion on venirepersons attempting to avoid jury duty, see ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 91 (2015) (“Given the great human longing for power—our dry-throated thirst for control, our teeth-baring fury to protect even the feeblest charge over the most limited domain—I have always been baffled by the effort people devote to getting out of jury service.”).

<sup>74</sup> See *United States v. Wood*, 299 U.S. 123, 134 (1936) (“[I]mplied bias [is] a bias

the word “impartial,” the judge may excuse a biased prospective juror, even if that juror and the defendant both strenuously object to the exclusion.

Voir dire practices vary across jurisdictions.<sup>75</sup> In federal courts, the judge usually conducts the examination,<sup>76</sup> but will allow attorneys to submit additional questions that the judge may ask.<sup>77</sup> In state courts, the attorneys often participate more actively in voir dire.<sup>78</sup> During voir dire, the prosecutor and defense attorney may move to strike a prospective juror for cause.<sup>79</sup> If the judge detects actual or implied bias and believes that a prospective juror will be unable to faithfully honor his or her oath to consider only the evidence presented during the trial, then the juror will be dismissed.<sup>80</sup> Because the judge may be satisfied by a prospective juror’s assurances that he or she can and will remain impartial, for-cause challenges “are sustained rather infrequently.”<sup>81</sup>

At the conclusion of voir dire, attorneys for both sides are afforded the opportunity to exercise a statutorily limited number of peremptory challenges.<sup>82</sup> A peremptory challenge allows the attorneys to strike a prospective juror without articulating

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attributable in law to the prospective juror regardless of actual partiality.”); Stevenson, *supra* note 73, at 1663 (“For cause’ strikes must be based either on a statutory exclusion of the juror, . . . or based on actual bias, as demonstrated during voir dire; or ‘implied bias,’ a legal presumption covering relatives and other close associates of the parties themselves.” (footnotes omitted)).

<sup>75</sup> See *Skilling v. United States*, 561 U.S. 358, 386 (2010) (“No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*.”); BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM* 38 (2017) (“Procedural rules in almost all jurisdictions allow for prospective jurors to be questioned by judges, attorneys, or both, though practices vary significantly between federal and state courts.”).

<sup>76</sup> BORNSTEIN & GREENE, *supra* note 75, at 38 (“In federal courts *voir dire* is dominated by judges, whereas attorneys take a much more active role in state courts.” (internal citation omitted)).

<sup>77</sup> The Federal Rules of Criminal Procedure allow for jury examination to be conducted by either the judge or the attorneys, but if the judge conducts voir dire, the attorneys must be allowed either to ask additional questions to the jurors or to submit questions to the jurors. See FED. R. CRIM. P. 24(a)(1) (“The court may examine prospective jurors or may permit the attorneys for the parties to do so.”); FED. R. CRIM. P. 24(a)(2) (“If the court examines the jurors, it must permit the attorneys for the parties to: (A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper.”).

<sup>78</sup> See BORNSTEIN & GREENE, *supra* note 75, at 38.

<sup>79</sup> See *id.* (“As the questioning unfolds, a prospective juror may be challenged and eliminated *for cause*. A for-cause challenge arises when jurors’ views or experiences prevent or impair them from performing their duties in accordance with the law and their oath to consider the evidence fairly and impartially.”).

<sup>80</sup> See *id.* at 38–39.

<sup>81</sup> *Id.* at 39.

<sup>82</sup> See FED. R. CRIM. P. 24(b) (setting the number of peremptory challenges each side may exercise in federal courts); see also Howard, *supra* note 51, at 377–80; Howeth, *supra* note 52, at 580–81.

a reason.<sup>83</sup> Peremptory challenges enable attorneys to strategically exclude jurors based on mere hunches.<sup>84</sup> Historically, peremptory challenges were often used discriminatorily, which led the Supreme Court to prohibit such use of peremptory challenges; in *Batson v. Kentucky*,<sup>85</sup> the Court applied an Equal Protection analysis<sup>86</sup> to prohibit the use of peremptory challenges to strike prospective jurors on the basis of race when the defendant was of the same race.<sup>87</sup> Because the defendant was required to be of the same race as the excluded juror, the Court was especially concerned with the Equal Protection of the criminal defendant's rights.<sup>88</sup> *Batson's* progeny have expanded the prohibition of discriminatory use of peremptory challenges to cases where the defendant and juror are different races,<sup>89</sup> suggesting that the focus has shifted from the Equal Protection and express Sixth Amendment rights of the defendant to the Equal Protection and implicit Sixth Amendment rights of the prospective jurors.<sup>90</sup> The same-race requirement ensured that the prosecutor would not exercise peremptory challenges to disadvantage a particular defendant.<sup>91</sup> Eliminating that requirement emphasizes the right of members of the community to serve on a jury and detracts attention from the criminal defendant's right to a jury.

Although protecting the rights of prospective jurors is constitutionally important, it must not come at the expense of the constitutional rights of the criminal defendant. The constitutional rights of prospective jurors to serve on a jury are

<sup>83</sup> See Howard, *supra* note 51, at 380–81.

<sup>84</sup> See *id.*

<sup>85</sup> 476 U.S. 79 (1986).

<sup>86</sup> See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Batson*, 476 U.S. at 86.

<sup>87</sup> *Batson*, 476 U.S. at 94 (“The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment.”).

<sup>88</sup> *Id.* at 86 (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.”). *But see id.* at 87 (“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.”).

<sup>89</sup> See generally *Powers v. Ohio*, 499 U.S. 400 (1991). *Batson's* progeny have also expanded the groups of persons who may not be excluded for discriminatory purposes. See generally *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting the use of peremptory challenges on the basis of sex); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that defendants may not use peremptory challenges discriminatorily in violation of the Equal Protection Clause); *United States v. Salamone*, 800 F.2d 1216 (3d Cir. 1986) (holding that prospective jurors may not be dismissed solely based on their membership in an organization).

<sup>90</sup> See *Powers*, 499 U.S. at 409 (“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.”); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 454 (1996) (“As a matter of constitutional law, then, *McCollum* represents a shift from *Batson's* primary focus on the right of a defendant to a fair trial to an exclusive focus on the venirepersons’ right to racially-neutral jury selection procedures.”).

<sup>91</sup> See *Batson*, 476 U.S. at 85, 89–93.

secondary to the constitutional right of the defendant to an impartial jury.<sup>92</sup> The defendant in a criminal trial faces a loss of liberty or, in capital cases, life. By contrast, the prospective juror faces denial of participation on a jury, a right that is merely implied in the Sixth Amendment, and one that he or she likely views as an undesirable duty.

In assessing the constitutionality of jury composition, analysis should be anchored by consideration of the accused's Sixth Amendment rights. The most constitutionally significant problem with jury selection procedure in criminal cases is that the prosecution should not be entitled to participate in composing the very jury that is supposed to serve as a check against its power.<sup>93</sup>

## II. CONFLICT BETWEEN JURY SELECTION PROCEDURES AND RATIONALES FOR JURY TRIAL

The jury selection process provides both the defendant and the prosecution with unlimited for-cause challenges to eliminate biased jurors and a fixed number of peremptory challenges to exclude prospective jurors for any reason or no reason, so long as the peremptory challenges are not used in violation of the Equal Protection Clause.<sup>94</sup> This Part will argue that the language of the Constitution and the rationales supporting the jury trial demonstrate that current jury selection processes are unnecessary and irrational. Worse, the symmetry between the prosecution and defendant in selection procedures undermines the spirit and intent behind this constitutional right.

Turning first to the language of the Constitution, the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”<sup>95</sup> The key terms in this clause are “accused” and “impartial.” The term “accused” indicates that the right belongs exclusively to the defendant and not to the state. The Court has emphasized this language in another Sixth Amendment context; in *Faretta v. California*,<sup>96</sup> the Court discussed the right to self-representation and reasoned that “[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”<sup>97</sup> In the jury

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<sup>92</sup> As the Court noted in *Faretta v. California*, it is the defendant who bears the loss if his or her Sixth Amendment rights are forgone. 422 U.S. 806, 819–20 (1975) (“The Sixth Amendment . . . grants to the accused personally the right to make his defense. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”).

<sup>93</sup> See *Powers*, 499 U.S. at 411 (“The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors.”).

<sup>94</sup> See Howard, *supra* note 51, at 379–81, 379 n.51.

<sup>95</sup> U.S. CONST. amend. VI.

<sup>96</sup> 422 U.S. 806 (1975).

<sup>97</sup> *Id.* at 819–20.

context, the right to a jury is given directly to the accused through the same language in the Sixth Amendment that gives the right to counsel directly to the accused.<sup>98</sup> The defendant's interest in jury selection is an interest in being judged by members of his community and having those community members check the government's power.<sup>99</sup> Likewise, it is the accused who suffers the consequences if the state excessively participates in selecting the accused's jury.

A historical analysis of peremptory challenges in jury selection also supports the views that the right to a jury trial exists to benefit the defendant and that the defendant has a greater interest than the state in the composition of the jury. The privilege to use peremptory challenges was granted exclusively to the defendant until the mid- to late 1800s.<sup>100</sup> From British common law<sup>101</sup> until 1865, the peremptory challenge was designed and perceived "primarily as a defendant's weapon."<sup>102</sup> William Blackstone praised the peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."<sup>103</sup> In his vigorous dissent in *Swain v. Alabama*,<sup>104</sup> Justice Goldberg wrote, "To begin with, the peremptory challenge has long been recognized primarily as a device to protect *defendants*."<sup>105</sup> Thus, the *Faretta* Court's interpretation of the Sixth Amendment language and the

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<sup>98</sup> The language of the Sixth Amendment lists rights belonging to the accused, including the right to an impartial jury and the right to the assistance of counsel for his defense. *See* U.S. CONST. amend. VI. The dissent in *Faretta* argued that the Sixth Amendment's grant of the right to assistance of counsel did not necessarily give the defendant the right to self-represent, but the dissent does not argue against the notion that the language of the Sixth Amendment grants a positive right to the accused. *See Faretta*, 422 U.S. at 836–37 (Burger, C.J., dissenting). In the jury context, the right to a jury trial is unambiguously conferred to the accused in the Sixth Amendment. *See* U.S. CONST. amend. VI. Because of the explicitness of the accused's right to a jury trial, the reasoning in the dissent in *Faretta* does not apply to the jury context.

<sup>99</sup> *See, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."); *see also, e.g.,* *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

<sup>100</sup> *See* Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1171–72 (1966) ("[States] were slow to accord the peremptory challenge to the prosecution, and this was accomplished by statute only over strenuous constitutional objections. Congress did not abrogate the rule of conformity and grant the peremptory challenge to the federal prosecutor until 1865." (footnotes omitted)).

<sup>101</sup> Prior to 1305, the Crown had unlimited peremptory challenges, but in 1305, the right to peremptory challenges was removed entirely. *See id.* at 1171.

<sup>102</sup> *Id.* at 1172.

<sup>103</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*353 (emphasizing the protection peremptory challenges afford to the criminal defendant).

<sup>104</sup> 380 U.S. 202 (1965) (holding that a defendant must show a pattern of discrimination to prove an equal protection violation when the state systematically excluded African Americans from a jury).

<sup>105</sup> *Id.* at 242 (Goldberg, J., dissenting).



history of peremptory challenges indicate that the jury and its selection are for the enjoyment and protection of the defendant.

Turning back to the literal text of the Sixth Amendment, one could argue that the state's interest in jury selection is to ensure that the jury is not biased. Certainly, the word "impartial" operates as a limitation on the defendant's right to a jury. A defendant would naturally prefer a partial jury in his favor to either an impartial jury or a jury biased in favor of the state. The prosecution's responsibility, as a seeker of justice,<sup>106</sup> is to act as a check against the defendant's possible attempts to imbalance the jury.<sup>107</sup> Regardless, to achieve this constitutional interest in impartiality, the prosecution need not participate in eliminating prospective jurors at the outset of the jury selection process. Instead, impartiality may be achieved through a later evaluation that ensures the defendant has not abused his Sixth Amendment right to a jury by creating a biased jury. Additionally, the prosecutor, in his role as an advocate for the "State" or the "People," may protect the Equal Protection rights of prospective jurors by asserting *Batson* challenges against the defendant when appropriate.<sup>108</sup> The prosecutor's interest in the jury trial is more limited than the defendant's right to a jury trial, so the prosecutor's participation in selecting the jury should be more limited as well.

Next, the Court, in *Duncan v. Louisiana*,<sup>109</sup> held that the right to a jury in a criminal trial is a fundamental right.<sup>110</sup> In so holding, the Court summarized the importance of the jury trial throughout U.S. history.<sup>111</sup> Most significantly, the Court offered the aforementioned rationales in support of the trial by jury, centered on limiting the amount of control the government has in the outcome of the case by allowing the community to democratically participate in the enforcement of criminal laws to the benefit of the defendant.<sup>112</sup>

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<sup>106</sup> See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); see also *Connick v. Thompson*, 563 U.S. 51, 71 (2011) ("The role of a prosecutor is to see that justice is done."); *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

<sup>107</sup> Cf. *Connick*, 563 U.S. at 71; *Berger*, 295 U.S. at 88.

<sup>108</sup> See generally *Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Hernandez v. New York*, 500 U.S. 352 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>109</sup> 391 U.S. 145 (1968).

<sup>110</sup> See *id.* at 154–56.

<sup>111</sup> See *id.* at 151–56. It was, in part, this history that led to the Court's holding. See *id.* at 153 ("Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice . . .").

<sup>112</sup> See *id.* at 156.

Allowing the prosecution to share equal control over jury selection with the defendant is inconsistent with the goals identified by the Court in *Duncan*, especially when peremptory challenges permit the prosecution to make strategic decisions to exclude jurors who are merely sympathetic,<sup>113</sup> rather than partial, toward the defendant, or who are opposed to enforcing certain laws.<sup>114</sup> Because, as the Court explains, the underlying rationale in support of a criminal trial by jury is to allow for community participation to protect the defendant from oppression by the government, the government's involvement in selecting which members of the community will protect the defendant against the government's own authority should be minimal.<sup>115</sup> Simply, the state should not be permitted to actively participate in selecting the very jury that is intended to serve as a check against its power.

Interestingly, the Federal Rules of Criminal Procedure also recognize that defendants ought to have more control than the prosecution in jury selection. Rule 24(b) sets the number of peremptory challenges granted to each side.<sup>116</sup> For felony cases, the prosecution is entitled to six peremptory challenges, and the defendant may exercise ten.<sup>117</sup> Although the history of this Rule at the time it was originally enacted is unavailable, the Supreme Court attempted to revise the Rule in 1976 to reduce the number of peremptory challenges to five for each side.<sup>118</sup> Congress rejected the proposed amendment, finding that the Court's reasons for the proposal did not "justify giving the prosecution and defense the same number of peremptory challenges in felony cases."<sup>119</sup> Specifically, Congress was not persuaded by the Court's arguments that reducing and equalizing the number of peremptory challenges would eliminate bias and reduce the systematic exclusion of protected groups of people.<sup>120</sup> Thus, Congress concluded, "it can be questioned whether it is desirable to introduce a [symmetry] notion into jury selection procedures."<sup>121</sup> By rejecting the proposed amendment, Congress acknowledged the defendant's greater entitlement to control over jury selection.

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<sup>113</sup> *Duncan* indicates that sympathy may rightly motivate a defendant to opt for a jury trial over a bench trial. *Id.* Because sympathy is a valid reason for asserting one's Sixth Amendment right to a jury trial, the prosecution should not be entitled to undermine that right.

<sup>114</sup> For a brief explanation of jury nullification, see 75A AM. JUR. 2D *Trial* § 681 (2017).

<sup>115</sup> See *Duncan*, 391 U.S. at 156.

<sup>116</sup> See FED. R. CRIM. P. 24(b) (allotting an equal number of peremptory challenges to the state and defendant in misdemeanor and capital cases, but granting more peremptory challenges to the defendant in felony cases).

<sup>117</sup> FED. R. CRIM. P. 24(b)(2).

<sup>118</sup> See WRIGHT ET AL., *supra* note 15, § 379 & n.14.

<sup>119</sup> H.R. REP. NO. 95-195, at 7-8 (1977).

<sup>120</sup> *Id.* (explaining that the difficulty of striking jurors for cause is the underlying reason for biased jurors and that judge-conducted voir dire is the root of the problem, and further explaining that prosecutors systematically exclude statistically more jurors than defendants, so reduction and proportionality are unsupported by the goal of reducing systematic exclusion).

<sup>121</sup> *Id.* at 8.

In sum, by allowing the prosecution to participate in jury selection equally with the defendant, jury selection procedures are inconsistent with the historical rationale for the jury trial, the literal text of the U.S. Constitution, the Court's interpretation of the right to a jury trial in criminal prosecutions, the Court's interpretation of the Sixth Amendment phrase "the accused shall enjoy,"<sup>122</sup> and Congress's rationale for rejecting a proposed amendment to the Federal Rules of Criminal Procedure. Given these examples of the American emphasis on protecting persons from government overreach, the jury selection process that puts the defendant and the state on equal footing is plainly untenable.

### III. POSSIBLE REMEDIES

Recall that the two primary, underlying justifications for trial by jury are: (1) to allow community participation in the criminal justice system, and (2) to protect criminal defendants from government overreach by giving them a screen of community members to check the government's power. Although this Article is concerned mainly with the second justification, any proposed system must also satisfy the first.

Previous attempts have been made to cure the oft-criticized jury selection process, but those attempts fail to address the problem of equality between the defendant and the state during jury selection.<sup>123</sup> William Stuntz offers the most closely related criticism of jury selection.<sup>124</sup> He proposes more democratic community participation in criminal justice, notes the general demise of the jury trial, and discusses the ways in which prosecutorial discretion and vague criminal laws add to uncertainty in criminal liability.<sup>125</sup> However, he argues that, although vagueness in criminal law is "part of a well-functioning system of checks and balances,"<sup>126</sup> a change in jury selection procedure is necessary for the viability of such a system.<sup>127</sup> Stuntz's ultimate proposal for revising the jury selection procedure focuses on the first step of jury selection: drawing the venire.<sup>128</sup>

Presently, the venire is selected from the district in which the crime occurred, usually the county.<sup>129</sup> Thus, the jury panel consists of members who represent a broad community; Stuntz argues that the jury panel should instead be drawn from

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<sup>122</sup> U.S. CONST. amend. VI.

<sup>123</sup> See generally, e.g., Frasher, *supra* note 71.

<sup>124</sup> See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

<sup>125</sup> See generally *id.*

<sup>126</sup> *Id.* at 304 ("Vague criminal prohibitions once were, and might be again, part of a well-functioning system of checks and balances.").

<sup>127</sup> *Id.* ("For those checks and balances to work as they should, one more legal change is needed: a change in the manner in which juries are selected.").

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

a more localized pool.<sup>130</sup> The purpose of localizing jury pools is to give a voice to the community that is most affected by the crime.<sup>131</sup> In addition to localizing jury pools, Stuntz also advocates for fewer peremptory challenges, because the body of law from *Batson* and its progeny is costly and ineffective in eliminating discriminatory use of peremptory challenges.<sup>132</sup> He acknowledges that his two proposed changes—localizing jury pools and limiting peremptory challenges—“might make convictions harder to obtain.”<sup>133</sup> He justifies this pro-defendant result, not by arguing that the defendant has a right and a greater interest in the jury trial than the state does, but instead by showing that the criminal justice system is currently “stacked in the government’s favor.”<sup>134</sup> He argues that his proposal would require the prosecution to persuade a jury of twelve persons from a high-crime neighborhood to convict one of their neighbors.<sup>135</sup>

Although Stuntz’s proposals seemingly reflect the first justification for jury trials by putting disenfranchised members of the community into the jury box, he makes an interesting point about the comparative advantage the state has over the defendant. He hints at the second rationale when he writes that “[c]urrent jury selection rules facilitate conviction . . . instead of obstructing it.”<sup>136</sup> Nevertheless, although his proposals are aimed to satisfy both rationales, Stuntz does not adequately articulate that the defendant is constitutionally entitled to greater control over the selection process. This Article proposes two possible remedies that keep the spirit of both justifications for the jury trial by granting the defendant greater control than the prosecution over selecting the jury after the panel has been drawn.

The problem of equality between the defendant and prosecution is not presented in the first step of jury selection. Thus, both of the following proposals leave the Jury Selection Act procedures for drawing names for the jury panel unchanged, but are workable under Stuntz’s suggested localized pools as well. With respect to the second step of jury selection, *voir dire*, the following proposals both call for judge-conducted *voir dire* and allow the defendant, but not the prosecution, to submit questions to the judge. The judge, as a neutral government actor, would ask prospective jurors questions designed to detect bias. After the judge and defendant dismiss jurors for cause, the prosecution then enters into the selection process.

Under the first revised system of jury selection, there are no peremptory challenges. Instead, the defendant compiles a list of approved jurors from those prospective

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<sup>130</sup> *Id.* (“Jury selection in large cities should be neighborhood based . . .”).

<sup>131</sup> *See id.*

<sup>132</sup> *Id.* (“[T]he number of peremptory challenges should be substantially reduced. . . . [This reduction] would remove the need for the expensive, elaborate, and largely ineffective body of law barring the discriminatory use of peremptory challenges. Eliminating that body of law would make criminal trials cheaper, a large collateral benefit.” (footnotes omitted)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

jurors not excluded for cause. This list will include a greater number of jurors than those who can actually serve. For example, if the empaneled jury will be composed of twelve jurors and two alternates, the defendant may present a list of twenty jurors. The prosecution would then inspect the list of proposed jurors and select the twelve who will actually serve and the two alternates. Because the list from which the prosecution selects has already been approved by the judge and the defendant, the prosecution can simply dismiss the six nonserving jurors for any or no reason. This procedure gives the defendant an active role in selecting his jury, while giving the prosecution a later-stage role in selection. The judge's early involvement and the prosecution's later-stage role provide ample opportunity to sufficiently prevent abuse by a defendant. Eliminating the prosecution's ability to exercise strategic challenges is consistent with the rationales for the defendant's right to a jury trial. This gives the defendant more control than the prosecution without compromising the state's interest in ensuring that the jury is impartial. The defendant would pull the weeds from the garden, and the prosecution would pick the flowers.<sup>137</sup>

Critics may argue that the defendant could compile the list discriminatorily, excluding potential jurors on the basis of race or another characteristic protected by the Equal Protection Clause through *Batson* and its progeny.<sup>138</sup> Although discrimination would not arise specifically through peremptory challenges, defendants could still plausibly exclude jurors systematically from the short list on the basis of membership in a protected class. In its roles as advocate for the State or the People and as seeker of justice, the prosecution would be entitled to raise *Batson* challenges to vindicate the rights of the excluded jurors under the Equal Protection Clause.<sup>139</sup> If the prosecution observes systematic exclusion on the basis of a protected characteristic, then it may challenge the defendant's proposed list. Because, under the current system, discriminatory use of peremptory challenges is more frequently committed by the prosecution,<sup>140</sup> this proposed system might make jury selection more efficient by reducing the frequency of *Batson* challenges.<sup>141</sup>

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<sup>137</sup> See *supra* notes 49–58 and accompanying text.

<sup>138</sup> See generally *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that the defendant is prohibited from discriminatory use of peremptory challenges under the Equal Protection Clause).

<sup>139</sup> For *Batson* challenge procedures, see *Batson v. Kentucky*, 476 U.S. 79 (1986). See also generally *Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam); *McCollum*, 505 U.S. 42; *Hernandez v. New York*, 500 U.S. 352 (1991).

<sup>140</sup> See H.R. REP. NO. 95-195, at 8 (1977) (“The rationale that reducing the number of peremptories will eliminate the systematic exclusion of certain groups of people is also unpersuasive. Since the number of defense peremptories was reduced more than the number of prosecution peremptories [in the proposed amendment that would have given equal peremptories to the defense and the prosecution], that rationale seems to be bottomed upon an assumption that it is defense counsel who are using peremptory challenges systematically to exclude classes of people. The testimony and statistics . . . indicate that, on the contrary, it is the prosecution that most often uses peremptories in that fashion.”).

<sup>141</sup> *Batson* challenges require the challenging party to make the prima facie case for asserting

Alternatively, under the second proposal, peremptory challenges are reserved for the exclusive enjoyment of defendants. The abolition of prosecutorial peremptory challenges is not a novel idea.<sup>142</sup> Asymmetry between the prosecution and defense at the peremptory stage may help cure the fact that, as Stuntz explains, the criminal justice system is “stacked in the government’s favor.”<sup>143</sup> For example, the fair cross-section requirement, as part of the right to a jury trial, is intended to protect the defendant.<sup>144</sup> Yet, there is a practical impossibility of achieving a representative empaneled jury.<sup>145</sup> Thus, the fair cross-section requirement only applies to the pool from which the jurors are actually selected. Even this loosened mandate has been criticized as “anemic” in its application and enforcement, because some community members are absent from the lists from which the court draws names.<sup>146</sup> The jury selection scales that should be tipped in favor of the defendant instead weigh more heavily for the state at this first stage. Giving the defendant heightened control over jury selection at the peremptory challenge stage would not remedy the ills experienced by members of the community, but it would tip the scales back toward the defendant’s side by giving the defendant more control over who will ultimately check the government’s power.

These are only two of several possible ways to grant the defendant more control over the jury selection process. Any procedural revision giving the defendant more

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discrimination. *Purkett*, 514 U.S. at 767–68. The burden then shifts to the challenged party to offer a race-neutral explanation for striking a particular juror. *See id.* at 767. Some critics of *Batson* argue that this procedure is a “charade” or an “ill-conceived sinkhole.” *See* Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 185 (S.D.N.Y. 1996) (stating that it is time to end the “charade” that the *Batson* test genuinely reveals racial discrimination); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 67 (1993) (referring to *Batson* as an “ill-conceived sinkhole”); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 179 (2005).

<sup>142</sup> *See, e.g.*, Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1148 (1994) (“There is ample historical precedent for the allotment of peremptories to defendants but not to the government.”).

<sup>143</sup> STUNTZ, *supra* note 124, at 304 (describing procedures as “stacked in the government’s favor”).

<sup>144</sup> *See* *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”).

<sup>145</sup> *See* Zuklie, *supra* note 61, at 102 (“Given their limited size, juries cannot fully replicate the diversity of the communities from which they are drawn.”).

<sup>146</sup> Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1528 (2015).

control would be an improvement over the current structure, because such a revision would better reflect the Founders' vision and the Court's interpretation of the right.

A change in the procedure that affords the defendant greater control than the prosecution could also resolve other identified Sixth Amendment issues, such as the prevalence of plea bargaining (i.e., waiver of the right to a jury trial) and the low rate of jury acquittals.<sup>147</sup> If the defendant were able to enjoy his right to an impartial jury more fully, by having more control in selecting his "hedge"<sup>148</sup> against the government, then he might be more willing to assert his right to a jury trial. The petit jury may also be more likely to acquit if the jurors' interaction with the prosecution is limited during the selection process. This ultimately would better reflect the Founders' intention for the jury trial to be the rule, rather than the exception.

#### CONCLUSION

The Sixth Amendment right to a jury trial has been praised for serving as a vital protection for the defendant against governmental overreach.<sup>149</sup> In practice, however, defendants waive this right in the overwhelming majority of cases through plea bargaining. Of the comparatively rare cases that go to trial, those tried before a jury are more likely to result in a conviction than those tried before a judge.<sup>150</sup> An investigation into the inconsistency between the celebration of the jury trial as a benefit to the defendant and the grim reality of high conviction rates reveals a constitutional problem in the process through which juries are selected. The procedures afford the prosecution symmetrical participation with the defendant in selecting the jury. This is problematic because the jury trial is meant to serve the defendant by providing a hedge against the government. The state should not enjoy equal participation with the defendant in selecting the very jury charged with checking its power. To cure the problem, it is necessary to revisit jury selection procedures with the purpose behind the defendant's Sixth Amendment rights in mind and to revise those procedures by granting the defendant greater control over his enjoyment of his right.

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<sup>147</sup> See *supra* notes 10–12 and accompanying text.

<sup>148</sup> See *Taylor*, 419 U.S. at 530.

<sup>149</sup> See *id.*; see also Jefferson Letter to Thomas Paine, *supra* note 1, at 71.

<sup>150</sup> See *supra* notes 10–12 and accompanying text.