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NOTES

REDEFINING THE HARM OF PEREMPTORY CHALLENGES

"Jury competence is an individual rather than a group or class matter."¹

—Justice Frank Murphy

"[T]oo old, too white, too middle class'"²

—2 Live Crew's Luther Campbell

To shield a criminal defendant from compliant judges and overzealous prosecutors,³ the Framers of the Bill of Rights pro-

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

2. Anderson, *2 Live Crew Acquitted*, A.B.A. J., Dec. 1990, at 29, 29 (quoting 2 Live Crew's Luther Campbell). During jury selection for the trial of the musical group 2 Live Crew, charged with obscenity for performing a song from their album, *As Nasty as They Wanna Be*, defense counsel argued that the venire should not be drawn solely from voter registration lists, but should be supplemented with telephone listings, lists of food stamp recipients, and drivers' registration lists in order to compensate for the underrepresentation of blacks and young people on voter registers. Rimer, *Rap Group's Lawyer Challenges Selection of Jury*, N.Y. Times, Oct. 11, 1990, at A16, col. 4. The population of the trial site was 13% black, but the panel of 70 venirepersons contained only three blacks, or 4.3% of the venire. *Id.* The jury, whom singer Luther Campbell thought would not comprehend the band's music, consisted of four white, middle-aged to elderly women, a middle-aged black woman, and a 24-year-old white male member of a church choir. After deliberating briefly, the jury acquitted Campbell and fellow band members of obscenity charges. Anderson, *supra*, at 29.

3. Justice Byron White expounded upon the purpose of trial by jury:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. 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. . . . 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. . . . 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.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (footnote omitted).

vided the criminally accused with the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed."⁴ The Framers envisioned that the collective experience of a lay jury, the community's conscience, would dictate guilt or innocence—not an officer of the court⁵—and that participation of the citizenry would comport with the democratic process.⁶ Nevertheless, as recent Supreme Court decisions continue to suggest,⁷ the meaning of an "impartial jury" in an adversarial setting varies with the goals of the parties, who seek opposite outcomes. Inherent in the debate over a jury's appropriate composition is the selection process itself.

Although the sixth amendment entitles the accused to a jury pool drawn from a cross section of the community⁸ and the equal protection clause prohibits the prosecution's purposeful exclusion of jurors based on their race,⁹ underinclusive methods of randomly assembling potential jurors¹⁰ and tactical jury selection may homogenize the body that ultimately determines the defendant's guilt or innocence. To remove prospective jurors perceived as sympathetic to his adversary, each litigant summarily strikes from the venire those presumably detrimental to his own cause. Under the pretense of assembling an impartial jury, the courtroom becomes a peculiar setting where stereotypes, the siblings of discrimination, survive.¹¹

4. U.S. CONST. amend. VI.

5. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975). The Court declared, "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." *Id.* at 530 (citing *Duncan*, 391 U.S. at 155-56).

6. See, e.g., *Powers v. Ohio*, 59 U.S.L.W. 4268 (U.S. Apr. 1, 1991) (No. 89-5011) ("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."); *Taylor*, 419 U.S. at 527 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)) (exclusion of racial groups is "at war with our basic concepts of a democratic society and a representative government"); THE FEDERALIST No. 83, at 499 (A. Hamilton) (C. Rossiter ed. 1961) (trial by jury is "the very palladium of free government").

7. See, e.g., *Holland v. Illinois*, 110 S. Ct. 803 (1990); *Batson v. Kentucky*, 476 U.S. 79 (1986).

8. See *Taylor*, 419 U.S. at 537.

9. See, e.g., *Powers*, 59 U.S.L.W. at 4271; *Batson*, 476 U.S. at 86.

10. Underinclusiveness results when the method of selection fails to encompass a broad segment of society. For a discussion of underinclusiveness, see *infra* notes 175-76 and accompanying text.

11. Last year's trial of former Washington, D.C., Mayor Marion Barry illustrates stereotypical notions of group bias at work. The charges against Barry included possessing cocaine and lying to a federal grand jury. At his trial, the venire comprised 15 whites

In 1986, the Supreme Court began to harness discriminatory challenges, as it held in *Batson v. Kentucky*¹² that a black criminal defendant may challenge on equal protection grounds the prosecution's peremptory removal of black venirepersons.¹³ *Batson* marked the Court's first significant step in over a century toward proscribing racial discrimination in jury selection.¹⁴ Last Term, the Court extended *Batson's* reach. In *Powers v. Ohio*,¹⁵ the Court declared that a criminal defendant, regardless of his or the removed jurors' race, may employ the equal protection clause to challenge the race-based exclusion of the potential jurors.¹⁶ Whether this reasoning will, and should, curb other instances of discriminatory peremptory challenges is the focus of this Note.

This Note begins by examining briefly the jury selection process, including the purportedly fundamental role peremptory challenges have played in assembling an impartial jury. It then discusses *Batson's* effect on the challenge and explores several issues engendered by *Batson*. By examining several Supreme Court decisions on discriminatory jury selection, this Note asserts that inclusiveness—not crude characterizations of representativeness—has shaped the Justices' vision of impartiality. Given the challenged juror's right not to be discriminated against arbitrarily, the inimical effect peremptory challenges have on the fair cross section principle, and the peremptory challenge's perpetuation of invidious and stereotypical notions of group bias, the Note next advocates abolition of the peremptory challenge. Finally, the Note offers a means of assembling a more inclusive, and consequently more representative, jury that balances the interests of the litigants and the jurors, thus bolstering the public's confidence in the integrity of the judicial process.

and 22 blacks after challenges for cause. Gellman & Thompson, *Barry Jury Set, Testimony Begins Today*, Wash. Post, June 19, 1990, at A1, col. 4. Barry's counsel first peremptorily struck two blacks, who expressed resentment during voir dire that Barry had gotten himself into trouble in the first place. *Id.* The defense used its remaining challenges to remove whites, and the prosecution used its challenges to remove only blacks. *Id.* The final jury, including six alternates, consisted of 13 blacks and five whites. *Id.* Although the empanelled jury was not monochromatic, the racial nature of the strikes suggests each side's preconception of how race would influence the verdict.

12. 476 U.S. 79.

13. For a summary of the test the Court devised in *Batson*, see *infra* text accompanying notes 55-59.

14. See *infra* notes 41-59 and accompanying text.

15. 59 U.S.L.W. 4268 (U.S. Apr. 1, 1991) (No. 89-5011).

16. *Id.* at 4271; *Batson*, however, has produced a myriad of other problems that lower courts have failed to resolve uniformly. See *infra* note 60.

"[A]N ARBITRARY AND CAPRICIOUS SPECIES OF CHALLENGE"¹⁷

Jury selection includes several phases: compilation of a comprehensive juror source list; random selection of a jury panel, or venire; examination of venirepersons to eliminate anyone unqualified to serve; peremptory challenges; and seating of the petit, or final, jury. Under federal law, the Jury Selection and Service Act of 1968 (Act) governs jury selection.¹⁸ A 1968 House Report defined the goals of the Act as

(1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only. These principles provide the best method for obtaining jury lists that represent a cross section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness.¹⁹

Although the Act does not mandate an exclusive method of assembling a venire, courts most frequently use voter registration lists²⁰ to select randomly a fair cross section of the community where the court convenes.²¹ After selection of the venire, the judge, sometimes with the assistance of counsel, conducts voir dire to determine whether any prospective juror cannot deliberate impartially.²² Through challenges for cause, the attorneys also may request the exclusion of those prospective jurors whose answers reveal that they cannot deliberate impartially.²³ Following the challenges for cause, each side may exercise a limited

17. W. BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 353 (D. Berkowitz & S. Thorne eds. 1978).

18. 28 U.S.C. §§ 1861-1869 (1988).

19. H.R. REP. NO. 1076, 90th Cong., 2d Sess. 4, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1792, 1793.

20. 28 U.S.C. § 1863(b)(2).

21. *Id.* § 1861. For a sample of how the states select prospective jurors, see *infra* note 173.

22. Rule 24(a) of the Federal Rules of Criminal Procedure governs the examination of venirepersons:

The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

FED. R. CRIM. P. 24(a). The trial judge may, for good cause shown, exclude any juror from jury duty. 28 U.S.C. § 1866(c)(4).

23. 28 U.S.C. § 1866(c)(4).

number of peremptory challenges, or "strikes," which require no justification before a party demands removal of a potential juror.²⁴

"[H]unches, unsystematic past experience, intuition, [or] stabs in the dark"²⁵ may inspire use of a peremptory challenge, which 200 years ago William Blackstone labeled "an arbitrary and capricious species of challenge."²⁶ Blackstone defined two rationales supporting the challenge:

1. As everyone must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.
2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.²⁷

Although the Framers did not expressly incorporate the peremptory challenge into the sixth amendment,²⁸ the Supreme Court

24. In a federal criminal trial, the prosecution and the defense have a variable number of peremptory challenges, depending upon the gravity of the charge. In trials for capital offenses, for example, each side may exercise 20 peremptory challenges. FED. R. CRIM. P. 24(b). If the alleged offense is punishable by confinement not exceeding one year, each side may use only three peremptory challenges. *Id.*

25. M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 55 (1978); see Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 554 (1975) ("[W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.").

26. W. BLACKSTONE, *supra* note 17, at 353.

27. *Id.* Contrary to the contemporary perception that the practice was a bastion of common law jury trials, Blackstone's work discloses that the challenge was limited to capital trials and was not employed unquestionably by the Crown: "[T]he king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court." *Id.* Furthermore, the frequently low number of available venirepersons prevented use of the peremptory challenge without resulting in an inadequate number of jurors; consequently, neither side could regularly employ them. See J. COCKBURN & T. GREEN, *TWELVE GOOD MEN AND TRUE* 71 (1988).

28. Patrick Henry criticized the Framers for failing to express in the sixth amendment the defendant's right to exercise peremptory challenges:

If [the people] dare oppose the hands of tyrannical power, you will see what has happened elsewhere. They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all

traditionally has given the practice a lofty position. In the late 1800's, the Court expressed seemingly unwavering faith in the peremptory challenge:

Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him.²⁹

More recently, the Court suggested that peremptories engender a fair trial: "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."³⁰

Although the Court's lofty rhetoric appears to have made the peremptory challenge sacrosanct as the means of assuring a fair trial,³¹ a critical analysis asks how fairness stems from a strike that is not necessarily an instrument of neutrality, but instead a weapon to adjust the outcome of a case. Limited only in number, the peremptory challenge perpetuates invidious stereotypes, as each party applies both limited knowledge of the jurors and generalizations shaped by experience to eliminate jurors seemingly unsympathetic to a litigant.³² Depending upon the compo-

the forms of a fair trial. . . . I would rather the trial by jury were struck out altogether.

V. HANS & N. WIDMAR, *JUDGING THE JURY* 37 (1986) (quoting Patrick Henry, Virginia Ratification Debates). James Madison, on the other hand, interpreted the amendment more broadly: "Where a technical word ['impartial'] was used . . . , all the incidents belonging to it necessarily attended it. The right to challenge is incident to the trial by jury, and, therefore, as one is secured, so is the other." *Id.* (quoting James Madison, Virginia Ratification Debates).

29. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887); see also *Pointer v. United States*, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. . . . Any system for the empaneling of a jury that pre[v]ents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.").

30. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

31. See *Holland v. Illinois*, 110 S. Ct. 803, 808 (1990) (plausible that sixth amendment requirement of an "'impartial jury' impliedly compels peremptory challenges"); *Pointer*, 151 U.S. at 408 (peremptory challenge "is one of the most important of the rights secured to the accused"). But see *Stilson v. United States*, 250 U.S. 583, 586 (1919) (declaring that the Constitution mandates peremptory challenges for neither the government nor the accused).

32. See, e.g., J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 152-60 (1977). According to Van Dyke, prosecutors typically look for those prospective jurors who, presumably, will be partial to government—those

sition of the venire and the number of peremptory strikes allowed, the parties may summarily strike whole groups from participation in a trial; not only may the group and the community consequently doubt the integrity of the process, but the process has *possibly* eliminated a realm of human experience composing the voice of the community.³³

In an effort to assemble a group of people whose diverse backgrounds may promote vigorous deliberation, the court acquiesces in each side's effort to stack the jury in its favor. Recognizing that parties may wield peremptory challenges to assemble bias rather than to remove partiality,³⁴ the Court has employed two amendments to curb unjustified challenges based upon ill-founded notions of group bias: the fourteenth amendment's equal protection clause³⁵ and the fair cross section requirement implicit in the sixth amendment right to an impartial jury.³⁶ In 1990, the Court held in *Holland v. Illinois*³⁷ that the sixth and fourteenth amendments each offer distinct protection to the parties and to the judicial system in general. A five-to-four majority held that the sixth amendment mandates an impartial jury—not

who are white, middle-aged, and middle class. *Id.* at 152. Defense attorneys, on the other hand, look for venirepersons whose occupations require self-governance: for example, salespeople, actors, and writers probably "have been exposed to a wide variety of experiences, are not easily shocked by crime, and are likelier to forgive indiscretions in others." V. HANS & N. WIDMÄR, *supra* note 28, at 73. *But see* Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978). Zeisel and Diamond studied the decisionmaking of three groups of jurors: peremptorily struck jurors, randomly selected jurors from the remainder of the venire, and jurors chosen through voir dire. *Id.* at 492, 498. Analysis of the verdicts of these three groups, which heard the same testimony and saw the same exhibits in 12 cases, rebuts the presumption that peremptory challenges have some influence on the verdict, as prosecutors generally failed to alter verdicts through peremptory challenges and defense counsel were "only slightly better" than their counterparts. *Id.* at 492, 528.

33. *See, e.g.*, *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (footnote omitted) (Marshall, J.):

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

34. *See* *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) ("The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate . . .").

35. *See, e.g.*, *Powers v. Ohio*, 59 U.S.L.W. 4268 (U.S. Apr. 1, 1991) (No. 89-5011); *Batson*, 476 U.S. 79; *Swain v. Alabama*, 380 U.S. 202 (1965).

36. *See, e.g.*, *Holland v. Illinois*, 110 S. Ct. 803 (1990); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

37. 110 S. Ct. 803.

a representative one—and that a party may not invoke the sixth amendment to contest the discriminatory use of peremptory challenges.³⁸ By straying from its previous path of demanding nondiscriminatory jury selection, the Court halted its progress toward an end to racial discrimination in jury selection.³⁹

STRIKING THE PEREMPTORY CHALLENGE

A Challenge on Equal Protection Grounds

Although the Supreme Court has refused to eliminate peremptory challenges, it has begun to insist that the practice have a legitimate basis. The Court's prohibition of challenges based purely on jurors' race in *Batson v. Kentucky*⁴⁰ marked the first noticeable inroad on peremptory challenges. The Court traveled a circuitous route, however, to reach that exception.

In *Strauder v. West Virginia*,⁴¹ decided in the post-Reconstruction era, the Court held that a state law allowing only white males to serve on juries denied a black defendant equal protection under the fourteenth amendment.⁴² During the civil rights movement almost a century later, however, the Court erected an imposing barrier for a defendant to hurdle when asserting an equal protection violation.⁴³ In *Swain v. Alabama*,⁴⁴ the Court held that the objector must uncover purposeful discrimination by showing that the prosecutor in the case at hand had, over a period of time, excluded blacks on the basis of race.⁴⁵ In this

38. *Id.* at 806. Petitioner Daniel Holland, who was white, employed the sixth amendment to challenge the prosecution's peremptory removal of the only two blacks in the venire. *Id.* at 805.

39. See, e.g., *Batson*, 476 U.S. at 89 (holding that the fourteenth amendment prevents the discriminatory use of peremptory challenges by the prosecution to remove venirepersons of the defendant's own race); *Taylor*, 419 U.S. at 530 (declaring that an integral component of the sixth amendment right to an impartial jury is the right to have a jury drawn from a fair cross section of the community).

40. 476 U.S. 79.

41. 100 U.S. 303 (1880).

42. *Id.* at 310. The Court further declared,

The very fact that colored people are singled out and expressly denied . . . all right to participate . . . as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing individuals of the race that equal justice which the law aims to secure to all others.

Id. at 308.

43. *Swain v. Alabama*, 380 U.S. 202 (1965).

44. *Id.*

45. *Id.* at 226-27. The Court noted that peremptory challenges are a "suitable and

instance, the Court found that despite the total exclusion of blacks from the juries empaneled in that jurisdiction since 1950,⁴⁶ the defense failed to show that the particular prosecutor in Swain's trial historically had exercised his challenges discriminatorily.⁴⁷ Not until a century after *Strauder* did the Court take a significant step toward limiting discriminatory strikes against black venirepersons.⁴⁸

In *Batson*, the Court lowered the threshold of proof required in *Swain*, thereby restraining the "unfettered exercise"⁴⁹ of peremptory challenges. Petitioner James Batson contested the prosecutor's peremptory removal of all four black venirepersons, which left an all-white jury.⁵⁰ The jury convicted Batson, and on

necessary method of securing juries which in fact . . . are fair and impartial." *Id.* at 212. Moreover, the Court declared that a prosecutor may strike potential jurors on the basis of group affiliations, "whether they be Negroes, Catholics, accountants or those with blue eyes." *Id.*

46. *Id.* at 205. Although black males over age 21 constituted 26% of the males in Talladega County, Alabama, eligible to participate, they were usually underrepresented on jury venires; no black had survived voir dire challenges since 1950. *Id.* In petitioner Robert Swain's case, of the eight blacks in the venire, two were exempt from jury service, and the prosecutor peremptorily struck the remaining six. *Id.*

At the time of Swain's trial, the State of Alabama used a "key-man" system to compile juror source lists: jury commissioners from each county placed on the juror roll the names of all qualified males, including those "reputed to be honest and intelligent men . . . esteemed in the community for their integrity, good character and sound judgment." *Id.* at 206 n.2 (quoting ALA. CODE tit. 30, § 21 (1958)).

47. *Id.* at 227. The Court further held that the prosecution is presumed to have struck prospective jurors impartially. *Id.* at 222. Before *Batson*'s relaxation of *Swain*, only two cases had satisfied the *Swain* requirement. See *State v. Washington*, 375 So. 2d 1162 (La. 1979); *State v. Brown*, 371 So. 2d 751 (La. 1979).

In his dissent in *Swain*, Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, rebuked the majority for placing the "inviolab[le]" peremptory challenge over the defendant's right to an impartial jury. *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting).

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

49. *Id.* at 98. The cases presented thus far stemmed from peremptory challenges employed before *criminal* jury trials. At least one court has held recently that the equal protection clause also applies to peremptory challenges in a private civil action. See *Fludd v. Dykes*, 863 F.2d 822, 829 (11th Cir.), *cert. denied*, 110 S. Ct. 201 (1989). In *Fludd*, the United States Court of Appeals for the Eleventh Circuit held that the trial judge becomes a state actor when he overrules an objection to a discriminatory use of peremptory challenges:

In overruling the objection, . . . the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause, we conclude that there is no constitutional bar to the application of *Batson* to a civil suit.

Id. at 828. For a contrary view, see *infra* note 60.

50. *Batson*, 476 U.S. at 83.

appeal the Kentucky Supreme Court, relying on *Swain*, refused to adopt the position that "preemptory [sic] challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group and a likelihood [existed] that the challenges were based solely on group membership."⁵¹

On appeal to the United States Supreme Court, *Batson* contested his conviction primarily on sixth amendment grounds,⁵² but Justice Powell, writing for the majority, based the Court's decision on the equal protection clause.⁵³ According to the Court's earlier ruling in *Swain*, a contestant must base an equal protection argument upon a showing of purposeful discrimination by the prosecutor over a period of time.⁵⁴ In *Batson*, however, the majority ruled that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."⁵⁵ The Court announced a three-part test: the defendant must show that those removed constitute a "cognizable racial group";⁵⁶ that the defendant is a member of that racial group;⁵⁷ and that the surrounding facts, either of systematic exclusion or of the particular case, raise an

51. *Batson v. Commonwealth*, No. 84-SC-733-MR, mem. op. at 8 (Ky. Dec. 20, 1984) (citations omitted), in Joint Appendix, On Writ of Certiorari to the Supreme Court of Kentucky (U.S. June 17, 1985) (No. 84-6263).

52. Brief for Petition of Certiorari at 4, *Batson v. Kentucky*, 476 U.S. 79 (1986) (No. 84-6263).

This brief is premised on the belief that the concept of the jury as a fair cross-section of the community announced in *Taylor v. Louisiana*, 419 U.S. 522 (1975), was designed to secure a trial jury that is representative of the community and not simply to create a representative panel or venire from which a prosecutor can exclude groups of people by means of peremptory challenges.

Id.

53. The majority wrote, "We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments." *Batson*, 476 U.S. at 85 n.4. Whether the petitioner asserted both grounds for reversal was a source of contention between the majority and the dissent. In dissent, Chief Justice Burger and Justice Rehnquist emphasized that the petitioner had relied on the sixth amendment and conceded that he was not making an equal protection claim under the fourteenth amendment: "Petitioner's 'question presented' involved only the 'constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.'" *Id.* at 113 (Burger, C.J., dissenting) (quoting Brief for Petition of Certiorari at i).

54. 380 U.S. 202, 226-27 (1965).

55. *Batson*, 476 U.S. at 96.

56. *Id.*

57. *Id.*

inference that the exclusions were based solely upon race.⁵⁸ Once the defendant has developed a prima facie case of purposeful prosecutorial discrimination, the prosecution "must articulate a neutral explanation related to the particular case to be tried."⁵⁹

Batson stepped significantly beyond *Swain* toward the goals of eradicating race-based discrimination and of fostering community representation in a black defendant's jury trial, but the decision spawned more questions than it resolved.⁶⁰ For example, until

58. *Id.* Temporarily overlooking the heavy burden in *Swain*, Powell added, [T]he Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. . . . For evidentiary requirements to dictate that "several must suffer discrimination" before one could object would be inconsistent with the promise of equal protection to all.

Id. at 95-96 (citation omitted). The Court did not, however, define when a logical inference should be drawn that a party exercised peremptory challenges discriminatorily; it merely stated that "the trial court should consider all relevant circumstances." *Id.* On one hand, the Court's vagueness will prompt much litigation over the sufficiency of evidence of discrimination. On the other hand, talismanic formulas to calculate discrimination would leave more troublesome results. Without considering the composition of the community and the representativeness of the venire, the Court would provide parameters of legitimate discrimination within which each party could operate.

For illustrations of courts applying differing litmus tests to detect discrimination, thereby reaching dissimilar results, see Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 27-37 (1988).

59. *Batson*, 476 U.S. at 98. Furthermore, "the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *id.* at 98 n.20 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)), which means more than a good faith explanation. *Id.* at 98.

After announcing this new test, the Court remanded the case to the trial court to decide whether "the facts establish, prima facie, purposeful discrimination and [if so, whether] the prosecutor [can] come forward with a neutral explanation for his action." *Id.* at 100.

60. As this Note was going to print, the Supreme Court was considering two issues that could further diminish discrimination in the selection process while fostering broader participation within the community: *Batson's* applicability to civil trials, *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir.) (en banc), *cert. granted*, 111 S. Ct. 41 (1990), and circumstances yielding a prima facie case of prosecutorial discrimination, *Hernandez v. New York*, 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990), *cert. granted*, 111 S. Ct. 242 (1990).

In *Edmonson*, petitioner Thaddeus Edmonson, who had brought a personal injury action, asserted that *Batson* should apply to jury selection in civil trials. 895 F.2d at 219. The United States Court of Appeals for the Fifth Circuit held that a civil litigant is not a state actor and, therefore, that peremptory challenges are not subject to scrutiny in civil cases. *Id.* at 221-22. The court in *Edmonson* failed to resolve whether its holding would apply when the State is a civil litigant. *Id.* at 222 n.10. The United States Court of Appeals for the Eighth Circuit has held that, regardless of the civil or criminal nature of the case, a government litigant cannot exercise racially discriminatory strikes. *Reynolds v. City of Little Rock*, 893 F.2d 1004, 1008 (8th Cir. 1990), *petition for cert. filed*, 59

the Court's decision last Term in *Powers v. Ohio*,⁸¹ the viability

U.S.L.W. 3053 (U.S. June 25, 1990) (No. 90-1).

Resolution of the issue in *Edmonson* may dispose of another issue—whether *Batson* applies equally to the defense in criminal cases when the sixth amendment, without mentioning the right of the prosecution, expressly provides that the accused has a right to an impartial jury. See U.S. CONST. amend. VI. Should that issue arise, the Court may attempt to distinguish purportedly different interests at stake in criminal and civil trials. Whereas in a civil case the jury serves primarily as a factfinder, in the criminal context, a jury of laypersons also lends integrity to and legitimates the criminal justice process, giving the defendant the confidence that he is not being adjudged by collusive prosecutors and compliant judges. On the other hand, in isolated instances members of the Court have stated that the prosecution likewise is entitled to a fair trial. See, e.g., *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)) ("Between [the accused] and the state the scales are to be evenly held."); *Witherspoon v. Illinois*, 391 U.S. 510, 535 (1968) (Black, J., dissenting) ("[T]he people as a whole . . . have as much right to an impartial jury as do criminal defendants."); *Fay v. New York*, 332 U.S. 261, 288-89 (1947) ("Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury."). *But cf.* *Polk County v. Dodson*, 454 U.S. 312, 325 (1981) (holding that a public defender in a criminal case does not engage in state action when representing a client in court).

In *Hernandez*, also argued last Term, the Court, in granting certiorari, limited the appeal to the following two issues: (1) whether the prosecutor had offered a race-neutral explanation when he asserted that he had struck two Latino jurors because both stated on voir dire that they would hesitate to abide by the official, English translation of testimony given in Spanish, which they would already comprehend; (2) the degree of deference an appellate court owes to a trial court's conclusion that the prosecutor has offered a race-neutral explanation. 111 S. Ct. 242 (1990).

Furthermore, this Note does not comprehensively address what constitutes a prima facie case under *Batson*, an issue dividing lower courts. See *Serr & Maney*, *supra* note 58. In *Batson* the Court held, "For evidentiary requirements to dictate that 'several must suffer discrimination' before one could object . . . would be inconsistent with the promise of equal protection to all." *Batson*, 476 U.S. at 95-96 (quoting *McCray v. New York*, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from denial of certiorari)). This statement may refer to the Court's limitation of *Swain*, which required a showing that the prosecution discriminatorily struck jurors over a period of time—not only in one case. In *Batson*, the Court stated that the defense must reveal a "pattern" of strikes against jurors of the same race, *id.* at 96-97, which may mean more than one instance of discrimination.

On the other hand, the Court could have meant that race-based discrimination against any person is prohibited. Several courts have held that "the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated." *United States v. Johnson*, 873 F.2d 1137, 1139 (8th Cir. 1989) (quoting *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987)), *cert. denied*, 111 S. Ct. 304 (1990); see *United States v. Horsley*, 864 F.2d 1543, 1545-46 (11th Cir. 1989) (peremptory strike of only black in venire may establish prima facie case); *Stanley v. State*, 313 Md. 50, 84-87, 542 A.2d 1267, 1283-85 (1988) (if the state uses peremptories to strike all blacks, even when only one is empaneled, the court may find a prima facie case).

The Supreme Court, however, could have meant that the result, and not the means, demonstrates whether the prosecution has transgressed. See *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988) ("Any claim that the jury was not impartial . . . must focus not on [a potential juror who was excluded], but on the jurors who ultimately sat."); *United States v. Grandison*, 885 F.2d 143, 147-49 (4th Cir. 1989) (although prosecutor peremptorily struck six black venirepersons when using nine peremptories, defendant failed to make a prima

of cross-racial challenges to discriminatory peremptories had not been resolved. Given the historical suspectedness of the struck group⁶² and the fundamentality of the right to trial by an impartial jury, the Court's decision in *Batson* also left room for speculation over the application of its reasoning to other cognizable groups.⁶³ Most significantly, however, by relying on the fourteenth amendment, the Court left obscure its perception of the sixth amendment's role in the selection of the petit jury, an issue it resolved abruptly in *Holland v. Illinois*.⁶⁴

Peremptorily Challenging a Representative Cross Section

Nowhere does the sixth amendment state expressly that an "impartial jury" is one drawn from a fair cross section of the community, but the Supreme Court traditionally has linked the sixth amendment to a jury ideally embodying a microcosm of the community.⁶⁵ Before limiting the import of the sixth amendment to the means of assembling a representative venire,⁶⁶ the Court suggested that the amendment applies to selection of the petit jury.⁶⁷

In *Taylor v. Louisiana*,⁶⁸ the defendant, a male, challenged the constitutionality of women's underrepresentation in jury pools;

facie showing when two blacks remained on petit jury and three of six alternates were black), *cert. denied*, 110 S. Ct. 2178 (1990); *United States v. Woods*, 812 F.2d 1483, 1487 (4th Cir. 1987) (despite prosecutor's peremptory removal of four blacks, number of blacks remaining on jury represented their percentage in the district's population, thus precluding a *Batson* violation); *Ward v. State*, 293 Ark. 88, 94, 733 S.W.2d 728, 731 (1987) ("The best answer the state can have to a charge of discrimination is to be able to point to a jury which has some black members."). These holdings suggest that the prosecution, with impunity, may take several bites of the forbidden fruit. *But see* *Alvarado v. United States*, 110 S. Ct. 2995, 2996 (1990) (*per curiam*) (without ruling on the merits, a five-to-four majority vacated a Second Circuit ruling, regarding which the prosecution conceded error, that would have allowed racially discriminatory strikes as long as the petit jury satisfied the fair cross section concept).

61. 59 U.S.L.W. 4268 (U.S. Apr. 1, 1991) (No. 89-5011).

62. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (racial classifications bear "a heavy burden of justification").

63. For a discussion of the characteristics of cognizability, see *Willis v. Kemp*, 838 F.2d 1510, 1516 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989) ("similarity of attitudes binding all members of the group[, which are] not shared by the remainder of the community," marks cognizable group) (citations omitted).

64. 110 S. Ct. 803 (1990).

65. *See infra* text accompanying notes 108-09, 144-46.

66. *See Holland*, 110 S. Ct. at 809.

67. *See Duren v. Missouri*, 439 U.S. 357 (1979) (sixth amendment applies to selection of venire); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (sixth amendment applies to jury pool).

68. 419 U.S. 522.

women were exempt unless they volunteered for jury duty.⁶⁹ The Court held that a male defendant had standing to challenge such systematic exclusion.⁷⁰ Moreover, the Court stated that the sixth amendment guarantees "a fair *possibility* for obtaining a jury constituting a representative cross section of the community,"⁷¹ but does not require that the jury "mirror the community and reflect the various distinctive groups in the population."⁷² In *Duren v. Missouri*,⁷³ the Court held that a system allowing women to opt out of jury duty, the converse of the situation in *Taylor*, likewise led to impermissible underrepresentation violative of the sixth amendment.⁷⁴ Nevertheless, prior to *Holland v. Illinois*, the Court avoided an extension of *Taylor*'s reasoning by misconstruing a reasonable inference of that case.⁷⁵

In *Teague v. Lane*,⁷⁶ the prosecution used its allotted peremptory challenges to remove only black venirepersons, leaving a white jury to try Frank Teague, a black defendant.⁷⁷ The trial judge denied defense counsel's motion for a mistrial, reasoning that the jury "'appear[ed] to be a fair [one]," and the jury convicted Teague.⁷⁸ The United States Court of Appeals for the Seventh Circuit rejected Teague's assertion that the sixth amendment mandates at least the possibility that the petit jury will comprise a fair cross section of the community.⁷⁹ On appeal to the Supreme Court, Teague stated that he was entitled to "procedures that allow a *fair possibility* for the jury to reflect a cross

69. *Id.* at 524-25.

70. *Id.* at 526.

71. *Id.* at 528 (citing *Peters v. Kiff*, 407 U.S. 493, 500 (1972) (Marshall, J.)) (emphasis added).

72. *Id.* at 538.

73. 439 U.S. 357 (1979).

74. *Id.* at 369. In *Duren*, the Court announced a three-part test to apply when deciding whether the sixth amendment's fair cross section requirement has been satisfied:

[T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Id. at 364.

75. See *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).

76. *Id.*

77. *Id.* at 292-93.

78. *Id.* at 293.

79. *Teague v. Lane*, 820 F.2d 832, 839 (7th Cir. 1987) (en banc), *aff'd*, 489 U.S. 288 (1989).

section of the community.”⁸⁰ A plurality of the Court, however, held that even if the fair cross section requirement applied to selection of the petit jury, it would not apply to a case on collateral review by way of a habeas petition.⁸¹ Moreover, in its discussion of Teague’s claim, the Court reconfigured his argument in the exact terms the Court rejected in *Taylor*—that the petit jury’s composition must mirror the distinct groups within the community.⁸²

In his dissent, Justice Brennan accused the plurality of “mischaracterizing”⁸³ Teague’s sixth amendment claim and found that an extension of *Taylor*’s sixth amendment reasoning would differ little from the result reached in *Batson*:

The only potentially significant difference is that Teague’s claim, if valid, would bar the prosecution from excluding venirepersons from the petit jury on account of their membership in some cognizable group even when the defendant is not himself a member of that group, whereas the Equal Protection Clause might not provide a basis for relief unless the defendant belonged to the group whose members were improperly excluded.⁸⁴

Nevertheless, in *Holland*, a divided Court addressed the reach of the sixth amendment and rejected foursquare the argument that a trial judge must preserve the possibility of a representative petit jury:

[T]o say that the Sixth Amendment deprives the State of the ability to “stack the deck” in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side.⁸⁵

80. *Teague*, 489 U.S. at 341 (Brennan, J., dissenting) (quoting Brief for Petitioner at 4). Teague, who was black, pleaded the sixth amendment because the Court had held in *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), that *Batson* did not apply to cases on collateral review.

81. *Teague*, 489 U.S. at 305-10 (O’Connor, J., plurality opinion).

82. *Id.* at 299 (O’Connor, J., plurality opinion). Although Teague compared the percentage of blacks on the petit jury with their percentage in the community only as an indication of disproportionate exclusion, Justice O’Connor asserted that Teague demanded proportionate representation. *Id.* at 301 n.1.

83. *Id.* at 340 (Brennan, J., dissenting).

84. *Id.* at 341-42 (Brennan, J., dissenting).

85. *Holland v. Illinois*, 110 S. Ct. 803, 807 (1990).

Writing for a five-member majority, Justice Scalia addressed two issues on appeal from the Illinois Supreme Court: (1) whether a white defendant has standing to challenge the prosecutor's exercise of peremptory challenges to exclude all black venirepersons and (2) whether those exclusions deprive the defendant of the impartial jury guaranteed by the sixth amendment.⁸⁶ Although all Justices held that a white defendant does have standing under the sixth amendment to challenge the peremptory removal of blacks, they disagreed on whether petitioner Holland could extend the cross section requirement to the petit jury.⁸⁷

Just as Frank Teague had asserted, petitioner Daniel Holland claimed that the removal of all blacks "violated the Sixth Amendment by denying him a 'fair possibility' of a petit jury representing a cross section of the community."⁸⁸ On this occasion, however, the Court neither skirted nor misconstrued the issue;⁸⁹ it cursorily rejected the petitioner's construction of the sixth amendment:

We reject petitioner's fundamental thesis that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the "fair possibility" of a representative jury. . . . A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury.⁹⁰

Furthermore, "[the defendant] does not have a valid constitutional challenge *based on the Sixth Amendment*—which no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics."⁹¹ Additionally, Justice Scalia declared that the fair cross section requirement "has never included the notion

86. *Id.* at 805.

87. *Id.*; *id.* at 811 (Kennedy, J., concurring); *id.* at 814 (Marshall, J., dissenting); *id.* at 820 (Stevens, J., dissenting).

88. *Id.* at 806.

89. Although the majority in *Holland* finally did confront the issue presented in *Teague*, as an afterthought it reverted to its misapplication of *Taylor v. Louisiana*, 419 U.S. 522 (1975). Justice Scalia wrote that *Taylor* "specifically disclaimed application of [its] analysis to the petit jury." *Holland*, 110 S. Ct. at 810.

90. *Holland*, 110 S. Ct. at 806.

91. *Id.* at 811.

that, in the process of drawing the jury, that initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests.”⁹²

By limiting the reach of the sixth amendment in *Holland*, the Court intimated that, as contrasted with a *Batson*-type racial correlation between the accused and the struck venirepersons, a defendant invoking the sixth amendment lacks a viable complaint if the prosecution arbitrarily removes members of another race. The impermissible presumption that black members of the venire are partial to blacks, a presumption violating the equal protection clause,⁹³ “has nothing to do with the legal issue in th[e] case.”⁹⁴ The lesson from *Holland*, however, is not the limited reach of the sixth amendment; rather, the subtle message is that the reprehensibility of discriminatory tactics apparently diminishes when the races of the defendant and the venirepersons differ.

The immediate impact of this reasoning is the same in each case: the jury lacks the participation of a sizable group in the community, and the judiciary denies the defendant the possibility of a representative jury. The remaining impression is more subtle but no less objectionable: race does make a difference in the courtroom. Such line drawing suggests further that a defendant’s confidence in his jury’s impartiality rests in the *appearance* of impartiality as seen through the defendant’s subjective lens. Ironically, in an effort to remove racial considerations from the courtroom, the Court encouraged the mentality that racial groups should limit their expectations of impartiality and fairness to members of their own respective race. The Court’s decision in *Powers v. Ohio*,⁹⁵ however, indicates that seven Justices may have seen the handwriting on the wall.⁹⁶ If they had held that a white defendant may not challenge, on equal protection grounds, the

92. *Id.* at 807.

93. *Id.* at 828 (Stevens, J., dissenting) (discussing *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)).

94. *Id.* at 810. “All we hold is that he does not have a valid constitutional challenge based on the Sixth Amendment.” *Id.*

95. 59 U.S.L.W. 4268 (U.S. Apr. 1, 1991) (No. 89-5011).

96. Although in *Holland* petitioner Daniel Holland, who was white, relied on the sixth amendment to challenge the prosecution’s peremptory removal of black venirepersons, five Justices declared that petitioner Holland had standing under the equal protection clause. See *Holland*, 110 S. Ct. at 812 (Kennedy, J., concurring); *id.* at 813 (Marshall, J., with whom Brennan and Blackmun, JJ., joined, dissenting); *id.* at 821-22 (Stevens, J., dissenting). Of those five, Justice William Brennan has since retired. His replacement, Justice David Souter, and Justice Sandra Day O’Connor, who did not comment on the viability of an equal protection claim discussed by several Justices in *Holland*, composed part of the seven-Justice majority in *Powers*.

peremptory removal of black venirepersons, then they might as well have stated what *Batson* and *Holland* only intimated: inexplicably, a fair trial may depend on the racial composition of the jury.⁹⁷

COMING TO TERMS WITH EQUAL PROTECTION, IMPARTIALITY, AND REPRESENTATIVENESS

The Court in *Batson* and *Powers* stated that the accused is harmed when the prosecution discriminatorily strikes jurors based on their race, but the exact harm remains elusive. In *Batson*, the majority declared that a black defendant has a "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria"⁹⁸ and that racial discrimination prevents trial by a jury of a defendant's equals.⁹⁹ In *Powers*, the majority held that race-based challenges cause a defendant a "cognizable"¹⁰⁰ or "real"¹⁰¹ injury, because such discrimination "'casts doubt on the integrity of the judicial process.'"¹⁰² Nevertheless, in neither case did the Court state that a criminal trial is fairer when a jury comprises several races. To the contrary, the majority in *Powers* conceded that if a group's sympathy toward the accused were the sole reason he challenged its removal, then those jurors could be removed for cause anyway.¹⁰³ Given the Court's failure to define any concrete injury the defendant suffers when discrimination takes place, it should not be surprising that in *Powers*, in which the harm appeared less invidious because the defendant's race was not the object of discrimination, the Court focused on those actually harmed—the excluded jurors.¹⁰⁴

97. Although Justice Scalia, with whom Chief Justice Rehnquist joined, dissenting, did not expressly assert that a defendant has less room to complain when members of his own race try him, he did encourage that conclusion:

[I]t is entirely offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded. I am unmoved, however, and I think most Americans would be, by this white defendant's complaint that he was sought to be tried by an all-white jury

Powers, 59 U.S.L.W. at 4276 (Scalia, J., dissenting).

98. *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986) (citing *Martin v. Texas*, 200 U.S. 316 (1906)).

99. *Id.* at 86.

100. *Powers*, 59 U.S.L.W. at 4271.

101. *Id.* at 4272.

102. *Id.* at 4271 (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

103. *Id.*

104. *See id.* at 4270-73. Writing for the majority, Justice Kennedy asserted, "A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id.* at 4272.

An examination of the sixth amendment cases likewise reveals that the Justices' concern is not purported harm to the defendant but is, instead, public disrespect and doubt bred by the removal of citizens competent to serve impartially. In *Holland*, for example, the underlying issue was not the reach of the sixth amendment but the meaning of a trial by an "impartial jury." The majority and dissenting opinions reflect Justices wrestling with a definition that promotes inclusion of a broad range of perspectives but that does not imply that impartiality mandates a heterogeneous jury. Writing for the majority in *Holland*, Justice Scalia noted that the fair cross section requirement stems from the "traditional understanding of how an 'impartial jury' is assembled,"¹⁰⁵ but he drew a line at the venire, stating that the Court has never construed the sixth amendment to require a representative jury—only an impartial one.¹⁰⁶ Although he never expressly stated that a heterogeneous jury will not lead to greater impartiality, Scalia's preservation of the peremptory challenge, when confronted with the sixth amendment, suggests that he views impartiality as an individual characteristic not linked to a counterbalancing of perspectives.¹⁰⁷

105. *Holland v. Illinois*, 110 S. Ct. 803 (1990).

106. *Id.* Justice Kennedy concurred, asserting that expansion of the scope of the sixth amendment to selection of the petit jury would have "no limiting principle to make it workable in practice." *Id.* at 811 (Kennedy, J., concurring). Nevertheless, he emphasized that under the equal protection clause, *Holland* could have asserted both his right to a jury chosen according to "nondiscriminatory criteria" and the rights of jurors removed because of their race. *Id.* at 812. Focusing predominantly upon a defendant's advantageous position to protect "the duty[] and honor[] of jury service," Kennedy suggested that the opportunity to participate—rather than the purported injury to a defendant tried before a less heterogeneous jury—motivated his argument. *Id.*

107. Scalia's belief that the removal of "postmen, or lawyers, or clergymen," *id.* at 810, would implicate the sixth amendment no less than the removal of blacks—but nonetheless not compromise the impartiality of the resulting jury—also suggests that he perceives impartiality as an individual attribute not influenced by the experiential baggage each juror brings into the courtroom.

Such reasoning resembles two dissenting opinions of Chief Justice Rehnquist. In *Taylor* he ridiculed the majority's reasoning that including women on a jury adds a "flavor" otherwise absent when only men deliberate. See *Taylor v. Louisiana*, 419 U.S. 522, 541-42 (1975) (Rehnquist, J., dissenting). He continued, "[T]his 'flavor' is not of such importance that the Constitution is offended if any given petit jury is not so enriched." *Id.* at 542 (Rehnquist, J., dissenting). Rehnquist also rejected the belief that underrepresentativeness injures the defendant:

[The majority] concludes that the jury is not effective, as a prophylaxis against arbitrary prosecutorial and judicial power, if the "jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." It fails, however, to provide any satisfactory explanation of the mechanism by which the Louisiana system undermines

In separate dissents, Justices Marshall and Stevens approached differently the meaning of "impartiality." Marshall asserted that the sixth amendment demands not only an impartial jury, but also one drawn from a cross section of the community.¹⁰⁸ He added, however, that the exclusion of distinct groups denies a defendant "the benefit of the common-sense judgment of the community."¹⁰⁹ Nonetheless, except for mentioning that the defendant's right "arguably . . . would be [better] served by a requirement that all distinctive groups in the community be represented on each petit jury,"¹¹⁰ Marshall never linked racial representativeness with impartiality. Instead, as Justice Kennedy did in his concurrence,¹¹¹ Marshall concentrated on the need to eradicate racially discriminatory challenges of qualified jurors.¹¹² Justice Stevens, on the other hand, asserted unequivocally that racially discriminatory selection contravenes the principle of an impartial jury¹¹³ by denying a defendant his "interest in a neutral factfinder."¹¹⁴ Stevens acknowledged, however, that preoccupation with race alone would lead to a disregard of other groups.¹¹⁵ Like Marshall, Stevens apparently was more concerned about the

the prophylactic role of the jury

Id. at 541 (Rehnquist, J., dissenting) (quoting the majority opinion at 530).

Similarly, in his dissent in *Duren v. Missouri*, 439 U.S. 357 (1979), Rehnquist pointed out that if the sexes truly do produce a more impartial jury, "a defendant would be entitled to a jury composed of men and women in perfect proportion to their numbers in the community." *Id.* at 372 (Rehnquist, J., dissenting). On the other hand, "[i]f . . . men and women are essentially fungible for purposes of jury duty, the question arises how underrepresentation of either sex on the jury or the venire infringes on a defendant's right to have his fate decided by an impartial tribunal." *Id.* Rehnquist contended that the compelling issue should not be the defendant's right to have a fair cross section of the community deliberate his case but rather the equal protection interest of the prospective juror. *Id.* at 373 (Rehnquist, J., dissenting).

Rehnquist did not apply the same reasoning, however, in *Batson*; instead, he stated that no equal protection violation occurs so long as the State consistently uses peremptory challenges against venirepersons of a defendant's race, regardless of his race. *See Batson v. Kentucky*, 476 U.S. 79, 137-38 (Rehnquist, J., dissenting). Such a practice would reduce equal protection to equal infringement.

108. *Holland*, 110 S. Ct. at 815 (Marshall, J., dissenting).

109. *Id.* (quoting *Lockhart v. McCree*, 476 U.S. 162, 175 (1986)).

110. *Id.* at 817 (Marshall, J., dissenting).

111. *See supra* note 106.

112. *Holland*, 110 S. Ct. at 817-19 (Marshall, J., dissenting).

113. *Id.* at 820-21 (Stevens, J., dissenting).

114. *Id.* at 827 (Stevens, J., dissenting) (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986)).

115. *Id.* at 824 (Stevens, J., dissenting) ("[W]hile a racially balanced jury would be representative of the racial groups in the community, the focus on race would distort the jury's reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level or economic class.").

discriminatory use of peremptory challenges than about the composition of the final jury.

The *Holland* decision reveals the Court's struggle to avoid capture by its own rhetoric. On one hand, the Court intimated that individually impartial *jurors*, regardless of group affiliation, comport with the notion of an impartial jury; on the other hand, the Court emphasized that community participation, which integrates a variety of backgrounds and attitudes, fosters an impartial *jury*. By adhering to the former proposition, the Court suggests that an underrepresentative jury has no injurious effect on the accused, presumably because each individual is impartial.¹¹⁶ When the Court espouses the latter proposition,¹¹⁷ however, it states euphemistically that no individual juror is impartial;¹¹⁸ instead, one must infer that impartiality arises from counterbalanced biases.

A review of several cases predating *Holland* and *Powers* and consideration of the goals underlying a trial by jury reveal that the Justices' fundamental and overriding impetus has not been to protect the defendant from idiosyncratic perspectives, but rather to give all segments of the community the opportunity to participate in the judicial process.

In *Taylor v. Louisiana*,¹¹⁹ the Court announced three components of the fair cross section requirement implicit in the sixth amendment: (1) the common sense of the community shields a defendant from an "overzealous or mistaken prosecutor";¹²⁰ (2) "[c]ommunity participation . . . is also critical to public confidence in the fairness of the criminal justice system";¹²¹ and (3) the jury's representativeness "assur[es] . . . diffused impartiality."¹²² The first two ingredients implicate universal participation, or inclusiveness, which recognizes the democratic nature of the judicial process. The third component, representativeness, also sounds

116. Nevertheless, neither the defendant nor the community as a whole is likely to respect a verdict rendered by a jury comprising an insular subset of the community. For example, if a discriminatorily selected white jury convicted a black, neither the defendant nor the community would likely respect the verdict as much as a similar verdict rendered by a racially mixed jury. Although a black jury might have reached the same result, discriminatory tactics alone would erode the integrity of the process.

117. See *infra* notes 122, 129, and 144-46 and accompanying text.

118. A jury comprising only white males, each of whom appears impartial on voir dire, who remain after the peremptory removal of all minorities and women will appear to be less impartial than a jury resembling a representative percentage of genders and races.

119. 419 U.S. 522 (1975).

120. *Id.* at 530 (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

121. *Id.*

122. *Id.* (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

the democratic belief that all persons, regardless of background, should shape the community's conscience; however, it also suggests that a less representative jury, whatever it may entail,¹²³ lacks the collective impartiality inherent in a more variegated body. The Court's struggle to accommodate individual competence to serve, on one hand, and to ensure diverse community participation, on the other, dramatizes the tension that has produced strained results.¹²⁴

The Court's cases on the size of criminal petit juries help to define the Justices' image of impartiality. In *Williams v. Florida*,¹²⁵ which affirmed the constitutionality of six-person criminal juries, the Court held that the "essential feature of a jury obviously lies in the interposition between the accused and his accuser . . . the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."¹²⁶ The Court stated that a six-man jury would not "significantly diminish[]" a jury's diversity.¹²⁷ It held to the contrary, however, with regard to five-man juries. In *Ballew v. Georgia*,¹²⁸ the Court found that juries with less than six members are more susceptible to "biased decisionmaking,"¹²⁹ not only because smaller juries are less likely to retain facts accurately,¹³⁰ to reach verdicts uniformly,¹³¹ and to assure minority participation,¹³² but also because they reduce "the counterbalancing of various biases [that] is critical to the accurate application of the common sense of the community to the facts of any given case."¹³³ In neither *Ballew* nor *Williams* did the Court find that underrepresentation prejudiced the defendant, but both holdings suggest that impartiality stems from vigorous debate among various segments of the community.

In more perplexing cases, the Court found no traceable injury to the defendant, which arguably would be spawned by the

123. Groups linked by race or gender are immutable, but such factors as education, religion, age, and economic status also may shape how the individual may react to any set of facts presented in a courtroom.

124. See *infra* notes 147-52 and accompanying text.

125. 399 U.S. 78 (1970).

126. *Id.* at 100.

127. *Id.* at 102.

128. 435 U.S. 223 (1978).

129. *Id.* at 239.

130. *Id.* at 232-34.

131. *Id.* at 234-35.

132. *Id.* at 236-37.

133. *Id.* at 234.

exclusion of a discrete segment of society, but still was compelled to condemn discriminatory practices. In *Thiel v. Southern Pacific Co.*,¹³⁴ jury commissioners regularly excluded daily wage earners because these workers historically had been excused from jury duty after claiming financial hardship.¹³⁵ Because it did "violence to the democratic nature of the jury system,"¹³⁶ the Court prohibited the systematic exclusion of wage earners.¹³⁷ Nevertheless, the Court made no finding that the petitioner had been denied an impartial jury.

In *Peters v. Kiff*,¹³⁸ three Justices opined that the exclusion of blacks from grand and petit juries denied a white defendant due process.¹³⁹

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.¹⁴⁰

Although that opinion never expressly equated jury bias with group exclusion, Chief Justice Burger, dissenting, drew that inference; he retorted that the petitioner had failed to show that the exclusion of blacks prejudiced him.¹⁴¹

In *Taylor v. Louisiana*,¹⁴² a male defendant alleged that he was denied the right to a fair trial under the sixth amendment because women, as a group, were exempted from jury duty unless they

134. 328 U.S. 217 (1946).

135. *Id.* at 222.

136. *Id.* at 223.

137. *Id.*

138. 407 U.S. 493 (1972).

139. *Id.* at 504 (Marshall, J.).

140. *Id.* at 503-04 (Marshall, J.) (citing *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)).

Justice White, joined by Justices Brennan and Powell, concurred in the judgment but relied on 18 U.S.C. § 243, which provides, "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of involuntary servitude" *Id.* at 505 (White, J., concurring) (citing 18 U.S.C. § 243 (1982)).

141. *Id.* at 510-11 (Burger, C.J., dissenting).

142. 419 U.S. 522 (1975).

volunteered to serve.¹⁴³ For the first—and only—time, the Court directly linked impartiality with representativeness: “As long as there are significant departures from the cross-sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.”¹⁴⁴ Holding that both sexes bring to the jury box a “distinct quality [that] is lost if either sex is excluded,”¹⁴⁵ the Court squarely held that the exclusion of women from venires removes the “diffused impartiality”¹⁴⁶ linked to a representative jury. Nevertheless, the Court never stated that the all-male jury that tried Taylor was partial to the prosecution.¹⁴⁷ The Court held in effect, however, that a jury comprising less than a representative cross section of the sexes is less likely to be impartial than a jury composed of more proportionate representation.

By insisting that women, as a distinct group, offer a unique quality unshared by men, the Court in *Taylor* assumed that (1) a jury composed of one gender is less impartial than a jury comprising both genders; (2) men and women, as isolated groups, possess a perspective unique to and universal among their respective members; and (3) those perspectives counterbalance bias inherent within the other gender, thus forming a more impartial jury. Ironically, by linking group identification with shared atti-

143. *Id.* at 524-25, 533.

144. *Id.* at 529 n.7 (quoting H.R. REP. NO. 1076, 90th Cong., 2d Sess. 8, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1792, 1797).

145. *Id.* at 532 (citing *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)).

146. *Id.* at 530-31 (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). In *Ballard*, Justice Douglas, writing for the Court, made a similar observation:

The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference.

Yet a flavor, a distinct quality is lost if either sex is excluded.

Ballard, 329 U.S. at 193-94.

147. See Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 30 (asserting that the majority in *Taylor* distorted the issue of impartiality to give the petitioner standing) (citing *Taylor*, 419 U.S. at 538-43 (Rehnquist, J., dissenting)); see also *supra* note 107.

tudes, the Court carelessly prescribed exactly what it tried to proscribe: it substituted ill-founded notions of group bias for individual ability to deliberate impartially.

If the inferences drawn from *Taylor* are sound, the concept of impartiality might mandate the inclusion of those cognizable groups on the petit jury, a process that assumes juror competence is limited to the group to which one belongs.¹⁴⁸ Although it has insisted that "[j]uror competence is an individual rather than a group or class matter,"¹⁴⁹ the Court's assertion that groups, characterized by race or gender, bring to the jury box a "qualit[y] of human nature,"¹⁵⁰ among other "imponderable[s],"¹⁵¹ suggests that a representative jury amounts to a more impartial jury. Nonetheless, the Court steadfastly has refused to hold that a defendant is entitled to a jury reflecting the diversity within his community.¹⁵² To hold that the jury must be a microcosm of the

148. In *Cassell v. Texas*, 339 U.S. 282 (1950), the Court in dictum denounced exclusionary and inclusionary tactics: "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." *Id.* at 287. *Contra* *Brooks v. Beto*, 366 F.2d 1, 24 (5th Cir. 1966) (en banc) (purposeful inclusion of blacks on grand jury venire appropriate when selection procedure results in underrepresentation), *cert. denied*, 386 U.S. 975 (1967).

Under English common law, a jury *de medietate linguae*, or a jury of the half-tongue, heard cases involving a foreign merchant, presumably for convenience of communication and for protection of sojourning merchants in England; half of the jurors were not from England, but they did not necessarily share the foreign litigant's nationality. F. BUSCH, 1 LAW AND TACTICS IN JURY TRIALS § 65 (1959). Although some courts in the United States once sanctioned its use, *see id.* § 65 n.20, this type of jury is no longer recognized. *See* *United States v. Wood*, 299 U.S. 123, 145 (1936).

Under the assumption that a black defendant is deprived of the right to a fair trial when a white jury hears his case, at least one commentator recommended adoption of a scheme analogous to the jury *de medietate linguae*, calling for the affirmative selection of black jurors. *See* Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80, 92-94 (1973). Another commentator urged the drawing of jury districts according to racial boundaries, and in less monochromatic areas, according to proportional representation of races. *See* Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970). Significantly, these articles were written before *Batson* lowered the insurmountable hurdle the Court erected in *Swain v. Alabama*, 380 U.S. 202 (1965). *See supra* notes 43-59 and accompanying text.

149. *Thiel*, 328 U.S. at 220.

150. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (Marshall, J.).

151. *Ballard v. United States*, 329 U.S. 187, 193 (1946).

152. *See, e.g., 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."); *Thiel*, 328 U.S. at 220 ("This does not mean that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community"); *cf. Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976) ("In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.").

community would lead to the conclusion that an individual, whose only link to a group is identical gender or race, will bring to jury deliberations exactly that image the litigants stereotypically perceive. Moreover, such a holding would only perpetuate stereotypes in the last place they should survive—a courtroom. If the Court means no such thing, as is indicated by its refusal to demand representative petit juries, then its true motivation emerges: the opportunity for community participation is vital to the concept of trial by jury.

BATSON'S PROGENY: BREEDING CASES OF OVERT DISCRIMINATION

Doubting the majority's confidence that its decision would not create "serious administrative burdens,"¹⁵³ Justice White warned in his concurrence in *Batson* that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid."¹⁵⁴ Only one year after the ruling, William Pizzi wrote, "If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*."¹⁵⁵ By cautiously condemning race-based motives in jury selection, the Court preserved the fanciful sanctity of the peremptory challenge, leaving undisturbed other forms of impermissible discrimination in the courtroom. *Holland v. Illinois*¹⁵⁶ foreclosed a defendant's use of the sixth amendment to attack race-based peremptory challenges; a ruling to the contrary would have preserved the possibility of trial before a cross section of the community.¹⁵⁷ The following discussion reveals the avenues of discrimination left open by *Batson* that *Powers* and *Holland* never closed, as it prompts the recommendation that the peremptory challenge should be abolished.

Use of the Peremptory Challenge on Nonracial Grounds

The majority in *Batson* avoided addressing the relationship between the sixth amendment's fair cross section requirement

153. *Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

154. *Id.* at 102 (White, J., concurring).

155. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 155.

156. 110 S. Ct. 803 (1990).

157. For a discussion of two cases argued this Term that may make inroads on discriminatory selection procedures, see *supra* note 60.

and the parties' removal from the venire groups not linked by race.¹⁵⁸ In *Holland*, the Court's pronouncement that the sixth amendment does not apply to the petit jury¹⁵⁹ cut off the path toward a more racially representative jury. By stressing in *Batson* that proof of a prima facie case initially depends upon a correlation between the defendant's race and the race of the venirepersons the prosecution peremptorily removed,¹⁶⁰ the Court implicitly licensed discrimination on nonracial grounds. Gender-based discrimination, for example, which the Supreme Court has disallowed during selection of the venire¹⁶¹ and permitted outside the courtroom only when the government can demonstrate an important governmental interest,¹⁶² apparently can survive a literal application of *Batson*.¹⁶³ The Court should acknowledge, how-

158. Although the Court denounced the prosecution's removal of prospective jurors on account of race as violative of the equal protection clause, *Batson*, 476 U.S. at 84, it surreptitiously refused to address *Batson*'s sixth amendment claim that the jury be drawn from a cross section of the community. *Id.* at 84 n.4.

159. *Holland*, 110 S. Ct. at 810-11.

160. *Batson*, 476 U.S. at 96.

161. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

162. *See, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (invalidating the state university's policy of limiting enrollment to women); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (invalidating law permitting 18-year-old women to buy beer but proscribing purchases by men unless they were at least 21); *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973) (invalidating gender-based law denying dependency benefits to male spouse of female Air Force officer).

163. Stereotypes about women historically have led to their participation on or exclusion from juries, depending upon the side making the challenge:

Clarence Darrow offered the categorical advice to avoid women in all defense cases. Others recommend choosing women for the defense if the principal witness against one's client is female, under the assumption that women are somewhat distrustful of other women. Another view hints that "women's intuition" may assist an attorney who can't win a case on the facts alone. Moreover, other lawyers have volunteered that old women wearing too much makeup are usually unstable. Then, of course, the challenge to Darrow: the common belief that women are more sympathetic than men to criminal defendants.

V. HANS & N. WIDMAR, *supra* note 28, at 73 (footnotes omitted); *see* 1 F. LANE, LANE'S GOLDSTEIN TRIAL TECHNIQUE § 9.47 (3d ed. 1984):

Women are preferred [for the defendant in personal injury cases] especially when the plaintiff is a woman. It is thought that married women with children will not sympathize with the plaintiff's effort to recover for pain and suffering. The most severe pain in their lives was probably during childbirth, which they endured without complaint or monetary compensation.

See also M. BELLI, 3 MODERN TRIALS § 51.68 (2d ed. 1982):

If plaintiff is a woman and has those qualities which other women envy—good looks, a handsome husband, wealth, social position—then women jurors would be unwise. Woman's inhumanity to womankind is unequalled. They are the severest judges of their own sex. Generally, then, for a woman

ever, that race does not have a monopoly on cognizability and should proscribe other forms of discrimination.

Having confronted the validity of gender-based challenges, federal and state courts disagree on *Batson's* application to non-racial forms of discrimination.¹⁶⁴ In *Hamilton v. United States*,¹⁶⁵ the government exercised seven of its eight peremptory challenges to strike blacks from the jury.¹⁶⁶ The prosecution explained that the final three strikes of black women provided a more balanced gender composition, which would curb a predominantly female jury's sympathy for a female defendant.¹⁶⁷ The United States Court of Appeals for the Fourth Circuit begrudgingly condoned this gender-based form of discrimination, holding, "While we do not applaud the striking of jurors for any reason relating to group classifications, we find no authority to support an extension of *Batson* to instances other than racial discrimination."¹⁶⁸ The United States Court of Appeals for the Ninth Circuit in *United States v. De Gross*¹⁶⁹ reached the opposite result. In *De Gross*, the court held that, in the absence of a neutral explanation, the defendant's peremptory removal of the eighth of eight men struck by the defense constituted impermissible discrimination.¹⁷⁰

plaintiff or where the witnesses on plaintiff's side are largely female, male jurors would be more acceptable.

However, if plaintiff has nothing that a woman juror would envy, and no criticism may be directed at her; if she has the same problems of raising a family, an errant husband or wayward child, then women jurors would commiserate with her in their verdict. Women also make good jurors for plaintiff in children's cases.

164. See *infra* notes 165-70 and accompanying text; see also *State v. Morgan*, 553 So. 2d 1012, 1018 (La. Ct. App. 1989), *writ denied*, 558 So. 2d 600 (La. 1990) (*Batson* does not apply when prosecution used peremptory challenges solely to exclude males); *State v. Oliviera*, 534 A.2d 867, 870 (R.I. 1987) (same; moreover, unlike blacks, males as a group have not been victims of systematic discrimination). *Contra* *People v. Irizarry*, ____ A.D.2d ____, ____, 560 N.Y.S.2d 279, 281 (N.Y. App. Div. 1990) (*Batson* applies to gender-based discrimination; exclusion of women solely because of gender denies equal protection to the defendant and to the struck jurors).

165. 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 110 S. Ct. 1109 (1990).

166. *Id.* at 1039.

167. *Id.* at 1041.

168. *Id.* at 1042 (footnote omitted). Relying strictly on *Batson's* plain language, the majority held that "if the Supreme Court in *Batson* had desired, it could have abolished the peremptory challenge or prohibited the exercise of the challenges on the basis of race, gender, age or other group classification." *Id.*

169. 913 F.2d 1417 (9th Cir. 1990).

170. *Id.* at 1425. The court held, "[B]ecause the evils of discriminatory peremptory challenges result from the misuse of peremptory challenges, regardless of which party exercises the challenges, the fifth amendment similarly limits a federal criminal defendant's peremptory challenges." *Id.* at 1423. In the same opinion, the court also rejected

Regardless of the disagreement among appellate courts, the Supreme Court has recognized that immutable characteristics do not compromise an individual's ability to serve as an impartial juror.¹⁷¹ The sexes, for example, bring to the courtroom ill-defined characteristics that *may* expand the spectrum of community perspectives. Likewise, individuals loosely linked by economic status, religious affiliation, or educational background, to name a few, *may* react similarly to any given set of facts. Nevertheless, recognition that a group *may* bring to the jury box a perspective differing from another group's viewpoint does not mean that either group is necessarily partial, nor does such an acknowledgment necessarily dictate how a group member will react to the evidence at hand. If a trial judge allowed to participate only those jurors lacking diverse experiences to shape their decision-making, a seemingly homogeneous mind-set, neither party would enjoy the right to the diversity stemming from a jury drawn from a cross section of the community. To the contrary, identical backgrounds and indistinguishable perspectives—all sought in the name of impartiality—would foster a group whose only superiority to judges would be its members' collective ability to recollect more facts adduced at trial. Only when the court pronounces as its goal *inclusiveness*—and not representativeness—can the judicial process earn the confidence of the community without succumbing to stereotypical notions of group biases.¹⁷²

the prosecutor's attempt to justify the removal of the only person in the venire who shared the same racial background as the defendant on the ground that he wanted more men on the jury. *Id.* at 1426.

Nevertheless, in *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1378-79 (9th Cir. 1990), the same court limited its application of *Batson* when it held that a corporation could not claim a violation of its equal protection right under *Batson* because a corporation was not a member of the removed class, blacks. Moreover, the court distinguished the government's duty to protect the rights of excluded venirepersons from the purported duty of the civil corporate defendant: "Unlike the U.S. government, a civil defendant has no inherent duty to safeguard the integrity of the judicial process . . ." *Id.* at 1380.

171. See *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975); see also Brest, *The Supreme Court 1975 Term: Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 10 (1976) (citation omitted):

Generalizations based on immutable personal traits such as race or sex are especially frustrating because we can do nothing to escape their operation [T]hey are often premised on the supposed correlation between the inherited characteristic and the undesirable voluntary behavior of those who possess the characteristic Because the behavior is voluntary, and hence the proper object of moral condemnation, individuals as to whom the generalization is inaccurate may justifiably feel that the decisionmaker has passed moral judgment on them.

172. In Hamilton County, Ohio, "where an individual cannot rent an X-rated video,

FOSTERING REPRESENTATIVENESS THROUGH INCLUSIVENESS

Expanding the Pool of Participants

The possibility of participation by a cross section of the community begins not with hindsight, appellate review of purportedly discriminatory tactics but with the first step toward bringing jurors to the courthouse—selection of the venire. Necessarily, a method attempting to encompass a spectrum of racial, cultural, and socioeconomic backgrounds, among others, improves the possibility that a venire will resemble the diversity of the community. Many states choose jurors from voter registration lists,¹⁷³

where film societies and the resident professional theater company live in fear of police censorship, and [where] Hustler magazine is not openly displayed in most stores," prosecutors brought suit against Cincinnati's Contemporary Art Center and its director for allegedly displaying obscene photographs taken by Robert Mapplethorpe. Kaufman, *Both Sides Battled for Cincinnati's Souls*, NAT'L L.J., Oct. 15, 1990, at 8, col. 1. The 172 photographs in the Mapplethorpe exhibit included depictions of a man's hand and forearm inserted in the rectum of another man, a bullwhip protruding from Mapplethorpe's anus, a man urinating into another's mouth, and a naked boy sitting next to a partially clothed girl whose genitals were showing. *Id.* The prosecution struck prospective jurors who had seen the exhibit, while the defense tried to remove those "inclined to put 'God's law' before 'man's law.'" *Id.* The final jury, consisting of four men and four women who were described as a college graduate and seven working class churchgoers, took only two hours to deliberate before acquitting the exhibitors. Masters, *Art Gallery Not Guilty of Obscenity: Cincinnati Jury Clears Mapplethorpe Exhibitors of All Charges*, Wash. Post, Oct. 6, 1990, at A1, col. 4. One Cincinnati attorney commented, "[The result] shows that human beings, even if drawn from a vacuum, . . . and who were about as homogenized a jury as you can get, that they can learn something. . . . They learned what art is." Wilkerson, *Obscenity Jurors Were Pulled 2 Ways*, N.Y. Times, Oct. 10, 1990, at A12, col. 4. A juror later stated, "I'm not an expert. I don't understand Picasso's art. But I assume the people who call it art know what they're talking about." Grundberg, *Critic's Notebook: Cincinnati Trial's Unanswered Question*, N.Y. Times, Oct. 18, 1990, at C17, col. 3. Such a reaction adds little to the analysis of community standards in obscenity cases and it calls into question whether juror impartiality necessarily means juror ignorance.

173. The kinds of source lists vary among the states. Thirteen states require use of at least voter registration lists. See ARK. STAT. ANN. § 16-32-103 (1987); FLA. STAT. § 40.01 (1988); LA. CODE CRIM. PROC. ANN. art. 404.1 (West Supp. 1990); MD. CTS. & JUD. PROC. CODE ANN. art. 404.1, § 8-104 (1989); MISS. CODE ANN. § 13-5-4, -8 (Supp. 1990); MONT. CODE ANN. § 3-15-301-402 (1989); N.H. REV. STAT. ANN. § 500-A:1, 3 (1983); R.I. GEN. LAWS § 9-9-1.1 (Supp. 1990); S.C. CODE ANN. § 14-7-140 (Law. Coop. 1977); S.D. CODIFIED LAWS ANN. § 16-13-4.1 (1987); UTAH CODE ANN. § 78-46-11 (Supp. 1990); WASH. REV. CODE ANN. § 2.36.060 (1988); WIS. STAT. ANN. § 756.01 (West 1981). Four states rely on driver's license and identification card lists. See ME. REV. STAT. ANN. tit. 14, § 1252-A (Supp. 1990) (also allowing qualified volunteers not appearing on either list); MICH. COMP. LAWS ANN. § 600.1304 (West Supp. 1990); MINN. STAT. ANN. § 593.37 (West Supp. 1991) (driver's license only); OKLA. STAT. tit. 38, § 18 (1990). Eight states combine voter registration and driver's license source lists. See CONN. GEN. STAT. §§ 51-221, -222a (Supp. 1990); ILL. ANN. STAT. ch. 78, para. 1 (Smith-Hurd Supp. 1990); KY. REV. STAT. ANN. § 29Ak-040 (Michie Supp. 1990); N.J. STAT. ANN. § 20A:70-4 (West Supp. 1990); N.M. STAT. ANN. § 38-5-3

and federal law recommends their use for federal jury selection,¹⁷⁴ but such a practice leaves nonvoters, particularly minorities and young people,¹⁷⁵ underrepresented in the selection

(Supp. 1990); N.C. GEN. STAT. § 9-2 (1986); OHIO REV. CODE ANN. § 2313.06 (Anderson Supp. 1989); TEX. GOV'T CODE ANN. § 62.001 (Vernon Supp. 1991) (combining the two sources only when a city is located in more than one county). Several states provide that jury commissioners may supplement the required source list with other lists to promote inclusion. *See, e.g.*, ALA. CODE § 12-16-57 (1986) (lists of taxpayers and utility customers); VA. CODE ANN. § 8.01-345 (Supp. 1990) (where feasible, lists of licensed drivers, county and city directories, telephone directories, and personal property tax rolls may supplement lists derived from voter registrants).

174. 28 U.S.C. § 1863(b)(2) (1988). Nevertheless, 28 U.S.C. § 1863 also allows the use of "some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title." *Id.* Section 1861 provides that "all citizens shall have the opportunity to be considered for jury service" and that "grand and petit juries [shall be] selected at random from a fair cross section of the community in the district or division wherein the court convenes." *Id.* § 1861. Section 1862 prohibits the exclusion of prospective jurors "on account of race, color, religion, sex, national origin, or economic status." *Id.* § 1862.

175. *See* U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1988 42, 46 (compared to 74% of persons in 45-to-54 age group reported to be registered to vote, only 48% in 18-to-24 age group section reported to be registered).

In 1973, the Supreme Court dismissed, for lack of a substantial federal question, a challenge to jury selection procedures that led to the disproportionate underrepresentation of young adults between the ages of 18 and 30. *White v. Georgia*, 414 U.S. 886, *dismissing appeal from* 230 Ga. 327, 196 S.E.2d 849 (1973). The petitioner, a 24-year-old white male, also challenged procedures leading to the underrepresentation of blacks and women. *Id.* at 887 (Brennan, J., dissenting). The Court, however, summarily dismissed these assertions as well. *Id.* at 886. In dissent, Justices Brennan, Douglas, and Marshall linked young adults to blacks and women, whom the petitioner also claimed were substantially underrepresented in the venire. *See id.* at 889-90 (Brennan, J., dissenting). Without explaining their reasoning, they argued that young adults constitute a "large, identifiable segment of the community." *Id.* at 890 (Brennan, J., dissenting). Although adults from ages 18 to 30 composed 26.2% of the eligible jurors of Coweta County, Georgia, only 1.25% of the 400 names on that county's grand jury list were under 30. *Id.* at 887 (Brennan, J., dissenting).

At the height of anti-Vietnam sentiment in 1970, the United States Court of Appeals for the First Circuit held that young adults do have a sufficiently different outlook such that attorneys should not without justification exclude them from juries. *United States v. Butera*, 420 F.2d 564, 570 (1st Cir. 1970). Nevertheless, the First Circuit reversed itself 15 years later in *Barber v. Ponte*, 772 F.2d 982, 999 (1st Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1050 (1986) ("[I]f the age classification is adopted, surely blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications will be entitled to similar treatment.").

Within a specific age range, experiences and values may be so divergent that no commonality marks the group compared to ages just outside the group. For example, within a group of 18- to 34-year-olds, the attitudes of those bordering each age limit may be more similar to their closer respective limit than are the attitudes of those within the purported group itself. In *Barber*, the First Circuit took judicial notice that 18- to 34-year-olds exhibit "meaningful contrasts in such social indicators as their marital and divorce rates, school enrollment and educational attainment, economic status, employment

process.¹⁷⁶ To alleviate this problem, other sources should supplement voter lists, including vehicle registration lists, local taxation lists, federal income taxation lists, public assistance lists, telephone listings, and county and city directories.¹⁷⁷ If the clerk of

rate, criminality, . . . and participation in the political processes." *Id.* at 998-99 (footnotes omitted); see also *Willis v. Kemp*, 838 F.2d 1510, 1517 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989) (holding that petitioner failed to submit any evidence that the purported group aged "18 to 29 did not share[] any common attribute, other than their age"); *United States v. Cresta*, 825 F.2d 538, 545 (1st Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988) (citing *Barber* approvingly and holding that *Batson v. Kentucky*, 476 U.S. 79 (1986), did not alter analysis of cognizability). Furthermore, unlike immutable race- and gender-based groups, professed age-based groups are fluid and amorphous; no member is bound permanently within a category, nor is he invariably subject to nonmembers' notions of group bias. More practically, the more narrowly one defines the age group in an attempt to establish group commonality, the more one weaves a tangled web of categories. See, e.g., *Ford v. Commonwealth*, 665 S.W.2d 304, 308 (Ky. 1983), *cert. denied*, 469 U.S. 984 (1984) ("The terminal ages of 'young adults' defy definition, and we know of no end to the maze that could be created by classifying jurors as young adults, middle-aged adults, elderly adults, and on and on.").

For a comprehensive examination of young adults as a cognizable group, see Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045 (1978). Zeigler argues that the knowledge persons of similar age acquire during childhood, those persons' parallel developmental patterns, and societal segregation by age in the areas of employment, education, and residency collectively shape perspectives unique to age strata. *Id.* at 1075-76. Moreover, after comparing views among four age groups (18-30, 31-45, 46-60, and 61-75) on such issues as presumed innocence, the defendant's refusal to testify, and the guilt of one charged with several offenses, Zeigler concludes that young adults tend to approach the criminal process less cynically than their elder counterparts. *Id.* at 1078-83.

176. See *United States v. Armsbury*, 408 F. Supp. 1130, 1140 (D. Or. 1976) ("The voting list is not the end sought but only the means used to ensure that all cognizable groups within the populace are represented on juries. The voting list cannot be adequate if some groups are significantly underrepresented, regardless of the cause."). Combining driver's license and voter registration lists diminishes the underrepresentation resulting from the exclusive use of either source. See Logan & Cole, *Reducing Bias in a Jury Source List by Combining Voters and Drivers*, 67 JUDICATURE 87, 94 (1983). In Connecticut, a state having a higher percentage of licensed drivers and registered voters than most states, 98% of those persons Logan and Cole randomly telephoned stated that they were either licensed drivers, registered voters, or both; separately, 79% of the sample consisted of registered voters, and 91% consisted of licensed drivers. *Id.* at 89-90. Over 99% of Connecticut households have telephones. *Id.* at 89.

Some critics have proposed the affirmative addition of minorities in the venire if their representation within the original panel is disproportionately lower than their community proportion. See *supra* note 148. Such a scheme, however, fails to address what should transpire when a venire contains a disproportionate number of minorities compared to their percentage in the community. Presumably, under the belief that an immutable characteristic yields a certain perspective, those critics would have to concede that no group can be overrepresented. Consequently, the excess would be removed solely because of group affiliation.

177. See, e.g., COLO. REV. STAT. § 13-71-107 (Supp. 1990) (voter registration lists and, as the state supreme court so designates, licensed driver lists and other lists of persons living in the counties); N.Y. JUD. LAW § 506 (Consol. 1983) (voter lists, utility subscribers,

each circuit court annually revises this compilation, only those who did not vote in the past year, do not drive, own neither taxable personal nor real property, do not receive any public assistance but also do not work—or if they work do not pay taxes, do not have a telephone in their name, and are not included in a directory—will not be called to serve on a jury.¹⁷⁸

Protecting the Interests of All Participants in the Process

In *Batson v. Kentucky*,¹⁷⁹ Justice Powell noted that the harm caused by discriminatory challenges extends beyond the defendant himself to the prospective juror and to the community.¹⁸⁰ Although the discrimination in *Batson* was based on race, a classification traditionally examined with strict scrutiny, courts should bar less invidious forms of discrimination affecting other participants in the criminal process.¹⁸¹ As between exclusions based upon either race or gender, for example, some specific explanation, unrelated to group bias, should support the exclusion of either.¹⁸²

licensed drivers, registered owners of motor vehicles, state and local taxpayers, and qualified volunteers); 42 PA. CONS. STAT. ANN. § 4521 (West Supp. 1990) (voter lists, which may be augmented by telephone and city directories, local taxpayer lists, public assistance recipients, school census lists, and qualified volunteers); VA. CODE ANN. § 8.01-345 (Supp. 1990) (voter lists supplemented by a list of persons issued driver's licenses, city or county directories, telephone books, tax rolls, and other lists approved by the chief judge of the circuit court).

178. If such potential jurors do exist, they could be perceived as adding an unparalleled perspective to community diversity; more likely is the prospect that their social isolation will add nothing to the fair cross section concept.

A shortcoming of this comprehensive compilation rests in the inherent inability to select 18-year-olds when they are first eligible to serve. Presumably, some individuals of that age would appear on lists of licensed drivers, but the person responsible for compiling the source list would have the additional responsibilities of removing persons who have not reached majority and of adding those who became eligible to serve in the interval between annual revision of the source list.

179. 476 U.S. 79 (1985).

180. *Id.* at 87.

181. In *Carter v. Jury Commission*, 396 U.S. 320 (1970), the Court did not go so far as to state that jury service is a fundamental right, but the Court did hold denial of the opportunity on racial grounds is no less invidious than denial of the right to vote. *Id.* at 330 (footnote omitted).

182. *See, e.g., Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (statutory exemption of women from jury service, which serves to exclude their participation, had rational basis in 1961 because the "woman is still regarded as the center of home and family life"); *State v. Hall*, 187 So. 2d 861, 863 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966) ("The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them . . . from the filth, obscenity, and noxious

William Blackstone wrote that the peremptory challenge will more likely leave the defendant with "a good opinion of his jury, the want of which might totally disconcert him."¹⁸³ Although exalting the peremptory challenge as a means of assembling an impartial jury,¹⁸⁴ the Supreme Court has overlooked the prospective juror's interest in not being arbitrarily removed during the selection process, except in the case of race-based challenges.¹⁸⁵ The Court has failed to acknowledge that, on principle, discrimination against anyone has no standing in a courtroom. Preconceived notions of racial bias are more invidious than stereotypes based upon mutable characteristics; the court impliedly tells the struck juror, "You are not as competent to serve as someone of another race," and the arbitrary removal suggests to the group itself that its perspectives cannot contribute to the community's voice. Nonetheless, *any* juror surviving a challenge for cause should not be denied the opportunity to participate in the judicial process merely because a lawyer's suspicion, shaped not by voir dire but by his own intuition, prompts an irrational categorization of the juror.¹⁸⁶ Ironically, the protection of the prospective juror lies in the peremptory challenge itself.

The mere license to remove a venireperson without explanation does not necessarily indicate that the peremptory challenge is arbitrary and capricious. Voir dire provides not only a means of discovering actual or implied bias, but also a firmer basis upon which the parties may exercise their peremptory challenges rationally.¹⁸⁷

atmosphere that so often pervades a courtroom during a jury trial.").

For a summary of conflicting results regarding female jurors' predispositions, see Sagawa, *Batson v. Kentucky: Will It Keep Women on the Jury?*, 3 BERKELEY WOMEN'S L.J. 14, 30-34 (1987-88).

183. 4 W. BLACKSTONE, *supra* note 17, at 353.

184. *See supra* note 31.

185. *See supra* note 36 and accompanying text.

186. Last Term, three white Howard Beach defendants presented this issue before the Supreme Court. Contesting the trial judge's refusal to allow the defense to strike black venirepersons peremptorily (the victims were black), the defendants petitioned the Court, asking it "to strike the proper balance between the state constitutional right of prospective jurors and the petitioners' Federal constitutional right to a fair trial." *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert. denied*, 111 S. Ct. 77 (1990).

In holding that the defense may not discriminate in jury selection on the basis of race under the New York Constitution, *id.* at 650-58, 554 N.E.2d at 1241-46, 555 N.Y.S.2d at 653-58, the court did not expressly balance the jurors' rights against the defendants' right to the appearance of impartiality.

187. Several state courts have noted that voir dire gives counsel a "rational basis" for exercising peremptory challenges. *See, e.g.,* *People v. Furman*, 158 Mich. App. 302, 322, 404 N.W.2d 246, 255 (1987); *Odom v. State*, 355 So. 2d 1381, 1383 (Miss. 1978); *cf. Murry v. State*, 713 P.2d 202, 211 (Wyo. 1986) ("Before a peremptory challenge is made there should be some rational basis to believe that the challenged juror's replacement would be more suitable.").

and intelligently.¹⁸⁸ A party who unsuccessfully challenges a juror for cause nonetheless may have a specific, legitimate reason for seeking a juror's removal.¹⁸⁹ Given a predetermined number of peremptories, a conscientious litigant will try to learn enough about the venirepersons in order to discriminate rationally—not based on stereotypes he brings into the courtroom. Voir dire should provide the basis of neutral explanations unrelated to stereotypical notions of group bias. For example, if defense counsel moves to strike a low wage earner, only because the attorney believes blue collar jurors favor personal injury plaintiffs,¹⁹⁰ the trial judge should refuse to remove him. If plaintiff's counsel moves to strike a scrawny man only because he looks less charitable than a portly juror, the trial judge should refuse to remove him.¹⁹¹ A lawyer's hunch should not hinder a juror's right

188. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring) (voir dire "facilitate[s] intelligent exercise of peremptory challenges and . . . help[s] uncover factors that would dictate disqualification for cause"); *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965) (because voir dire "tends to be extensive and probing, [it] operate[s] as a predicate for the exercise of peremptories"); *Booker v. Jabe*, 775 F.2d 762, 766 (6th Cir. 1985) ("peremptory challenge . . . supplement[s] the more stringently defined challenge for cause"), *aff'd*, 801 F.2d 871, *vacated sub nom.* *Michigan v. Booker*, 478 U.S. 1001 (1986), *cert. denied*, 479 U.S. 1046 (1987); *United States v. Whitt*, 718 F.2d 1494, 1497 (10th Cir. 1983) ("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges."); *People v. Wheeler*, 22 Cal. 3d 258, 274, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 901 (1978) (merely because no reason need be given does not mean that no reason exists; counsel will not "squander his peremptories . . . simply because he has the right to do so").

189. Ultimately the party's reason may be a desire to win the case, but that rationale fails to support a finding that the juror cannot deliberate impartially.

190. See B. COLSON, L. BLUE, & J. SAGINAW, *JURY SELECTION: STRATEGY AND SCIENCE* §§ 7.06-07 (1986) (low income jurors empathize with civil plaintiffs, whereas wealthy jurors favor civil defendants); R. WENKE, *THE ART OF SELECTING A JURY* 64, 71 (2d ed. 1988) (occupation ranked as "extremely important" in evaluating juror; civil plaintiff should avoid owners of small businesses and the self-employed). On the other hand,

[W]hat the prospective juror *does* for his living may not reveal *how* he really feels Some of the great humanitarians are huge men who have struggled up a little step at a time, while others, and there have been many of these, were born with the proverbial silver spoon. The mere fact that a man is in the business world and is financially fortunate, does not foreclose the possibility that his heart is elsewhere, perhaps even with an injured plaintiff. And contrariwise, simply because the prospective juror's job is aligned with labor does not guarantee that his personal goals and experiences are not consistent and sympathetic with the business world.

Spence, *The Dynamics of Identification in Jury Selection or How You Lost Your Last Case Without Even Knowing It: A New Approach to Voir Dire Examination*, in *JURY SELECTION TECHNIQUES* 60, 68 (G. Cooper ed. 1981) (National College for Criminal Defense).

191. As between two men, one gaunt and the other obese, mere weight should not provide a rational basis to exclude either, Julius Caesar's paranoia to the contrary:

Let me have men about me that are fat

to be considered as impartial as his peers.¹⁹² When an "arbitrary and capricious right" meets equal protection, the latter must prevail.¹⁹³

To balance the interest of the prospective juror with the parties' interest in an impartial jury, the judiciary or legislature should replace peremptory challenges with a "neutral explanation" test as articulated in *Batson*.¹⁹⁴ Under this plan, each side may exercise as many challenges for cause as are warranted by the responses evoked on voir dire. After challenges for cause, the parties draft separate lists of names,¹⁹⁵ which designate in the order of each party's preference those venirepersons who should sit on the jury. Regardless of the order presented, those venirepersons appearing on both lists will sit on the petit jury.¹⁹⁶

Sleek-headed men, and such as sleep o' nights.
Yond Cassius has a lean and hungry look;
He thinks too much; such men are dangerous . . .
Would he were fatter!

W. SHAKESPEARE, JULIUS CAESAR, I.ii. 199-202 (L. Wright ed. 1959) (1623). For more recent stereotypes based on weight, see F. LANE, *supra* note 163, §§ 9.45, 9.47 (endomorphs are more generous to plaintiffs than are "lean, underweight, thin-lipped delicate type[s]"); T. SANNITO & P. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS § 2.27 (1985) ("sympathetic indulger," preferable to plaintiffs, is "somewhat overweight"); V. STARR & M. MCCORMICK, JURY SELECTION § 12.2.2 (1985) (attorneys should be aware of stereotypical traits accompanying somatotypes); W. WAGNER, ART OF ADVOCACY: JURY SELECTION § 1.04[3][g] (1990) (ectomorphs are "very tight about money in damage awards").

192. See, e.g., *People v. Green*, 561 N.Y.S.2d 130, 132 (1990) (hearing impaired juror is not presumptively unqualified; person exercising challenge must at least have a rational basis).

193. The intent here is neither to elevate acts of discrimination historically less invidious than racial discrimination nor to trivialize race-based discrimination. See Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 182 (1989) (issue is not whether other forms of discrimination are as "bad" as racial discrimination but rather whether discrimination is "bad" in principle).

Although in his dissent in *Batson* Chief Justice Burger vehemently objected to any compromise of the peremptory challenge, he aptly defined the irreconcilable interests at stake: "[U]nadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum 'rationality' in government actions has no application to 'an arbitrary and capricious right'. . . ." *Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).

194. See *supra* note 59 and accompanying text.

195. The number of names on the list should correspond to the number of jurors who will sit on the jury.

196. Tracey Altman proposed this method, called "affirmative selection," in Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 806 (1986), and Hans Zeisel endorsed the method in Zeisel, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165 (1987).

Their inclusion on both lists indicates that both parties have confidence in their impartiality.

The remaining jurors, appearing only once between the two lists, are subject to removal if, to the court's satisfaction, the moving party provides a neutral explanation justifying their dismissal. To monitor the use of such explanations as a pretext for discriminatory challenges,¹⁹⁷ the trial judge should evaluate similarities and differences between challenged and unchallenged venirepersons to determine whether the explanation given comports with a specific bias not shared by other panel members.¹⁹⁸ The court should conduct these challenges alternately, permitting each side as many strikes as a system of peremptory challenges would have allowed. If both parties exhaust their challenges and the number of eligible jurors still exceeds the number of seats remaining on the petit jury, the court should randomly select from among the remaining venirepersons the number needed to fill the petit jury. By this approach, the "neutral explanation" test will provide all prospective jurors an equal opportunity to sit as jurors.¹⁹⁹ Subject only to random selection, no venireperson is impliedly told, "You have demonstrated an inability to be fair."

When a court system couples this procedure with a more comprehensive means of obtaining jurors from a range of com-

197. See *Batson*, 476 U.S. at 106 (Marshall, J., concurring) ("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.").

198. The trial judge should be wary of counsels' attempts to isolate and alienate venirepersons on voir dire under the pretense of eliciting the basis for challenges for cause. Furthermore, by asking probing questions, counsel should not reap the benefit of incurring a prospective juror's resentment, only to justify removal based upon what counsel precipitated.

199. The most conspicuous difference between the approach espoused in this Note and Ms. Altman's recommendation lies in the procedure following the judge's noting any overlap between the two lists of names. Whereas with affirmative selection the court fills vacant seats by taking, alternately and in descending order, the names on the two lists until he has a full jury, see Note, *supra* note 196, at 806, this Note proposes that a party may not remove a venireperson based solely upon the intuition that the prospective juror will be partial to the other side. Furthermore, if Ms. Altman has assumed correctly that each side will be able to choose those jurors it perceives as most sympathetic to its case, the resulting jury will comprise three groups: those sought by both sides, those purportedly partial to the prosecution (or plaintiff), and those seemingly sympathetic to the defendant. Juror attitudes will not be as centrist as the result produced traditionally when each side peremptorily strikes those venirepersons on each end of the spectrum; on the contrary, affirmative selection may lead to a jury comprising radically different and idiosyncratic viewpoints. Collectively the jury would be impartial, but in the absence of the moderating voice between the two extremes, hung juries may be the inefficient product. See *id.* at 808-10.

munity backgrounds, a more inclusive, and potentially more representative, body will debate the merits of a case. If the parties' preferences overlap, they gain the satisfaction of knowing that purportedly indifferent jurors are seated. Unique to this approach is the protection afforded prospective jurors, who would otherwise have only the safeguard of a self-interested party to preserve his right to participate.²⁰⁰

CONCLUSION

An archaic device which for centuries has severed from jury panels divergent voices in the community, the peremptory challenge contravenes the goal of assembling a jury comprising a spectrum of community experiences and perspectives. The practice perpetuates notions of group bias in an unlikely place, a court of law. It inappropriately places the parties' desire to manipulate the outcome over the venirepersons' right not to be judged arbitrarily. By placing greater emphasis on the selection procedures that precede the parties' attempts to manipulate the jury and by curbing the parties' attempt to discriminate against any qualified juror, the judiciary bolsters the integrity of the trial process in the eyes of the community, allows the parties to gain some sense of mutual control over the selection process, and protects prospective jurors capable of deliberating impartially. Only in this manner can the judicial process comply with constitutional mandates of an impartial jury and equal protection under the law.

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200. To the extent that this method allows the choosing of jurors apparently compatible with both parties, those not chosen by both parties are excluded without a rational basis. Under this approach, the parties' mutual contentment derived from selecting, rather than excluding, prospective jurors therefore outweighs the interest of those jurors who still may serve on the jury.