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A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection

Donna J. Meyer

A NEW PEREMPTORY INCLUSION TO INCREASE REPRESENTATIVENESS AND IMPARTIALITY IN JURY SELECTION

I. INTRODUCTION

"The jury is one of our most democratic institutions."[1] Trial by jury allows for the popular participation of society in democratic decision-making,[2] and guarantees a criminal defendant protection from arbitrary government power.[3] It does so by including the "collective sentiments and conscience of the community" into the determination of guilt or innocence.[4] These interests are constitutionally based in the Sixth Amendment which reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[5]

The guarantee of a public trial by an impartial jury is also necessary to secure society's respect for and the legitimacy of the criminal justice system.[6] But this legitimacy will only be sustained if the jury satisfies society's and the defendant's expectations of an impartial jury.[7] Impartiality is defined as group representativeness,[8]

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1. HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 3 (1993).

2. *See* Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 512 (1986) (discussing the value of jury participation in criminal trials).

3. Katherine Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 826 (1989) (citing Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

4. FUKURAI, *supra* note 1, at 3.

5. U.S. CONST. amend. VI.

6. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 32 (1977) (noting that underrepresentation of minorities on juries contributes to mistrust of the criminal system by minorities).

7. *See* Massaro, *supra* note 2, at 544 (discussing how the parties' ideas of the jury's impartiality impact upon the legitimacy of the jury itself).

8. The Court adopted the definition of an impartial jury as "a body truly representa-

and the visual image of the jury is perhaps the most significant indication of representativeness to both society and the defendant.[9] To both parties, representativeness is violated by the exclusion of distinct groups of persons from the jury solely on the basis of their group membership.[10] However, the current method to achieve representativeness presents a conflict between two interests.

For society, representativeness is achieved by the opportunity of all citizens to participate as jurors, without being excluded because of discriminatory jury selection practices.[11] For the criminal defendant, representativeness is a more inclusive concept that suggests the affirmative presence of his peers on the jury.[12] Both expectations can be almost completely fulfilled by the random selection of prospective jurors from extensive source lists of eligible jurors, provided that groups of citizens are not intentionally excluded from the lists.[13]

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tive of the community," in Smith v. Texas, 311 U.S. 128, 130 (1940). The legitimacy of the jury depends on the representativeness of the jurors to truly speak on behalf of the community and all of its diverse groups. VAN DYKE, *supra* note 6, at 224.

9. *See* Massaro, *supra* note 2, at 504 ("What a jury 'looks like' to the community will affect the community's respect for the verdict."); *see also* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975) ("'The appearance of impartiality is an essential manifestation of its reality.'") (quoting Dennis v. United States, 339 U.S. 162, 182 (1950)) (Frankfurter, J., dissenting). The Court adopted this concept in Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986) (stating that "'justice must satisfy the appearance of justice.'") (quoting *In re* Murchison, 349 U.S. 133, 136 (1955) (citations omitted)).

10. "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." Taylor v. Louisiana, 419 U.S. 522, 530 (1975); *see also* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (discussing the unconstitutionality of excluding a juror on account of his race); Massaro, *supra* note 2, at 556 (noting that the contents of conventional textbooks on the legal system and trial by jury can provide an indication of the popular notion of jury impartiality and that today's textbooks teach students to expect women and minorities on juries). Another indication of the popular opinion is the treatment of juries in American literature. *Id.* at 557-59 (suggesting that writers perceive current jury practices to be unfair to the "different" defendant because of the control of the jury by the majority).

11. FUKURAI, *supra* note 1, at 4-5.

12. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1433 (1994) (O'Connor, J., concurring) (suggesting that unrestricted use of peremptory challenges is necessary for the criminal defendant to ensure peer representation on the jury).

The definition of peer may simply be a member of the same race or ethnic group as the defendant, or it may be something more. *See infra* notes 72-77 and accompanying text (discussing definition of peer representation). While the majority of criminal defendants are members of a racial minority, minorities are consistently underrepresented on juries in both state and federal courts. *See* FUKURAI, *supra* note 1, at 3-4 (citing numerous studies supporting the proposition of minority underrepresentation).

13. *See* FUKURAI, *supra* note 1, at 13 (noting that juries have not been representative

However, modern jury selection practices also allow for the exercise of challenges by the prosecution and defense in selecting an impartial jury.[14] Party challenges in the jury system provide for the removal of randomly selected citizens who cannot be impartial due to bias or prejudice against a party to the case.[15] One type of challenge, the peremptory challenge, allows the removal of prospective jurors without reason,[16] and is usually based on a party's intuitive judgement that the person will be partial to the opposing side.[17]

The peremptory challenge in criminal trials has long been recognized primarily as a device to protect defendants.[18] The peremptory challenge originally was designed to give the criminal defendant partial control over jury selection to secure a jury to his "liking"[19] and, thus, to legitimize the jury's verdict. This idea of

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in the past due to biased selection procedures); *see also infra* notes 83-86 and accompanying text (discussing random selection of jurors).

14. *See* Massaro, *supra* note 2, at 546-48 (suggesting that jury selection processes yield an impartial jury, but not one that is a true cross-section of the community); *see also infra* text accompanying note 89-101 (discussing party selection component of jury selection).

15. *See* VAN DYKE, *supra* note 6, at 143 (noting that a person who has preconceived ideas about a defendant cannot be an impartial judge); *see also infra* text accompanying notes 89-108 (discussing the exercise of party challenges to achieve an impartial jury).

"Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides, . . . thereby 'assuring the selection of a qualified and *unbiased jury*.'" Holland v. Illinois, 493 U.S. 474, 484 (1990) (emphasis added) (quoting Batson v. Kentucky, 476 U.S. 79, 91 (1986)).

16. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated . . . ." Swain v. Alabama, 380 U.S. 202, 220 (1965) *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986); *see also Swain*, 380 U.S. at 212-13 (discussing generally the history of the arbitrary and capricious nature of the peremptory challenge).

17. "Indeed, often a reason for [a challenge] cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's 'bare looks and gestures.' . . . . That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous." J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1431 (1994) (O'Connor, J., concurring) (footnote omitted); *see also* Massaro, *supra* note 2, at 520 (stating that peremptory challenges are designed to eliminate undesirable jurors).

18. Swain v. Alabama, 380 U.S. 202, 242 (1965) *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986) (Goldberg, J., dissenting). "[T]he [peremptory] challenge is 'one of the most important of the rights secured to the accused.'" *Id.* at 219 (quoting Pointer v. U.S., 151 U.S. 396, 408 (1894)).

19. The concept of the defendant "liking" his or her jury recognizes the extremely personal interest at stake and makes the criminal trial appear fair by giving effect to the defendant's reaction. Goldwasser, *supra* note 3, at 829; *see also* Babcock, *supra* note 9,

creating a jury to the defendant's "liking" has persisted in Supreme Court doctrine, which has described an impartial jury as a jury of the defendant's peers or equals.[20] The Court recognized over a century ago that "securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial."[21] Thus, by allowing the defendant to shape the composition of the jury to reflect minority perspectives which may be absent from the majority population, the peremptory challenge historically has been the primary method for the criminal defendant to achieve impartiality.[22]

However, this tradition of arbitrary peremptory challenges conflicts with society's goals of representativeness by allowing prospective jurors to be removed based on their group membership. The Court has recognized that the peremptory challenge empowers "those to discriminate who are of a mind to discriminate."[23] The harm caused by such a discriminatory jury selection practice is greater than the attached stigma to the excluded group; discriminatory practices undermine the public's confidence in the legitimacy of the jury system.[24] As a result, in *Batson v. Kentucky*,[25] the Court announced a prohibition against the exercise of peremptory

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at 552 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES 353 (William Draper Lewis ed., 1897), for the origin of the concept of "liking"). Blackstone wrote: "How necessary it is that a prisoner (when put to defend his life) should have a good opinion of the jury, the want of which might totally disconcert him." *Id.* at 552 n.26.

20. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine . . . ." Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

21. Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring).

22. *See* Goldwasser, *supra* note 3, at 827 (noting that peremptory challenges are a way for defendants to protect themselves from biased juries).

23. Batson v. Kentucky, 476 U.S. 79, 96 (1986) (citing Avery v. Georgia, 345 U.S. 559, 562 (1953)).

24. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. The *Batson* Court found that public respect for the system of justice and the rule of law will be strengthened by the prohibition of racially discriminatory jury selection practices. *Id.* at 99.

The Court reaffirmed this principle in J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994) (extending the prohibition of discriminatory peremptory challenges to include gender). Justice Blackmun stated for the majority: "The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *Id.* at 1427.

25. 476 U.S. 79 (1986).

challenges for the purpose of excluding prospective jurors because of their race.[26]

While the *Batson* limitation on peremptory challenges is a necessary step towards eliminating discrimination in the courtroom, the restriction also hinders the criminal defendant's ability to shape the composition of the jury in order to achieve an impartial and representative jury. Ergo, the peremptory challenge has become a double-edged sword to minority defendants.[27] As the Court noted in *Batson*, the peremptory challenge once provided a cover for the State to engage in the intentional and systematic exclusion of minorities from the jury.[28] The Court's decision in *Batson* helps to eliminate the discrimination against defendants by prohibiting the exclusion of jurors because of their shared race, but also prevents the defendant from manipulating the composition of the jury pool to place minority jurors on the petit jury. "In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death."[29]

To protect the guarantee of a fair trial and impartial jury under the Sixth Amendment, the criminal defendant needs a mechanism to include minority perspectives on the jury which will achieve a representative panel. Many critics argue that the solution is to either eliminate the peremptory challenge entirely,[30] or to

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26. While *Batson* prohibited the State's use of race-based peremptory challenges, the same prohibition was extended to the defense's exercise of peremptory challenges in Georgia v. McCollum, 112 S. Ct. 2348 (1992) (holding that the defendant's racially discriminatory exercise of peremptory challenges violated the prospective juror's right to equal protection of the laws under the Fourteenth Amendment). Recently, this prohibition has also been extended to gender-based peremptory challenges. *J.E.B.*, 114 S. Ct. at 1419, 1430.

27. *See* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1828-29 (1993) (discussing whether the prohibition of race-based peremptory challenges benefits or hinders defendants in assuring a nonbiased jury). "[T]he unfettered discretion of the peremptory challenge can be used either to conceal or to combat racism." *Id.* at 1828 (citing *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring)). The decisions following *Batson* that curtailed the defense's use of peremptory challenges removed much of the benefit the challenge provided in the fight against racism. *See id.* at 1828-29.

28. *See* Batson v. Kentucky, 476 U.S. 79, 84-85 (1986) (discussing the rationale behind early efforts of the court to eradicate discriminatory peremptory challenges).

29. *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring).

30. *See, e.g.*, *Batson*, 476 U.S. at 102-03, 107-08 (Marshall, J., concurring) (arguing that the peremptory challenge must be eliminated entirely to end discrimination in jury selection). *See infra* note 198 and accompanying text (discussing alternatives to a random jury selection method).

achieve greater representativeness by affirmative selection of jurors by the parties[31] or by judicial enforcement of a system of racial quotas.[32] While all of these proposals disregard the important role of the peremptory challenge in the current system, only the latter two recognize the need for an inclusionary approach to jury selection.

This Note will propose a new peremptory inclusion which provides a mechanism for the criminal defendant to create a more representative jury without violating any prospective juror's right against discriminatory exclusion. Part II reviews the Sixth Amendment, the jury system in America, and the current method of jury selection. Part III discusses the source and harm of racial discrimination in the jury system, the Court's response, and the consequences to the current jury system of the Court's action. Part IV analyzes the conflicting interests of prospective jurors and the criminal defendant in attempting to remedy discriminatory practices. Finally, this Note will suggest a new method of jury selection, the peremptory inclusion, which will balance these interests and allow the criminal defendant to create a more impartial and representative jury.

II. THE JURY SYSTEM

The American colonists considered the guarantee of an independent and impartial jury to be a fundamental right.[33] In declaring independence from England, the colonists listed the deprivation of trial by jury among their grievances against the King.[34]

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31. *See* Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 802-12 (1986) (proposing a system of affirmative selection that allows the parties to seat rather than exclude jurors).

32. *See* Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1691-708 (1985) (proposing a system of racial quotas in jury selection); *see also* Diane Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80, 82-95 (1973) (stating that current jury selection practices result in unrepresentative juries of mostly white, middle-class citizens).

33. VAN DYKE, *supra* note 6, at 6. The Court recognized in Duncan v. Louisiana, 391 U.S. 145, 149 (1968), that "trial by jury in criminal cases is fundamental to the American scheme of justice." *See generally*, WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (1971) (discussing the origins of the American jury).

34. VAN DYKE, *supra* note 6, at 6. The colonists believed that only a trial and verdict by laypersons would prevent this abuse of government power. *See* Massaro, *supra* note 2, at 508 (discussing the historical importance in America of the right to trial by jury). This popular notion of justice culminated in the adoption of the Sixth Amendment to the Constitution. *Id.* The supporters of the new Constitution referred to the jury as "a valuable

Subsequently, in the drafting of the original Constitution in 1787, the colonists provided for the guarantee of trial by jury for all crimes, except impeachment.[35] This guarantee is now protected by the Sixth Amendment to the Bill of Rights which provides in part that the accused shall have the right to a "trial, by an impartial jury of the State and district wherein the crime shall have been committed."[36]

A. The Sixth Amendment

The constitutional guarantees of the Sixth Amendment belong only to the criminal defendant.[37] The Court emphasized the defendant-centered interest of the Sixth Amendment in the following passage:

> The record of English and colonial jurisprudence outdating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court.[38]

This protection is necessary owing to the unique plight of the criminal defendant in the justice system and the possibility of conviction and loss of liberty[39] as a result of the jury's verdict.

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safeguard to liberty" and "the palladium of free government." *Id.* at 508 n.44 (citing THE FEDERALIST No. 83, at 521-22 (Alexander Hamilton) (B. Wright ed., 1961)).

35. VAN DYKE, *supra* note 6, at 7.

36. U.S. CONST. amend. VI. The original constitutional provision provided for trial by jury in the State where the crime had been committed. VAN DYKE, *supra* note 6, at 7. This provision caused much concern during the ratification debates because of the broad vicinage provision for state-wide juror selection. *Id.* The Sixth Amendment addressed this concern by adding "district" to the vicinage. The term district, opposed to State, preserved the colonists' commitment to local trials and juries. *Id.*

37. *See* Massaro, *supra* note 2, at 515 (stating that the right to a jury trial was, above all else, the privilege of the accused).

38. *Id.* at 516 n.91 (citing Patton v. United States, 281 U.S. 276, 296-97 (1930)).

39. The Court recognized the gravity of the consequences for criminal defendants in asserting that, on appeal, the failure of the prosecutor to give a race-neutral explanation after a prima facie showing of purposeful discrimination requires reversal of petitioner's conviction. *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986); *see also* Whitus v. Georgia, 385 U.S. 545, 549-50 (1967) (reversing the conviction of black defendants when the prosecution could not offer a race-neutral explanation in response to a prima facie show-

Because the liberty interest at stake is so significant, the Court has long recognized the importance of the jury in the American system of justice: "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"[40]

The Sixth Amendment ideally envisions a jury as a microcosm of the community,[41] but the Court has never interpreted this to give a defendant the right to a jury "composed in whole or in part of persons of his own race."[42] However, while a defendant is only guaranteed a fair possibility of a representative cross-section of the community,[43] he does have the right to a jury selected by nondiscriminatory criteria.[44] According to one Justice, "[b]y compromising the representative quality of the jury, discriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.'"[45] To fully understand the

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ing of discrimination); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (reversing the conviction of a Hispanic defendant on the grounds that there had not been a Hispanic juror in Texas, a prima facie showing of systematic exclusion); Patton v. Mississippi, 332 U.S. 463, 469 (1947) (reversing the conviction of a black defendant because there had been no black jurors in the jurisdiction for 30 years and the prosecutor could not offer a sufficient race-neutral explanation).

40. McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1879)).

41. *See* Holland v. Illinois, 493 U.S. 474, 494 (1990) (Marshall, J. dissenting).

42. *Batson*, 476 U.S. at 85 (citing *Strauder*, 100 U.S. at 305). *See also Hernandez*, 347 U.S. at 482 (stating that a criminal defendant is not entitled to jurors of his or her ethnic group, but is entitled to be tried by jurors from which members of ethnic groups are not systematically excluded); Cassell v. Texas, 339 U.S. 282, 286-87 (1950) (stating that the Constitution does not require a proportional representation of races on a jury, but only a fair jury, selected without regard to race); Akins v. Texas, 325 U.S. 398, 403 (1945) (holding that the mere fact that there was only one grand jury member of the defendant's race is not proof, in and of itself, of discrimination); Martin v. Texas, 200 U.S. 316, 321 (1906) (holding that the allegation of discrimination by the criminal defendant was not established simply by proving that no one of his race was on the grand or petit juries); Neal v. Delaware, 103 U.S. 370, 394 (1881) (stating that the Constitution does not require an ethnically mixed jury, simply one selected without discrimination). The Court in Holland v. Illinois, 493 U.S. 474, 512 (1990) noted that a requirement of representativeness on the basis of race would "distort the jury's reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level, or economic class."

43. Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (citing Peters v. Kiff, 407 U.S. 493, 500 (1972)).

44. Batson v. Kentucky, 476 U.S. 79, 86 (1986) (citing Martin v. Texas, 200 U.S. 316, 321 (1906); *Ex parte* Virginia, 100 U.S. 339, 345 (1880)).

45. *Id.* at 87 n.8 (quoting Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting)).

consequence of these rights for the defendant, the concepts of "impartiality," "jury of one's peers," and "cross-section of the community" must be defined.[46]

These concepts underlying the Sixth Amendment have been subject to extensive interpretation by the Supreme Court. While the text of the amendment calls for "an impartial jury," the Court has developed the additional requirements of "peers" and "cross-section" from the history and purpose of the jury in our criminal justice system. While there is some overlapping between the terms, in some respects they are diametrically opposed.[47] The balancing of these concepts is necessary to achieve the requirement of a fair jury.[48]

1. Impartiality

The right of impartiality under the Sixth Amendment is not so much a guarantee of jury neutrality as it is an assurance of the elimination of extreme partiality from the jury.[49] "[A]n impartial juror is not a completely neutral person, but is one who evidences no extreme bias for or against the accused."[50] To achieve an impartial body, each juror is questioned for bias and ability to impartially consider the evidence at trial.[51] An "impartial juror is one who will base a verdict on the evidence developed at the trial and not on any preconceived notion about the defendant's guilt or innocence."[52] Because studies are inconclusive as to the correlation between a juror's race and any predisposition in deciding a case,[53]

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46. Massaro, *supra* note 2, at 542.

47. *Id.* Professor Massaro notes that a jury of one's peers may not be impartial or represent a cross-section of the community. *Id.* Similarly, an impartial jury may not include one's peers or a cross-section of the community. *Id.*

48. *Id.* at 545. "A 'fair jury' is not merely a group of impartial fact finders, but is one that is drawn from all sectors of the community and that includes some people who are the defendant's peers." *Id.*

49. Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986).

50. Massaro, *supra* note 2, at 544.

51. Batson v. Kentucky, 476 U.S. 79, 87 (1986) (citing Thiel v. Southern Pac. Co., 328 U.S. 217, 223-24 (1946)). The Court has stated that "[t]he function of the [peremptory] 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." *Swain*, 380 U.S. at 219.

52. Massaro, *supra* note 2, at 543.

53. *See id.* at 522-23 n.108 (discussing various studies on jurors and race); *infra* note 110 (listing several studies indicating a correlation between the racial composition of the jury and the verdict).

fitness to be a juror "is an individual rather than a group or class matter."[54] Impartiality, on the other hand, is strictly a group matter.[55] No individual person is really impartial, but the gathering of twelve persons can produce a "diffused impartiality"[56] from the heterogeneity of their experiences and perceptions.[57] The Supreme Court has also said that an impartial jury must be a representative jury.[58] To challenge a jury selection practice, a group must show that without its inclusion, the jury will not be representative.[59] The Court has ruled that all racial or ethnic groups, as well as women, are cognizable groups for the purposes of representativeness.[60]

2. Cross-Section of the Community

The Court originally announced the cross-section requirement in *Glasser v. United States*.[61] The Court defined a cross-sectional jury as one that is drawn from a venire pool in which no distinctive group is underrepresented due to systematic exclusion.[62] The cross-section requirement represents society's interest in popular participation in the jury system.[63] To achieve this goal, the Court prohibits systematic and intentional exclusions of groups and individuals from the jury pool.[64] However, the Court only requires that jury pools, or venire pools, and not necessarily the petit jury,

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

55. "No individual is totally objective; all people have their own personal views and experiences . . . . The jury is an attempt to minimize bias in all of us by drawing a group of persons from the community and trusting that the combination of differing perspectives will balance out." VAN DYKE, *supra* note 6, at xiii.

56. *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting) (stating that the broad representative character of the jury is essential partly as assurance of a diffused impartiality).

57. Massaro, *supra* note 2, at 511. The ideal of impartiality is not that each juror should be individually indifferent, rather that the jurors should be different from each other. Babcock, *supra* note 9, at 552.

58. Smith v. Texas, 311 U.S. 128, 130 (1940).

59. VAN DYKE, *supra* note 6, at 48.

60. *Id.* (citing Taylor v. Louisiana, 419 U.S. 522 (1975); Hernandez v. Texas, 347 U.S. 475, 478 (1954)).

61. 315 U.S. 60 (1986). In holding the exclusion of women who were not members of the League of Women Voters from the jury venire unconstitutional, the Court stated that "[t]he officials charged with choosing federal jurors . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a *cross-section of the community*." *Id.* at 86 (emphasis added).

62. Massaro, *supra* note 2, at 547 n.224 (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)).

63. *Id.* at 545.

64. *Id.* at 547.

represent a cross-section of the community.[65] By focusing on jury procedures that wrongfully exclude individuals from the jury pool, the Court has never required the affirmative inclusion of any individual in order to meet the fair cross-section requirement.[66]

3. Jury of One's Peers

The last and perhaps most debated concept of a fair jury is a jury of one's peers.[67] The original right to a "jury of one's peers" was a special right of an elite social class to be tried by their associates.[68] This concept was broadened by the colonists[69] and defined by the Court in *Strauder v. West Virginia.*[70] In the words of *Strauder*, "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[71]

Literally interpreted, this defines all American citizens who are over the age of eighteen and have not been convicted of a felony as being legal equals to all other similar Americans.[72] A narrower interpretation of "peers" presupposes a common characteristic between the accused and a juror which enables the juror to understand the defendant better than others who do not possess the shared trait.[73]

A peer should not be confused with a friend of the accused,[74] but rather is one who can empathize with the defendant in making the determination of guilt or innocence.[75] The capacity to empa-

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65. Massaro, *supra* note 2, at 529.

66. *Id.*

67. *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

68. Massaro, *supra* note 2, at 505. The Magna Carta's guarantee of "judgement of his peers" for all freemen was to ensure that the barons would be tried by their associates, or sectatores, and not by the king's judges who were ecclesiastics. *Id.* at 505 n.17.

69. *See supra* note 36 (discussing concern over broad vicinage provision of the original right to trial by jury and compromise in the Bill of Rights to ensure local jury selection).

70. 100 U.S. 303 (1879).

71. *Id.* at 308.

72. VAN DYKE, *supra* note 6, at 9.

73. Massaro, *supra* note 2, at 548-49. This perspective has an English historical tradition in the ancient jury *de medietate linguae* which guaranteed foreign litigants the right to a jury half composed of persons from his country. *Id.* at 550. A jury *de medietate linguae* was also granted to Jews to protect the Crown's property interest in Jews and their effects. *Id.* at 550 n.238.

74. *Id.* at 552.

75. *Id.*; *see also* FUKURAI, *supra* note 1, at 142-43 (arguing that especially from a de-

thize is important because jurors make subjective decisions on the credibility of witnesses and circumstantial weight of evidence. Consequently, these evaluations may differ according to the juror's experiences.[76] Although it is difficult to determine who is a peer, immutable characteristics such as race and gender are both recognizable as well as important to the visual image and acceptance of the jury by both the defendant and society.[77]

B. Modern Jury Selection

The Federal Jury Selection and Service Act of 1968[78] is a statutory attempt to implement the Court's decisions interpreting the Sixth Amendment guarantees of a fair and impartial jury. The Act states, in part: "It is the policy of the United States that all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries *selected at random* from a *fair cross section of the community* in the district or division wherein the court convenes."[79]

Although juror requirements historically have been designed to exclude certain groups of persons as unqualified to serve as jurors,[80] the Act outlaws special requirements for federal jurors[81]

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fense counsel's point of view, jurors should be in "emotional sympathy" with the defendant's life condition). Understanding the defendant's motivation is not only important for the determination of guilt or innocence but also in making a sentencing decision. *Id.*

76. Massaro, *supra* note 2, at 552.

77. There are some cases in which it is clear in the eyes of observers that racism has influenced the jury verdict and the "transparency of those cases is far more traumatic than the knowledge we derive from statistics." Herman, *supra* note 27, at 1809. The recent riots in Miami and Los Angeles following the acquittals of police officers by all-white juries accused of beating and killing black arrestees, support the need for affirmative inclusion of minorities on petit juries to support the legitimacy of verdicts in racially motivated cases. *See id.* at 1810 (discussing the Los Angeles riots following the acquittal of two police officers charged with beating motorist Rodney King); *see also* Rodger L. Hochman, Note, *Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw*, 17 NOVA L. REV. 1367, 1394-95 (1993) (noting the extent of property damage and the number of lives lost as a result of riots in Los Angeles, and Miami following the acquittal of police officers who beat Arthur McDuffie to death after his arrest for a traffic violation).

78. 28 U.S.C. §§ 1861-69 (1988) [hereinafter "the Act"].

79. *Id.* § 1861 (emphasis added).

80. Historically excluded groups include blacks, women, foreigners, nonfreeholders, uneducated persons, and low income persons. *See generally* VAN DYKE, *supra* note 6, at 13-16 (outlining the history of juror requirements).

81. *Id.* at 16. Most states have enacted similar legislation to prevent discriminatory exclusion of otherwise eligible jurors. *See id.* at 86 (stating that in recent years most state courts have made changes similar to the Federal Act and now randomly select jurors from a standard list).

and directs jurors to be selected randomly from extensive venire pools.[82]

Jury selection begins with the compilation of a venire pool of eligible persons to serve as jurors.[83] The primary source for the venire is voter lists,[84] which is to be supplemented by other lists when needed to produce a fair cross-section of the community.[85] By compiling a list of eligible jurors and selecting randomly from the list there are only minimal opportunities for discrimination in the selection of the venire pool.[86] However, a truly random selection procedure would interfere with the impartiality criterion because it would permit persons with overt prejudices and biases to be impaneled. Thus, to balance cross-representativeness with impartiality the parties need a method of excluding jurors who are incapable of deliberating impartially. The final stage of jury selection satisfies this need by allowing the parties to challenge jurors from the venire pool until a petit jury is impaneled.[87] In addition, the participation by the parties in selecting the jury enhances both the defendant's and the community's acceptance of the verdict.[88]

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82. *Id.* at 16-17.

83. *Id.* at 24, 85; *see also* BLACK'S LAW DICTIONARY 1556 (6th ed. 1990) (defining "venire" as the "group of citizens from whom a jury is chosen in a given case"); *see generally* VAN DYKE, *supra* note 6, at 85-109 (discussing the process of list compilation according to the Act and various state statutes). Eligibility to serve as a juror only requires satisfaction of certain minimal requirements. *See* JODY GEORGE ET AL., THE FEDERAL JUDICIAL CENTER, HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS 24-26 (1989) (outlining the requirements for jury service). After the court compiles a list of all eligible jurors, the court then grants "excuses" to jurors who are unable to serve due to health problems, economic hardship, work, or other responsibilities. *See generally* VAN DYKE, *supra* note 6, at 111-37 (discussing the various "excuses" for which potential jurors are relieved of jury duty). The "excuse" stage of jury selection actually involves three separate procedures: disqualifications, automatic exemptions, and discretionary excuses. *Id.* at 111.

84. VAN DYKE, *supra* note 6, at 88.

85. *Id.* at 94 (citing 28 U.S.C. § 1863(b)(2) (1989)). The most common supplemental list is the list of holders of driver licenses. *Id.* at 99. Other possible sources include census lists, lists of Social Security numbers, and persons who have filed income tax returns. *Id.* at 99-100.

86. *Id.* at 18.

87. While the federal courts and many state courts use a twelve-person petit jury, the Court has upheld the constitutionality of a six-person jury for criminal cases in Williams v. Florida, 399 U.S. 78, 100-02 (1970) (holding that a twelve-person requirement is not an indispensable part of the Sixth Amendment).

88. Massaro, *supra* note 2, at 513-14.

C. *Voir Dire and Party Challenges*

Challenges are a negative kind of selection[89] which allow the parties to eliminate prospective jurors they believe will be unfavorable to their case in hopes of replacing them with more favorable jurors.[90] Parties exercise their challenges against prospective jurors during voir dire, which allows venirepersons to be questioned by the parties[91] in order to expose bias or prejudice which may affect their impartiality.[92] Voir dire is designed to elicit information about each prospective juror's life experiences and how these experiences relate to the case.[93]

There are two types of party challenges. The first type, the challenge for cause, provides for disqualification on narrow legal grounds[94] based on a juror's specific bias.[95] This mechanism allows parties to construct an impartial jury by removing jurors with demonstrable partiality to the other side.[96] However, during voir dire, prospective jurors may deceive the court about their prejudices or be reluctant to admit to harboring prejudices,[97] obliging the

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89. VAN DYKE, *supra* note 6, at 140.

90. *Id.* For the minority defendant, the exercise of challenges helps to "even out" a disproportionate representation of a population group on the venire and increases the likelihood that a minority juror will serve on the jury. *Id.* at 139.

91. In many jurisdictions, including federal court, voir dire questioning is conducted by the judge. Babcock, *supra* note 9, at 548 (discussing various methods of voir dire).

92. *See generally id.* at 545 (discussing the purpose and benefit of voir dire).

93. FUKURAI, *supra* note 1, at 154. In many cases, voir dire has been expanded from simple intuition to a complex application of computers and statistical techniques. *See id.* at 141-64; *see also* WALTER F. ABBOTT, ANALYTIC JUROR RATER (1987) (suggesting a value scale to rank jurors and assist in the exercise of party challenges).

Personal characteristics are considered relevant indicators of the prospective juror's partiality to one side or the other. FUKURAI, *supra* note 1, at 141; *see* ROBERT A. WENKE, THE ART OF SELECTING A JURY 62 (2d ed. 1989) (listing a ranking by experienced trial lawyers of relevant factors in jury selection). Many experienced lawyers consider personal characteristics, occupation, personality, and race, in that order, to be "extremely important" in jury selection. *Id.* at 64. Physical signs, nationality, body language, gender, and age were described as "important." *Id.*

94. The legal grounds for disqualification are statutorily authorized. VAN DYKE, *supra* note 6, at 143. Commonly recognized grounds include present or prior relationships with a party to the case, a witness, or an attorney, knowledge of the facts of the case, previously serving in a related case, or preconceived opinion of guilt or innocence or the opinion on the merits of the case. *Id.*

95. Challenges for cause require a showing of specific bias that interferes with impartial consideration of the case at hand. VAN DYKE, *supra* note 6, at 139; *see also* FUKURAI, *supra* note 1, at 154.

96. VAN DYKE, *supra* note 6, at 140.

97. *See* Goldwasser, *supra* note 3, at 839; Babcock, *supra* note 9, at 547, 554 (sug-

court to accept the juror's pledge of impartiality.[98] A second type of challenge, the peremptory challenge, provides protection from this danger of juror deception.[99]

The peremptory challenge is most commonly used to remove a juror whom a party suspects is biased but against whom the party does not have sufficient grounds to support a challenge for cause.[100] While challenges for cause can be exercised without limitation, subject only to the approval of the presiding judge, peremptory challenges are limited in number by statute.[101]

The Constitution does not guarantee the exercise of peremptory challenges but the Court traditionally has viewed the challenge as a "necessary part of trial by jury."[102] The challenge is considered necessary to achieve an impartial jury by providing the opportunity to remove a prospective juror whose prejudices may not have been revealed by normal questioning but may have been exhibited in the appearance and demeanor of the juror.[103] Historically the peremptory challenge has been permitted "for any reason at all, as long as that reason is related to . . . the outcome" of the case.[104] Following this tradition, attorneys have developed jury selection strategies designed to create homogenized juries favorable to their cases by striking jurors according to their group membership.[105] Recently,

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gesting that jurors may be ashamed to admit biases, or may intentionally deceive the court to avoid being removed).

98. *See* Babcock, *supra* note 9, at 549-50. If a juror states that he or she would decide the case only on the evidence presented, judges are reluctant to impugn the credibility of this professed impartial juror. *Id.* at 550.

99. *See* VAN DYKE, *supra* note 6, at 168 (stating that peremptory challenges allow each side to eliminate people suspected of holding extreme views). Peremptory challenges also enable a party to remove a juror who may be resentful against the party for any personal or intrusive questions during voir dire. *Id.* at 163.

100. *Id.* at 146.

101. *Id.* at 145.

102. Swain v. Alabama, 380 U.S. 202, 219 (1965), *overruled in part by* Batson v. Kentucky 476 U.S. 79 (1986). In the opinion, Justice White outlines the historical significance of the peremptory challenge as an important means of assuring the selection of an unbiased and impartial jury. *Swain*, 476 U.S. at 212-19.

103. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 353 (D. Berkowitz & S. Thorne eds. 1978). Blackstone explains that peremptory challenges are essential because a juror's bias may be insufficient to qualify as a challenge for cause, and intrusive questioning of the juror may result in resentment by the juror. *Id.*

104. United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976), *vacated and remanded sub nom.* United States v. Newman, 549 F.2d 240 (2d Cir. 1977).

105. *See, e.g.*, Robert L. Harris, Jr., *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1028 (1991). It is generally believed by lawyers and researchers that homogeneity among jurors is likely to result in conformity to the majority view during deliberations. *See* MICHAEL FRIED ET AL., *Juror Selection: An Analysis of*

the discretion to arbitrarily strike prospective jurors has been limited by the Supreme Court. In *Batson v. Kentucky*,[106] the Court prohibited the exercise of peremptory challenges made on the assumption that members of defendant's race as a group are not qualified to serve as jurors.[107] The Court also held in *J.E.B. v. Alabama ex rel. T.B.*[108] that gender is an unconstitutional proxy for jury impartiality.

III. RACIAL DISCRIMINATION IN THE JURY-BOX

Race historically has played a major role in jury selection, especially where the criminal defendant is a member of a racial minority.[109] The exclusion of minorities rests on the assumption that acculturated racial prejudice and attitudes tend to predispose jurors to a particular verdict.[110] Although we aspire to be a society in which race is irrelevant,[111] this is only an ideal, not reality.[112]

The Court began its "unceasing efforts to eradicate racial discrimination" from the jury-box over a century ago.[113] In *Strauder v. West Virginia*,[114] the Court found that a black defendant was denied equal protection when he was tried by a jury from which

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Voir Dire, *in* THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 47, 51 (R. Simon ed. 1975) (stating that selection of jurors is based on the differential aims of the plaintiff and the defendant); WENKE, *supra* note 93, at 77 (noting that groups of similarly situated people tend to possess similar views); Massaro, *supra* note 2, at 549 (noting that differences among groups of people may affect their perceptions).

106. 476 U.S. 79 (1986).

107. *Id.* at 86.

108. 114 S. Ct. 1419, 1430 (1994).

109. FUKURAI, *supra* note 1, at 156.

110. *Id.* Several jury research studies indicate a correlation between the racial composition of the jury and the verdict. *See* Goldwasser, *supra* note 3, at 834 (citing Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133 (1979)) (stating that race does play a role in a person's personal perception); Johnson, *supra* note 32, at 1611 (showing a correlation between racial composition of the jury and race of the defendant). *But see* John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 LAW & HUM. BEHAV. 89, 95 (1980) (finding no relationship between juror race and the verdict); Jeffrey E. Pfeifer, Comment, *Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?*, 69 NEB. L. REV. 230 (1990) (suggesting that jurors are capable of setting aside personal biases); *see also* WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM (1987).

111. Goldwasser, *supra* note 3, at 835.

112. *Id.*

113. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986).

114. 100 U.S. 303 (1879).

members of his race had been purposefully excluded.[115] The Court declared that "[t]he very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine."[116] Racially-based selection procedures violate equal protection when they are used to exclude persons from the jury venire[117] or the petit jury[118] on the basis of race. While venire pools can be secured against discrimination by random selection methods, the peremptory challenge remains an impenetrable shield for discrimination. "Racism in the criminal justice system hides behind discretion,"[119] and the peremptory challenge provides the perfect cover for discriminatory jury selection practices.

The Court first addressed this concern in *Swain v. Alabama*.[120] In this case, the prosecutor exercised the state's peremptory challenges to strike all six black venirepersons.[121] Although the Court rejected the defendant's claim of purposeful discrimination by the prosecutor,[122] the Court recognized that the

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115. *Id.* at 310. The Court struck down the state statute which only qualified white persons for jury duty. *Id.*

> 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 aspects fully qualified, is practically a brand upon them . . . an assertion of their inferiority, and 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.

116. *Id.* at 308.

117. *Id.* at 305; *see also* Sims v. Georgia, 389 U.S. 404, 407-08 (1967) (per curiam) (finding that the process of drawing names from lists designating race results in racially disproportionate inclusion into the jury pool); Whitus v. Georgia, 385 U.S. 545, 549-55 (1967) (holding that the Equal Protection Clause of the Fourteenth Amendment would not allow to stand a conviction resulting from a procedure which created an all-white jury); Avery v. Georgia, 345 U.S. 559, 562 (1953) (determining that the absence of any black juror in a 60-member panel violated the petitioner's right to equal protection).

118. Norris v. Alabama, 294 U.S. 587, 589 (1935); *see also* Martin v. Texas, 200 U.S. 316, 319 (1906); Neal v. Delaware, 103 U.S. 370, 394 (1880).

119. Herman, *supra* note 27, at 1808.

120. 380 U.S. 202 (1965), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986). Defendant, Robert Swain, was a black man indicted and convicted of rape, and sentenced to death by an all-white jury. *Swain*, 380 U.S. at 203.

121. *Swain*, 380 U.S. at 210.

122. The Court required a black defendant to show that the system was "being perverted" by the striking of potential black jurors by the prosecutor in repeated cases. *Id.* at 223-24. In failing to make this prima facie case of purposeful and systematic discrimination, the Court simply relied on the presumption that the prosecutor did not discriminate. *Id.* at 221-22.

"State's purposeful or deliberate denial to [blacks] on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."[123]

Under the rule of *Swain*, the defendant's challenge to the exercise of race-based peremptory challenges required empirical proof that the prosecutor had engaged in systematic exclusion of blacks in case after case.[124] This standard proved to be almost impossible to surmount.[125] While the *Swain* Court was willing to recognize a right to community-based racial diversity on juries, it was unwilling to vindicate the individual defendant's right to be tried by a racially diverse jury in a particular case. It was over twenty years before the Court decided to reevaluate this "crippling burden of proof."[126]

A. Batson v. Kentucky

Batson involved a challenge to the prosecutor's use of his peremptory challenges to strike all four black venirepersons.[127] As a result of the prosecutor's actions, the jury selected was composed of all white persons.[128] The defense objected to the peremptory strikes on the grounds that the removal of all black veniremen violated the defendant's rights under the Sixth Amendment's guarantee of a jury drawn from a cross-section of the community and the Fourteenth Amendment right to equal protection of the laws.[129] The judge denied the motion, stating that the cross-section requirement applied only to the venire selection.[130] The Supreme Court of Kentucky affirmed the decision of the trial judge, holding that the defendant failed to demonstrate systematic exclu-

123. *Id.* at 203-04.

124. Herman, *supra* note 27, at 1818 n.50 (citing *Swain*, 380 U.S. at 223-24).

125. Only two challenges succeeded under the *Swain* burden of proof. *See* State v. Washington, 375 So. 2d 1162, 1162-64 (La. 1979) (basing its finding of systematic exclusion on both empirical evidence and the prosecutor's admission); State v. Brown, 371 So. 2d 751, 754 (La. 1979) (finding systematic exclusion demonstrated in a series of cases by a single prosecutor over a seven year period).

126. The Court termed the evidentiary burden in *Swain* a "crippling burden of proof" because it was virtually impossible for an individual defendant to overcome. Batson v. Kentucky, 476 U.S. 79, 92 (1986).

127. *Id.* at 83. Batson was a black man indicted on charges of second-degree burglary and receipt of stolen goods. *Id.* at 82. Under the state statute, the prosecutor had six peremptory challenges. *Id.* at 83 n.2.

128. *Id.*

129. *Id.* at 83.

130. *Id.*

sion of black jurors from the venire, as required by *Swain v. Alabama*.[131] The Supreme Court granted certiorari to reevaluate the evidentiary burden required under *Swain*.[132]

The Court declared that a single invidiously discriminatory exercise of a peremptory challenge is a violation of the Equal Protection Clause.[133] "For evidentiary requirements to dictate the 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection for all."[134] The Court also lessened the burden on the defendant to establish a prima facie case of purposeful discrimination.[135] If the defendant's showing is successful, the burden then shifts to the State to give a race-neutral explanation for the exclusion of the juror.[136] While the reason does not have to rise to the level of a challenge for cause,[137] the prosecutor is prohibited from challenging a juror "on the assumption—or his intuitive judgment—that [the juror] would be partial to the defendant because of their shared race."[138] Although the Court chose to leave the implementation of this rule to the lower courts,[139] it did provide some guidelines for what constitutes an acceptable race-neutral reason.[140]

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131. Batson v. Kentucky, 476 U.S. 79, 83-84 (1986).

132. *Id.* at 84, 90.

133. *Id.* at 95-96.

134. *Id.* (quoting McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting)).

135. The Court laid out a three-part test:

> To establish such a case [of purposeful discrimination], the defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96 (citations omitted).

136. Batson v. Kentucky, 476 U.S. 79, 94, 97 (1986).

137. *Id.* at 97.

138. *Id.* The Court argues that "[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Id.* at 97-98.

139. *Id.* at 99.

140. *Id.* at 98. The prosecutor may not rebut a prima facie case of discrimination by merely denying any discriminatory motive, *id.*, or by arguing "good faith" in assessing an individual juror's competence. *Id.* (citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

B. A Race-Neutral Reason

To successfully rebut a prima facie case under *Batson*, the prosecutor must articulate a race-neutral reason "related to the particular case to be tried."[141] The Court illustrated the boundaries of this test by stating that a neutral explanation does not include a mere denial of a discriminatory motive, or an assertion of good faith in exercising the challenge.[142] In addition, an explanation based on the prosecutor's intuitive judgment that the venireperson would be partial to the defendant because of their shared race is not permissible.[143]

The Court attempted to further clarify its position on the permissible use of peremptory challenges in *Hernandez v. New York*.[144] In this case the Court upheld the prosecutor's exercise of peremptory challenges to strike Hispanic jurors because of their bilingualism.[145] The majority found bilingualism to be a neutral explanation despite the disproportionate impact on Hispanic members of the venire pool.[146] The Court stated that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[147] As a result of this decision, courts now are authorized to accept facially neutral explanations, without investigating further into the prosecutor's motive.[148]

Critics of the Court's decisions in *Batson* and *Hernandez* argue that the Court's concern with the fair process of jury selection is

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141. Batson v. Kentucky, 476 U.S. 79, 98 (1986).

142. *Id.*

143. *Id.* at 97.

144. 500 U.S. 352 (1991).

145. *Id.* at 361, 372. In this case, the defendant was Hispanic as were most of the defense's witnesses. The prosecutor stated that he had doubts as to whether the Hispanic jurors would accept the interpreter as the final arbiter of what was said by the defendant and the witnesses on the stand. *Id.* at 356-57.

146. *Id.* at 361.

147. *Id.* at 360.

148. Stephanie Goldberg, Batson *and the Straight-Face Test*, 78 A.B.A.J., Aug. 1992, at 82. Examples of courts' new lax approach to discrimination include: United States v. Payne, 962 F.2d 1228, 1233 (6th Cir.), *cert. denied*, 113 S. Ct. 811 (1992) (upholding peremptory strike of juror because he was a member of the NAACP); Goodman v. Lands End Homeowners Assoc. of Hilton Head, Inc., No. 91-2542 (4th Cir. 1992) (allowing peremptory challenge against a male juror in a personal injury case because he was "effeminate"); Williams v. Rader, 1992 WL 54728, at *2 (E.D. La.), *cert. denied*, 113 S. Ct. 821 (1992) (accepting peremptory challenge against a juror who continually looked at the defendant and defendant's mother, suggesting he might sympathize with the defendant).

insufficient to secure equal protection for both the criminal defendant and the prospective juror[149] because it does not protect against the judges' and counsels' subconscious prejudice.[150] In *Batson*, Justice Marshall argued that facially neutral reasons based on demeanor were insufficient because the trial judge is not able to evaluate those reasons for actual motive of the prosecutor.[151] While the peremptory challenge will always be an essentially subjective exercise of discretion, the courts need some objective criteria to assist in evaluating the prosecutor's reasons in order to guarantee that equal protection is served.[152]

The *Batson* decision was the Court's first substantial step to-

149. *See* Herman, *supra* note 27, at 1814 (referring to subsequent Supreme Court cases which clarify that *Batson* protects the rights of the prospective juror as opposed to the defendant's right to be free of discrimination). *See also* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-57 (1980) (discussing the difficulty in determining whether an unconstitutional motivation influenced a decision).

150. The limitation placed on peremptory challenges simply shifts the discretion to remove a juror from the parties to the judge. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (expressing concern over the danger of a prosecutor's conscious or unconscious racism that may lead him or her to perceive a prospective black juror's demeanor negatively and a judge's racism that may accept the strike). Justice Stevens, dissenting in *Hernandez*, noted that means less drastic than juror exclusion are available to ensure compliance. Hernandez v. New York, 500 U.S. 352, 379 (1991) (suggesting use of limiting instruction or use of headphones to only allow jurors to hear the interpreter and not the witness). The Court has previously held that availability of nondiscriminatory alternatives is evidence of discriminatory motive. Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

151. *Batson*, 476 U.S. at 105-06. "If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." *Id.* at 106.

152. In *Batson*, the Court drew from its Title VII decisions in establishing the burden of proof rules for jury selection cases. Following this precedent, the Court in *Batson* required the prosecutor to "articulate a neutral explanation related to the particular case to be tried." *Id.* at 98. In addition, "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 Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

Several jurisdictions have implemented a similar fact-based standard by requiring a rational basis for the exercise of the peremptory challenge. *See* People v. Green, 561 N.Y.S.2d 130, 132 (Westchester County 1990) (requiring a rational basis in the exercise of a peremptory challenge against a hearing-impaired juror). *See also* People v. Furman, 404 N.W.2d 246, 255 (Mich. Ct. App. 1987) (stating that a rational basis is required for the exercise of peremptory challenges); Odom v. State, 355 So. 2d 1381, 1383 (Miss. 1978) (stating that the facts obtained in voir dire provide the rational basis upon which to challenge a juror); Murray v. State, 713 P.2d 202, 211 (Wyo. 1986) (stating that before a peremptory challenge is made there should be some rational basis for the exclusion of the juror). But while a rational basis test requires a reason well-founded in fact, many race-neutral reasons based on demeanor are not founded in fact. The judge is not competent to assess the prosecutor's credibility and veracity in deciding whether or not to accept the explanation for the exercise.

wards eliminating discrimination in the jury-box by placing a restriction on the exercise of peremptory challenges.[153] However, in allowing the courts to implement the *Batson* rule according to their local jury selection practices,[154] the prohibition on racially discriminatory peremptory challenges has become a "vain and illusory" guarantee of equal protection in the courtroom.[155] "Discrimination may no longer hide behind the peremptory challenge, but it only has to move one small step to hide behind the race-neutral explanation."[156] Because the danger of discrimination still exists in the jury-box, there is a need for other jury selection mechanisms to protect the criminal defendant's interest in a fair and impartial jury.

IV. THE CONFLICT BETWEEN EQUAL PROTECTION AND IMPARTIALITY

Both society and the defendant have an interest in removing racial discrimination from the jury-box but these interests are not necessarily coexistent. The defendant's interest is a personal interest in receiving a fair trial under the Sixth Amendment.[157] The societal interest, on the other hand, is a collective interest in preventing discrimination based on race or group affiliation.[158] The Court chose to pursue the equal protection approach to jury selection in *Batson*[159] and later cases[160] rather than addressing the

153. *See supra* notes 127-140 and accompanying text (discussing *Batson* ruling).

154. *See Batson*, 476 U.S. at 97 (discussing the Court's confidence that trial judges in supervising voir dire can decide whether a peremptory challenge is based on discriminatory motives).

155. *See* Herman, *supra* note 27, at 1830-31 (stating that *Batson's* ruling better serves the equality rights of jurors than it does defendants', although it even fails to serve the jurors' rights very well); *see also Batson*, 476 U.S. at 106 (Marshall, J. concurring) ("If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.").

156. *See* Herman, *supra* note 27, at 1830-31.

157. For the criminal defendant, everything about the trial is personal because his or her life and/or liberty is at stake. Goldwasser, *supra* note 3, at 829.

158. *See Batson*, 476 U.S. at 87 (noting that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

159. Herman describes the Court's rationale in *Batson* and later cases as embracing the representation-reinforcement theory of judicial review as espoused by John Ely. Herman, *supra* note 27, at 1814. This theory states that the proper reviewing role of the courts is to guarantee fair and equal access for all groups to the decision-making process, and then to defer to the decision made by the normal functioning of the process. *Id.* at 1814 (cit-

defendant's Sixth Amendment right because of the desirability of a colorblind approach.[161]

The appeal of a colorblind approach is rooted in the Court's finding that the use of race as the basis for any classification is objectionable because of the stigmatizing effect of racial stereotypes.[162] However, while potential jurors have the right not to be excluded on the basis of their race, the criminal defendant's right to a fair and impartial jury is a more pressing right that justifies the use of peremptory challenges to ensure a racially inclusive jury.[163] In *Georgia v. McCollum*,[164] the Court considered whether the interests served by *Batson* are secondary to the rights of a criminal defendant.[165] The Court held that purposeful dis-

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ing ELY, *supra* note 149, at 135-57). The Court in *Batson* ensures access to the jury by minority members without requiring more assurance of a fair verdict.

160. The Court has adopted an equal protection approach to allow for the extension of the *Batson* rule to civil litigants. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); *see also* Georgia v. McCollum, 112 S. Ct. 2348 (1992) (extending the rule to criminal defendants); J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (extending the rule to gender-based peremptory challenges).

To extend the restriction against racially discriminatory peremptory challenges, the Court had to find the exercise of a peremptory challenge by the defense counsel to be a state action. *Edmonson*, 500 U.S. at 619. Justice O'Connor states in her *McCollum* dissent that previous decisions firmly establish that criminal defendants are not state actors under the Fourteenth Amendment when performing traditional trial functions. *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting) (citing cases that discuss the relationship between defendants and government at trial). *See also* Polk County v. Dodson, 454 U.S. 312, 325 (1981) (holding that a public defender is not a state actor under 42 U.S.C. § 1983 "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding").

161. Herman, *supra* note 27, at 1824-25 (surveying affirmative action cases and the Court's inclination to avoid race-conscious remedies in favor of colorblindness).

162. *See* Herman, *supra* note 27, at 1826. *See also* Loving v. Virginia, 388 U.S. 1 (1967) (discussing the stigmatizing effect of racial discrimination on the black community); Brown v. Board of Educ., 347 U.S. 483, 494 (1954) ("To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

163. *See, e.g.*, Peters v. Kiff, 407 U.S. 493, 503-04 (1972):

> 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.

Id. at 503-04.

164. 112 S. Ct. 2348 (1992).

165. *Id.* at 2357-58.

crimination in the exercise of peremptory challenges by either party is unlawful.[166] In other words, the Court found that the rights of the prospective jurors preempt the criminal defendant's rights to exercise peremptory challenges to shape the composition of the jury.[167]

The Court introduced its nonexclusion theory to jury selection in *Strauder*.[168] In this decision, and several subsequent decisions,[169] the Court relied on the Equal Protection Clause of the Fourteenth Amendment to prohibit the exclusion of black males from jury pools.[170] The Court's focus in these cases was not so much the fairness of the jury as the doctrines of "equality, emancipation, and nondiscrimination."[171] It was not until the 1940s that the Court began to describe a fair jury in terms of a representative body.[172] In *Glasser v. United States*,[173] the Court supported the cross-representativeness theory in a Sixth Amendment challenge to the exclusion from a petit jury of women who were not members of the League of Women Voters.[174] The Court stated that jury officials should not make selections that "'do not comport with the concept of the jury as a cross-section of the community.'"[175] Since this decision, the Court has continued the concept of cross-representativeness as an "essential component of the Sixth Amendment right to a jury trial."[176]

Carter v. Jury Commission of Greene County[177] was the first

166. *Id.* at 2359.

167. *Id.* at 2360 (Thomas, J., concurring). "In effect, [the Court has] exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *Id.*

168. *See* Massaro, *supra* note 2, at 530 (describing the three cases in which the Supreme Court first applied the nonexclusion approach to jury selection cases).

169. *See, e.g.*, Virginia v. Rives, 100 U.S. 313 (1879) (addressing the propriety of a petition by two black defendants for removal from the state court to the federal system, based on allegations that the grand and petit juries were all white and that defendants were entitled to a jury that included some black members); *Ex parte* Virginia, 100 U.S. 339 (1879) (denying a writ of habeas corpus to the petitioner, a judge who was charged with using race as a factor to select jurors for petit and grand juries).

170. Massaro, *supra* note 2, at 530.

171. *Id.* at 531.

172. *Id.* at 532. Justice Black described the jury as a body "truly representative of the community" in Smith v. Texas, 311 U.S. 128, 130 (1940).

173. 315 U.S. 60 (1942).

174. Massaro, *supra* note 2, at 532.

175. *Id.* at 533 (citing Glasser v. U.S., 315 U.S. 60, 86 (1986)).

176. *Id.* (citing Taylor v. Louisiana, 419 U.S. 522, 528 (1975)).

177. 396 U.S. 320 (1970).

case which gave a group of individuals, other than defendants, standing to bring suit for being denied the right to serve on a jury.[178] In *Carter*, Justice Stewart wrote for the Court: "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."[179] The comparison of jury service with the right to vote is significant because the right to vote has been described as a 'fundamental right' by the Court.[180] "A 'fundamental right' is a right so basic to our democratic government that the government must ensure the equal access of all citizens to it; all discrimination affecting access to the right must be eliminated unless justified by some 'compelling state interest.'"[181] The recognition of jury service as a fundamental right is important in development of equal protection rights because it prevents the infringement of the right for mere administrative convenience.

Under *Batson*, the guarantees of the Equal Protection Clause forbid counsel to strike a potential juror "on the false assumption that members of his race as a group are not qualified to serve as jurors."[182] While only state actions constitute violations of the Fourteenth Amendment,[183] the Court in *Edmonson v. Leesville Concrete Co.* extended this ban on racially discriminatory peremptory challenges to cover counsel for civil litigants.[184] In *Edmonson*, the Court concluded that the courtroom is a "real ex-

178. VAN DYKE, *supra* note 6, at 58. The appellants in the case were black citizens of Greene County, Alabama, who commenced a class action against the officials charged with administration of the jury selection laws of the state. *Carter*, 396 U.S. at 321. The District Court found that the county's methods for obtaining names of eligible jurors systematically excluded blacks from the jury roll. *Id.* at 324-27.

179. *Carter*, 396 U.S. at 330.

180. VAN DYKE, *supra* note 6, at 75. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (holding that the state's durational residence requirement excluded too many people and did not serve adequately the state's interest in an informed electorate); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (ruling the state's imposition of a poll tax unconstitutional because wealth or property, like race, bears no relation to voter qualification).

181. VAN DYKE, *supra* note 6, at 72-73.

182. Batson v. Kentucky, 476 U.S. 79, 86 (1986). The Court has also held that gender-based peremptory challenges violate the Equal Protection Clause by serving to perpetuate archaic stereotypes about the relative abilities of men and women. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1426-28 (1994).

183. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1990).

184. *Id.* at 630.

pression of the constitutional authority of the government" and thus "[t]o permit racial exclusion in this official forum compounds the racial insult in judging a citizen by the color of his or her skin."[185] This doctrinal extension indicates the great significance that the Court places on the rights of prospective jurors.

But unconscious racism affects everyone in the courtroom[186] and therefore may also affect the verdict.[187] Chief Justice Burger, in his *Batson* dissent, recognized the conflict between the psychological reality of race-consciousness and the utopian ideal of a colorblind society.[188] The major function of the peremptory challenge in the modern jury system is to reconcile our understanding that members of groups possess similar characteristics with our desire to treat people as individuals and not simply as members of groups.[189] So, while a colorblind approach to party challenges serves jurors, it disserves defendants.[190]

V. FIGHTING DISCRIMINATION AFTER *BATSON*

Because the requirements of the Equal Protection Clause of the Fourteenth Amendment trump the common law practice of peremptory challenges, many critics believe that the challenge should be

185. *Id.* at 628.

186. Herman, *supra* note 27, at 1822. Unconscious racism "may often have subtle effects on our judgments about who is telling the truth or who looks dangerous." *Id.* (footnote omitted). Although colorblindness achieves the goals of equality, the Court apparently refuses to recognize that "real jurors in the real world" are not colorblind. *Id.* at 1825.

187. *See id.* at 1823 (arguing that jurors may be unconsciously affected by racism even though they and others consider themselves fair).

188. Batson v. Kentucky, 476 U.S. 79, 121 (1986) (Burger, C.J., dissenting). Chief Justice Burger believes that the unexplained peremptory challenge strengthens the jury system and relies on arguments by Babcock:

> The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes . . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases . . . . [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.

Id. (quoting Babcock, *supra* note 9, at 553-54).

189. Babcock, *supra* note 9, at 553.

190. Herman, *supra* note 27, at 1828. Some commentators argue that regardless of the effect the racial composition of the jury has on the verdict, the defendant's belief that the jury was fair and impartial is by itself an important objective. *See* Babcock, *supra* note 9, at 552.

abolished entirely.[191] Justice Marshall advocated this alternative in *Batson v. Kentucky*, stating that elimination of the peremptory challenge is the only way to end racial discrimination in jury selection.[192] But a truly random selection procedure would interfere with the impartiality of a fair jury because it would permit persons with overt prejudices and biases to be selected.[193] The exercise of party challenges are necessary to assure that biased jurors are not impaneled.[194] However, under a system of cause challenges only, the Sixth Amendment's criterion for a fair jury is not satisfied either because there is no mechanism to secure peer representation.[195] By extending the *Batson* limitation to the defense's exercise of peremptory challenges in *Georgia v. McCollum*,[196] the Court constrained the criminal defendant's ability to fight discrimi-

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191. For discussions of the evolving caselaw in jury selection and the case for abolishing peremptory challenges, see Hochman, *supra* note 77, at 1367 (arguing that the peremptory challenge should be abolished as incompatible with the Equal Protection Clause of the Fourteenth Amendment); William T. Pizzi, Batson v. Kentucky: *Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 134-44 (criticizing the Court's evolving law of jury discrimination as creating a costly and time-consuming system of judicial review which fails to provide any corresponding benefit); *cf.*, Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is It, Anyway?*, 93 COLUM. L. REV. 725, 760-73 (1992) (arguing that the Court's modified peremptory challenge under *Batson* and *Hernandez* is worth preserving and will not result in a heavy burden if properly administered).

192. *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring). Justice Marshall expressed concern that the difficulty of establishing a prima facie case of discrimination will allow the continued illegitimate use of peremptory challenges. *Id.* at 105. As an example, Justice Marshall suggests a prosecutor will feel no reservation in striking black jurors in a case where only one or two blacks survive the challenges for cause. *Id.* ("Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable level'."). Justice Marshall also suggests that trial judges will be forced to accept readily generated explanations for the exercise of the challenges. *Id.* at 106 ("Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.").

193. If courts abolished peremptory challenges entirely, jurors would be selected randomly. The Federal Jury Selection and Service Act views random selection as an ideal practice. *See* VAN DYKE, *supra* note 6, at 84-85. However, it is not an adequate method of achieving a representative jury. *See infra* notes 239-40 and accompanying text (discussing the underrepresentation of minorities on venire lists and the low statistical likelihood of a minority juror being randomly seated on a jury). Moreover, the homogenized result from random selection will not enhance the legitimacy of the jury as does a selection practice that allows for an element of party choice in the seating of jurors.

194. Massaro, *supra* note 2, at 545 (stating that party challenges and voir dire are procedures that protect the defendant's interest in impartial jurors).

195. *Cf.* Georgia v. McCollum, 112 S. Ct. 2348, 2364 (1992) (O'Connor, J., dissenting) (supporting the use of unrestricted peremptory challenges by the defense as the most effective method to secure minority representation and overcome racial bias on the jury).

196. 112 S. Ct. 2348 (1992).

nation to the fullest extent once allowed under the Sixth Amendment. Consequently, the defendant is unarmed to secure peer representation to secure an impartial jury.[197]

Another proposed alternative is a system of affirmative selection of jurors.[198] Affirmative selection allows parties to list, in order of preference, twelve jurors from a twenty-four person venire.[199] Under this method, the judge would first impanel any juror listed on both parties' list, and then would alternate between the lists, seating a selected juror in descending preferential order until the panel was complete.[200] Because this system is based on the selection of a jury favorable to both parties, as opposed to avoiding an unfavorable jury, it increases the legitimacy of the verdict to both the parties and to society.[201] Affirmative selection also creates a more representative panel by reflecting a broad spectrum of viewpoints and biases.[202] However, while affirmative selection promotes the cross-sectional and peer representation requisites of a fair jury, it fails to assure impartiality by allowing the selection of jurors with extreme partiality.[203]

Another critical concern of reform proposals is that they disregard the importance of the peremptory challenge to the jury system

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197. *See id.* at 2360 (Thomas, J., concurring) (concurring in the holding but dissatisfied with the impact that eliminating the opportunity to secure minority representation on the jury will have on the defendant's right to a fair and impartial jury).

198. *See* Altman, *supra* note 31, at 786 (proposing a system of affirmative selection that allows the parties to seat rather than exclude jurors).

199. *Id.* at 806.

200. *Id.*

201. *Id.* at 807-08. "The defendant's ability to choose half of the jury prevents the jury from being used as an organ of the prosecution. In addition, to the extent that affirmative selection seats more minorities on juries, it promotes public confidence in the jury . . . ." *Id.* at 808. Even if a monoracial jury is impaneled by this method, the fact that the parties chose the jury attaches legitimacy. *Id.* at 811.

202. *Id.* at 807.

203. *See* Altman, *supra* note 31, at 808-09 (acknowledging the likelihood of overrepresentation of minority or extreme viewpoints under affirmative selection, which could result in a high number of hung juries).

Hans Zeisel, Professor of Law and Sociology, Emeritus, University of Chicago, considered some of the negative effects of affirmative jury selection. Hans Zeisel, Comment, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165 (1987). Professor Zeisel noted that affirmative selection may result in the seating of diametrically opposed jurors which will increase the likelihood of hung juries. *Id.* at 1167 (noting that the jurors most prejudiced toward either side will be seated). Of course, the success of each party in seating favorable jurors depends on their awareness of the jurors' predispositions. *Id.* at 1165-66 (noting that it is unlikely that a party will have perfect knowledge of potential jurors' predispositions).

and to the protection of the criminal defendant.[204] "[T]he jury . . . is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice,'"[205] but unlike other formal protections for the criminal defendant,[206] the jury is masked in an environment of discretion[207] through which prejudice can penetrate.[208] The peremptory challenge historically has been a major protection by which the defendant can exclude those jurors who exhibit a bias against him and create a more favorable forum for his case.[209] The peremptory challenge also provides a margin of protection from unsuccessful challenges for cause due to the limited allowance for voir dire questioning[210] and the reluctance of judges to excuse potentially biased jurors.[211] The peremptory challenge also provides both parties with an opportunity to affect the composition of the decision-making body,[212] which enhances both their respect for the verdict as well as society's confidence in the jury.[213]

The new peremptory inclusion strikes a balance between all of these considerations. The inclusion is similar to the current method of party challenges because it preserves the ability of parties to exclude biased and unfavorable jurors. In addition, this new selection procedure assures the criminal defendant the ability to secure

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204. *See supra* note 102 and accompanying text (the Court has traditionally viewed the peremptory challenge as a "necessary part of trial by jury." Swain v. Alabama, 380 U.S. 202, 219 (1965)).

205. McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1879)).

206. *See infra* text accompanying note 248 (discussing other procedural rights of the criminal defendant in the adversary trial setting).

207. *See* Herman, *supra* note 27, at 1845.

208. Herman observes:

> The potentially discriminatory attitudes of the jurors themselves are far more critical than those of the lawyers. Yet by focusing all of our attention on how jurors are selected, we allow ourselves to ignore the fact that discrimination will still be able to enter and hide in the jury room.

Id. at 1852.

209. VAN DYKE, *supra* note 6, at 139. Despite the eventual allocation of peremptory challenges to the prosecutor, federal and state statutes traditionally have granted more peremptories to the defendants to maintain this advantage. *Id.* at 282-84 (listing the number of challenges provided to both parties in criminal and capital cases for all states).

210. *Id.*

211. Babcock, *supra* note 9, at 554-55; *see supra* notes 97-98 and accompanying text (discussing the reluctance of persons to admit biases during voir dire and the judge's reluctance to excuse a juror who pledges impartiality).

212. VAN DYKE, *supra* note 6, at 139-70.

213. *See supra* notes 6-7 and accompanying text.

peer representation on the jury without violating the equal protection doctrine now governing jury selection law. Moreover, it is unlikely that this selection method will result in a greater number of hung juries because the number of jurors a defendant may seat peremptorily can be limited.[214] This inclusionary approach also enhances the legitimacy of the jury by giving effect to the defendant's personal interest at stake.

A. The Peremptory Inclusion

As the name suggests, a peremptory inclusion would allow for the inclusion of a juror peremptorily by the defense, meaning without contest or removal by the prosecution.[215] Under this modified system, the criminal defendant would have the option of exercising a peremptory inclusion in place of a statutorily authorized peremptory challenge. In other words, the defendant could choose to peremptorily include a venireperson placed in the jury-box as a juror on the jury panel rather than exclude another.

In some jurisdictions, including many federal courts, the court uses the "box" method to impanel the jury. The judge, or clerk of the court, randomly seats potential jurors in the jury-box for voir dire questioning and the exercise of challenges for cause. After challenges for cause are exercised, the parties issue peremptory challenges against the impaneled jurors in alternating order. Once a juror is removed, another venireperson is randomly selected to enter the jury-box to replace the challenged juror.[216] This process continues until the parties have exercised all of their peremptory challenges.[217] The peremptory inclusion would be exercised during this stage of the jury selection process.

This inclusion could not be challenged by the prosecution through the exercise of one of the state's peremptory challenges; to so allow would destroy the inclusion's function of securing minority representation on the jury panel. A system of peremptory inclu-

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214. *See infra* note 218 (discussing the limitation of the defendant's number and use of the peremptory inclusion and the unlikelihood that the inclusion of one or two peers will change the final verdict of the jury).

215. At this stage in the jury selection process, challenges for cause have been exercised so the risk of bias or partiality of the juror is relatively low.

216. GEORGE, *supra* note 83, at 52-53 (describing the two basic methods used by federal judges in permitting attorneys to exercise challenges).

217. The number of peremptory challenges each party has is limited by statute. VAN DYKE, *supra* note 6, at 140. In federal court, for felony cases, the defense has ten peremptory challenges and the prosecution has six. FED. R. CRIM. P. 24(b).

sions will allow the defendant, by affirmatively selecting certain jurors, to attempt to achieve representation of his peers on the jury panel without violating the rights of the prospective jurors. However, the defendant should not have the right to completely manipulate the composition of the jury to his favor. Therefore, the right of the defendant to exercise peremptory inclusions in substitution for a peremptory challenge should be limited to a fraction of his statutory number of peremptory challenges.[218]

B. An Inclusionary Approach to Jury Selection

Combining the Sixth Amendment requirements of impartiality, a cross-section of the community, and a jury of one's peers, an ideal jury can be defined as one drawn from inclusionary practices to ensure representativeness.[219] However, the Court does not define an impartial jury in the same way, rather, it employs a negative definition that defines an impartial jury as one that has not been drawn by discriminatory procedures that violate an equal protection prohibition of exclusionary practices.[220] This definition

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218. This Note proposes limiting the number of peremptory inclusions to one-third the number of peremptory challenges. In federal court, this would give the defendant the option to exercise three of his ten peremptory challenges as peremptory inclusions. The one-third limitation allows the defendant to include his peers on the jury and enhance minority representation, without permitting him to control the jury with a majority of sympathizers.

Studies of jury dynamics suggest that one or two dissenting jurors are not likely to hold out against a majority vote and cause a hung jury. ABBOTT, *supra* note 92, at 98 (citing S. E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, *in* BASIC STUDIES IN SOCIAL PSYCHOLOGY 393, 393-401 (Harold Proshansky & Bernard Seidenberg eds. 1965)). However, the presence of one or two peers on the jury may affect the jury's dialogue during deliberations; and the purpose of a representative jury is to include diverse perspectives in the deliberations. Massaro, *supra* note 2, at 564. Therefore, if the defendant is successful in selecting one or two minorities, the likelihood of increased numbers of hung juries from this practice is unlikely.

Although the ability of the defendant to use all three peremptory inclusions to select minority jurors may increase the chance of a hung jury, the rule of Apodaca v. Oregon, 406 U.S. 404 (1972), stating that a unanimous verdict is not required, may make the minority coalition unsuccessful. Moreover, one can debate whether a hung jury is necessarily a negative result. A hung jury may be a positive result when the jurors reach differing conclusions after observing the same evidence and testimony because it indicates that there is not a consensus among the community that the defendant is guilty. *See generally* David A. Vollrath & James H. Davis, *Jury Size and Decision Rule*, *in* THE JURY: ITS ROLE IN AMERICAN SOCIETY 73-103 (1980) (noting that two jurors at the same trial may not agree on a verdict).

219. *See* Massaro, *supra* note 2, at 529-37 (explaining the history of the courts' nonexclusionary practices of jury selection and the courts' reluctance to state what a proper jury must include, other than at least six people who must reach a unanimous verdict).

220. *Id.* at 529-30.

concentrates on the process of selecting a jury,[221] while an inclusionary approach is more concerned with the substantive result of the procedures.

The Court describes the cross-sectional requirement to be "an essential component of the Sixth Amendment right to a jury trial,"[222] and defines a cross-sectional jury as one that does not systematically exclude "distinctive groups in the community."[223] But while this nonexclusion rule satisfies the community-based interest in participation in the justice system, it does not necessarily assure the criminal defendant a fair and impartial jury.[224] The additional requirement of a "jury of one's peers" recognizes the defendant's intensely personal interest at stake in the verdict.[225]

Although the Court does not define the right to a "jury of one's peers" to be the right to a "petit jury composed in whole or in part of persons of [the defendant's] own race,"[226] many of its decisions suggest a inclusionary imperative for the petit jury. The Supreme Court has stated:

> If 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

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221. *See* Herman, *supra* note 27, at 1823 (discussing the desire to promote fair trials through jury selection procedures). The Court stated in McCleskey v. Kemp, 481 U.S. 279, 313 (1987): "[A]ny mode for determining guilt or punishment has its weaknesses . . . [but] our consistent rule has been that constitutional guarantees are met 'when the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.'" (quoting Singer v. United States, 380 U.S. 24, 35 (1965)).

222. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

223. *Id.* at 538 ("In holding that petit juries must be drawn from a source fairly representative of the community . . . the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community . . . .").

224. *See* Massaro, *supra* note 2, at 546-47.

> The cross-representative requirement could actually defeat the defendant's right to a fair jury. Depending on how local rules define the geographical area from which jury pools are to be selected, a cross-section of the "community" could be a totally homogeneous group of citizens known to harbor strong ill-will toward people of the defendant's race or background.

Id. at 547.

225. *See* Goldwasser, *supra* note 3, at 829. The court also acknowledged the criminal defendant's personal interest when it introduced the concept of a "jury of one's peers" in Strauder v. West Virginia, 100 U.S. 306, 308 (1879) ("The very idea of a jury is a body of men composed of peers or equals of the person whose rights it is selected or summoned to determine.").

226. Batson v. Kentucky, 476 U.S. 79, 85 (1986) (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1879)).

> 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.[227]

The Court made a similar observation in *Ballard v. United States*:[228]

> 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.[229]

However, despite the implicit references to the imperative of including representative perspectives on the jury, the Court has consistently held that the requirements of representativeness only applies to the venire pool.[230] But the petit jury, not the venire, is the democratic decision-making body that is designed to represent the collective sentiments of the community.[231] If representativeness is not extended to the petit jury, then the prom-

227. Peters v. Kiff, 407 U.S. 493, 503-04 (1972).

228. 329 U.S. 187 (1946).

229. *Id.* at 193-94.

230. Holland v. Illinois, 493 U.S. 474, 480 (1990) (stating that the Sixth Amendment requires an impartial jury, not a representative one). Earlier, in Taylor v. Louisiana, 419 U.S. 522, 529 n.7 (1975), the Court noted that "[a]s 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."

231. *See* FUKURAI, *supra* note 1, at 5 (explaining that those deliberating must be representative of the community on whose behalf they speak).

ise of an exchange of collective sentiments found in the venire pool is a hollow promise and the jury fails to serve its democratic function.[232]

Perhaps the Court has declined the extension of representativeness to the petit jury because of the administrative difficulties in managing a jury system that requires the affirmative representation of different groups, perhaps even proportional representation,[233] on the jury panel.[234] However, strict adherence to demographic proportions is not the only method of achieving representativeness. The most important goal of representativeness is that it gives the jury the appearance of impartiality and fairness.[235] This does not require the presence of all distinct and identifiable groups on the jury but only the representation of the defendant's peers on the panel.

The Court retreats from the administrative difficulty of defining "peer" for representativeness purposes.[236] But while this standardization is difficult, if not impossible, it is also unnecessary. A peer under the Sixth Amendment is what the defendant subjectively

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232. The Court assumed in *Taylor v. Louisiana* that a representative jury pool will result in a representative jury when it stated: "Trial by jury presupposes a jury drawn from a pool broadly representative of the community . . . . [The] broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." 419 U.S. at 530-31 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

233. *See* Johnson, *supra* note 32, at 1695-1700 (proposing a system of racial quotas in jury selection). *But see* Batson v. Kentucky, 476 U.S. 79, 86 n.6 (1986) ("[I]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.")

234. *See* VAN DYKE, *supra* note 6, at 23 (discussing the need for impaneled juries to reflect a cross-section of the community while acknowledging the impossibility of having exact representation on all juries); *see also* Potash, *supra* note 32 (discussing how the probable existence of racism in the "all white" jury would require minority representation on jury panels).

235. *See supra* note 9 and accompanying text (discussing visual image of jury and effect on the legitimacy of the verdict).

236. *See* Massaro, *supra* note 2, at 560 n.272 (discussing the difficulty of defining "peer" for purposes of mandatory juror inclusion). *See also id.* at 547-55 (discussing the possible definition of "peer"). Gender and race may be necessary characteristics to satisfy the visual image of a jury of the defendant's peers. *See supra* note 235 and accompanying text. However, it is less clear whether age, occupation, or other socioeconomic factors should be included in a selection standard. Further, there may be overlap of many different demographic groups within one individual. For example, under a proportional representation model or other mandatory inclusion model, how should an elderly black female be treated? It is unclear whether the presence of this single juror on the jury should satisfy representational requirements for the elderly, women, or blacks.

values as an empathizer to his case, someone the defendant feels will be able to understand his position.[237] This designation may be because of the juror's race, sex, age, or simply a shared occupation. The peremptory inclusion allows this subjective decision to be made by each individual defendant in each individual case, thus securing the legitimacy of the jury and the verdict to society.[238]

In addition to the appearance of representativeness, some form of affirmative inclusion on the petit jury also is necessary to combat the inherent underrepresentation of minorities in the venire pool.[239] Under the current system of jury selection, minority defendants are at the mercy of the low statistical likelihood that a minority juror will be placed on the jury panel randomly, because of the failure of the system to qualify minorities as eligible ju-

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237. *See* DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION—FROM HYPOTHESIS TO PROOF 151 (1984) ("When a witness is in some way similar to a fact finder, a witness' credibility may increase. And when the witness is dissimilar, credibility may well decrease.") (citing B. COLLINS, SOCIAL PSYCHOLOGY 119-25 (1970)); FUKURAI, *supra* note 1, at 142-43 (suggesting that similar experiences and background between a juror and defendant may help the juror to understand the motivations behind, and the context of, the act). Because of the subtleties of bias, many jurors may not be aware of their prejudices, or they may underestimate the impact of prior experiences on their present perspectives. *See* Babcock, *supra* note 9, at 554 (suggesting that this may be especially true in cases of group bias where the juror may not realize that his views are not accepted outside of his group). The cultural context of the incident giving rise to the criminal charges may create a barrier to white juries' understanding and objectively evaluating the racial issues in the case. See FUKURAI, *supra* note 1, at 157. Bias is not black-white, nor should the assumption be made that all white jurors are biased against minority defendants, but the differing backgrounds and experiences of the jurors may affect their judgement of the credibility of the witnesses and the defendant. *Id.* at 156-60 (discussing how various differences among jurors can affect trial outcomes). Moreover, many people tend to evaluate a person's credibility on the basis of gender, social class, racial and ethnic background, and language; thus, jurors infuse subconscious bias into their consideration of evidence and witnesses. *See id.* at 157.

238. *See* Massaro, *supra* note 2, at 513 ("[A] verdict by a jury composed of representatives of key community groups—minority and nonminority women and men—is more likely to be acceptable to all of these groups than would one judge's ruling.").

239. *See* FUKURAI, *supra* note 1, at 34 (listing various causes of minority underrepresentation in venires). The use of registered voters' rolls as a source list for the jury pool results in minority underrepresentation because blacks and Hispanics are less likely to register to vote. *Id.* at 18. Also, the increased residential mobility of minorities, owing to their likelihood to be employed in secondary labor markets, makes them ineligible to vote or serve as a juror for failing to meet residential requirements. *Id.* at 21-26. The process of judicial district gerrymandering further limits minority participation. *Id.* at 29-34 (offering specific examples of systematic inclusion and exclusion of minority neighborhoods that result in minority underrepresentation). *See also* Massaro, *supra* note 2, at 509 (arguing socioeconomic factors result in underrepresentation on the venire); VAN DYKE, *supra* note 6, at 30 (finding black mobility and infrequent updating of source lists to result in underrepresentation).

rors.[240]

C. *Fair Jury Selection Procedures*

The peremptory inclusion satisfies the defendant's constitutional right to a representative jury of his peers, but, in addition to achieving substantive results, the jury selection practice must be functional. Professor Massaro outlines three requirements for fair jury selection procedures:

> The first requirement is that the constitutional standard be a simple one. The second is that the judiciary have adequate control over the means of effectuating enforcement. The third is that the public acquiesce—there is no need for agreement, simply the absence of opposition—in the principle and its application.[241]

The peremptory inclusion meets all three requirements.

First, the peremptory inclusion is a simple constitutional standard because it is an inclusionary practice, rather than an exclusionary practice that may foster discrimination. The proposed peremptory inclusion does not violate the prospective juror's rights under the Equal Protection Clause because he is not being excluded from the jury, rather he or she is being selected. The Court recognized in *Powers v. Ohio* that "[a]n individual juror does not have a right to sit on any particular petit jury," but only the right to not be excluded from any jury on the basis of race.[242]

Second, the judge is able to exercise control over the inclusion method without difficulty because it involves a limited exercise without a subjective decision on the judge's part to approve the exercise.

Third, because the peremptory inclusion enhances representativeness on the jury, it will likewise enhance the public's confidence in the jury system and the legitimacy of the jury verdict. However, a possible source of opposition may come from the prosecutor, who is not granted the similar opportunity to select jurors to the State's liking. The objective of the criminal justice

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240. *See generally* FUKURAI, *supra* note 1 (discussing legal and nonlegal factors of minority underrepresentation in every stage of venire and jury selection).

241. Massaro, *supra* note 2, at 542 (citing Philip B. Kurland, *Equal Education Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 592 (1968)).

242. 499 U.S. 400, 409 (1991).

system is fairness, and fairness allows for asymmetrical treatment of the defense and prosecution based on their different roles in the adversary setting.[243] In fact, in our legal system, the concept of justice refers to the like treatment of persons in similar situations, while fairness recognizes the different circumstances of each person and crime and recommends differing treatment based on the individual situation. In addition, our criminal justice system is built asymmetrically to give the accused an advantage in the trial.[244] Justice Black observed that "tactical advantage to the defendant is inherent in the type of [criminal] trial required by our Bill of Rights."[245]

Different treatment of the accused and the State is necessary to strike the proper balance between partisan advocacy and fairness.[246] The advantages given to the defendant are to compensate for the "awesome investigative and prosecutorial powers of government."[247] These include the Fifth Amendment privilege against self-incrimination, the Sixth Amendment rights to trial by an impartial jury, to confront and cross-examine witnesses, to compulsory process, and to assistance of counsel, and the due process rights under the Fifth and Fourteenth Amendments.[248] While the defendant has the right to remain silent throughout the trial, the Due Process Clause requires the prosecution to disclose evidence favorable to the defense[249] and to bear the burden of proving guilt beyond a reasonable doubt.[250] Any opposition by the State is without support in the criminal justice system.

Under this new jury selection practice of peremptory inclusions the criminal defendant's Sixth Amendment right is advanced by allowing the defendant to define and select his peers, helping to create an impartial and representative jury. Moreover, as a result of increased representativeness and impartiality, the legitimacy of the jury system is enhanced in the eyes of the defendant, as well as

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243. *See* Goldwasser, *supra* note 3, at 821, 825-26.

244. *Id.* at 821-22.

245. Williams v. Florida, 399 U.S. 78, 111 (1970) (Black, J., concurring in part and dissenting in part).

246. Goldwasser, *supra* note 3, at 821.

247. *Williams*, 399 U.S. at 112.

248. Goldwasser, *supra* note 3, at 821 n.78.

249. *Id.* at 822. *See* Giglio v. United States, 405 U.S. 150, 153-55 (1972) (discussing the prosecutor's duty to reveal all relevant information pertaining to the defendant); Brady v. Maryland, 373 U.S. 83, 86 (1963) (stating that suppression of evidence favorable to the defense is a violation of the Due Process Clause of the 14th Amendment).

250. Goldwasser, *supra* note 3, at 822.

the eyes of society.

VI. CONCLUSION

The Sixth Amendment is a paramount right for the criminal defendant to ensure a fair and impartial jury. The guarantee of a public trial is also important to society because it establishes popular participation in the democratic decision-making process. The right to serve on a jury is a fundamental right of prospective jurors that is protected from discriminatory exclusion under of the Fourteenth Amendment. But a jury system must be flexible to accommodate the growth and change of modern societal needs.[251] The Supreme Court itself has noted that "[c]ommunities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross-section at another time or a different place."[252] Thus, the Court has modified the traditional jury system to meet the new demands of society. Foremost among its modifications, the Court has restricted the use of the historically protected peremptory challenge to prohibit the exercise of a challenge for discriminatory purposes. The Court's nonexclusion theory is a necessary step in the elimination of discrimination in the courtroom, but it is not clearly determined to be effective in this endeavor. Discrimination still exists in the jury system, but after *Batson* there is no weapon with which to fight.

The restriction on peremptory challenges is necessary to protect the rights of the prospective jurors but it also hinders the defendant's ability to impanel an impartial and representative jury. Therefore, a new jury selection practice is needed to enhance representativeness to satisfy the defendant's Sixth Amendment right. The peremptory inclusion serves this purpose by providing an affirmative weapon to fight racism by securing the presence of minority jurors on the jury, which adds important perspectives and experiences to the jury deliberations. Most of the emphasis of this Note is on the right of minority defendants to have members of their racial or ethnic groups on the jury, but the right to an impartial jury drawn from a fair cross-section of the community should also include the right of nonminority defendants to have a racially-mixed jury. In *Peters v. Kiff*, a white petitioner challenged the

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251. *See* Massaro, *supra* note 2, at 504-10 (discussing the evolution of juries as a reflection of the changing needs of society).

252. Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

exclusion of blacks from both the grand and petit juries.[253] The Court held that the racial background of the defendant was irrelevant to the requirement of a fair cross-section of the community for jury selection.[254] The Court found that the rights of defendants transcend racial barriers when it stated:

> The precise question in this case, then, is whether a State may subject a defendant to indictment and trial by grand juries and petit juries that are plainly illegal in their composition, and leave the defendant without recourse on the ground that he had in any event no right to a grand or petit jury at all. We conclude . . . that to do so denies the defendant due process of law.[255]

The peremptory inclusion would be available for all criminal defendants to enhance the representativeness of the jury. In addition, this ability to select several jurors would increase the legitimacy of the verdict to both the defendant and society.

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253. 407 U.S. 493 (1972). *But see* Torres v. Florida, 541 So. 2d 1224 (Fla. Dist. Ct. App. 1989) (interpreting *Batson* to require that, in order to establish a case of discrimination, the defendant must show that he is a member of the racial group purposefully excluded by prosecution peremptory challenges).

254. *Peters*, 407 U.S. at 504.

255. *Id.* at 501.