PEREMPTORY CHALLENGES, *GRUTTER*, AND CRITICAL MASS: A MEANS OF RECLAIMING THE PROMISE OF *BATSON*

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INTRODUCTION

Historically, this nation's justice system has excluded African Americans from jury participation.[1] In early American history, people of African ancestry did not have the right to participate in jury service. Later, through the jury selection process, eligible African Americans were routinely eliminated from venire panels.[2] The result has all too often deprived African American defendants of fair trials[3] guaranteed by the Sixth Amendment and denied black prospective jurors the rights and privileges of citizenship guaranteed by the Thirteenth and Fourteenth Amendments.[4]

In *Batson v. Kentucky*, the Supreme Court took its first meaningful step to remedy this history of exclusion.[5] Using an equal protection analysis, the Court ruled that prosecutors may not use peremptory challenges in a racially motivated manner.[6] In *Georgia v. McCollum*, the Court extended

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1. *See infra* Part II.A. In fact, it was not until 1860 that the first person of African ancestry sat on an American jury. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 31 n.140 (1990).

2. *See infra* Part II.B.

3. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 888, 893–97 (1994) (detailing methods used to systematically exclude African Americans from jury service, leading to unjust verdicts); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L. J. 895, 909–10, 915 (2004) (describing the practice of post-Civil War all-white juries punishing black defendants "particularly harshly" while failing to punish whites who victimized blacks).

4. "In this respect, exclusion of jurors is like exclusion of voters: the exclusion of voters by reason of race does violence to constitutional ideals, whether or not the exclusion affects the outcome of any particular election." Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 727 (1992).

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

6. *Id.* at 86.

the holding in *Batson* to prohibit criminal defendants from using race-based peremptory challenges on African American venirepersons.[7]

Social science studies and analysis of jury verdicts from real cases demonstrate that an all-white jury is more likely to convict a black defendant than is an ethnically diverse jury.[8] This research also shows that an all-white jury is more likely to convict a black defendant than it is a white defendant charged with a similar crime.[9] To achieve fairness in our criminal justice system, minorities cannot be excluded from juries.

Yet application of the *Batson/McCollum* doctrine by trial courts has had inconsistent results. Symmetrical application of *Batson*'s equal protection reasoning to prosecutor and minority defendant alike can prevent the defendant from securing minority representation on a trial jury.[10] This is especially true with venire panels that contain little diversity. This symmetrical equal protection approach can paradoxically undermine *Batson* and *McCollum*'s underlying purpose of preventing the exclusion of minorities from jury service. The desire to achieve a color-blind system actually thwarts efforts to obtain a racially balanced jury for the people who historically have had the most difficulty obtaining equal protection under the law.

However, the recent Supreme Court decision of *Grutter v. Bollinger* creates an opening to reinforce the right to a fair trial and obtain equal protection for minority defendants during jury selection.[11] *Grutter* specifically recognized a compelling state interest in obtaining a "critical mass" of diversity in an academic environment to develop "cross-racial understanding" and "break down racial stereotypes."[12] These objectives are every bit as much compelling state interests in the jury room as they are in the class room. The "critical mass" analysis in *Grutter* creates the opportunity to re-examine *Georgia v. McCollum* in a way that values the purpose of *Batson*: to provide equal protection for minority defendants and to prevent exclusion of underrepresented minorities on juries.

To address the issues raised by applying the *Batson/McCollum* restrictions to non-majority criminal defendants, Part I of this article begins by analyzing the historical context in which the peremptory challenge emerged and developed. The history of the peremptory illustrates that, at its inception, the peremptory challenge was conceived of as a defendant's

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7. Georgia v. McCollum, 505 U.S. 42 (1992).
8. *See infra* Part V.C.
9. *Id.*
10. *See infra* Part VI.C.
11. Grutter v. Bollinger, 539 U.S. 306 (2003).
12. *Id.* at 329–30.

tool to protect the defendant from the power of the government. Restricting a criminal defendant's use of the peremptory challenge is an incongruous development in light of its history. Part II of this article chronicles this nation's history of excluding African Americans from jury service. This practice denied African Americans fair trials and full privileges of citizenship. Considering this history of exclusion, the detrimental impact of limiting a criminal defendant's peremptories is compounded when applied to a non-majority defendant.

Part III of the article analyzes the problem which the Supreme Court sought to remedy when it issued the *Batson* and *McCollum* decisions. It also reviews the expansion of the *Batson* doctrine. These discussions examine the significance of basing *Batson* and *McCollum* on equal protection grounds rather than addressing claims of the right to a fair trial.[13] Continuing on this thread, Part IV tracks the evolution of post-*Batson* cases, illustrating how each well-intentioned expansion sowed the seeds of *Batson* growing unintended branches that now need pruning.

Shortly before and after the time of the *McCollum* decision, Justices, scholars, and advocates speculated on the true impact this decision would have on jury selection in trial courts.[14] Twelve years after the decision, it is time to evaluate this impact. Part V takes on that task, identifying and examining the problem of attempting to achieve a color-blind justice system by symmetrically applying *Batson* and *McCollum* equal protection limitations to minority defendants. This section also addresses how demographic realities place minority defendants at a greater disadvantage than other litigants when *McCollum* is applied to them. This discussion

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13. The *Batson* decision focused primarily on the equal protection rights of the jurors. The Court avoided expressing an opinion on the defendant's Sixth Amendment rights. *See infra* notes 77–79 and accompanying text. The *McCollum* decision built on the reasoning of *Batson*. *See infra* notes 127–128 and accompanying text.

14. Justice Thomas speculated that the *McCollum* decision "inexorably will lead to the elimination of peremptory strikes." Georgia v. McCollum, 505 U.S. 42, 60 (1992) (Thomas, J., concurring). Justice O'Connor articulated a concern that the *McCollum* decision might "fail to advance nondiscriminatory criminal justice." *Id.* at 68 (O'Connor, J., dissenting). Justice O'Connor added, "In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions." *Id.* at 69. In an amicus brief submitted in *McCollum*, attorneys from the NAACP weighed in that, "The use of all of a defendants' [sic] peremptories to strike majority-group jurors, where it is impossible to produce a jury on which there will be no such jurors sitting, presents a far different issue than the use of peremptories to strike all minority jurors, thus producing a monochromatic jury." Brief of Amici Curiae NAACP Legal Defense and Education Fund, Inc. at 2, Georgia v. McCollum, 505 U.S. 42 (1992) (No. 91-372); *see also* Deborah Zalesne & Kinney Zalesne, *Saving the Peremptory Challenge: The Case for a Narrow Interpretation of* McCollum, 70 DENV. U. L. REV. 313, 335 (1993) (arguing that whether application of *McCollum* extends to a minority defendant's use of a peremptory challenge on a majority prospective juror remains an open question).

goes on to examine the importance of obtaining diversity on juries. Studies demonstrate that all-white juries reach different conclusions than mixed-race juries.[15] These differences critically impact the ability of non-white defendants to receive fair trials and realize equal protection under the law.

Some state courts have interpreted *McCollum* to apply symmetrically to both minority and majority defendants' use of the challenge.[16] Circumstances in which minority defendants have been prevented from using peremptory challenges on majority venirepersons have led to outcomes that are inconsistent with the purpose of *Batson* and its progeny. Part VI of this article evaluates these situations.

Since the Supreme Court has settled upon the Fourteenth Amendment to build the remedy for racially motivated use of peremptories, this article goes on to analyze equal protection jurisprudence from contexts in which race consciousness in a decision-making process is permissible. Focusing primarily on the recent Supreme Court decision of *Grutter v. Bollinger*, in which the Court held there was a compelling state interest to obtain a "critical mass" of racially diverse people in an educational environment, the decision's rationale is analyzed and parallels are drawn between the value of diverse communities in the classroom and the jury room.[17] After considering suggestions added to the academic discourse by scholars, the article concludes with a proposal to apply *Grutter* to the jury selection process. Modifying the equal protection framework that governs the use of peremptory challenges, *Grutter*'s values and reasoning should be infused into the procedure for adjudicating disputes over a minority defendant's use of peremptory challenges. Permitting minority defendants to consider race as one of many factors when using peremptory challenges can restore the *Batson* doctrine to its original purpose: to prevent the exclusion of minority members from jury service and restore equal protection to minority defendants.

I. HISTORY ESTABLISHED THE PEREMPTORY CHALLENGE AS A DEFENDANT'S RIGHT

The history of the peremptory challenge demonstrates that the criminal defendant's right to use the challenge has been fundamental in nature. Indeed, history demonstrates that it is a defendant's right. The defendant's ability to use the peremptory challenge developed in a different context than the prosecution's use of the challenge. The different historical path for each

15. *See infra* Part V.C (discussing the findings of social science studies about jury dynamics).
16. *See infra* Part VI.
17. *Grutter*, 539 U.S. at 328–32.

reflects that the defendant's use of the peremptory was an attempt to even the scales of justice for the defendant. At its inception, the peremptory challenge was not intended to apply equally to both defendants and prosecutors. In fact, when the peremptory originated, the prosecution had no access to this litigation tool.

The concept of the peremptory challenge has existed since the early days of jury trials in England.[18] It was implemented to rectify inequities that existed in the jury process. The earliest juries were hand-picked by the Crown.[19] Sheriffs, who were agents of the Crown, were given complete control over obtaining people to sit on the jury panel.[20] They rationally chose people predisposed in favor of the Crown.[21] If an individual unacceptable to the Crown somehow slipped through this process and appeared on the jury list, the Crown could simply remove that person.[22]

However, in 1305, the English Parliament decided that a jury, which was structurally designed to be biased toward the prosecution, was inconsistent with the concept of justice.[23] Parliament passed a statute precluding the Crown from using peremptory challenges and limiting the Crown to challenges for "cause certain."[24] Five centuries later, Sir William Blackstone commented that the peremptory challenge was clearly the defendant's right.[25] During the 500-year period that followed its enactment, use of the peremptory challenge in English and American common law was limited exclusively to the defendant.[26]

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18. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977).

19. *Id.* In the 14th century during the reign of Edward III, the official position was that a juror biased against the defendant was good for the King. Even the Chief Justice of England, Lord Parnung, shared this belief, stating, "'[C]ertainly if, indictors [persons who have already concluded as to the defendants guilt] be not there [on the petit jury] it is not well for the King.'" S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 292 (1972) (second and third alterations in original) (quoting Charles L. Wells, *Early Opposition to the Petty Jury in Criminal Cases*, 30 L.Q. REV. 97 (1914)).

20. Gutman, *supra* note 19, at 292.

21. *Id.*

22. VAN DYKE, *supra* note 18, at 147. It is significant to note that this unchecked ability of the King to remove prospective jurors existed for less than a century. Trial by jury replaced other forms of dispute resolution (such as trial by battle and trial by ordeal) sometime after 1215. The English Parliament eliminated this power of the state in 1305, the same year the peremptory challenge was introduced to the accused. *Id.* at 2–4, 147; *see also* Colbert, *supra* note 1, at 9 n.30 (discussing the early history of the peremptory challenge).

23. VAN DYKE, *supra* note 18, at 147.

24. *Id.*

25. In an often quoted phrase, Blackstone stated that the peremptory is "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous." *Id.*

26. Colbert, *supra* note 1, at 10.

The concept underlying this framework for the peremptory challenge came across the Atlantic to the American colonies and was integrated into the state and federal courts of the United States.[27] The fundamental nature of this right for criminal defendants is reflected in the consideration Congress gave to including it in a constitutional amendment guaranteeing a right to a fair trial. A proposed draft of this amendment referred to "the right of challenge and other accustomed requisites" as a means to guarantee the right to a fair trial for an accused.[28] Although Congress opted not to include this guarantee in the final draft that became the Sixth Amendment, it took action to ensure that the peremptory challenge survived as a trial mechanism for the accused.[29] In 1790, Congress passed a statute granting defendants thirty-five peremptory challenges in cases of treason and twenty peremptory challenges in other capital cases.[30] At that time, no peremptory challenges were afforded to the government.[31]

Over time, states gradually granted prosecutors the ability to use peremptory challenges. However, there was little uniformity or consistency in doing so. During the early 19th century, two of the most populous states, New York and Virginia, denied the prosecution any peremptory challenges at all.[32] Even states that gave the prosecution peremptory challenges generally did so in lesser numbers than those granted to the defense.[33]

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27. Even before the Bill of Rights was adopted, the fundamental nature of the peremptory challenge was discussed in the Virginia Ratification Debates in 1788. George Mason spoke of the *right* to peremptorily challenge jurors in criminal trials. Gutman, *supra* note 19, at 296. Patrick Henry argued that the individual's right to challenge jurors is as valuable as the right to trial by jury itself. *Id.* at 297.

28. Colbert, *supra* note 1, at 10 (citing GAZETTE OF THE UNITED STATES, Aug. 29, 1789, at 158).

29. *Id.* at 10–11. One could suggest that the absence of the peremptory challenge from the Constitution indicates its omission was intentional. However, the silence of the Constitution on this issue does not necessarily mean the right was purposefully omitted. In the *Federalist Papers*, No. 83, Alexander Hamilton asserts that there is a difference between *silence* and *abolition*. The fact that an item is not provided for in the Constitution does not mean it was intended to be abolished. The context of this argument was to refute the claim that since a civil trial was not enumerated in the Constitution, there was no such right. THE FEDERALIST NO. 83, at 539 (Alexander Hamilton) (Sherman F. Mittell ed., 1937). The Seventh Amendment later clarified that there was a right to jury trials in civil cases. U.S. CONST. amend. VII. The Bill of Rights makes this point clear in the Ninth Amendment. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

30. VAN DYKE, *supra* note 18, at 149. By structuring peremptories this way, Congress followed a centuries-old practice of denying peremptory challenges to the prosecution. Colbert, *supra* note 1, at 11.

31. VAN DYKE, *supra* note 18, at 149.

32. *Id.*

33. *Id.* at 149. For example, Delaware first granted the prosecution only three peremptory challenges while maintaining six challenges for the defendant. *Id.* "In Alabama, the prosecutors were given only four peremptory challenges, while the defendant had sixteen challenges in capital cases and twelve in non-capital cases." *Id.* In two states, Kentucky and Maryland, efforts in the mid-nineteenth

The time frame during which state and federal governments ultimately authorized peremptory challenges for the prosecution is interesting to note. For example, in New York the prosecution was granted peremptory challenges by statute in 1858.[34] In the District of Columbia, this power was extended to the prosecution in 1872.[35] In 1865, Congress permitted prosecutors to exercise peremptory challenges in federal criminal trials.[36] Viewing this change of the long-held status quo in the context of concurrent events provides insight into the divergent histories associated with the defendant's right to peremptorily challenge and the prosecution's authority to do so. Moreover, this time frame provides insight into the reason that the federal and state governments elected to abandon five centuries of limiting the peremptory challenge as a tool to be used exclusively by defendants.

The United States Supreme Court noted that most states' prosecutory peremptory laws were enacted by 1870.[37] One might surmise that the emergence of the prosecutorial peremptory challenge was merely a long overdue leveling of the playing field in criminal cases.[38] Perhaps this reason alone can account for this dramatic change in the way juries were selected. However, with the enactment in 1865 of the federal law providing prosecutors with the peremptory, one can argue that this was a response to the passage of the Thirteenth Amendment,[39] the purpose of which was to

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century to allow the government peremptory challenges were defeated altogether at constitutional conventions. *Id.*; *see also* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 14 (2001) (observing that although most jurisdictions now have the same number of peremptory challenges for the defense and prosecution, historically, the defendant was granted more peremptory challenges).

34. *See* Colbert, *supra* note 1, at 11 n.39; 1858 N.Y. Laws ch. 332. New York did not grant criminal defendants the power to peremptorily strike prospective jurors until 1828. Rev. Stat. of N.Y. [1829], part.IV, ch.II, tit.V §9. This is almost forty years later than the federal government granted this right. This indicates a less established historical commitment on the part of New York to the defendant's peremptory challenge. This may provide insight to the discussion of New York's role in limiting the power of the defendant's peremptory. *See infra* Part VI.C.

35. Sec. 819 R.S. U.S., 8 June 1872, ch. 333, sec. 2, v. 17, p. 282. This statute permitted twenty challenges for the defense and five for the prosecution in cases charging treason or in capital cases. For all other felonies, the defendant was permitted ten peremptory challenges and the prosecution was permitted three.

36. Eric D. Katz, Comment, *Striking the Peremptory Challenge from Civil Litigation: "Hey* Batson, *Stay Where You Belong!"*, 11 PACE L. REV. 357, 360 (1991).

37. Swain v. Alabama, 380 U.S. 202, 216 (1965).

38. One Pennsylvania prosecutor urged that providing the prosecution with four peremptory challenges was necessary to protect the public against jury members who were "pledged to the defendant." Colbert, *supra* note 1, at 11–12 (quoting JOHN PROFATT, A TREATISE ON TRIAL BY JURY, § 155, at 210–11 (1877)).

39. *But see* Colbert, *supra* note 1, at 11 n.38 (proposing that Congressional debates do not support a link between passage of the Thirteenth Amendment and prosecutor's peremptory challenges). Colbert hypothesizes that this may not have been the true purpose for the emergence of the prosecutory peremptory. *Id.* He notes that only six states passed these laws after 1865. *Id.* at 11 n.39. However,

remove "badges and incidents of slavery" from African Americans.[40] The challenge could be used to exclude African Americans from jury service, even though the Thirteenth Amendment, in principal, guaranteed this right to black Americans.[41]

Whatever the reason, or combination of reasons, these events create a strong inference that the prosecution was granted the use of the peremptory challenge in response to political events. This is a very different origin than that of the peremptory for the accused. Criminal defendants were granted this right as a means of insuring a fair trial against the awesome power of the government. Defendants enjoyed exclusive use of this right for 500 years.[42] Indeed, as noted, the right was deemed so fundamental that it was considered for inclusion in the Sixth Amendment.[43] Although the Constitution does not specifically enumerate the right to a peremptory challenge, it is clearly interwoven with the right of the accused to trial by an impartial jury, which *is* secured by the Sixth Amendment.[44]

Even though the source of the peremptory challenge is common law rather than the Constitution, the United States Supreme Court has spoken forcefully in the past on protecting the *right* of defendants to peremptorily challenge jurors. In *Pointer v. United States*, the Court stated,

> The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. . . . Any system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned.[45]

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between 1820 and 1861, fifteen states passed such laws. *Id.* Colbert does credit the decision in *United States v. Shackelford*, 59 U.S (18 How.) 588 (1855), with contributing to this change. *Id.* at 11 n.38. In *Shackelford*, the Court struck down the government's "stand aside" as an analogue of the defendant's peremptory challenge. The "stand aside" was a judicially developed measure from the English Common Law which permitted the prosecution to have a prospective juror be deferred from consideration. *Id.* The juror could be considered later if the defendant ran out of peremptories and if the prosecution had directed too many people to stand aside. The "stand aside" differs from the peremptory. In a "stand aside" that juror may eventually be selected to serve. A juror who is peremptorily stricken is permanently excused from that jury. *See Swain*, 380 U.S. at 213 (recounting the use of "stand aside" in England after The Ordinance for Inquests, 33 Edw. I, Stat. 4 (1305), was issued); Colbert, *supra* note 1, at 11 n.34 (noting the practical distinction between the "stand aside" and a peremptory challenge).

40. Civil Rights Cases, 109 U.S. 3, 20 (1883).

41. U.S. CONST. amend. XIII. The Fourteenth Amendment, which made the Thirteenth Amendment applicable to the states, was promulgated in 1866 and ratified in 1868. U.S. CONST. amend. XIV.

42. Colbert, *supra* note 1, at 10.

43. *Id.*; *see also supra* notes 28–29 and accompanying text (discussing the historical development of the peremptory challenge).

44. U.S. CONST. amend. VI; *see also* discussion *infra* at note 47.

45. Pointer v. United States, 151 U.S. 396, 408 (1894); *see also* Rodger L. Hochman,

Earlier, the Court had stated in *Lewis v. United States* that "[t]he right of challenge . . . has always been held essential to the fairness of trial by jury."[46] While the Court has backtracked from such strong language, it still ties the peremptory challenge to the right to a fair trial.[47]

This leaves the door open to potential impact on the Sixth Amendment if at some point in the future the peremptory challenge is eliminated.[48] Specifically, the history of the peremptory challenge for the accused illustrates that it enjoys a strong link to the right to a fair trial, which is guaranteed by the Sixth Amendment. Because of this relationship, the nature of the peremptory strike differs between the defendant and the prosecution. The Sixth Amendment does not discuss the right of the state to trial by an impartial jury.[49] As such, the Court's decision to restrict the manner in which a prosecutor exercises peremptory challenges does not alter the historical essence or legal foundation of the challenge as does applying limitations on the defendant's use of the challenge.[50]

Although the peremptory challenge's link to the right to a fair trial lends itself to a solution framed in the Sixth Amendment, the Court chose to base *Batson* upon an equal protection analysis. This decision was at first blush a seemingly logical means of addressing the history of excluding African Americans from jury service. Yet this ruling generated inertia that steered subsequent decisions in a direction that had unintended results. A

Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw, 17 NOVA L. REV. 1367, 1372 n.28 (1993) (highlighting the same quote from *Pointer v. United States* provided in the text above).

46. Lewis v. United States, 146 U.S. 370, 376 (1892); *see also* Hochman, *supra* note 45, at 1372 (providing the same quotation from *Lewis v. United States*). While this language illustrates the historical evolution of the peremptory strike and places it in context, these quotes do not reflect the Supreme Court's current position on the peremptory challenge.

47. In *McCollum*, the Court noted that the peremptory challenge is not a constitutionally protected fundamental right. Georgia v. McCollum, 505 U.S. 42, 57 (1992). Moreover, the Supreme Court observed in *Stilson v. United States*, 250 U.S. 583, 586 (1919), that nothing in the Constitution of the U.S. requires "Congress to grant peremptory challenges to defendants in criminal cases." All that is secured is trial by impartial jury. However in *McCollum*, the Court did say that the peremptory challenge is a "means to the constitutional end of an impartial jury and a fair trial." *McCollum*, 505 U.S. at 57.

48. Justice Thurgood Marshall's concurring opinion in *Batson* states that the goal of eliminating racial discrimination from the jury selection "can be accomplished only by eliminating peremptory challenges entirely." Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

49. U.S. CONST. amend. VI; *see infra* note 85 and accompanying text.

50. *See* 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, 827–28 (1989) (noting that since the jury itself was designed as a device to protect defendants from the state, the peremptory challenge facilitates this function in the selection process. Historically, defense peremptories have been protected more than those of prosecutors. Consequently, there is no need to symmetrically place limits on the function of peremptory challenges for prosecution and defendant alike.).

Sixth Amendment cure for the racially motivated use of prosecutorial peremptories would have effectively remedied the history of exclusion. Moreover, consequences that come with the trend toward applying equal protection principles in a symmetrical manner could have been avoided.

II. HISTORICAL EXCLUSION OF AFRICAN AMERICANS FROM JURY SERVICE

A. State Laws Excluded Black Citizens from Jury Service

There are no known instances of black jurors serving on American juries prior to 1860.[51] From the end of the Reconstruction Era until the middle of the twentieth century, African Americans were rarely included on the lists of qualified jurors in the American South. After Reconstruction, many states possessed laws that prevented black Americans from qualifying for jury service. West Virginia enacted the first such statute addressed by the Supreme Court. In *Strauder v. West Virginia*, the Court overturned the state murder conviction of an African American man because a West Virginia law forbade blacks from participation in jury service, keeping them off Strauder's trial jury.[52] This statute violated black citizens' equal protection rights.[53] The Court noted that the Fourteenth Amendment prohibits "legal discriminations, implying inferiority in civil society, lessening the security of [black citizens'] enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."[54]

However, the Court reached a different conclusion when it ruled on an 1892 Mississippi law designed to restrict African Americans from participating in jury service. The law vested three state officials with the power to select jurors based on their "good intelligence, sound judgment and fair character."[55] Although race was not specifically enumerated as a factor, this was a thinly veiled means of granting white officials the power to exclude African Americans from the venire by using white stereotypes of black characteristics as criteria for service. In *Williams v. Mississippi*, the Supreme Court upheld the constitutionality of this discretionary jury

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51. Colbert, *supra* note 1, at 12. The first black jurors served at a trial which was held in Worcester, Massachusetts in 1860. *Id.* at 31 n.140.

52. Strauder v. West Virginia, 100 U.S. 303 (1880).

53. *Id.* at 308.

54. *Id.*

55. MISS. CODE ANN. § 2358 (1892), *quoted in* Williams v. Mississippi, 170 U.S. 213, 217–18 n.1 (1898).

selection law.[56] Even though the Mississippi statute empowered officials to presume that African Americans were ineligible to serve on juries, the Supreme Court reasoned that the actual administration of these laws could not be shown to be evil, "only that evil was possible under them."[57] Thus granted permission by the *Williams* decision, by 1910 seven other states included similar voting requirements in their state constitutions.[58] Consequently, the all-white jury became re-entrenched in the South, even though African Americans had served on juries during the Reconstruction Era.

B. Peremptory Challenges Are Used to Exclude African Americans from Juries

On those rare occasions when African Americans made their way into the venire pool, the prosecution used newly found power embodied in the prosecutory peremptory challenge to exclude them from the sitting jury.[59] A *New York Times* reporter noted the power of the peremptory challenge in observing that being qualified for jury service is not the same as being selected for a jury. "It is a long cry from the jury roll to a jury room, and thus far few Negroes have made it . . . . Negroes are just about as consistently excluded from jury duty in this part of the South today as before the Supreme Court decisions."[60]

With these developments, the impact of the peremptory challenge was altered. Rather than continuing to be a powerful tool to ensure a fair trial for the accused, in the hands of an unscrupulous prosecutor the peremptory became another tool to deny African Americans justice. Preventing black Americans from serving on juries increased the likelihood of conviction for black defendants.[61] Moreover, continued exclusion from full participation in government became a lingering "badge[] and incident[] of slavery . . . ."[62]

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56. Williams v. Mississippi, 170 U.S. 213 (1898).

57. *Id.* at 225.

58. By 1910, Alabama, Georgia, Louisiana, North Carolina, Oklahoma, South Carolina, and Virginia had all adopted similar laws to prevent blacks from serving on juries and even from voting. These laws usually contained the same criteria with respect to voter eligibility. This effectively eliminated the ability of blacks to exercise their right to vote. Colbert, *supra* note 1, at 77.

59. VAN DYKE, *supra* note 18, at 150.

60. Colbert, *supra* note 1, at 85 n.424 (quoting John Temple Graves, *Alabama Seeks End of Scottsboro Case*, N.Y. TIMES, Nov. 17, 1935, § 4, at E7).

61. *See infra* notes 192–206 and accompanying text.

62. Civil Rights Cases, 109 U.S. 3, 20 (1883).

III. THE SUPREME COURT ADDRESSES PROSECUTORS' RACIALLY BASED PEREMPTORY CHALLENGES

One of the first challenges to the use of racially motivated peremptory strikes occurred in the case of *Swain v. Alabama*.[63] In *Swain*, an all-white jury convicted a black man of raping a white woman.[64] The defendant claimed that the prosecutor impermissibly excluded all black venirepersons from jury service.[65] The Court denied Swain's claim. In so ruling, the Supreme Court held that the only way a defendant could prove that his Fourteenth Amendment rights were violated was to demonstrate that a prosecutor in a county, in case after case, had removed African Americans who were qualified as jurors.[66] The defendant's evidence failed to "show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County."[67] From a practical standpoint, this evidentiary requirement made it impossible for black defendants to prove prosecutorial misuse of peremptories.[68]

Significantly, *Swain* did not analyze the Sixth Amendment implications of the prosecution's purposeful exclusion of African Americans from jury service. Yet the Court did uphold the concept that a peremptory challenge could be exercised for virtually any reason and that it was a procedure "necessary" to the jury trial.[69]

For two decades following the insurmountable evidentiary standard set by *Swain*, prosecutorial abuses during jury selection continued. This prompted the Court to revisit the issue in *Batson v. Kentucky*.[70] Batson was an African American man indicted in Kentucky on burglary charges.[71] The prosecutor used his peremptory challenges to remove all four of the black venirepersons.[72] The result was an all-white jury.[73] Batson's attorney moved to discharge the jury, arguing that the prosecutor's strikes violated

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63. Swain v. Alabama, 380 U.S. 202 (1965).
64. *Id.* at 203.
65. *Id.*
66. *Id.* at 223–24.
67. *Id.* at 224.
68. *See* Batson v. Kentucky, 476 U.S. 79, 92 nn.16–17 (1986) (listing cases in which relief was denied because the burden established in *Swain* could not be met).
69. *Swain*, 380 U.S. at 219.
70. *Batson*, 476 U.S. 79 (1986).
71. *Id.* at 82.
72. *Id.* at 83.
73. *Id.*

Batson's Sixth and Fourteenth Amendment rights.[74] The trial judge denied the motion and Batson was convicted.[75]

A. Batson *Is Built on the Fourteenth Amendment*

On appeal, Batson continued to assert that the prosecutor's use of peremptories to eliminate all black venirepersons violated his Sixth and Fourteenth Amendment rights.[76] The Supreme Court's analysis of this case addressed only the Fourteenth Amendment claims. The Court specifically stated, "We . . . express no view on the merits of any . . . Sixth Amendment arguments."[77] Most significant to this decision was the Court's focus on the rights of the prospective juror, which were implicated by the purposeful exclusion from jury service. "[B]y denying a person participation in jury service on account of his race, the state unconstitutionally discriminated against the excluded juror."[78] The right to sit on a jury has long been held to be one of the fundamental rights of participation in government guaranteed to all citizens. The Fourteenth Amendment protects citizens from State action that abridges or infringes on privileges of citizenship.[79] Consequently, the Fourteenth Amendment's equal protection clause prevents individuals from being excluded from jury service on the basis of race.[80]

In *Batson*, the Court stated that in addition to protecting prospective jurors, "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of [the defendant's] race from the jury venire on account of [their] race . . . ."[81] However, the primary focus was on the protection provided to jurors by the Equal Protection Clause.[82]

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74. *Id.*

75. *Id.*

76. *Id.* at 83, 84 n.4.

77. *Id.* at 84 n.4.

78. *Id.* at 87.

79. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

80. Although not considered in the *Batson* decision, there is a strong argument that removing prospective African American jurors from the venire because of their race constitutes a violation of the Thirteenth Amendment. *See* Colbert, *supra* note 1, at 6. With jury service being a right and privilege of citizenship, elimination of the ability to participate fully in such privileges based upon one's race constitutes a "badge" or "incident" of slavery. The Thirteenth Amendment protects against such actions. U.S. CONST. amend. XIII.

81. *Batson*, 476 U.S. at 86 (citing Strauder v. West Virginia, 100 U.S. 303, 305 (1880)).

82. As the line of *Batson* cases continued, the focus shifted completely to the rights of the prospective juror. The right of the defendant during jury selection became less and less significant to the

B. Problems with Focusing on the Prospective Jurors' Equal Protection Rights Rather than the Defendant's Sixth Amendment Rights

This focus on the rights of the prospective juror is pivotal because it facilitated extending this doctrine beyond the actions of prosecutors. Eventually, symmetrical application of the equal protection rationale created an impediment to minority defendants obtaining minority representation on juries. This rationale not only makes the defendants' equal protection rights subordinate to the jurors', but it continues to ignore the defendants' Sixth Amendment right to a fair trial.

First, avoiding reliance on the Sixth Amendment clears one hurdle for the State to receive protection—rather than solely restriction—under *Batson*. Second, focusing on the rights of jurors permits extending *Batson*'s restrictions to the accused. The government on its own behalf has no right to equal protection, but it has standing to raise the right on behalf of a struck juror.[83] However, a third issue—the requirement that equal protection violations can be found to have occurred only when the violator is a state actor—seems like it would have presented an insurmountable obstacle to applying *Batson* to the accused in a criminal case. Subsequent decisions overcame this obstacle.

Turning to the Sixth Amendment issue first, had the Court based *Batson* upon the Sixth Amendment, any extension of this protection to the State would had to have been predicated upon a prosecutor's right to a fair trial. While the judicial system recognizes that the State is entitled to receive a fair trial,[84] the Sixth Amendment contains no language securing

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Court's analysis. *See* Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 485 (1998) [hereinafter Johnson, Batson *Ethics for Prosecutors*] (arguing that post-*Batson* cases "risk the interpretation that defendants do not matter as much as jurors and that the appearance of racial neutrality matters more than racially fair outcomes" and that "it [is] intuitively obvious that in the context of a criminal trial, fairness to the defendant is more morally compelling than is creating an appearance of neutrality among jurors").

83. *See* Powers v. Ohio, 499 U.S. 400, 410–11 (1991) (listing three important criteria that must be satisfied in order for a litigant to have the right to bring actions on behalf of third parties); Georgia v. McCollum, 505 U.S. 42, 56 (1992) (holding that "the State has standing to assert the excluded jurors' rights").

84. The prosecution's entitlement to a fair trial is secured by procedural rules rather than the Constitution. *See, e.g.*, Robert M. Grass, Note, *Bifurcated Jury Deliberations in Criminal RICO Trials*, 57 FORDHAM L. REV. 745, 760–61 (1989) (noting that procedural rules and decisions empower the prosecution to move to sever counts or defendants to avoid suffering prejudice; the prosecution can submit requests to charge the jury; the prosecution can decide to prove an element of an offense rather than accept a stipulation from the defense); *see also* Tex. Dist. Ct. Lubbock Cty. LR 4, 5.10 (articulating a policy statement in a court rule from Lubbock, Texas that courts have the responsibility to "establish neutral rules and policies without adversely affecting either side's right to a fair trial").

this privilege.[85] Consequently, basing *Batson* upon the Sixth Amendment would have precluded future extension of the holding to prevent criminal defendants from using their strikes in a racially motivated manner. Such a limitation would have had to be based upon different reasoning. If the Court was attempting to leave the door open to apply *Batson* beyond just prosecutors, this could explain why the Court chose not to address Batson's Sixth Amendment claim, ruling instead on the Fourteenth Amendment.[86]

Focus on the equal protection rights of the prospective juror clears the path for broad application of this reasoning beyond just the prosecutor in a criminal case. Had the Court based the decision solely on the defendant's equal protection rights, this ruling could never be applied reciprocally against the accused to protect the prosecution. The government has no constitutional right to equal protection under the Fourteenth Amendment.[87] By focusing on the rights of the prospective juror, the Court circumvented this impediment to future application of the *Batson* doctrine beyond limiting illegal use by the prosecutor.

Nevertheless, reliance upon the Fourteenth Amendment's Equal Protection Clause, even with its focus on the rights of the jurors, would seem to present obstacles of its own. In order for a violation of the Equal Protection Clause to be found, the violating party must be a state actor.[88] In applying this standard to prosecutors, the question is easily answered. Clearly, prosecutors, who are agents of the state, prosecuting on behalf of the state, are state actors. However, it is difficult to rationalize that a criminal defendant, who is required to appear in court by the state, to

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85. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . ." U.S. CONST. amend. VI.

86. Of course, the Court could have prohibited the racially motivated use of the defendant's peremptory strikes by employing different reasoning. There was no imperative for the Court to make such limitations conform to the reasoning it used in restricting the prosecution's illegal use of the challenge. Indeed, it would have made sense to employ different reasoning in light of the different historical evolutions of this trial tool for both the prosecution and the defense. A rationale based upon the Thirteenth Amendment could have been employed by the Court, as suggested by Colbert. Colbert, *supra* note 1, at 6.

87. Kenneth J. Melilli, Batson *in Practice: What We Have Learned about* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 454 (1996).

88. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (enunciating that "private conduct, 'however discriminatory or wrongful,' . . . 'erects no shield'" under the Equal Protection Clause; only "action by the state" is prohibited. (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948))); Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982) (noting that "[b]ecause the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action'").

defend his life and/or liberty against the state, in doing so becomes a state actor.[89]

Moreover, such a conclusion would appear to be prohibited by the Supreme Court's decision in *Polk County v. Dodson*.[90] In *Dodson*, the Court held "that a public defender does not act under color of state law" when performing functions as counsel in a criminal proceeding.[91] In her dissent in *McCollum*, Justice O'Connor placed heavy reliance on *Dodson*, noting that although lawyers are referred to as "officers of the court," "a lawyer representing a client is not, by virtue of being an officer of the court, a state actor."[92] The *Dodson* Court noted that the defense lawyer, in performing her function, "opposes the designated representatives of the State."[93] Defense counsel fulfills her duty, "not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of [the] client.'"[94] Consequently, *Dodson* appears to place an insurmountable hurdle in the path of applying *Batson* limitations to the accused's use of peremptory challenges during the jury selection. Nevertheless, expansion of the *Batson* ruling began to emerge in the years that followed.

IV. EXPANSION OF THE *BATSON* DOCTRINE

A. Supreme Court Applies Symmetry to the Issue of Standing

In this equal protection landscape, the reach of *Batson* extended. The first extension dealt with whether a white defendant has standing to object to a prosecutor's peremptory strikes of African American venirepersons. This issue was addressed in *Powers v. Ohio*.[95] Powers was a white defendant charged with murder.[96] There did not appear to be any racial component to the alleged crime.[97] During jury selection, Powers invoked *Batson* to object to the prosecution's use of peremptory challenges to

89. In his dissent in *McCollum*, Justice Scalia labels "terminally absurd" reasoning that permits the conclusion that "a criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." *McCollum*, 505 U.S. at 69–70 (1992) (Scalia, J., dissenting).

90. Polk County v. Dodson, 454 U.S. 312 (1981).

91. *Id.* at 325.

92. *McCollum*, 505 U.S. at 64 (1992) (O'Connor, J., dissenting) (quoting *Dodson*, 454 U.S. at 318).

93. *Dodson*, 454 U.S. at 318.

94. *Id.* at 318–19 (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979).

95. Powers v. Ohio, 499 U.S. 400 (1991).

96. *Id.* at 402.

97. *Id.* at 403.

remove seven black venirepersons from the jury.[98] Powers' objections were overruled by the trial court.[99] Upon review, the Supreme Court held that Powers had standing to object to the prosecution's conduct, even though his race was different from that of the excluded jurors.[100] *Powers*' recognition that a white defendant had standing to contest racially motivated elimination of African American venirepersons was a first step in symmetrically applying *Batson*'s equal protection analysis. However, the laudable goal of *Powers* could still have been achieved if the *Batson* remedy was grounded in the defendant's Sixth Amendment rights.

B. State Actor Analysis Extends Batson *to Civil Litigants*

The question of whether *Batson* challenges could be applied to civil litigants was the next step in this expansion to be addressed by the Court. The case of *Edmonson v. Leesville Concrete Co.* presented this opportunity.[101] Moreover, the Court's analysis in this case constructed the bridge which led to application of *Batson* to defendants in criminal cases. Prior to *Edmonson*, application of *Batson* was limited to jury selection practices of state officials. The reason for this is obvious. In order for an equal protection violation to be found, the violating party must be a state actor.[102]

In concluding that a civil litigant is a state actor, the *Edmonson* Court followed the framework it had previously created to test for state action in *Lugar v. Edmondson Oil Co.*[103] The *Edmonson* Court looked to three

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98. *Id.*

99. *Id.*

100. *Id.* at 415. In this decision, the Court discussed the importance of the jury selection process with respect to confidence in the judicial system as well as the rights of the prospective jurors.

> Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror.

Id. at. 413–14. Therefore, even though the defendants are third parties to the offending prosecutor and the aggrieved juror, they have standing to challenge the discriminatory practice since it is not practical for the prospective juror to raise the claim herself. Moreover, the race of the defendant is irrelevant to the defendant's standing. "To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 415.

101. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

102. *Id.* at 619.

103. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). Under *Lugar*, the Court must first look at "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege

principles to answer the state action question: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[104]

With respect to the first question, the Supreme Court concluded that the jury system could not exist without significant participation by the government.[105] With respect to the second question, the Court held that peremptory challenges perform a traditional function of the government.[106] It reasoned that the peremptory strike permits "litigants to assist the government in the selection of an impartial trier of fact."[107] Finally, the Court ruled that since the alleged discrimination occurs in the courtroom, the harmful effects of the discrimination are intensified.[108]

However, the Court's reasoning, particularly on the second point, is curious. Looking at the historical evolution of the peremptory challenge, discussed *infra*, it is clear that the strike arose from a need *to protect oneself from* the government rather than to *assist* the government in the selection of the jury. The mere fact that the peremptory is exercised in the courtroom does not give rise to the inference that a struck venireperson is discharged by the State. This is clearly supported by the Court's rationale in *Polk County v Dodson*.[109] The Court plainly articulated that a public defender, who is employed by the State, does not act under color of state law when performing a lawyer's traditional functions as counsel to a criminal defendant.[110] It is difficult, then, to imagine how the defendant is

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having its source in state authority." *Id.* at 939. With respect to this portion of the test, the Court concluded that a civil litigant's use of a peremptory challenge is established by governmental authority. *Id.* at 941. The Court reasoned that without governmental approval the private litigant would be unable to strike a juror. *Edmonson*, 500 U.S. at 624. The second prong of the *Lugar* test examined whether the private party charged with the deprivation can be described as a "state actor." *Lugar*, 457 U.S. at 941–42.

104. *Edmonson*, 500 U.S. at 621–22.

105. The Supreme Court found that "[b]y enforcing a discriminatory peremptory challenge, the court . . . 'has elected to place its power, property and prestige behind the [alleged] discrimination.'" *Id.* at 624 (alteration in original) (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961)). This reasoning was similar to that used by the New York Court of Appeals in a prior case, *People v. Kern*, 75 N.Y.2d 638, 656–57 (1990). In *Kern*, the New York Court of Appeals held that criminal defendants may not exercise their peremptory challenges in a racially motivated manner. *Id.* at 643; *see infra* notes 113–114 and accompanying text.

106. *Edmonson*, 500 U.S. at 624.

107. *Id.* at 620.

108. *Id.* at 628. There was concern that the perception will be that the court, rather than the litigant, excused the juror based upon race. This perception would attribute the action to the State. Georgia v. McCollum, 505 U.S. 42, 53 (1992).

109. Polk County v. Dodson, 454 U.S. 312 (1981).

110. *Id.* at 325.

considered to be acting on behalf of the state when even the defendant's state-employed lawyer is not.

C. Batson *Extends to Criminal Defendants' Use of the Peremptory Challenge*

With *Edmonson*'s reasoning, the Court removed the last obstacle to placing *Batson* limitations on the manner in which the accused exercises peremptory challenges. This leap occurred in *Georgia v. McCollum*.[111] The *McCollum* decision may also have been a response to states that had already extended *Batson*-type restrictions to criminal defendants.[112] One such case was the infamous, racially charged New York "Howard Beach" case, *People v. Kern*.[113] In *Kern*, white defendants who were charged with violent crimes against black victims were prohibited from using peremptory challenges in a racially motivated manner to remove African American venire members.[114]

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111. *McCollum*, 505 U.S. 42.

112. Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979), *cert. denied*, 444 U.S. 881 (1979). *Soares* held that the prosecution could not use peremptory challenges to eliminate twelve of thirteen black venirepersons. *Id.* at 517. The court also observed, in a footnote regarding an unpreserved claim, that it is not permissible for minority defendants to eliminate all venirepersons of Italian decent. *Id.* at 517 n.35; *see also* People v. Wheeler, 583 P.2d 748, 765 n.29 (Cal. 1978) (holding that a prosecutor may not use peremptory challenges based upon group bias, but noting in the footnote that a white defendant may not use peremptory challenges to eliminate black venirepersons either); State v. Neil, 457 So.2d 481, 488 (Fla. 1984) (ruling that neither the state nor the defendant may use peremptory challenges in a racially biased manner).

113. People v. Kern, 75 N.Y.2d 638 (1990).

114. *Id.* at 643. In this case, defendants Kern, Ladone, and Lester were convicted of manslaughter and other charges after a highly publicized trial. The charges arose out of the defendants' involvement in an attack by a group of white teenagers upon three black men in the Howard Beach section of Queens, N.Y. *Id.* During jury selection, the defendants used peremptory challenges to eliminate several African American members of the venire. *Id.* at 647. After denying as premature the prosecution's first attempt to apply a *Batson* challenge to the defendants' peremptory strikes, the trial court granted the prosecution's renewed *Batson* motion on the last day of jury selection. *Id.* In doing so, it held that the procedures articulated in *Batson* applied to defense counsel. *Id.* Although the trial court did not disturb any of the peremptory challenges already exercised by the defendants, it ruled that *Batson* would be applied prospectively. *Id.* The defendants had to provide race-neutral explanations for future challenges to African American venirepersons. *Id.*

After this ruling, the defendants peremptorily challenged seven African American jurors. *Id.* One juror was dismissed without requiring an explanation from the defendants. *Id.* Race-neutral explanations were proffered by the defendants on the remaining six jurors. *Id.* The trial court accepted the explanations as to three jurors and rejected the explanations as to the other three. *Id.* at 647–48. Two of those three were dismissed for reasons unrelated to *Batson*. *Id.* at 648. One juror was seated over the defendants' objection. *Id.* However, that juror was eventually excused because her son became ill prior to the end of the trial. *Id.* She was replaced by the first alternate, who deliberated with the rest of the jury. *Id.* After conviction, the defendants appealed, asserting that the trial court erred in restricting their use of peremptory challenges. *Id.* They argued that neither the New York State nor

In 1992, the Supreme Court's opportunity to address this issue was presented in *Georgia v. McCollum*.[115] As in the case faced by the New York Court of Appeals in *Kern*, the Supreme Court was confronted with a factual scenario in which white defendants were charged with a well publicized hate crime perpetrated on African American victims.[116] Prior to commencement of jury selection, the State sought a ruling from the trial court that would preclude the defendants from using their peremptory challenges in a racially motivated manner.[117] Counsel for the defendants had indicated a clear intention to do so, arguing that they had that right under the circumstances of the case.[118] The State asserted that if the venire panel was composed of a representative cross section of the county, eighteen of the forty-two venirepersons would be African Americans.[119] Through use of all twenty of their peremptory challenges, the defendants would be able to exclude all African Americans from the jury.[120] The prosecution sought an order requiring the defendants to provide a racially neutral reason for exercising their challenge if a prima facie case of discrimination was shown.[121] The trial judge denied the motion.[122] The

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Federal Constitutions preclude the use of racially discriminatory peremptory challenges by criminal defendants. *Id.*

The New York Court of Appeals rejected the defendants' claim citing two reasons. They first relied upon the Civil Rights Clause of the New York Constitution. N.Y. CONST. art. I, § 11. The court noted that the second sentence of the Civil Rights Clause prohibits *private* as well as State discrimination regarding civil rights. *Kern*, 75 N.Y.2d at 651 (citing Dorsey v. Stuyvesant Town Corp., 87 N.E.2d 541, 548 (1949) (reasoning that jury service is a well recognized privilege and duty of citizenship)). The court ruled that a private litigant's racially motivated use of peremptory challenges fell under the protection of New York's Civil Rights Clause. *Id.* at 651 (citing Thiel v. S. Pac. Co., 328 U.S. 217, 224 (1946)). Under this analysis, it was not necessary for the New York Court of Appeals to evaluate the question of whether a criminal defendant is a state actor. However, in providing a second reason for its ruling, the Court of Appeals did just that. Relying on the reasoning established in *Lugar*, the *Kern* court concluded that since the power to strike jurors is conferred by statute and the process of calling jurors is organized by the State, that the State is "inextricably involved in the process of excluding jurors." *Id.* at 656. Consequently, state action was found. *Id.* at 657. A motivating factor in this decision seems to have been that "[t]he jurors do not know whether it is the Judge, the prosecutor or the defense attorney who has excused them." *Id.* In other words, it did not appear that the court wanted to run the risk that an excused juror might believe that it was the court, and not a litigant, that excused the juror.

115. Georgia v. McCollum, 505 U.S. 42 (1992).

116. *Id.* at 44.

117. *Id.* at 44–45.

118. *Id.* at 45.

119. *Id.* The prosecutor noted that 43% of the county was African American.

120. *Id.* Interestingly, the prosecution's mathematical analysis illustrates just how easy it had historically been for prosecutors to remove minority venirepersons from jury panels in the trials of minority defendants.

121. *Id.*

122. *Id.*

matter was certified for immediate appeal to the Georgia Supreme Court.[123] In a 4-3 vote, Georgia's highest court upheld the trial court's ruling.[124] The case proceeded on to the U.S. Supreme Court.

In its analysis, the Supreme Court identified four questions which needed to be addressed.

> First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by *Batson*. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.[125]

Answering the first question, the Court noted that an individual juror does not have a right to sit on any particular jury.[126] The Court added that "[r]egardless of who invokes the discriminatory challenge . . . the harm is the same—in all cases, the juror is subjected to open and public racial discrimination."[127] The need for public confidence in the integrity of the jury system was central to the Court's reasoning.[128] However, as discussed *infra*, the particular reasoning employed by the *McCollum* Court in applying *Batson* to the accused, runs the risk of undercutting public confidence in the jury process when the accused is a member of a minority group—a scenario not contemplated by the *McCollum* majority decision.

The second question identified by the Court required a more complex answer. Relying on the reasoning of *Lugar* and the foundation laid in *Edmonson*, the Court handily concluded that a criminal defendant's use of a peremptory challenge involves state action.[129] The dissenting Justices, O'Connor and Scalia, concentrated on this issue as being the major flaw in the majority's logic.[130] O'Connor distinguished the circumstances of civil litigants, presented by *Edmonson*, from those of criminal defendants,

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123. *Id.*

124. *Id*. at 45. Although the Georgia Supreme Court acknowledged the *Edmonson* decision, they drew a distinction between the importance of the peremptory challenge for civil litigants as opposed to criminal defendants. *Id.* at 45–46.

125. *Id.* at 48.

126. *Id.*

127. *Id.* at 49.

128. *Id.*

129. *Id.* at 50–55.

130. *Id.* at 62–69 (O'Connor, J., dissenting); *id*. at 69–70 (Scalia, J., dissenting)..

presented by *McCollum*.[131] The majority's conclusion that the accused is a state actor when selecting a jury, O'Connor argued, ignores "a realistic appraisal of the relationship between defendants and the government."[132] O'Connor's dissent focused on the reasoning in *Dodson* which held that "[d]efending an accused 'is essentially a private function,' not state action."[133] She pointed out that the ruling dodges "*Dodson*'s logic by spinning out a theory that defendants and their lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions."[134]

Justice O'Connor went on to identify another issue at odds with the reasoning from *Edmonson* that was relied upon by the majority decision of *McCollum*. In finding state action, a "private party's exercise of choice allowed by state law does not amount to state action for purposes of the Fourteenth Amendment so long as 'the initiative comes from [the private party] and not from the State.'"[135] A private decision does not constitute state action unless the State "has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State."[136] In other words, the mere fact that a private choice is authorized by the State does not render that choice to be state action.[137] Applied to a criminal trial, if the State has not taken a coercive role in the defendant's exercise of peremptory challenges, the mere fact that the State authorizes the challenge should not relegate the conduct to state action.

Justice Scalia's dissent differed from Justice O'Connor's only in that he did not perceive a distinction between a private litigant using a

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131. *Id.* at 66–67 (O'Connor, J., dissenting).

132. *Id.* at 64 (O'Connor, J., dissenting).

133. *Id.* at 65 (quoting Polk County v. Dodson, 454 U.S. 312, 319 (1981)).

134. *Id.* Justice O'Connor noted that under *Swain v. Alabama*, 380 U.S. 202, 212–219 (1965), making a peremptory challenge qualifies as a "traditional function" of criminal defense lawyers. *Id.* at 66.

135. *Id.* at 66 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974)). *Jackson* was a case involving a privately owned utility corporation which was heavily regulated by a public commission and which filed a tariff with the public utility commission to obtain the right to terminate service for non-payment. The Court held that the utility corporation did not engage in state action when terminating petitioner's utility service even though the utility obtained public utility commission approval for the practice. *Jackson*, 419 U.S. at 358–59.

136. *McCollum*, 505 U.S. at 66 (omission in original) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

137. This flaw in the Court's logic was also pointed out by Justice O'Connor in her dissent in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631–38 (1991) (O'Connor, J., dissenting). She notes that parties are not "compelled by government action to use a peremptory challenge." *Id.* at 636. Rather, the parties make the decision to exercise a strike and the "judge does little more than acquiesce in this decision by excusing the juror." *Id.* at 635.

peremptory in a civil case and a criminal defendant doing so in a criminal case.[138] Scalia concluded that the Court's decision in *McCollum* was a logical extension of *Edmonson*.[139] However, in pointing out the flawed reasoning of both decisions, he noted "that a bad decision should not be followed logically to its illogical conclusion."[140] He labeled "terminally absurd" the proposition that a "criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state."[141]

Returning to the four questions addressed by the Court in the *McCollum* decision, the Court answered the third question expeditiously. They concluded that the State does have standing to raise this constitutional challenge on behalf of struck jurors.[142] The State is the proper party to do so because it is the representative of all citizens.[143] The Court relied on the standing issue addressed in *Powers v. Ohio*, and noted that the State's relation to jurors is even closer than the party that raised the question in *Powers*.[144]

The fourth question addressed by the Court was whether a defendant's constitutional rights preclude extending *Batson* to an accused's exercise of peremptory challenges.[145] Had the defendant's ability to peremptorily strike jurors been written into the text of the Sixth Amendment,[146] the analysis would likely end here. The defendant's right to use the peremptory challenge when selecting the jury for his one and only trial would likely be superior to the prospective juror's right to sit on a particular jury free of discrimination. However, without the bright line provided by a constitutional amendment, the answer was more attenuated.

First, the Court noted that peremptory challenges are not constitutionally protected fundamental rights.[147] Interestingly, it did acknowledge that the peremptory is a "means to the constitutional end of an

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138. *McCollum*, 505 U.S. at 70 (Scalia, J., dissenting).

139. *Id.* at 69.

140. *Id.* at 70.

141. *Id.* at 69–70. One scholar proposed that the "state action" analysis can have a different result when conducted under the state, rather than federal constitutions. A state supreme court could conclude that under that state's constitution, a criminal defendant is not a state actor. Therefore, he would not be restricted under an equal protection analysis. John Devlin, *Louisiana Constitutional Law*, 54 LA. L. REV. 683, 701 n.81 (1994).

142. *McCollum*, 505 U.S. at 56.

143. *Id.*

144. *Id.* (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991)).

145. *Id.* at 57.

146. *See supra* note 28 and accompanying text.

147. *McCollum*, 505 U.S. at 57.

impartial jury and a fair trial."[148] This language supports a strong link between the peremptory challenge and the Sixth Amendment. While noting that the Court in *Swain* had recognized "that the peremptory challenge is a necessary part of trial by jury,"[149] the *McCollum* Court did not conclude that limiting the defendant's use of the peremptory challenge in a *Batson* situation would "undermine the contribution of the peremptory challenge to the administration of justice."[150] The Court held that permitting the racially motivated use of a defendant's peremptory challenge was simply too high a price to preserve, in an unfettered fashion, the defendant's peremptory.[151]

Applied to the factual circumstances of the *McCollum* case, the Court's decision seems to be just. Indeed, it is hard to argue that any litigant should be able to use our courts to exclude minority or historically oppressed groups from sitting on a jury. However, symmetrically applying *McCollum* to minority defendants does not remedy the wrong that the ruling contemplated. Yet this potential damage to a minority defendant's right to a fair trial was introduced by the articulated basis for the *McCollum* decision. The flawed framework, set up by the *Batson* Court, was extended to its progeny. As will be discussed *infra*, even if the Court did not wish to revisit the analytical framework of *Batson* itself, the cases that followed could have rested on different reasoning—or at least incorporated different reasons to address the different nature of prosecutorial peremptories and defense peremptories. This would have permitted a just outcome under the facts of each case, without the danger of turning *Batson* and *McCollum* on their heads. The *Batson*, *Powers*, *Edmonson*, and *McCollum* decisions were all motivated by the goal of protecting traditionally oppressed and underrepresented groups in the formation of juries.[152] But when applied to minority litigants, the rulings' equal protection basis makes exclusion of underrepresented jurors possible.

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148. *Id.*

149. *Id.* (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)).

150. *Id.*

151. *Id.* at 57.

152. The next expansion of *Batson* underscores that motivation. *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), addressed whether *Batson* challenges could be made when a litigant struck a prospective juror based upon gender. *J.E.B.* was a paternity and child support action in which the State used nine of its ten peremptory challenges to exclude male jurors. *Id.* at 129. Although men were excluded, the court commented that the State's desire to have an all-female jury "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.* at 131. The Court went on to analogize the history of oppression women have experienced in this country to that of African Americans. It noted that "our Nation has had a long and unfortunate history of sex discrimination." *Id.* at 136 (citing Frontiero v. Richardson, 411 U.S. 677, 684 (1973)). In holding that the respondent State could not use gender as a proxy for juror competence and impartiality, the Court stated that "Respondent's rationale . . . is reminiscent of the arguments advanced to justify the total exclusion of women from juries." *Id.* at 138.

V. SHOULD *BATSON*/*MCCOLLUM* APPLY TO MINORITY CRIMINAL DEFENDANTS EXERCISING PEREMPTORY CHALLENGES ON WHITE VENIREPERSONS?

Justice Thomas' concurring opinion in *McCollum* warned that continued regulation of the peremptory challenge would produce unfavorable consequences: "I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes."[153] While the elimination of peremptory strikes has not yet been realized, symmetrical application of the *McCollum* decision in the trial courts has permitted an environment in which black—indeed, all non-majority defendants—face a new challenge. Simply stated, when *McCollum* extends to minority defendants, there are occasions in which their exercise of peremptory challenges on white venirepersons can raise the specter of a *Batson* challenge. This creates the possibility that this line of cases can be used to prevent a jury from reflecting the diversity of the population. The irony is that such a result is akin to the very disparity that *Batson*/*McCollum* sought to eliminate.

When *Batson* and *McCollum* were first ruled upon, there was speculation, even among the justices, as to whether the rulings of these cases could be applied to minority criminal defendants when exercising peremptory strikes against white venirepersons. Chief Justice Burger's dissent in *Batson* proposed a hypothetical in which an Asian defendant might be called upon to "articulate a neutral explanation" for exercising a peremptory challenge upon a white person who had denied harboring racial prejudice but was nevertheless believed by the defendant to harbor such prejudice.[154] Justice Burger correctly hypothesized that such a venire

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153. Georgia v. McCollum, 505 U.S. 42, 60 (1992) (Thomas, J., concurring).

154. Batson v. Kentucky, 476 U.S. 79, 129 (1986) (Burger, C.J., dissenting) (quoting the majority).

> Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior . . . ." Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. . . . The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation" for his peremptory challenge, a burden he probably cannot meet.

Id. at 128–29 (Burger, C.J., dissenting) (alteration in original) (citations omitted) (first omission in original).

would most likely contain a majority of white panelists. Although not specifically articulated, the inference is that the minority defendant will be required to justify his challenges more frequently than would a majority defendant. Justice Burger concluded that this would result in a loss of confidence in the impartiality of the jury system.[155] With this hypothetical, Justice Burger illustrated his belief that *Batson* would extend to criminal defendants—even non-majority defendants.

Justice Thomas did not believe that the *McCollum* holding technically applied to minority criminal defendants.[156] However, he predicted such an application would inevitably occur: "It is difficult to see how the result could be different if the defendants here were black."[157] He predicted that black criminal defendants would come to regret the decision reached by the Court.[158] Justice O'Connor's dissent also anticipated that *McCollum* would apply to minority defendants, stating, "In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions."[159]

The issue of whether the *Batson*/*McCollum* rule could be applied in the manner anticipated by Justices Burger and Thomas has also been debated among advocates and scholars. The NAACP filed an amicus brief in *McCollum*, arguing that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors."[160] Scholarly articles have been written on both sides of the issue.[161] Some

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155. "This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than 'disconcert' litigants; it will diminish confidence in the jury system." *Id.* at 129.

156. "Eventually, we will have to decide whether black defendants may strike white veniremen." *McCollum*, 505 U.S. at 62 (Thomas, J., concurring).

157. *Id.* at 62 n.2.

158. *Id.* at 60.

159. *Id.* at 69 (O'Connor, J., dissenting).

160. *Id.* at 62 n.2 (quoting Brief for Amici Curiae NAACP Legal Defense and Educational Fund, Inc., *supra* note 14, Record at 2, *McCollum* (No. 91–372)).

161. *See generally* Colbert, *supra* note 1 (arguing for evaluation of peremptory challenges under the Thirteenth Amendment); Zalesne & Zalesne, *supra* note 14 (discussing whether application of *McCollum* extends to a minority defendant's use of a peremptory challenge on a majority venireperson). *But see* Salvatore Picariello, Note, *Fourteenth Amendment—Peremptory Challenges—The Equal Protection Clause of the Fourteenth Amendment Prohibits a Criminal Defendant's Exercise of Racially Discriminatory Peremptory Challenges*—Georgia v. McCollum, *112 S. Ct. 2348 (1992)*, 23 SETON HALL L. REV. 1160 (1993) (arguing for the elimination of the peremptory challenge to eliminate prejudice in the courtroom). *See also* Jeanette M. Boerner, Case Note, *The Discriminatory Effect of the "Color-Blind" Jury:* Georgia v. McCollum, 112 S.Ct. 2348 (1992), 16 HAMLINE L. REV. 975, 975–76 (1993) (discussing the substantial negative impact of *McCollum* on non-white criminal defendants).

scholars have argued that due to the Court's reliance on the Equal Protection Clause, striking a white venireperson would not create the same implications as striking a minority member of the venire.[162] Others argue that the only way to ensure that racism is eliminated from the jury process is to do away with peremptory challenges altogether.[163] Still another approach asserts that the rationale underpinning *Batson*/*McCollum* misses the mark and that evaluating the issue under the Thirteenth Amendment would be preferable.[164]

The ideological underpinnings of the *Batson*/*McCollum* doctrine—that underrepresented groups should not be excluded from jury service—leads toward consideration of additional issues when evaluating a minority defendant's use of peremptory challenges. When challenges are used to eliminate historically oppressed people from jury service, public confidence in the justice system is shaken.[165] However, when non-white defendants use peremptories on white venirepersons to ensure some minority presence on the empanelled jury, or to remove people suspected of racial bias who do not rise to the level of a challenge for cause, the public is less likely to lose faith in the system.[166]

A. Demographic Considerations

Additional arguments against applying *Batson*/*McCollum* to minority defendants are based upon the demographic reality of the criminal justice system. Members of ethnic minorities appear as defendants in criminal cases in a larger percentage than they appear in the general population. According to the information compiled by the U.S. Census Bureau in 2000,

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162. Zalesne & Zalesne, *supra* note 14, at 333–34.

163. *See, e.g.*, Melilli, *supra* note 87, at 502–03 (arguing that peremptory challenges have outlived their usefulness and that the application of *Batson* in the trial courts has been inconsistent and proven futile). *See generally* Brent J. Gurney, Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 283 (1986) ("Legislatures should abolish peremptory challenges because they have become tools for biasing juries, silencing minority voices, and promoting disrespect for the criminal justice system.").

164. Colbert, *supra* note 1, at 8–9.

165. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1613 (1985) [hereinafter Johnson, *Black Innocence and the White Jury*] (discussing problems of all-white juries judging minority defendants and relating survey results in which minority persons perceive unfairness in the criminal justice system); Zalesne & Zalesne, *supra* note 14, at 335 (asserting that "when white defendants . . . strike every black juror, the public recognizes not only that the jurors have suffered an injustice, but also that the court has sanctioned it"); VAN DYKE, *supra* note 18, at 32 (stating that under-representation of African Americans on juries impacts the criminal justice system).

166. Zalesne & Zalesne, *supra* note 14, at 335 (discussing how public confidence in the judicial system is affected by the exclusion of jurors based on race).

African Americans comprise 12.6% of the American population.[167] Hispanic Americans comprise 12.5% of the American population.[168] However, statistics maintained by the U.S. Department of Justice Bureau of Justice Statistics reflect that in 1996, 63% of jail inmates belonged to a racial or ethnic minority.[169] Statistics maintained by the Federal Bureau of Prisons reflect that as of February 2005, the federal prison racial population comprised 40.1% Black inmates, 1.6% Asian inmates, and 1.7% Native American inmates.[170] Under this tabulation, Hispanic was considered an ethnicity rather than a race. Of the federal prison population, 32.1% were ethnically Hispanic.[171] While these numbers do not bring into sharp focus the breakdown by race of people charged with crimes throughout the country, they clearly illustrate that minorities are over-represented as defendants in the criminal justice system as compared to their representation in the overall population.

Assuming that venire panels reflect the demographics of the general population, these numbers mean that prospective jurors will consist of an overwhelming percentage of whites.[172] Yet the defendants in criminal

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167. This number reflects people who self-identified as Black only, or Black in combination with another non-Hispanic ethnic group. This number is up from 11.7% in 1990. Population Reference Bureau, *Do Hispanics Outnumber Blacks in the U.S.?* (June 2001) (analyzing data from the 2000 census), *at* http://www.prb.org/AmeristatTemplate.cfm?Section=2000Census1&template=/ContentManagement/ContentDisplay.cfm&ContentID=7822 (last visited Mar. 6, 2005).

168. *Id.* This number includes people who self-identified as Hispanic only or in combination with any other ethnic group. This number is up from 9.0% in 1990. *Id.*

169. This number increased from 61% in 1989. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PROFILE OF JAIL INMATES 1996 3 (April 1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pji96.pdf (revised June 4, 1998). This number reflects the number of people who were in jail. While it is a useful measure, it does not reflect the number of people who were arrested, or for that matter, the number of people who were convicted.

170. FEDERAL BUREAU OF PRISONS, QUICK FACTS (Feb. 19, 2005), *available at* www.bop.gov//news/quick.jsp (last visited Mar. 6, 2005).

171. *Id.* These numbers do not reflect as a racial classification people who are ethnically Hispanic. If some of the ethnically Hispanic people were grouped as racially White, the actual percentage of minority population in the Federal Prisons is even higher. *See* Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?*, 44 ST. LOUIS U. L.J. 999, 1001 n.11 (2000) (citing Fox Butterfield, *Study Examines Race and Justice in California*, N.Y. TIMES, Feb. 13, 1996, at A12 (reciting that in California, almost 40% of black men in their twenties are incarcerated, on probation, or on parole, while only 5% of white men and 11% of Hispanic men in that age group are similarly restricted), *and* Fox Butterfield, *Racial Disparities Seen as Pervasive in Juvenile Justice*, N.Y. TIMES, Apr. 26, 2000, at A1, A18 (reporting that in New York, almost one third of the African American male population in their twenties is incarcerated or under parole or probation supervision)).

172. Indeed, the percentage of minority members of a venire panel is in most circumstances lower than the percentage of minority members in the population at large. *See* VAN DYKE, *supra* note 18, at 28–35 (stating that in the majority of courts in the United States, non-whites are underrepresented on juries); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (asserting that racial and ethnic

cases, whose fates are in the hands of these panelists, are disproportionately non-white. When the *Batson* rule is applied equally to the prosecutor and the defendant, there is a disproportional impact on non-majority defendants.[173]

Consider the following: an African American defendant uses peremptory challenges in a random manner upon a typical venire panel. Under these circumstances, he will strike many more white venirepersons than black venirepersons, even though the strikes are being used at random, rather than in a racially purposeful manner. The majority of peremptories will be exercised on people of a different race than the defendant, creating the impression that he is attempting to exclude white venirepersons. Conversely, a prosecutor in that hypothetical case, using the same random method of exercising strikes, will eliminate few, if any, members of the defendant's race. This means that there is a higher likelihood that a minority defendant's use of challenges will be suspected of being racially motivated. Under these circumstances, this suspicion regarding the defendant's neutral use of challenges will certainly occur more frequently than with the prosecutor's random use of peremptory challenges. Therefore, the minority defendant's strikes are more likely to fall under *Batson* scrutiny. Consequently, when the *Batson*/*McCollum* holdings are applied to non-majority criminal defendants, there is a racially disproportionate impact upon them. Prosecutors of minority defendants and indeed, even white defendants who exercise challenges randomly, will not experience the same increased risk that a *Batson* challenge will be made on their use of peremptory strikes as will minority defendants.

B. Practical Implications

Application of *Batson*/*McCollum* to minority defendants fundamentally alters the manner in which defense attorneys select a jury when they represent non-white clients. When exercising most of their peremptory challenges, since these challenges are statistically most likely to be on people who are white, attorneys of minority defendants will no longer be able to rely on their "feeling" or "intuition."[174] The mere risk of a *Batson*

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minorities are underrepresented on criminal juries).

173. "De facto" discrimination has been defined as "government action that is racially neutral in its terms, administration, and purpose but which has a discriminatory effect or impact." WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW, CASES–COMMENTS–QUESTIONS 1169 (6th ed. 1986).

174. HENRY H. JOY, ON PEREMPTORY CHALLENGES OF JURORS ¶2 (1844); *see also* LOUIS NIZER, THE JURY RETURNS 279 (1966) ("When a lawyer selects jurors, he scans their faces, evaluates their voices, appraises their diction, observes their clothes, senses their empathy, weighs their mannerisms . . . ."). Justice O'Connor noted that "a trial lawyer's judgments about a juror's sympathies

challenge will alter the way minority defendants use their peremptory challenges. They will have to search for a reason that will pass race-neutral scrutiny in the likely event that they are called upon to provide a race-neutral explanation to the court. Opponents of racial use of peremptory challenges may applaud such a requirement, asserting that such racism has no place in the courtroom.[175] However, as noted, minority defendants will be operating under this disadvantage far more frequently than any other group. Neither white defendants nor prosecutors of non-white defendants would need to identify race-neutral reasons upon random or neutral use of peremptory challenges in representative panels as frequently as would minority defendants. Non-majority defendants will not be able to use their peremptory challenges with the same freedom as other litigants. Consequently, application of the *Batson*/*McCollum* holdings upon minority defendants results in a disproportionate impact upon minority defendants.

Altering the previous hypothetical, imagine that an African American defendant is using peremptory challenges in an attempt to secure some minority representation on his jury. If *Batson*/*McCollum* is extended to him, this use of peremptory challenges is not permitted because he is using his strikes in a racially motivated manner. It does not matter that he is most likely dealing with a venire that is overwhelmingly white. Moreover, it does not matter that he is using his challenge to achieve a similar aim as *Batson* itself—to prevent exclusion of minorities from a jury. This use of challenges becomes impermissible.[176] A flaw in extending *Batson*/*McCollum* to minority defendants is that it fails to contemplate that such a defendant does not have the same ability to eliminate majority groups as does a prosecutor or majority defendant in attempting to eliminate

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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.'" J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 148 (1994) (O'Connor, J., concurring).

175. "[S]orting on the basis of race will perpetuate the power of racial classifications rather than eradicate them." Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury* De Medietate Linguae: *A History and a Proposal for Change*, 74 B.U. L. Rev. 777, 810–11 (1994) (acknowledging a point of view critical to her thesis) (citing Metro Broadcasting v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) (observing that using race-based classifications creates the danger of "race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict")). However, Ramirez points out that the Supreme Court has rejected this argument when presented to oppose judicial procedures designed to protect against prejudice. *Id.* at n.190.

176. This result is contrary to the spirit of *Strauder v. West Virginia*, which observed, "It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former." Strauder v. West Virginia, 100 U.S. 303, 309 (1880).

a minority group from the panel.[177] Consequently, if a defendant is not permitted to use peremptory challenges to eliminate some majority venirepersons, statistics may prevent any minority jurors from being seated.[178]

C. Racially Diverse Juries Are Necessary to Avoid Injustice

In order to view this issue as a problem, one must first acknowledge that there is value in having diversity in the jury room.[179] Diversity not only improves cultural understanding; evidence demonstrates that the presence of diversity in group dynamics collectively enhances cognitive skills and improves insights of the group.[180] Data illustrates that

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177. "Because [of] the [limited] number of peremptory challenges available to a lawyer . . . a lawyer seeking to remove all members of a particular group from participation on a jury is not likely to be successful unless members of that group constitute a small portion of the venire [and thereby a small portion of the population of that jurisdiction]." Melilli, *supra* note 87, at 455; *see also* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 527 (1999) (arguing that because minorities "usually appearing in much smaller numbers, [in the typical venire they] can be completely eliminated, whereas the attempt to exclude whites, even if only as an attempt to include some minorities and level the playing field, will give rise to *Batson* challenges which will win with attorneys not savvy enough in the vagaries of the neutral explanation doctrine to take advantage of it").

178. For example, in a jurisdiction that possesses a 10% minority population, a venire panel of forty prospective jurors would contain four minority panelists, assuming it reflects the population. The first round of jury selection might not include any of those four panelists. Assuming that the first twelve panelists are not otherwise objectionable, if the defendant is not permitted to exercise any strikes due to *McCollum* (or at least the risk of a *McCollum* challenge), there will be no minority representation on the jury.

179. Indeed, ethnic diversity is recognized as having value in other important functions of modern society. The business community increasingly recognizes the value added to its ranks through the inclusion of ethnic diversity at the decision-making levels. *See* Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. OF RACE & L. 127, 132 (2000) (observing that "[a] culturally diverse workforce unleashes critical thinking, innovation, and creativity. Diverse perspectives provide an employer with valuable insights, much like a graduate degree or other intellectual qualification, that can serve as a basis for achieving important institutional missions . . . . "). Certainly, these qualities are an asset in the jury room as well as the board room.

180. *See* Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 252, 257 (1996) (concluding from studies that ethnically diverse work groups produced superior ideas and exhibited decision-making advantages over non-diverse groups); *see also* Deborah H. Gruenfeld et al., *Cognitive Flexibility, Communication Strategy, and Integrative Complexity in Groups: Public Versus Private Reactions to Majority and Minority Status*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 202, 219 (1998) (stating that minority influence improves majority decision-makers' integrative complexity); Charlan Jeanne Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 PSYCHOL. REV. 23, 28 (1986) ("Those exposed to minority viewpoints . . . think in more divergent ways. . . . [T]hey use a greater variety of strategies, . . . and importantly, they detect correct solutions."); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837, 848–50 (2003) (reciting ways in which diverse groups demonstrate improved cognitive abilities over homogenous groups).

heterogeneous juries engage in longer, more thorough deliberation than all-white juries.[181] Additionally, in studies, white jurors on heterogeneous juries were more willing to discuss racially charged topics than whites on homogenous juries.[182]

The concept of a jury "drawn from a fair cross section of the community" was based on the Court's assumption that the outcome of cases might be affected by excluding certain groups from the jury pool.[183] History has borne out this fear. The all-white jury has denied justice to African Americans who have been the victims of crime as well as those who have been unfairly accused of crime.[184]

Social science research on jury deliberations and dynamics sheds light on this issue. Unfortunately, empirical studies generally play a lesser role in legal research than they should.[185] However, on the fiftieth anniversary of the landmark case of *Brown v. Board of Education*, scholars should not forget that social science data played a significant role in that historic decision.[186] Perhaps scholars have been reluctant to rely on such data because even when the Court relied on social science data that demonstrated the importance of integrated learning environments, those empirical studies were challenged by some who viewed them with suspicion.[187] Indeed, reviewers of data can reach a multitude of

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181. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1030 (2003).

182. *Id.*

183. Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 Geo. L.J. 945, 955 (1998). However, note that a criminal defendant is not entitled to be tried by a jury that includes members of any particular group. Rather, the panel must be drawn from a pool of citizens drawn from a fair cross-section of the community. *Id.* at 949 (citing Holland v. Illinois, 493 U.S. 474, 480 (1990)).

184. Colbert, *supra* note 1, at 110.

185. Sommers & Ellsworth, *supra* note 181, at 1003. There is a feeling that the courts may not rely on social science research, fearful that the data is not reliable. Johnson, *Black Innocence and the White Jury*, *supra* note 165, at 1704.

186. Brown v. Board of Education, 347 U.S. 483, 494–95 n.11 (1954) (citing K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development, in* MIDCENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH (1950); HELEN LELAND WITMER AND RUTH KOTINSKY, PERSONALITY IN THE MAKING ch. VI, 135 (Helen Leland Witmer et al. eds., 1952); Max Deutscher & Isidor Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Isidor Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OPINION AND ATTITUDE RES. 229 (1949); Theodore Brameld, *Educational Costs*, *in* DISCRIMINATION AND NATIONAL WELFARE 44–48 (R.M. MacIver, ed., 1949); E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 674–81 (1949); GUNNAR MYRDAL, AN AMERICAN DILEMMA (Twentieth Anniversary ed. 1962)).

187. Johnson, *Black Innocence and the White Jury*, *supra* note 165, at 1704 (citing Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–58 (1955) (arguing that there was a danger that lawyers and judges might begin to believe that the outcome could be determined "by the testimony and opinions" of social scientists); A. James Gregor, *The Law, Social Science, and School Segregation: An*

conclusions. Nevertheless, while social science data from the 1940s and 1950s was met with a degree of skepticism, more recent empirical data chronicling the impact of race upon jury decision making can be considered to be "consistent and convincing."[188]

While there is social science research investigating the impact of race on jury decision making, it is not a field that has been exhaustively researched.[189] This is certainly an area that merits further attention from social scientists and legal scholars.[190] In the absence of exhaustive empirical data dealing directly with jury dynamics, scholars can look to studies that evaluate the benefits of diversity upon group dynamics in other areas, thereby shedding light upon some tangible benefits that can be reaped by obtaining ethnically diverse juries.[191]

Statistics derived from criminology studies provide evidence that impartial verdicts do not result when all-white juries decide cases involving interracial crimes. Studies provide insight into various factors impacting this phenomenon. The analysis of one such leading scholar, Sheri Lynn Johnson, concluded that racial bias on the jury did indeed affect the outcome of deliberations.[192] The empirical data reviewed by Johnson was drawn from mock jury research, much of which used the defendant's race or the juror's race as variables.[193] This data evidenced that white jurors were more likely to find a minority race defendant guilty of a hypothetical crime than they were a white defendant identically charged.[194]

Assessment, 14 W. RES. L. REV. 621 (1963) (disagreeing with the U.S. Supreme Court's use of social science material in *Brown v. Board of Education*); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1961) (objecting to what he saw as misleading social science testimony by Professor Kenneth Clark in *Brown v. Board of Education*)); *see also* Frank I. Goodman, *DeFacto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 400–35 (1972) (discussing the usefulness of data from various studies).

188. Johnson, *Black Innocence and the White Jury*, *supra* note 165, at 1704. One reason may be the impact that the passage of time has had upon society's willingness to address issues of race in an analytic fashion. Studies conducted in the last two decades may be viewed as less of a threat to the status quo than studies from five decades ago that threatened continued existence of the widespread segregation laws.

189. Sommers & Ellsworth, *supra* note 181, at 1004. Between 1990 and 2000, there were fewer than thirty studies published on the topic. *Id.* at 1005–06.

190. This is particularly true for empirical studies that subject African American participants to the same conditions as white participants. *Id.* at 1005–06. Although such studies exist, they are few in number. *Id.* at 1005.

191. *See supra* notes 179–180.

192. Johnson, *Black Innocence and the White Jury*, *supra* note 165, at 1625.

193. *Id.*

194. *Id.* at 1626–28. Some studies reviewed by Johnson also indicated that white jurors were more likely to sentence black defendants more harshly than white defendants convicted of identical crimes. These results were not as conclusive. *Id.* at 1636–37. While some of the results were varied along racial lines, others appeared to have outcomes determined by social attractiveness, with socially

Moreover, nominal minority representation on a jury did not overcome racial bias. From the data, Johnson theorized that at least three black jurors are necessary to insure impartiality in cases with racial components.[195] Johnson reasoned that three racially similar jurors are necessary to stave off group pressure of a white majority.[196] Even one or two jurors are unlikely to sustain their position against the weight of the remaining white majority.[197] This critical mass of minority members not only helps minority jurors maintain their views of a case, the perspective of the white majority jurors can be enriched by minority jurors who supply insight into aspects of a particular culture beyond the experience of white panelists.[198]

According to studies cited by Johnson, jurors of the same race as the defendant are often more adept at interpreting a defendant's demeanor than jurors whose race is different than the defendant's.[199] African American jurors may shed light on "subcultural patterns" that are beyond the experience of white jurors.[200] Perceptions of witness truthfulness are also impacted by race. For example, a black witness testifying on behalf of a black defendant is most likely to be disbelieved by an all-white jury.[201] This phenomenon can lead white juries to convict African American

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unattractive defendants being treated more harshly than attractive defendants. *Id.* at 1637.

195. *Id.* at 1698.

196. *Id.* at 1698–99.

197. *Id.* at 1698 (citing MICHAEL SAKS, JURY VERDICTS 16–18 (1977) (finding that "the presence of one or more allies is vital"); Dale Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 748 (1959) (noting that "[i]n almost all of the cases where the minority prevailed, . . . it was a large minority—three or more jurors"); Rita James Simon & Prentice Marshall, *The Jury System*, *in* THE RIGHTS OF THE ACCUSED 211, 227 (Stuart S. Nagel ed. 1972) (discussing results from experimental civil and criminal juries, the authors note that "[t]here were no instances in which one juror or even two held out against the other ten or eleven and then succeeded in persuading them to their position"); *and* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 463 (1966) (observing that "for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. . . . To maintain his original position . . . it is necessary for him to have at least one ally")); *see also* Colbert, *supra* note 1, at 113 n.560 (citing S.E. Asch, *Effect of Group Pressure Upon the Modification and Distortion of Judgments*, *in* GROUP DYNAMICS 151–155 (Dorwin Cartwright & Alvin Zander eds., 1953) (citing studies indicating that three racially similar jurors are necessary to withstand the group pressure of a nine-person white majority")).

198. VAN DYKE, *supra* note 18, at 33, 166–67; Colbert, *supra* note 1, at 114 n.561 (citing Peters v. Kiff, 407 U.S. 493, 503–04 (1972) (asserting that the elimination of an identifiable segment of the community from jury service excludes "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable")). This particular benefit of diversity in group dynamics was recently recognized by the Supreme Court in *Grutter*. *See infra* Part VII.A.

199. Johnson, *Black Innocence and the White Jury*, *supra* note 165, at 1706.

200. VAN DYKE, *supra* note 18, at 33.

201. Colbert, *supra* note 1, at 114 n.561 (citing Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 242 n.30 (1967–68), *and* S. W. Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 VA. L. REV. 736, 742–45 (1966)). Colbert notes that this perception of non-trustworthiness of black witnesses is one of slavery's "remaining vestiges" in today's justice system. *Id.*

defendants under circumstances in which they would acquit white defendants.[202]

Analysis of jury verdicts from real cases supports these conclusions. William J. Bowers conducted a study of death-sentencing rates in 340 trials held in fourteen different states.[203] Bowers' work demonstrates a strong correlation between racial composition of the jury and imposition of the death penalty.[204] In the absence of any African American men on juries, significantly higher rates of death sentences were imposed than by juries that had at least one black male.[205] Similarly, on juries in which there were at least five white men, black defendants were given the death sentence at a higher rate than juries with fewer white men.[206] This study of verdicts from capital cases provides real-world support for the conclusions reached by sociological studies: racial composition of juries impacts trial verdicts.

More recent analysis of social science studies is consistent with the earlier conclusions.[207] Two researchers, Sommers and Ellsworth, recently

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202. Johnson, *Black Innocence and the White Jury*, *supra* note 165, at 1625–28. Johnson reported on sociological studies of mock trials in which the only variable was the race of various participants. White subjects (jurors) were more likely to find minority race defendants guilty than they were white defendants who were identically situated. *Id.* at 1626.

203. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

204. *Id.* at 193.

205. *Id.* The death sentence was imposed in 71.9% of cases with a black defendant and white victim in which there were no African American men on the jury. *Id.* When one black male was on the jury, the death sentence was imposed in 42.9% of the cases. *Id.* When there were one or more black male jurors, the death sentence was imposed in 37.5% of the cases. *Id.*

206. *Id.* Notably, the difference between the presence of four and five white males on the jury made a significant difference in the penalty issues. When there were only four white males on the jury, the death sentence was issued in 23.1% of the cases compared to 63.2% in cases in which there were five white men on the jury. *Id.* There was only a minor difference when comparing the impact of having four or fewer, and five or more, white male jurors (30% vs. 70.7%). *Id.* Sociological research also supports the observation that white men tend to vote for the death penalty more than other jurors. A 1990 survey study which presented a capital murder case scenario to a random sample of 2,000 Texas drivers' license holders evaluated the effect of gender and race of the defendant and jurors. Frank P. Williams, III & Marilyn D. McShane, *Inclinations of Prospective Jurors in Capital Cases*, 74 SOC. & SOC. RESEARCH 85, 86 (1990). One of the many conclusions of the study was that white males who would qualify as jurors on a capital case voted to impose the death penalty at a much higher rate, almost 72%, than other death qualified jurors. *Id.* at 87. White females were the next highest at 54%. *Id.*

207. While some studies of mock juror tests did not demonstrate white bias, those studies were either not based upon statistically significant results or they failed to factor in pertinent criteria. Sommers & Ellsworth, *supra* note 181, at 1009 (citing Mary V. McGuire & Gordon Bermant, *Individual and Group Decisions in Response to a Mock Trial: A Methodological Note*, 7 J. APPLIED SOC. PSYCHOL. 220 (1977); Stephanie Nickerson et al., *Racism in the Courtroom*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 255 (John F. Dovidio & Samuel L. Gaertner eds., 1986); *and* Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315 (1994)).

analyzed legal scholars' reviews of empirical studies regarding the role of race upon jury decision-making. They also analyzed primary source material for many recent social science and psychological studies on the topic.[208] Those studies that presented white mock jurors with fact patterns in which the variable was the race of the defendant consistently resulted in individual jurors being more likely to believe that the black defendants were guilty than they were to believe the white defendants were guilty.[209] White mock jurors were also more likely to recommend longer sentences for African American defendants than they were for white defendants.[210]

Perceptions of stereotypes about the categories of crime most likely to be committed by either white or black defendants also played a role in decision-making for white mock jurors. White-collar crimes were more closely associated with stereotypical white criminal behavior while violent crime was more closely associated with black criminal behavior.[211] Perceptions of stereotype also impact sentencing decisions. Researchers have concluded from experimental studies that when people commit crimes that are stereotypically linked with their race, they receive harsher sentences

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208. Sommers & Ellsworth, *supra* note 181.

209. *Id.* at 1006 (citing Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21 (1982) (studying bias and the effect of different defendant/victim racial combinations in rape cases upon the decision-making process of a jury and verdict outcomes); Jeffrey E. Pfeifer, *Mock Juror Decision-Making and Modern Racism: An Examination of the Role of Task and Target Specificity on Judgmental Evaluations*, *in* DISSERTATION ABSTRACTS INTERNATIONAL 52 (1992) (reviewing the findings of four studies indicating that, depending on task and target specificity, black defendants were rated guiltier than white defendants); Robert W. Hymes et al., *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 J. SOC. PSYCHOL. 627 (1993)).

210. Sommers & Ellsworth, *supra* note 181, at 1006 (citing Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992), *and* Andrea DeSantis & Wesley A. Kayson, *Defendants' Characteristics of Attractiveness, Race, and Sex and Sentencing Decisions*, 81 PSYCHOL. REP. 679 (1997)).

211. *Id.* at 1007 (citing Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. REL. 1 (1983) (discussing racial stereotypes associated with certain crimes and the effect of those stereotypes on jurors' verdicts)). A study testing Sunnafrank and Fontes' theory confirmed that white mock jurors were more likely to exhibit racial bias in fact patterns in which African American defendants were charged with violent crimes. *Id.* at 1007–08 (citing Randall A. Gordon, *The Effect of Strong Versus Weak Evidence on the Assessment of Race Stereotypic and Race Nonstereotypic Crimes*, 23 J. APPLIED SOC. PSYCHOL. 734 (1993) (finding that "defendants accused of race stereotypic crimes were more likely to be perceived as guilty and as more typical offenders than were defendants accused of race nonstereotypic crimes")); *see also* Ronald L. Poulson, *Mock Juror Attribution of Criminal Responsibility: Effects of Race and the Guilty but Mentally Ill (GBMI) Verdict Option*, 20 J. APPLIED SOC. PSYCHOL. 1596, 1604 (1990) (analyzing a study measuring the impact of race and various verdict options involving mental culpability in which one variable was the defendant's race. In the study's scenarios, the defendant presented as black was viewed as being less able to appreciate the criminality of conduct than was the defendant presented as white).

than those convicted of crimes not stereotypically connected with their race.[212]

These stereotypical perceptions and inclinations to perceive African Americans as more likely to be guilty of a crime are forged through bias.[213] The nature of this bias has evolved somewhat over the decades. For some, it has shifted from being conscious and on the surface to a phenomenon that is more subtle, yet still pervasive. Psychologists believe that racism among whites still exists in modern America, but the manifestation of bias has changed.[214] Overt racism is frowned upon in most white social circles, leaving the expression of racial ideations to occur in more subtle or "acceptable" manners.[215] One such "acceptable" manner is to oppose social policies such as affirmative action, which are designed to lead to equality.[216]

Whites inclined to behave in an egalitarian manner will make conscious efforts to act in a non-prejudiced manner when circumstances make racial overtones apparent.[217] However, when racial overtones are absent or cues that trigger motivation to avoid racism are missing, then such whites frequently demonstrate bias.[218] Sommers and Ellsworth propose that

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212. Karl L. Wuensch et al., *Racial Bias in Decisions Made by Mock Jurors Evaluating a Case of Sexual Harassment*, 142 J. SOC. PSYCHOL. 587, 588 (2002) (citing Mazella & Feingold, *supra* note 207 (examining how certain personal attributes of both defendants and victims, including race, impacts juridic decision-making); Randall A. Gordon, *Attributions for Blue-Collar and White-Collar Crime: The Effects of Subject and Defendant Race on Simulated Juror Decisions*, 20 J. APPLIED SOC. PSYCHOL 971 (1990); Randall A. Gordon et al., *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCHOL. 191 (1988)).

213. The phenomenon of bias, which can emerge from a shared cultural background, can cause a witness or party in a lawsuit who shares a particular cultural origin with a juror, to be perceived as more credible than a witness or party from a different cultural origin. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1042 (2003).

214. Sommers & Ellsworth, *supra* note 181, at 1010–11.

215. Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713, 1715 (1991).

216. Sommers & Ellsworth, *supra* note 181, at 1011 (citing Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414, 415 (1981) (discussing the hypothesis that one form of prejudice is a reaction to a perceived threat of disruption to the "Good Life")).

217. *Id.* at 1011 (citing Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986)).

218. *Id.* at 1011 (citing Gaertner & Dovidio, *supra* note 217, at 81); *id.* at 1011–12 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989), *and* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995) (finding the theory of implicit stereotyping "consistent with . . . findings of discrimination by people who explicitly disavow prejudice")); *see also* Pfeifer and Ogloff, *supra* note 215, at 1715–16 (stating that modern racism is more likely to manifest itself "in ambiguous situations—such as legal cases where the defendant's guilt is unclear").

this phenomenon leads, somewhat counter-intuitively at first blush, to a jury dynamic in which white jurors are actually less likely to exhibit racial bias when overt racially charged factors are present in a trial.[219] Indeed, psychologists suggest that racism among white jurors is more likely to occur when racial overtones are absent.[220] The non-racially charged, garden-variety trial in which the defendant is African American may be the one in which white jurors are the most likely to exhibit racial bias.[221] Empirical data collected through experiments run by Sommers and Ellsworth in 2000 support this theory.[222] Results of follow-up experiments they conducted in 2001 reinforced the supposition that white jurors are more prone to convict black defendants than they are to convict white defendants when the facts underlying a charge are not race-salient.[223]

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219. Sommers & Ellsworth, *supra* note 181, at 1013.

220. *Id.* at 1014.

221. *Id.* Results of mock trial studies that did not involve racially charged offenses or circumstances supported this supposition in the form of white jurors demonstrating more punitive attitudes toward black defendants than they did toward white. *Id.* at 1014 (citing David B. Gray & Richard D. Ashmore, *Biasing Influence of Defendants' Characteristics on Simulated Sentencing*, 38 PSYCHOL. REP. 727 (1976) (finding a racial sentencing bias in a simulated sentencing study); Klein & Creech, *supra* note 209, at 30–32; Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 191 (1992) (examining various studies and concluding that those with "greater methodological rigor" show racial bias in sentencing decisions).

222. In 2000, using 156 white mock jurors, Sommers and Ellsworth presented written trial summaries in which the variables were the race of the defendant and the presence of race-salient circumstances. The fact pattern involved a defendant who knocked down his girlfriend in a bar. In the race-salient version, the defendant yells at the girlfriend, "You know better than to talk that way about a White (or Black) man in front of his friends." In the non-race-salient version, the reference to "White" or "Black" is removed. *Id*. at 1014–15. White jurors voted to convict black defendants 73% of the time in the race-salient case; that number jumped to 87% in the non-race-salient version. *Id*. at 1015. Additionally, in the non-racially-charged version, white jurors rated the case against the black defendant as being stronger than the case against the white defendant. In a parallel conclusion, even though the defenses for the white and black defendants were the same, the defense of the black defendant in the non-race-salient case was rated as being weaker than that of the white defendant. *Id.* In the non-racially-charged case, white jurors rated the black defendant as being more violent and aggressive than they did the white defendant. They also perceived that the black defendant would be more likely to get re-arrested in the future than the white defendant. However, when evaluating positive character traits, the white defendant was rated by the white jurors as being more honest and moral than the black defendant. *Id.*

223. The 2001 study conducted by Sommers and Ellsworth involved providing white mock jurors with a written summary of a locker room assault involving basketball teammates. Once again, the variables were the race of the defendant and the presence of race-salient circumstances. In the case, the race salient circumstance was that the defendant was one of only two people of his race on the team. There was testimony of racial animosity being present in the locker room all season long. In the non-race salient version, the testimony was that the defendant had only one other friend and that there was social tension in the locker room. In the non-race-salient trial, the white jurors voted to convict the black defendant 90% of the time, while voting to convict the white defendant only 70% of the time. *Id.* at 1016.

Additionally, in the context of civil cases, there is evidence that a juror is more inclined to vote in favor of a party who shares the juror's race.[224]

In addition to documenting the impact that race has on jury verdicts, social science studies also demonstrate that ethnically diverse juries exchange information differently than homogeneous juries. Jurors of different races have different "personal experiences, social perspectives, and concrete knowledge."[225] Therefore, heterogeneous juries have the benefit of broader viewpoints and more interpretations than homogenous juries.[226] In much the same way that diverse work groups demonstrate superior ideas and decision-making capabilities over non-diverse groups,[227] diverse juries exhibit decision-making benefits. For example, they cover a wider range of information,[228] "deliberate longer, discuss more case facts, and bring up more questions about" evidence missing from trials.[229] Diverse juries also demonstrate a greater likelihood to discuss issues of race such as racial profiling. Significantly, the white members of mixed juries were the people who more often than not raised these issues.[230] This supports the theory that when serving on racially mixed juries, cues that motivate white jurors to avoid racial prejudice are activated.[231] In contrast, on all-white juries, when issues of racial bias were brought up, other jurors were likely to change the topic or render the issue irrelevant.[232]

Notwithstanding the tangible harm that results when juries contain no minority members, and notwithstanding the measurable benefits realized by diverse juries, jury selection mechanisms still permit—even facilitate—all-white juries. Sadly, *McCollum*, which emerged from a line of cases

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224. Wuensch, *supra* note 212. This study involved a simulated trial of a sexual harassment lawsuit. The experiment had multiple variables, including the race of the plaintiff and defendant, and the race and gender of the mock jurors. While not all of the researchers' predictions were borne out in the study, white male jurors were more than twenty times more likely to find in favor of the plaintiff in the fact pattern with a white female plaintiff and black defendant than in the scenario with the black plaintiff and white defendant. *Id.* at 593.

225. Sommers & Ellsworth, *supra* note 181, at 1024.

226. *Id.*

227. *See supra* note 180 (citing articles discussing the decision-making benefits of diverse groups).

228. It is theorized this occurs because "Black jurors tend to raise issues that White jurors do not." Sommers & Ellsworth, *supra* note 181, at 1025.

229. *Id.* at 1028.

230. *Id.* Racial composition of a jury may "trigger normative pressures regarding race by activating jurors' motivations to avoid prejudice." *Id.* at 1024. *But see* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1318 (2000) ("Often—although not always or exclusively—people of color and women will be the jurors who object to the foreclosure of perceptions or issues relating to gender or race.").

231. Sommers & Ellsworth, *supra* note 181, at 1028.

232. *Id.* at 1029.

designed to prevent the exclusion of minorities from jury service, can be used as an instrument to prevent non-majority defendants from securing minority jurors to sit for their trials.

VI. STATE COURTS APPLY *MCCOLLUM* TO MINORITY DEFENDANTS

Although the United States Supreme Court has not yet spoken definitively on whether *McCollum* applies to a minority defendant's use of peremptory challenges, it has indicated that *McCollum* does.[233] Some states have more definitively addressed this issue.

The Georgia Supreme Court was asked whether a different standard should be applied when a minority defendant, as opposed to a white defendant, exercises peremptory challenges on the basis of race. In *State v. Carr*, a black defendant used fifteen peremptory challenges to remove fifteen white venirepersons from the jury panel.[234] The resulting jury consisted of eleven African American panelists and one Hispanic panelist.[235] The State objected under *Batson*, asking the court to compel the defendant to provide race-neutral reasons for the peremptory challenges.[236] The court denied the motion and the State filed an interlocutory appeal.[237] The Georgia Supreme Court ruled that *Batson* did not apply to criminal defendants' use of peremptory challenges.[238]

On appeal to the U.S. Supreme Court, the judgment was vacated and remanded to the Georgia Supreme Court for "further consideration in light of *Georgia v. McCollum*."[239] The U.S. Supreme Court decision was one paragraph long and did not elaborate further.[240] Neither the U.S. Supreme Court, nor the Georgia Supreme Court articulated the need for a different

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233. *See* Georgia v. Carr, 506 U.S. 801, 802 (1992) (vacating judgment in light of *McCollum*). Note, however, that Justice Thomas stated in his concurring opinion in *McCollum* that "[t]oday, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen." Georgia v. McCollum, 505 U.S. 42, 62 (1992) (Thomas, J., concurring).

234. State v. Carr, 413 S.E.2d 192 (Ga. 1992).

235. *Id.*

236. *Id.*

237. *Id.* In initially ruling, the trial court held that the Georgia Supreme Court treatment of *McCollum* controlled this situation. *Id.* at 193. Interestingly, the *Carr* case occurred after the Georgia Supreme Court had ruled upon *McCollum*, but before the U.S. Supreme Court had ruled on the case.

238. The Georgia Supreme Court affirmed the trial court in *Carr*, holding that *their* ruling in *McCollum* controlled. *Id.* at 193 (citing State v. McCollum, 405 S.E.2d 688 (Ga. 1991)). The Georgia Supreme Court ruled that the *Batson* doctrine did not apply to *McCollum*. *Id.*

239. Georgia v. Carr, 506 U.S. 801, 802 (1992).

240. *Id.* Upon remand, the Georgia Supreme Court, in turn, remanded the matter to the trial court to conduct further proceedings "consistent with *Georgia v. McCollum*." State v. Carr, 427 S.E. 2d 273 (1993).

analytical framework when the defendant is a member of a non-majority race. Perhaps striving for a "color blind" framework, neither decision even acknowledged that the issue merited discussion.

Some scholars suggest that with *Carr*, the U.S. Supreme Court clearly articulated that *McCollum* applies to non-majority defendants.[241] Others submit that the Court left its position ambiguous.[242] To avoid ambiguity, several states have independently crossed this bridge. In *People v. Yarbrough*, an intermediate-level appellate court in New York ruled that it was proper for a trial court to require race-neutral explanations from a black defendant who exercised all eight of his peremptory challenges on white venirepersons.[243] Moreover, the appellate court upheld the decision to seat four of those jurors over the defendant's objection upon finding that the proffered race-neutral reasons for exercising peremptory challenges on these individuals were inadequate.[244] The Mississippi Supreme Court also extended *McCollum* to a minority defendant's use of peremptory challenges in which there was no question of his racial motivation. In *Griffin v. State*, an African American defendant used all his peremptory challenges to strike white males from his jury panel.[245] When the prosecution made a *Batson* objection, the defendant argued that *Batson* did not apply to criminal defendants.[246] Indeed, counsel for the defendant specifically articulated that he intended to exercise challenges against white males as a matter of strategy.[247] He stated his belief that "white males tend to, more quickly and more readily, convict black males on the basis of race and race alone."[248] The court quickly rejected this reasoning, concluding that the recently decided *McCollum* case applied to minority defendants.[249]

The South Carolina Supreme Court similarly held in *State v. Govan* that a defendant, regardless of race, may not engage in purposeful

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241. *Carr*, 506 U.S. 801 (1992).

242. *See* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 111 n.185 (1993) (stating that although the U.S. Supreme Court remanded the *Carr* case to determine the matter in light of *McCollum*, the Court has yet to decide whether *McCollum* applies to black defendants challenging white jurors based upon their race); *see also* Devlin, *supra* note 141, at 701 n.81 (stating that while the Court's remand, by itself, is not dispositive on whether *Batson*/*McCollum* applies to minority defendants, all state action involving racial classifications must be justified in accordance with the strict scrutiny standard).

243. People v. Yarbrough, 589 N.Y.S.2d 891, 892 (N.Y. App. Div. 1992).

244. *Id.*

245. Griffin v. State, 610 So. 2d 354, 355 (Miss. 1992).

246. *Id.* At the time of the trial in the *Griffin* case, *McCollum* had not yet been ruled upon by the U.S. Supreme Court. The Court did issue the *McCollum* decision before the Mississippi Supreme Court issued the decision in *Griffin*.

247. *Id.*

248. *Id.*

249. *Id.* at 356.

discrimination on the basis of race during the exercise of peremptory challenges.[250] *Govan* also involved a case in which an African American male used all his peremptory challenges to strike white venirepersons. The defendant failed to articulate race-neutral reasons for exercising these challenges. On appeal, the defendant argued that *McCollum* did not apply because the defendant in *McCollum* was white and Govan was black.[251] The South Carolina Supreme Court held that since *McCollum* was founded upon "*the juror's constitutional right*, [the] holding applies to all criminal defendants irrespective of race."[252] Maryland and New Jersey have also concluded that *McCollum* applies to minority defendants.[253] These decisions involve black defendants who exercised all of their challenges on white venirepersons.

This raises the question of whether the result might have been different in any of these cases if the defendant had used only a portion of his peremptory challenges, rather than all of them, on white panelists. In a New Jersey case, *State v. Johnson*, the court noted that after challenges for cause were resolved, there were only two African Americans left in the entire venire.[254] The defendant in *Johnson* indicated that the challenges on white venirepersons were exercised in the hope of obtaining some minority presence on the jury.[255] The defendant's attorney did not articulate a desire to eliminate all whites. The New Jersey Appellate Division reasoned that the defendant's argument to obtain some black representation on the jury was "cogent and persuasive" but that, ultimately, the court was constrained by the supremacy of the *McCollum* decision.[256] The result in *Johnson* seems inconsistent with the spirit of *Batson*, which was to ensure that minorities are not excluded from juries.[257] However, application of *Batson*/*McCollum* to non-majority defendants has resulted in this doctrine being used to perpetuate the problem it sought to remedy. Moreover, it appears that no state confronting this issue has reached a conclusion other than that *McCollum* applies to minority defendants when they exercise peremptory challenges.[258]

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250. State v. Govan, 439 S.E.2d 263 (S.C. 1993).

251. *Id.*

252. *Id.* at 264 (emphasis added).

253. Gilchrist v. State, 667 A.2d 876, 885 (Md. 1993); State v. Johnson, 737 A.2d 1140 (N.J. Super. Ct. App. Div. 1999).

254. *Johnson*, 737 A.2d. at 1143.

255. *Id.*

256. *Id.*

257. *See supra* Part III.A.

258. *Johnson*, 737 A.2d at 1144.

A. Anecdotal Account of Application of Batson/McCollum *to a Minority Defendant in a Trial Court*

Drawing upon my own experience, I have seen *Batson*/*McCollum* applied even when a non-majority defendant's peremptory challenges on white venirepersons were not racially motivated. This particular observation occurred while representing a defendant during my tenure with the Legal Aid Society, Criminal Defense Division, in New York City. The trial took place after the *Kern* decision was issued by the New York Court of Appeals and the *McCollum* decision was issued by the U.S. Supreme Court.[259] The defendant in this case was an African American male charged with assault in the first degree.[260] The complaining witness in the case was also African American. The defense consisted of an alibi provided by the defendant's girlfriend and did not turn on a race-based issue. The majority of the venire was white. Late during the jury selection process, which had lasted several days, the parties were selecting the final few jurors.[261] After I completed my questioning of this group of venirepersons, I consulted with my client.[262] In this panel, there were two white women about whom I had no strong feelings one way or the other. My client, however, stated he did not want these two prospective jurors on the jury because throughout the round of questioning, they were looking at him in a way that made him feel uncomfortable. He said they were staring him down, making him think they had already decided the case. Significantly, at this stage of the jury selection process, several white men and women had been seated on the jury and had not been objected to by my

259. People v. Kern, 75 N.Y.2d 638 (1990); Georgia v. McCollum, 505 U.S. 42 (1992).

260. N.Y. PENAL LAW § 120.10 (McKinney 1993). At the time, this offense was a class C felony, punishable by a maximum of 15 years incarceration.

261. At the time, jury selection for a felony in Queens County began with a venire panel consisting of approximately 30–40 people. The courtroom clerk would select 14–18 people from this group by randomly drawing names from a small drum. Those drawn would be seated for voir dire. First, the trial judge would pose questions to the prospective jurors. Then the prosecutor would question this group. Finally, the defense attorney would ask voir dire questions of the drawn panelists. At the end of this round of questioning, the court first entertains challenges for cause. The court then permits the prosecution and defense, in turn, to exercise peremptory challenges. If twelve jurors (and one or two alternate jurors) are not remaining at the end of the challenges, the courtroom clerk would randomly select 14–18 more prospective jurors from the greater venire to participate in another round of voir dire. This process repeats itself until an entire jury is selected.

262. Jury selection practice materials recommend obtaining a client's input during jury selection. The client may have observed conduct impacting the venireperson's fitness or desirability to have on that jury that was missed by the attorney. *See*, *e.g.*, Hon. Mary-Lou Rup & Stephanie Page, *Voir Dire Issues*, *in* TRYING SEX OFFENSE CASES IN MASSACHUSETTS § 8.2.2 (Stephanie Page ed., 2001) (suggesting that practicing attorneys discuss jury selection issues with their clients); *see also* People v. Antommarchi, 80 N.Y.2d 247, 250 (1992) (recognizing the importance of defendants participating in the jury selection process).

client. Indeed, he had not even expressed reservations about the seated jurors. These two jurors were the only two venirepersons about whom he had made this type of complaint. Moreover, evaluating facial expressions and body language is recognized by New York's highest court as being a valid basis upon which to make jury selection decisions.[263]

After discussing the matter with my client, we chose to exercise peremptory challenges on these two white women.[264] When I did so, the prosecutor made a *Batson*/*McCollum* challenge,[265] arguing that the defendant was using his peremptory challenges in a racially motivated manner to exclude white women. The court determined that the exercise of these two challenges established the prima facie showing of discrimination required under the *Batson* analysis.[266] The court required me to provide race-neutral reasons for the exercise of these two peremptory challenges.

I related the above reasoning, explaining that my client had not made this observation about other white prospective jurors. I pointed out to the court that we had several white jurors already seated on the panel that would hear the case. I also argued that my client's observations regarding facial expressions and demeanor are precisely the type of factors that the New York Court of Appeals ruled in *People v. Antommarchi* that a defendant has the right to observe and consider during jury selection.[267] Upon hearing these explanations, the judge stated that he had not observed any unusual facial expressions from these jurors and ruled that my stated reasons were pretextual. The two white female venirepersons were seated on the jury over defense objection.

My use of these two peremptory challenges was in the traditional strike zone for attorneys exercising peremptory challenges.[268] There was a particular reason for wanting to remove these two venirepersons based upon their body language and facial expressions. However, in the wake of

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263. "Defendants are entitled to . . . have the opportunity to assess the juror's facial expressions, demeanor and other subliminal responses." *Antommarchi*, 80 N.Y.2d at 250 (quotations omitted).

264. Since my days as a clinical student, I was trained to be a "client-centered" attorney. Although sometimes falling short, I strive toward the goals of client-centered counseling by including my client in the decision-making process wherever possible. "Client-centered" is defined as approaching "problems from clients' perspectives . . . seeing problems' diverse natures, and . . . making clients true partners in the resolutions of their problems." DAVID A. BINDER et al., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH iii (West Publ'g. Co. 1991).

265. Referring to the controlling New York case, the prosecutor actually referred to the challenge as a *Kern* challenge.

266. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

267. *Antommarchi*, 80 N.Y.2d at 250.

268. *See* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 32 (2d ed. 1988) (discussing how nonverbal responses of a prospective juror are factors to consider when selecting a juror).

McCollum, these valid reasons for using the challenge were facially suspect. Yet under the *McCollum* framework, it is not surprising that the proffered reasons were suspect. How can a court credibly evaluate the reasons proffered in this case?

B. Risk of Ethical Consequences Can Have a Chilling Effect

Under the current application of *Batson*/*McCollum*, judges are called upon to determine the genuineness of explanations offered by attorneys for exercising peremptory challenges.[269] This places judges in the position of discerning potentially impermissible motives behind stated reasons. However, the line between subjectively impermissible intent and objectively impermissible intent can become blurred.[270] In *Hernandez*, the Court noted that there is often not much objective evidence supporting the explanations provided by the attorney.[271] This leaves trial courts to peer into the minds of the attorneys exercising peremptory strikes to discern their motives.[272]

Practical and ethical difficulties emerge from this framework. Inconsistent outcomes can result when a trial court attempts to determine whether an attorney's proffered reason justifying a challenge is truth or deception. Moreover, if denial of a given explanation is based upon a conclusion that the lawyer lied about a "race-neutral" reason, are there ethical implications to such a ruling?[273]

If the trial judge makes a determination, albeit an incorrect one, that the attorney violated a venireperson's equal protection rights, or worse, lied to the court, sanctions may follow.[274] If so, there may logically be a chilling effect on attorneys using peremptory challenges at all, fearful that doing so may result in professional sanctions. Making permissible use of challenges may not fully protect an attorney from sanctions if the judge misperceives

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269. *See* Hernandez v. New York, 500 U.S. 352 (1991) (holding that the prosecutor's explanations were not genuine).

270. Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 34 (1997) (stating that Justice Kennedy's opinion in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), "leaves open the question of whether the search for discriminatory intent is a search for subjectively held racial stereotypes in the minds of litigants or a search for any automatic invocation of race as the grounds for a peremptory strike").

271. *Hernandez*, 500 U.S. at 365.

272. Charlow, *supra* note 270, at 35.

273. *See id.* at 40–42 (discussing whether ethical sanctions should be imposed upon attorneys when trial courts have rejected their proffered race-neutral reasons).

274. *Id.* at 42 (noting that an attorney who offers a pretext to the court in an attempt to conceal the true motives has lied to the court. This constitutes an ethical violation.); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (stating that a lawyer shall not knowingly make a false statement of fact).

her intentions.[275] A lawyer using challenges in an appropriate manner may nevertheless be deemed by the trial judge to have lied or violated a prospective juror's equal protection rights. Fear of such a circumstance could cause attorneys to hesitate to utilize this important trial tool on behalf of their clients. Moreover, due to demographics of the criminal justice system, an attorney for a minority defendant is more likely to be concerned about this problem than is a prosecutor or an attorney for a white defendant.[276] This is yet another way in which applying *Batson*/*McCollum* to a minority defendant creates a disparate impact.

C. An Example of Batson/McCollum *Run Amuck*

The inequities created by applying *Batson* to criminal defendants can be brought into focus by examining a decision written by a New York intermediate appellate court in 1994. A threshold determination in any *Batson* analysis requires that before asking an attorney to offer a race-neutral reason for exercising a challenge, the trial judge must conclude that the juror being removed by a peremptory strike is a member of a cognizable racial group.[277] In *People v. Stiff*, the application of the *Batson* rule to the minority defendant extends beyond the absurd by interpreting "cognizable racial group" very broadly.[278]

In *Stiff*, an African American defendant, indicted for criminal possession of a weapon and menacing, was convicted after trial by jury. During jury selection, the defendant exercised peremptory strikes on a white male, an Asian male, a Hispanic male and a white female. The prosecutor made a *Batson*/*McCollum* challenge, noting the race of each

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275. Charlow, *supra* note 270, at 47. Charlow discusses the viability of imposing sanctions on attorneys who have been found to violate *Batson* restrictions. *Id.* at 40–41. She notes first that the legal system does, under certain circumstances, contemplate punishing actors who do not possess a culpable mental state. *Id.* at 41 (citing W. PAGE KEETON et al., PROSSER & KEETON ON THE LAW OF TORTS § 75, at 537 (5th ed. 1984)). Charlow goes on to discuss various reasons for and against imposing sanctions on a strict liability basis for *Batson* violators. This analysis takes place in the context of four scenarios: deliberate lies, unintended pretext, honest motives, and mixed motives. *Id.* at 42–49. Looking at the discussion of honest motives, Charlow notes that due to the scant evidence available for a judge to make a determination, judicial error can occur when a judge concludes that an attorney's reasons are pretextual. *Id.* at 47. Such determination can even occur when the attorney is not lying and the act of striking is not based on racial prejudice. Courts may be reluctant to impose sanctions against attorneys, choosing instead to more frequently declare reasons pretextual, thereby erring on the side of rooting out discrimination. Alternatively, they may choose to impose sanctions if the court's practice is to demonstrate restraint in ruling that proffered reasons are pretextual. *Id.* at 48–49.

276. *See supra* Part V.A (discussing demographic considerations for attorneys conducting voir dire).

277. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

278. People v. Stiff, 620 N.Y.S.2d 87, 91 (N.Y. App. Div. 1994).

struck juror. The defense counsel argued that the challenged panelists were of different races, nationalities, and gender. However, the court noted that all the challenged panelists were non-black and determined this was prima facie evidence that the defendant was exercising his challenges in a racially discriminatory manner. The trial judge proceeded to require defense counsel to provide race-neutral reasons for exercising the strikes.[279] After the defense attorney proffered reasons for striking the four jurors, the court concluded the reasons as to two of the panelists were pretextual and seated the jurors over the defendant's objection.[280]

On appeal, the Appellate Division identified the question before them as "whether it is improper for a defendant to exercise peremptory challenges in a manner which purposefully excludes prospective jurors who do not share the defendant's race."[281] In considering the issue, the *Stiff* court noted that in cases in which the excluded venireperson and the defendant are of different races, the central concern of the courts "is the right of every citizen to serve on a jury."[282] Focusing on the rights of the prospective jurors rather than the litigants ultimately drove the outcome of this case.

To answer the question presented, the *Stiff* court considered whether non-blacks are a "cognizable racial group."[283] The defendant argued that such a determination is not consistent with the definition of that term as used in *Batson*.[284] The Appellate Division disagreed, noting that the U.S. Supreme Court has articulated no clear definition of "cognizable racial group" in the context of selecting a trial jury.[285] They also recognized that the New York Court of Appeals previously rejected the idea that multiple minority ethnicities could collectively constitute a "cognizable racial group."[286] Nevertheless, the *Stiff* court concluded that "[i]t is no less discriminatory for a defendant to exclude jurors because they do not share

279. *Id.* at 89.

280. *Id.*.

281. *Id.* at 90.

282. *Id.* (citing Georgia v. McCollum, 505 U.S. 42, 47–50 (1992); Powers v. Ohio, 499 U.S. 400, 406–09 (1991); People v. Kern, 75 N.Y.2d 638, 650–54 (1990)).

283. *Id*. at 91 (relying on *Batson*, 476 U.S. at 96).

284. *Id.*

285. *Id.* In the context of composition of the Grand Jury, the Supreme Court defined the term as "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." Castaneda v. Partida, 430 U.S. 482, 494 (1977) (citing Hernandez v. Texas, 347 U.S. 475, 478–79 (1954)).

286. People v. Smith, 81 N.Y.2d 875, 876 (1993). The record in *Smith* was silent as to the specific ethnic makeup of the excluded jurors. *Id.*

his or her race than for a prosecutor to exclude jurors because they do."[287] That sentence highlights the problem inherent with such reasoning.

When a prosecutor challenges venirepersons because they are members of the same racial group as a minority defendant, she is usually dealing with a small portion of the venire. Due to the small number of minority members included in most venire panels, prosecutors are not likely to have many opportunities to exercise such racially motivated challenges. Attempts to eliminate all members of a single ethnic group will likely be quite conspicuous and an impermissible intent can be more reliably inferred from such focused conduct. However, when a non-majority defendant exercises a peremptory challenge in a manner that violates the *Stiff* classification of "cognizable group," suspect challenges could include those exercised on most members of the venire. This expanded definition includes challenges made to venirepersons who are members of the majority, who will usually constitute the majority of the venire. It will also include all other minorities who do not share the defendant's race. Consequently, peremptory challenges exercised by a minority defendant can fall under *Batson* scrutiny far more often than for any other litigant. Notwithstanding the flaws inherent in the *Stiff* decision, the Appellate Division upheld the trial court's determination and ruled that non-blacks constitute a cognizable racial group.[288]

The logical extension of the *Stiff* holding is that any time a minority defendant exercises a peremptory strike against anyone who is a member of a different race, there is a risk of a *Batson* challenge. Therefore, the minority defendant needs to prepare race-neutral reasons, in anticipation of fending off a *Batson* challenge, for every such strike.[289] Neither the prosecutor of a minority defendant, nor the attorney of a majority defendant, is likely to operate under the same disability in the unfettered and traditional use of their peremptory challenges.[290] As previously noted, this changes the fundamental nature of the peremptory challenge for the minority defendant.[291]

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287. *Stiff*, 620 N.Y.S.2d at 91.

288. *Id.*

289. One commentator has likened the evolution of race-neutral explanations as replacing a peremptory with a "quasi-cause" challenge anytime members of "cognizable" groups are struck. Cavise, *supra* note 177, at 504.

290. While it is possible under *Powers* for a *Batson* challenge to be made under these circumstances, from a practical perspective, the issue will not arise often. Simply stated, a peremptory is more suspicious when exercised against someone who looks like your opponent than someone who does not.

291. *See supra* Part V.B (discussing practical implications of the application of *Batson*/*McCollum*).

It seems unlikely that this disproportionate impact was the result intended by the U.S. Supreme Court when it ruled upon *Batson* in 1986.[292] However, the focus on the rights of the prospective juror begun by *Batson*, and extended through its progeny, has lead to a decision as paradoxical as *People v Stiff*. The New York Appellate Division was clearly influenced by *McCollum*'s focus on the rights of the venireperson over the rights of the defendant. This is exhibited in the ruling's language, which states, "in cases where the defendant and the excluded jurors do not share the same race, *the central concern is the right of every citizen to serve on a jury*."[293] This focus has led to conclusions potentially at odds with the purpose of *Batson/McCollum*—to ensure minority representation on juries.[294] Moreover, under the current analytical framework, the defendant's Sixth Amendment right to a fair trial has become subordinate to the prospective juror's right to sit on the jury.[295] As stated by one scholar, Susan Herman, by focusing the analysis on the rights of jurors, *Batson*'s legacy is "a story whose author has become so preoccupied with the fate of peripheral characters that the protagonist has been forgotten."[296]

D. Batson *Retreats a Half Step—But in the Wrong Direction*

Critics might argue that subsequent *Batson* progeny cases render moot the suggestion that symmetrical application of *McCollum* works a disparate impact on minority defendants. The U.S. Supreme Court decision in *Purkett v. Elem* opened the door to trial courts accepting a broad range of articulated reasons as being race-neutral explanations for exercising a suspect peremptory challenge.[297] Expanding on its holding in *Hernandez v. New York*, the U.S. Supreme Court held that even a "silly or superstitious"

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292. The underlying purpose of *Batson* was to ensure that venirepersons from underrepresented groups were not eliminated from jury service. *See supra* notes 78–80 and accompanying text; *see also* Underwood, *supra* note 4, at 727 (positing that the reason for prohibition of race-based strikes is "to bring all citizens into full and equal participation in the institutions of American self-government").

293. People v. Stiff, 620 N.Y.S.2d 87, 90 (N.Y. App. Div. 1994) (emphasis added) (citing Georgia v. McCollum, 505 U.S. 42, 47–50 (1992); Powers v. Ohio, 499 U.S. 400, 406 (1991); People v. Kern, 75 N.Y.2d 638, 650–54 (1990)).

294. *See supra* text accompanying notes 78–82, 292.

295. *See supra* note 82.

296. Susan N. Herman, *Why the Court Loves* Batson*: Representation–Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993).

297. Purkett v. Elem, 514 U.S. 765 (1995). With this per curiam decision, the Court took on the question of what constitutes a race-neutral explanation for striking a member of a cognizable group. In *Purkett*, the prosecution peremptorily struck two black males. During the portion of the *Batson* hearing in which race-neutral reasons were offered, the prosecutor stated that one juror had long unkempt hair, a moustache, and "goatee type" beard. The other struck juror also had a moustache and "goatee type" beard. *Id.* at 766.

reason may be sufficient to rebut prima facie evidence of discriminatory use of peremptories, so long as the reason is not racially motivated.[298] "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."[299]

It is worth noting that this new definition of "legitimate reason" might have prevented the decision to seat the struck venirepersons in *Stiff*. Under this standard, the proffered reasons articulated by Stiff's lawyer could have been accepted at face value since, as presented, they were not racially discriminatory.[300] Under the *Purkett* standard, they would have passed muster.[301] For that matter, a court applying the *Purkett* standard of "race-neutral" reasons would have accepted the race-neutral explanations offered by this author.[302] However, *Purkett* is justifiably regarded as a blow against the goal of race neutrality in jury selection. While some flawed decisions by trial courts might have been prevented by the *Purkett* definition, the goal of eliminating race-based challenges, as it existed when *Batson* was first issued, has become elusive.

By amending the definition of legitimate "race-neutral" reasons, the *Purkett* ruling has drawn harsh criticism. Dissenting justices criticized the holding as the equivalent of the Court claiming that it did not mean what it said years earlier in *Batson*.[303] Scholars have decried *Purkett* as signaling

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298. *Id.* at 765, 768; *see also* Hernandez v. New York, 500 U.S. 352, 360 (1991) (stating that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral").

299. *Purkett*, 514 U.S. at 769 (citing *Hernandez*, 500 U.S. at 359).

300. With respect to the white male who was seated as a juror over defense objection, the proffered reason for peremptorily challenging him was that he was employed in a supervisory capacity and that he had previously served on a civil jury. Counsel was concerned that the venireperson might not appreciate the differences between civil and criminal juries. Regarding the white female who was seated on the jury over defense objection, defense counsel argued that since she was employed by New York Telephone, a large hierarchical organization, she was more likely to be biased in favor of the prosecution. The court rejected these proffered reasons as being pretextual. People v. Stiff, 620 N.Y.S.2d 87, 89 (N.Y. App. Div. 1994).

301. Nevertheless, the flawed definition of "cognizable racial group," which is unaffected by the *Purkett* decision, still endures in New York from *Stiff*.

302. *See supra* Part VI.A (relating the author's experience with *Batson*/*McCollum*).

303. Dissenting in *Purkett*, Justices Stevens and Breyer compared the procedure articulated in *Batson* with the change created in *Purkett*. *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting). In *Batson*, the Court mandated a three-step process for proving misuse of peremptory challenges. Batson v. Kentucky, 476 U.S. 79, 96 (1986). "First, a pattern of peremptory challenges of black jurors may establish a prima facie case of discriminatory purpose. Second, the prosecutor may rebut that prima face [sic] case by tendering a race-neutral explanation for the strikes. Third, the court must decide whether that explanation is pretextual." *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting) (citing Batson v. Kentucky, 476 U.S. 79, 96–98 (1986)). The prosecution "must articulate a neutral explanation related to the particular case to be tried." *Purkett*, 514 U.S. at 770 (Stevens, J., dissenting) (quoting *Batson*, 476 U.S. at 98).

> [T]he Court replaces the *Batson* standard with the surprising announcement that

the "final demise of the *Batson* doctrine into the rule of useless symbolism."[304] Some fear that a finding of purposeful discrimination will be possible only when an offending attorney "is so naive as to be unaware of the minimal proscriptions of *Batson*."[305] At a minimum, this decision provides "plenty of comfort for the bad and the lazy, and still no guidance for the good"[306] attorneys and trial judges in what constitutes an ethically valid race-neutral reason for exercising a challenge on a member of a "cognizable group." As mentioned, this de-clawing of *Batson* might, at first glance, appear to render the disparate impact upon minority defendants irrelevant. That has not been the case.

State courts have distanced themselves from the holding in *Purkett*, relying on protections provided in state constitutions. Alabama's Supreme Court clearly stated that their peremptory challenge procedure differs from the federal standard because the state procedure is based upon "adequate and independent state law" more protective than the federal standard.[307] The concurring opinion criticized *Purkett*'s inconsistency with *Batson*, observing that the new rule was a departure from previous federal law. Noting that the peremptory strike upheld in *Purkett* would not have survived Alabama's standard, the opinion stated that "the Alabama peremptory challenge framework now differs substantively and substantially from the federal rule. This burden, which forms the essence of Alabama's peremptory challenge framework, exceeds the federal standard. The Alabama standard, which does not center on the proponent's subjective intent, discounts whimsical, *ad hoc* excuses."[308]

California similarly declined to follow *Purkett*, citing state grounds. In a substantial unpublished decision, *People v. Jamison*, issued in 1996, the

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> any neutral explanation, no matter how "implausible or fantastic," even if it is "silly or superstitious," is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate "step three" inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement that "the juror had a beard," or "the juror's last name began with the letter 'S'" should satisfy step two, though a statement that "I had a hunch" should not.

Purkett, 514 U.S. at 775 (Stevens, J., dissenting) (internal citations omitted).

304. Cavise, *supra* note 177, at 528.

305. *Id.* at 529.

306. Johnson, Batson *Ethics for Prosecutors*, *supra* note 82, at 488.

307. Bruner v. Cawthon, 681 So. 2d 173, 182 (Ala. 1996) (Cook, J., concurring). In this per curiam opinion, the Alabama Supreme Court quashed a writ of certiorari, but in doing so, disapproved of the Court of Civil Appeals' reliance on *Hernandez v. New York* and *Purkett v. Elem*. *Id.* at 173 (per curiam).

308. *Id.* at 182 (Cook, J., concurring) (quotations omitted).

California Court of Appeal quoted heavily from the California Supreme Court's predecessor to *Batson*, the renowned *Wheeler* case.[309]

> "Because a fundamental safeguard of the California Declaration of Rights is at issue, however, 'our first referent is California law' and divergent decisions of the United States Supreme Court 'are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.'"[310]

While noting that federal law did not supplant the superior protections offered by California's constitutional right to trial by an impartial jury, the court also noted that *Purkett* was a "digression from prior federal law prohibiting the prosecutor's use of peremptory challenges to remove prospective jurors on the basis of impermissible group bias."[311]

New Mexico, while not directly ruling on the issue, has indicated that if presented with the question, it may decline to follow *Purkett* in favor of the greater protection from discrimination offered by the New Mexico Constitution than is offered by the Fourteenth Amendment.[312] States inclined to recognize greater protections from state authority than from the federal constitution are likely to follow suit.

In any event, for state courts that are inclined to follow *Purkett*, easing review of what constitutes a race-neutral reason does not eliminate the disparate impact of applying *Batson*/*McCollum* to minority defendants. The Tennessee Court of Criminal Appeals, while asserting that it was following the *Purkett* holding, rejected an African American criminal defendant's reasons for peremptorily striking white venirepersons.[313] During seven rounds of jury selection, the defendant exercised nine peremptory challenges.[314] The first challenge was exercised on a black venireperson.[315] The other eight challenges were on white

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309. People v. Jamison, 50 Cal. Rptr. 2d 679, 681–83 (Ct. App. 1996); People v. Wheeler, 583 P.2d 748 (Cal. 1978).

310. *Jamison*, 50 Cal.Rptr.2d at 686 (quoting *Wheeler*, 583 P.2d at 767).

311. *Id.* The opinion concluded by submitting "[t]he assumption that there is a difference of constitutional magnitude between a statement that 'I had a hunch about this juror based on her appearance' and 'I challenged the only Black juror on the panel because she avoided eye contact with me' demeans the importance of the values vindicated by the California Supreme Court . . . ." *Id.*

312. State v. Jones, 934 P.2d 267, 269 (N.M. 1997).

313. State v. Stout, No. 02C01-9812-CR-00376, 2000 WL 202226 (Tenn. Crim. App. Feb. 17, 2000).

314. *Id.* at *7.

315. *Id.*

venirepersons.[316] After finding prima facie evidence of racial discrimination, the trial court directed the defendant to proffer race-neutral reasons for excusing the ninth juror.[317] Defense counsel stated that the venireperson "was 'not responsive'; was not making eye contact with him; that she appeared 'very stern'; and that she was a teacher" in the school the defendant had attended.[318] The court rejected these reasons as pretext.[319] The Tennessee Court of Criminal Appeals upheld the trial court ruling, stating this decision was consistent with *Purkett*.[320] Although the Court of Criminal Appeals acknowledged that the trial court apparently rejected facially race-neutral reasons, the record of the trial judge's reasoning was sufficient to indicate an in-depth analysis. Thus the findings of the trial court were to be given deference.[321] Using this standard of review, even with the new *Purkett* definition of race-neutral reason, any disproportional impact upon the defendant will likely remain undisturbed.

In the aftermath of *Purkett*, the U.S. Supreme Court has not only diminished protections against discriminatory use of peremptory challenges to remove minority members from juries; it has failed to remedy disparate consequences faced by minority defendants exercising challenges on majority venirepersons.

VII. LESSONS FROM OTHER EQUAL PROTECTION JURISPRUDENCE

Since the courts have committed to utilizing an equal protection analysis to resolve claims of discrimination in jury selection, there is value in drawing lessons from equal protection jurisprudence developed in other contexts.

A. Obtaining a Critical Mass of Minority Representation Is Permissible in an Academic Setting

Race conscious decision-making was recently upheld in the context of admissions to academic institutions. In the 2003 landmark case, *Grutter v. Bollinger*, the U.S. Supreme Court approved the admissions policy of the

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at *8.

320. *Id.* "We are not reviewing an appellate court's decision to substitute its findings of fact for those of the trial court. Rather, we are reviewing the trial court's lengthy findings after it heard substantial argument on this issue from both the State and the defendant." *Id.* (citing United States v. Tucker, 90 F.3d 1135, 1142 (6th Cir. 1996)).

321. *Id.*

University of Michigan Law School.[322] This policy considered race as one of many factors in the admissions process.[323] The purpose of the policy was to "ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body."[324] The Court concluded that there was a compelling state interest "in attaining a diverse student body" that permitted the University of Michigan Law School to consider a minority applicant's race as a factor in admission determinations.[325] For this reason, the plan survived strict scrutiny.[326]

Many of the critical factors that motivated the Court to find a compelling state interest in seeking a diverse population in an academic setting are also applicable to a jury setting. The Court noted that the University of Michigan policy promoted "cross-racial understanding" which helped "to break down racial stereotypes" and permitted individuals to "better understand persons of different races."[327] This is a compelling interest in the academic setting because such understanding leads to classroom discussion that is "livelier, more spirited, and simply more enlightening and interesting."[328] Learning in this environment better prepares students for work and citizenship in a way that "sustain[s] our political and cultural heritage" and "maintain[s] the fabric of society."[329]

The benefit of such a "critical mass"[330] approach is supported by conclusions drawn from social science research conducted about jury dynamics.[331] The studies demonstrated it was necessary to have more than nominal minority representation on juries to stave off group pressure of the majority,[332] and presumably create an environment in which diverse views

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322. Grutter v. Bollinger, 539 U.S. 306 (2003).

323. *Id.* at 318.

324. *Id.*

325. *Id.* at 328.

326. *Id.*

327. *Id.* at 330.

328. *Id.*

329. *Id.* at 331 (quoting Plyer v. Doe, 457 U.S. 202, 221 (1982)). The Court noted that these benefits "are not theoretical but real." *Id.* at 330. Businesses expressed to the Court through amicus briefs that only by exposure to "diverse people, cultures, ideas, and viewpoints" can students develop skills necessary for work in today's marketplace. *Id.* Moreover, high-ranking retired officers as well as civilian leaders from the military expressed through an amicus brief that a "racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." *Id.* at 331.

330. Michigan Law School officials defined "critical mass" as "'meaningful numbers' or 'meaningful representation' . . . that encourages underrepresented minority students to participate in the classroom and not feel isolated." *Id.* at 318.

331. *See supra* Part V.C (discussing the findings of social-science studies about jury dynamics).

332. *See supra* notes 195–206 and accompanying text.

would be given genuine consideration. Certainly, if minority members of a jury have difficulty staving off group pressure of the majority due to their underrepresentation, this affects their participation in the deliberative process integral to the jury function. Remedying this problem by seeking a "critical mass" of minority jurors should be every bit as much a compelling state interest as attaining a "critical mass" of minority students in the academic environment.

Even when compelling state interests permit drawing racial distinctions, the means must be narrowly tailored to accomplish the goal.[333] The University of Michigan Law School program met this standard in that it used race "in a flexible, nonmechanical way."[334] A quota system requiring fixed numbers or percentages of minority admittees is not permissible.[335] However, the Court concluded that the goal of attaining a "critical mass of underrepresented minority students" did not render the University of Michigan Law School admissions method a quota system.[336] Indeed, records showed that the number of minority students admitted to the law school over the years varied in a manner "inconsistent with a quota."[337]

In addition to operating in a way that is not like a quota system, the plan also had to employ "individualized consideration" for each applicant.[338] It had to "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[339] The Court found that the University of Michigan admissions program "engage[d] in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[340] Rather than using race as a criterion of automatic admission, it was used as a "plus" factor in its individualized review.[341]

Although "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,"[342] it does require that a race-

333. *Grutter*, 539 U.S. at 333.
334. *Id.* at 334.
335. *Id.* at 334–35.
336. *Id.* at 335.
337. *Id.* at 336.
338. *Id.*
339. *Id.* at 337.
340. *Id.*
341. *Id.* at 341.
342. *Id.* at 339.

conscious policy "not unduly harm members of any racial group."[343] The law school policy did not.[344] The Court found that the law school selects majority applicants who have a greater potential to enhance diversity than minority applicants.[345]

The narrowly tailored characteristics of the University of Michigan Law School admissions program can be evaluated to see if analogous circumstances exist for a non-majority defendant to consider race as a factor in jury selection. Jury selection, by its nature, addresses the requirement that race-conscious programs employ individualized considerations. Individual jurors provide a breadth of information to the litigants during the voir dire process. This process typically yields information about employment, family, police affiliation, and prior contact with the criminal justice system, at a minimum.[346] Even for a defendant seeking to obtain minority representation on a jury, information revealed about one of these areas might well outweigh the significance of race.[347] Viewed in the context of the information obtained during voir dire, race would be but one factor, albeit one that might be viewed as a plus or a minus.[348] Consideration of race during jury selection would be "flexible" and "non-mechanical."[349] Viewing race in the context of these other factors would

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343. *Id.* at 341. The Court observed that "[e]ven remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'" *Id.*

344. *Id.*

345. *Id.*

346. *E.g.*, Norman S. Ostrow & Maranda E. Fritz, *Attorney Conducted Voir Dire*, *in* THE JURY 1984: TECHNIQUES FOR THE TRIAL LAWYER 265–66 (PLI Litig. & Admin. Practice Course, Handbook Series No. H4-4959, Dec. 1, 1984); *see also* MAUET, *supra* note 268, at 30.

347. For example, the fact that a venireperson, or a family member of a venireperson, was a victim of a violent crime similar to the one being tried, would strategically factor more heavily than the race of the venireperson.

348. This would hold true for litigants who are members of a non-majority race. It might not hold true for members of a majority race who are mathematically capable of eliminating all venirepersons of a particular minority race. If motivated to do so, such a litigant might not consider any factor other than race. However, non-majority defendants exercising peremptory challenges are not capable of using peremptory challenges to remove all majority race venirepersons. *See* Brief of Amici Curiae NAACP Legal Defense and Education Fund, Inc., *supra* note 14, at 3–4 (proposing that it is an impossible goal to eliminate all majority venirepersons and that using challenges in a manner to ensure inclusion of some minority jurors presents a different question than that presented in *Strauder* and *Batson*); *see also* Melilli, *supra* note 87, at 455 (asserting that lawyers attempting to eliminate all venirepersons from a particular group are not likely to succeed unless that group makes up only a small portion of the venire). Since elimination of all venirepersons from the majority race is not possible, factors other than race are necessarily considered by a non-majority defendant when determining how to exercise peremptory challenges. Under those circumstances, race would be a plus or minus factor considered in the context of other factors.

349. *Grutter*, 539 U.S. at 334.

also ensure that a category of venireperson would not be "insulate[d] . . . from comparison with" other prospective jurors.[350]

Consequently, a non-majority defendant considering race as a plus or minus factor in jury selection in an attempt to obtain some minority representation on the jury would appear to meet the objectives and requirements approved by the Court in *Grutter v. Bollinger*. In an equal protection analysis, obtaining a "critical mass" of minority representation on a jury should present a compelling state interest. Doing so would promote "cross-racial understanding" which "helps to break down racial stereotypes."[351] This could be particularly important in cases in which analyzing facts in a cultural context is key to the outcome. Moreover, the objective of "encourage[ing] underrepresented minorit[ies] . . . to participate in the [discussion] and not feel isolated"[352] is as important in the jury room as it is in the classroom.[353] Studies of jury dynamics and verdicts punctuate this point.[354] Lastly, the framework of jury selection readily lends itself to a narrowly tailored framework which would pass the strict scrutiny test.

B. Redistricting Permits Race-Conscious Decision-Making

Redrawing legislative voting district lines is another context in which race-conscious decision-making may be permissible. The U.S. Supreme Court has approved voting district boundaries that were redrawn for the purpose of enhancing the probability that non-white legislators would be elected so long as white voting strength was not cancelled out.[355] Subsequently placing limits on such legislative plans, the Court held that

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350. *Id.* The Court also noted that to qualify as "narrowly tailored," a plan must not "unduly harm members of any racial group." *Id.* at 341. It held that the Law School admissions program did not. *Id.* The program considered "all pertinent elements of diversity" in a way that permitted selection of non-minority applicants who had potential to add to diversity. *Id.* Consideration of race as one of many factors by a minority defendant when exercising peremptory challenges would yield the same result.

351. *Id.* at 330. "[D]iminishing the force of such stereotypes is . . . [a crucial goal that] cannot [be] accomplish[ed] with only token numbers of minority students." *Id.* at 333.

352. *Id.* at 318.

353. In *Grutter*, the Court "recognized [that] law schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.'" *Id.* at 332 (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)). This implicitly recognizes that issues impacted by racial diversity predictably become relevant in the courtroom.

354. *See supra* notes 195–206 and accompanying text.

355. CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW, SECOND EDITION, VOLUME 2, EQUAL PROTECTION, CIVIL AND CRIMINAL JUSTICE §27.15, at 77 (analyzing *United Jewish Org. of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 168 (1977)).

bizarrely shaped districts created through race-consciousness are justified only when there is a compelling state interest.[356]

Nevertheless, under section 2 of the Voting Rights Act,[357] redrawing a district in a manner that prevents dilution of African American voting strength is justified. So long as the State does not go beyond what is reasonably necessary to avoid minority voter "retrogression," such redistricting is not a violation of the Equal Protection doctrine.[358] In such instances, race consciousness when redrawing the district lines "does not lead inevitably to impermissible race discrimination."[359] While the Voting Rights Act is not directly derived from the Constitution,[360] consideration of race as a factor is permissible under the Constitution.[361]

Using standards of redistricting as a guide is useful because similarities exist between factors considered by legislators redrawing voting districts and factors considered by attorneys exercising peremptory challenges. Legislators engaged in redistricting are always aware of race, "age, economic status, religious and political persuasion."[362] Attorneys who have conducted a meaningful voir dire and are exercising peremptory challenges are aware of most, if not all, of these same factors. Awareness of these specific factors has caused redistricting to differ from other types of state decision-making.[363] Consequently, the U.S. Supreme Court has historically analyzed race-based equal protection claims stemming from reapportionment situations differently from equal protection claims stemming from other forms of governmental conduct.[364] Similarly, evaluation of a defendant's use of peremptory challenges should not employ the standard equal protection analysis used in other types of state decision-making. Not only are the same determinative factors in play with reapportionment and jury selection, but also criminal defendants are not the typical "state actor."[365]

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356. Shaw v. Reno, 509 U.S. 630, 644 (1993).

357. The Voting Rights Act was enacted in 1965 by Congress, exercising its power under the Fifteenth Amendment. The U.S. Supreme Court has treated section 2 of the Voting Rights Act as being coextensive with the Fifteenth Amendment. ANTIEAU & RICH, *supra* note 355, at 72.

358. Bush v. Vera, 517 U.S. 952, 983 (1996).

359. *Shaw*, 509 U.S. at 646 (discussing Wright v. Rockefeller, 376 U.S. 52 (1964)).

360. ANTIEAU & RICH, *supra* note 355, at 71–72.

361. *Shaw*, 509 U.S. at 646 (stating that a race conscious redistricting plan "does not lead inevitably to impermissible race discrimination").

362. *Id.*

363. *Id.*

364. *Id.* at 680 (Souter, J., dissenting).

365. *See supra* notes 89–94, 109–110, 129–141 and accompanying text (discussing the manner in which criminal defendants differ from typical "state actors" for purposes of the Fourteenth Amendment).

The policies driving legislative reapportionment and those driving the *Batson* framework also share an important historical motivation—they both seek to remedy past disenfranchisement of minority citizens.[366] This history is why the Court, utilizing the Voting Rights Act, has fought against dilution of minority residents of legislative districts. It is also why the Court held in *United Jewish Organizations of Williamsburgh, Inc. v. Carey* that race may constitutionally be considered when redrawing districts.[367] Indeed, racial consideration was not held by the Court to be limited to curing the past effects of discrimination.[368] The U.S. Supreme Court in *United Jewish Organizations* permitted using racial considerations to redraw legislative lines so that the percentage of districts with a non-white majority approximated the percentage of non-whites in a county.[369]

While laws classifying citizens by race cannot be upheld unless they are "narrowly tailored to achieve[] a compelling state interest,"[370] it is clear that curing past disenfranchisement is a compelling state interest. In achieving these objectives, redistricting plans are prohibited from "fencing out" another group's participation in the political process.[371] However, so long as the race consciousness underlying the redistricting plan is narrowly

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366. ANTIEAU & RICH, *supra* note 355, at 71–72 (discussing court action and congressional measures taken to invalidate attempts by states to discriminate against voters based upon their race. Primary among these is the Voting Rights Act, authorized by Congress in 1965. The Act provided the Court with tools necessary to combat disenfranchisement of minority voters.); *see also supra* Part II (describing the past exclusion of African Americans from jury service).

367. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1977).

368. *See id.* at 163 (holding that race may be considered in redistricting).

369. *Id.* at 165. Note that the holding in *United Jewish Organizations* was significantly narrowed by *Miller v. Johnson*, 515 U.S. 900, 915 (1995). The *Miller* decision indicated that the "assignment of voters on the basis of race would be subject to [the] strictest scrutiny." *Id.* at 915. The Court went on, however, stating "it does not follow that race predominates in the redistricting process" merely because a legislature is "aware of racial demographics." *Id.* at 916. Rather, a court must accord a legislature the "presumption of good faith" when distinguishing between being motivated by racial considerations and merely being aware of them. *Id.* A plaintiff in a reapportionment case must show that "the legislature subordinated traditional race-neutral . . . principles . . . to racial considerations" in order to prevail on a claim. *Id.*

370. *Miller*, 515 U.S. at 904.

371. *United Jewish Orgs. of Williamsburg, Inc.*, 430 U.S. at 165.

> There is no doubt that . . . the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.
>
> It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.

Id.

tailored, is not the predominant interest, and does not unfairly affect another group's voting strength, the plan will be upheld.[372]

Jurisprudence reforming the use of peremptory challenges has been geared toward remedying past disenfranchisement of minority citizens. This remedy is intended to restore balance for minority defendants so that all-white juries do not judge them. It is also meant to prevent minority prospective jurors from being excluded from an important privilege of citizenship.[373] Since the Court recognizes that race-based decisions are permissible to achieve analogous state interests in the context of academic admissions and redistricting, it is appropriate to consider such a framework for making decisions in jury selection. Ensuring minority representation on a jury to preserve the prospective juror's equal protection rights, as well as to provide meaning to a minority defendant's Sixth Amendment rights should justify applying rules governing peremptory challenges in a structure similar to the redistricting framework. This means that under certain circumstances, it may be permissible to evaluate challenges exercised by minority defendants, or against majority venirepersons, differently than in other circumstances. The permissibility of a reapportionment plan is determined by the context in which it occurs. A plan drawn to protect white voting strength is evaluated differently than a plan designed to protect black voting strength.[374] Similarly, since *Batson*/*McCollum* can adversely affect minority defendants in a disproportionate manner,[375] the doctrine should be applied so that it is adaptable to the context of each trial's jury selection.

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372. Easley v. Cromartie, 532 U.S. 234 (2001). A party seeking to strike down redistricting legislation must show, at a minimum, that race was not simply a motivation for creating district lines, but rather the "*predominant* factor" motivating the decision, and that the legislation is "unexplainable on grounds other than race." *Id.* at 241–42 (citations omitted). Existence of hypothetical alternative districts does not demonstrate improper legislative motivation unless the alternatives would have better satisfied traditional non-racial political and districting goals. *Id.* at 249. Significantly, direct evidence that the legislature considered obtaining "racial balance" as a factor when drawing the district did not render the intent of the redistricting improper. This evidence did not show that obtaining "racial balance" was the predominant factor. *Id.* at 253, 257. Therefore, the plan was upheld by the Court. *Id.* at 258.

373. *See supra* Part II (discussing the historical exclusion of African Americans from jury service).

374. Under the Voting Rights Act, when a redistricting plan is challenged, the burden of proof automatically shifts, requiring the jurisdiction to convince the adjudicative body that the proposed plan has neither the intent nor effect of "minimizing or canceling out" minority voting power. Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes To Redistricting, Race Isn't Everything, It's the* Only *Thing"?*, 14 CARDOZO L. REV. 1237, 1245 (1993) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

375. *See supra* Part V.A–B (discussing demographic considerations and practical implications of *Batson*/*McCollum*).

VIII. RESOLUTIONS PROPOSED BY SOME SCHOLARS

Whether to preserve the peremptory challenge as a means of selecting juries is a subject of ongoing debate. Some recognize the peremptory challenge as one of the few powerful tools a criminal defendant has to fight the overwhelming power of the state.[376] Others argue that the history of the challenge's misuse provides reason to do away with it altogether.[377] A compelling reason to do so is that it is difficult to assess the motives of the person exercising the challenge.[378] Maintaining peremptory challenges keeps alive the possibility that racism will remain a factor in jury trials.[379] However, removing the peremptory challenge from use by a criminal defendant could lead to Sixth Amendment consequences. The history and evolution of the peremptory challenge is tied to the defendant's right to trial by an impartial jury.[380]

Scholars have proposed a variety of reforms to preserve the peremptory challenge. One proposal suggests modifying a method taken from the early days of English jury trials. This approach, called trial by *jury de medietate linguae*,[381] assures that half the trial jury will consist of the same minority background as the defendant.[382] This design recognizes that prejudice

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376. Gutman, *supra* note 19, at 324; Katz, *supra* note 36, at 357 n.1.

377. In his concurrence to the *Batson* decision, Justice Marshall proposed that the Court should entirely ban peremptory challenges from the criminal justice system. Batson v. Kentucky, 476 U.S. 79, 107 (1986) (Marshall, J., concurring). Scholars have made similar suggestions. *See* Hochman, *supra* note 45, at 1403–04 (concluding that abuse of the peremptory injects prejudice and bias into the jury system and that challenges should be legally and legislatively removed from the trial process); *see also* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 169–70 (1989) (arguing that peremptory challenges assure that jury selection will be made on the basis of stereotypes and arbitrary classifications and therefore violate the Equal Protection Clause even when based upon grounds other than race).

378. *See supra* Part VI.B (commenting on the difficulty of discerning the motives of an attorney attempting to strike a juror).

379. *See* Purkett v. Elem., 514 U.S. 765, 766 (1995) (permitting suspect strike based upon the "race-neutral" reason of the prospective jurors wearing a "moustache and goatee type beard" and "shoulder length, curly, unkempt hair"); Alschuler, *supra* note 377, at 169–70.

380. *See supra* Part I (discussing how history established the peremptory challenge as a defendant's right). Even though the peremptory is not a constitutional right, the Court refers to it as a means to a constitutional right. Georgia v. McCollum, 505 U.S. 42, 57 (1992). The clarity of the Sixth Amendment tie has been muddied by the *Batson* court's decision to pass on the Sixth Amendment issue presented to it. *See Batson*, 476 U.S. at 84 n.4.

381. A Latin phrase literally meaning jury of the half tongue. BLACK'S LAW DICTIONARY 873 (8th ed. 2004).

382. *See generally* Deborah A. Ramirez, *supra* note 175, at 781–82. Early English charters provided that disputes between Jewish residents and English subjects would be resolved by juries that were composed half of Englishmen and half of Jews. *Id.* at 783–84. The mixed jury was used in the American Colonies to include Native Americans on juries judging other Native Americans of crimes. *Id.* at 790–91.

against foreigners can lead to unjust jury verdicts. It is also a compelling method to neutralize that bias. However, American jurisprudence indicates that the U.S. Supreme Court would not support a plan that requires a jury to consist of half minority citizens.[383] In an effort to navigate around these obstacles, Professor Deborah A. Ramirez proposes a system involving some affirmative choice rather than one based entirely on striking unwanted venirepersons. By providing each side a number of "affirmative peremptory choices" that could be used for any reason without explanation, a racially mixed jury pool could be created.[384]

Another proposal involves "cumulative voting."[385] Under this proposal, litigants are granted a certain number of votes that correspond to the size of the jury.[386] After the court has considered and ruled upon challenges for cause, parties submit ballots exercising their votes on the remaining venirepersons.[387] In this innovation, votes can be used to either seat a juror or to eliminate a juror.[388] There is no limit, out of the available total, to the number of votes that a side may use either for, or against, a particular juror.[389] Jurors with the highest vote totals become the jury.[390] Effective utilization of this system will likely involve implementation of intricate strategies by the litigants.[391]

In a pre-*McCollum* article, Doug Colbert suggested another approach that employs a Thirteenth Amendment analysis to the use of peremptory challenges.[392] Recognizing that the purpose of *Batson* was to stop the exclusion of African Americans from jury service, this proposal posits that

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383. Interestingly, Chief Justice Marshall permitted a jury consisting of one half foreigners in a trial he presided over. United States v. Cartacho, 25 F. Cas. 312 (C.C.D. Va. 1823) (No. 14,738). However, in the early twentieth century, the U.S. Supreme Court noted that while aliens are protected by the Sixth Amendment, trial by jury *de medietate linguae* "no longer obtains." United States v. Wood, 299 U.S. 123, 145 (1936). Recent U.S. Supreme Court decisions addressing Equal Protection would seem to close the door on this approach.

384. Deborah A. Ramirez, *supra* note 175, at 806–08. In this proposal, a qualified venire would be selected. From that group, a "relevant" qualified venire would be selected. *Id.* at 807. Each party would be able to affirmatively select a certain number of persons to be in the "relevant" venire. *Id.* The court would randomly select the balance of the "relevant" venire. *Id.* Litigants would not know which venirepersons their opponent had selected. *Id.* From this point, the currently used technique of de-selection would be employed to select the jury from this "relevant" venire. *Id.*

385. Edward S. Adams & Christian J. Lane, *Constructing A Jury that is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703 (1998).

386. *Id.* at 745.

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* at 746.

391. *Id.* at 750 n.263, 751.

392. Colbert, *supra* note 1, at 5.

two categories of peremptory challenges be eliminated.[393] The first category is the prosecutor's challenge in criminal cases in which the defendant is African American.[394] The second category is the defense peremptory challenge in which the defendant is white and the victim is black.[395] Other than this limited circumstance, the criminal defendant would preserve the power to use peremptory challenges, unfettered.[396] Viewed more broadly, this plan would extend to any racially cognizable group that can demonstrate a history of discrimination associated with second-class citizenship or of conditions comparable to involuntary servitude.[397] In support of this proposal, Colbert asserts there is mutual support and interplay between the Sixth and Fourteenth Amendments and the Thirteenth Amendment.[398]

IX. PROPOSAL TO APPLY *GRUTTER* TO JURY SELECTION

As Colbert made clear when crafting his Thirteenth Amendment approach to peremptory challenges, the history of excluding African Americans from jury service must be contemplated in any solution. Applying *Grutter v. Bollinger* to construct a framework applicable to minority defendants using peremptory challenges in criminal trials will preserve the power of the peremptory challenge as a litigation tool, prevent the exclusion of minorities from jury service, and avoid impacting minority defendants in a disproportionate manner. *Batson*/*McCollum* challenges should protect classes of people contemplated by the Thirteenth Amendment,[399] as well as those venirepersons who, though not historically oppressed, have experienced recent discrimination.[400]

Since *Batson* and *McCollum* were designed to prevent underrepresented groups from being excluded, that is the context in which this approach should be framed. This proposal uses an analogue of the

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393. *Id.* at 8.

394. *Id.*

395. *Id.*

396. *Id.* at 4 n.9.

397. This expanded group is derived from the Thirteenth Amendment, which protects all those who suffer under "badges and incidents" of slavery. *Id.* at 5 n.10.

398. *Id.* at 8–9.

399. Those who have suffered under "badges or incidents" of second-class citizenship. *Id.* at 5 n.10.

400. For example, in recent years people of Middle Eastern heritage living in the United States have experienced increasing levels of discrimination. *See* Southern Poverty Law Center, *Raging Against the Other: September's Terrorist Strikes Trigger a Violent Outbreak of American Xenophobia*, INTELLIGENCE REPORT, Winter 2001 (describing a wave of anti-Arab hate acts following the September 11 attacks), *at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=159 (last visited Mar. 6, 2005).

"critical mass" approach approved in the *Grutter v. Bollinger* decision.[401] It still follows the jurisprudence designed to protect against using peremptory challenges to eliminate minority citizens from the jury panel, yet it protects against the unintended consequence of placing minority defendants at a disadvantage when using their peremptory challenges.[402]

Under this proposal, if a *Batson/McCollum* claim arises based upon a non-majority defendant's use of peremptory challenges on majority venirepersons, the first step would still be the same as currently exists. The court must first determine whether the challenger has made out a prima facie case of discriminatory use of peremptories.[403] However, the court's determination of what constitutes prima facie evidence should be guided by the principles underlying *Grutter*. The court should recognize that under *Grutter*'s reasoning, obtaining racial diversity on the jury is a permissible objective. As such, evidence of race-consciousness in a minority defendant's use of peremptory challenges would not automatically result in the trial court disallowing the exercise of the peremptory.[404]

In the first step of the *Batson* analysis,[405] the determination of whether evidence meets the prima facie standard will be influenced by the racial composition of the venire. *Batson* specified that "[i]n deciding whether the [litigant] has made the requisite showing, the trial court should consider all relevant circumstances."[406] When viewing the relevant circumstances, it is

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401. Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

402. *See, e.g.*, *supra* p. 344. This proposal seeks to provide a solution consistent with *Batson* jurisprudence; however, this proposal does not signal an agreement with some of the more troubling aspects of their underlying reasoning. For the reasons already stated, a gap exists in *Batson*'s logic due to its failure to address the defendant's right to a fair trial. *See supra* notes 82, 295–296 and accompanying text. Moreover, defining a criminal defendant as a state actor is a decision that merits revisiting. *See supra* notes 129–41 and accompanying text.

403. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

404. Application of this reasoning might have resulted in different decisions in People v. Yarbrough, 589 N.Y.S.2d 891 (N.Y. App. Div. 1992), Griffin v. State, 610 So. 2d 354 (Miss. 1992), and State v. Govan, 439 S.E.2d 263 (S.C. 1993); *see supra* notes 241–53 and accompanying text (discussing these three cases in turn).

405. During a typical jury selection, the trial judge first entertains and rules upon challenges to venirepersons for cause. Then the litigants exercise peremptory challenges on remaining venirepersons. If one party suspects the other of using peremptory challenges in a racially motivated manner, the first party must establish this racial discrimination through prima facie evidence. This is step one of the *Batson* challenge. *Batson*, 476 U.S. at 96–98. After the court determines there is prima facie evidence of discrimination, the party that exercised the peremptory challenge is required to rebut the prima facie showing by offering a race-neutral reason for striking the venireperson (or venirepersons). This is step two of the *Batson* challenge. *Id.* The court then determines whether the proffered reason is a pretext for discriminatory intent. This is step three of the *Batson* challenge. *Id.*

406. *Id.* at 96–97; *see also* Melilli, *supra* note 87, at 476–77 ("Using fifty percent of one's peremptory challenges against members of a group constituting a small portion of the venire has to be evaluated differently than exercising fifty percent of one's peremptory challenges against members of a group constituting half or more of the venire.").

clear that the fewer the number of minority venirepersons, the more difficult it will be to obtain diversity on the jury panel. As such, the compelling state interest of obtaining non-majority jurors will permit consideration of race during the selection process.

When determining whether prima facie evidence exists that peremptories are being used in an impermissibly discriminatory manner, the court should consider whether the strikes "fence out" majority participation on the jury.[407] For example, if a venire is 90% white, challenges on numerous white venirepersons would not constitute prima facie evidence of discriminatory intent unless it "fences out" white participation on the jury.[408] This threshold framework does not establish a quota system. It does not require any particular ethnic makeup on a particular jury. Rather, it is a framework to gauge when prima facie evidence of discriminatory intent exists, requiring further justification for exercising a peremptory challenge. Applying this method to all litigants in a criminal case, a relatively small number of peremptory challenges exercised against minority venirepersons will establish prima facie evidence of discrimination

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407. This borrows the test enunciated in *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977). An alternative version of this proposal would introduce a threshold stage that precedes determination of whether there is prima facie evidence of discrimination in selections. That stage would involve establishing standing to raise a *Batson*/*McCollum* challenge. The question of a voter's standing to challenge a redistricting plan was addressed in *Sinkfield v. Kelley*. Sinkfield v. Kelley, 531 U.S. 28 (2000). In *Sinkfield*, the Court determined that a white voter who was the member of the majority race in a district did not have standing to challenge a redistricting plan that established a majority-minority neighboring district. The court reasoned that a white voter who did not live in the majority-minority district had not "*personally* been denied equal treatment." *Id.* at 30 (quoting United States v. Hays, 515 U.S. 737, 746 (1995)). The rationale is that the collective voting power of the white plaintiff was not diminished by the re-districting plan. *Id.* at 30–31. Consequently, the voter and the district had not experienced a loss of presence. *Id.* By analogy, a white venireperson who is struck from a jury that maintains a majority of white members has not experienced a loss of collective voting power.

408. Significantly, this approach does not limit minority presence on a jury to a percentage consistent with the venire. The test is whether a party's power is "fenced out." A venire that is 10% minority could certainly generate a jury that has 50% minority representation without fencing out white jury representation. However, white jury representation that exceeds 95% would fence out the small minority presence on the jury. Consequently, using challenges to secure minority representation on a jury, even in excess of the percentage of minorities in a venire, will not constitute prima facie evidence of discrimination, so long as it does not unfairly cancel out the majority members' voting strength on the jury. This evaluative framework recognizes the jury verdict data gathered by Bowers *et al.* and the sociological data discussed by Sheri Lynn Johnson regarding the importance of having a critical mass of minority jurors to stand against the persuasive power of the white majority. *See* Bowers, *supra* note 203, at 193 (noting that the racial composition of a jury in capital cases leads to discrepancies in the frequency with which either a sentence of death or life is imposed); Johnson, *Black Innocence and the White Jury*, *supra* note 165, at 1698 (summarizing studies that suggest a threshold of at least three jurors are needed to withstand group pressure from the majority's view).

as compared to a larger number exercised on majority venirepersons needed to establish prima facie evidence of discrimination against the majority.[409]

If the court finds prima facie evidence at the first stage, in the instance of a minority defendant exercising a peremptory challenge on a majority venireperson, when called upon to justify use of the peremptory challenge, the reason proffered by the defendant need not be race-neutral. Following the reasoning of *Grutter*, a race-conscious decision would be permissible to achieve the compelling state interest of empanelling a "critical mass" of diverse jurors. So long as race is merely used as a plus or minus factor, considered by the defendant in the context of many factors, such reasoning would be sufficient to uphold the use of the peremptory and defeat the *Batson*/*McCollum* challenge.[410]

As such, under this proposal, dual objectives will be realized: the proposal restores *Batson*/*McCollum*'s underlying motivation to prevent elimination of minorities from jury panels, and the benefits of diversity approved in *Grutter* will be attainable, improving the quality of discourse in the jury room. Diversity on the jury will help produce "cross-racial understanding" and "break down racial stereotypes."[411] Where there is insufficient minority representation on a jury, there is a risk that individual jurors may interpret a minority defendant's conduct based upon faulty assumptions of stereotypical behavior.[412] Presence of non-majority jurors helps place actions and behavior in cultural contexts, increases understanding, and "diminish[es] the force of such stereotypes."[413] The reasoning behind holding this to be a compelling state interest for an academic institution applies just as powerfully for it to be a compelling state interest in our criminal justice system. Moreover, the Court recognized that this goal is one that "cannot [be] accomplish[ed] with only token numbers of minorit[ies]."[414]

Refocusing the analysis at the prima facie stage accounts for the demographic realities[415] and arithmetic likelihood that non-discriminatory

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409. Indeed, if there are very few minority venire panelists, it may be that using all of one's peremptory challenges on majority panelists would not give rise to prima facie evidence of discrimination.

410. Because minority venirepersons are not insulated from competition with majority venirepersons, and race is only one of several factors, the narrow tailoring standards used in *Grutter* would be complied with. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

411. *Id.* at 330.

412. *See supra* notes 198–202, 211 and accompanying text (discussing juror perceptions and assumptions of stereotypical behavior).

413. *Grutter*, 539 U.S. at 333.

414. *Id.*

415. *See supra* Part V.A–B (discussing the demographic considerations and practical implications of *Batson*/*McCollum* challenges).

peremptories will be exercised on majority venirepersons in proportionally greater numbers than against minority venirepersons. It contemplates that it is virtually impossible for a minority defendant to eliminate all majority members from a jury, yet under the current system it is relatively easy for a prosecutor to eliminate all those who share the race of the minority defendant.[416] Permitting race-consciousness by minority defendants when exercising peremptory challenges maximizes the likelihood of securing a "critical mass" of minority representation on a jury to achieve the compelling state interest of "cross-racial understanding" and "break[ing] down racial stereotypes."[417] Moreover, it allows minority defendants the opportunity to seek minority representation on a jury, while diminishing the risk of being called upon to defend a *Batson/McCollum* challenge for exercising peremptories on majority venirepersons.[418] It also facilitates a system that will benefit from ensuring diversity in the fact-finding body.[419]

CONCLUSION

While perhaps more dramatic remedies are desirable to restore to the accused the full historical power of peremptory challenges lost in the post-*McCollum* age, this proposal can be the first step in an evolution. It fits within the jurisprudential framework erected by the U.S. Supreme Court in analogous equal protection settings. It begins a return to the principles and objectives that inspired the *Batson* and *McCollum* decisions. It protects individuals who are members of historically oppressed ethnic groups, whether they are prospective jurors or defendants. It reduces the likelihood that a prosecutor can eliminate all people who share the defendant's race. It restores power to the non-majority defendants when selecting a jury. Most significantly, it eliminates the disproportional impact created against minority defendants exercising peremptory challenges.

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416. *See* Melilli, *supra* note 87, at 455 (stating that peremptory challenges have the potential to eliminate all members of a particular group that has a small presence on the venire). A distinct ethnic or racial group generally constitutes a small percentage of the venire when the group makes up a correspondingly small portion of the population of the jurisdiction from which the venire is drawn. *Id.*

417. *Grutter*, 539 U.S. at 330.

418. *See* supra Part VI.A (describing an anecdotal account of a *Batson* challenge made against this author's use of peremptory challenges upon two white women); *see also* Adams & Lane, *supra* note 385, at 724 (asserting that well intentioned theorists promoting colorblind logic in *Batson* and its progeny have robbed minority defendants of their only tool to increase minority representation on a jury).

419. *See supra* notes 179–182, 225–232 and accompanying text (acknowledging the value of diversity on the jury).