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Beyond Gender: Peremptory Challenges and the Roles of the Jury

Nancy S. Marder*

Should any peremptory challenges be allowed now that peremptories are no longer permitted on the basis of race or gender? Professor Nancy Marder argues that the answer should depend on whether peremptory challenges help or hinder the jury in the performance of its various roles. One of the jury's roles is to make public value decisions; peremptories are harmful to this function in that they exclude from the jury a range of values and perspectives so that different communities may no longer believe that the jury's verdict reflects their values. Another function of the jury is to render accurate verdicts; peremptories may impede accuracy by systematically eliminating jurors holding a range of views who might have challenged erroneous ideas. The jury also must appear to be a fair, and fairly constituted, decisionmaker, and yet peremptories compromise the jury's fairness by suggesting that the composition of the jury can be manipulated. Finally, the jury plays a critical role in allowing citizens in a democracy to participate in their own self-governance; peremptories deny access to this civic duty and education.

There are, however, several justifications for peremptory challenges. One justification is that peremptories give parties control over jury selection; another is that jury selection should be left to the adversarial process rather than to the judge; and finally, peremptories are part of our tradition, and there is reluctance to depart from tradition. What underlies the debate, however, are competing visions of the jury. One vision of the jury is as a public institution; another is as a protector of parties' rights. The Supreme Court has taken a view of the jury as a public institution in its Fourteenth Amendment jury cases and as a protector of parties' rights in its Sixth Amendment jury cases. Professor Marder also argues for eliminating peremptories by revisiting the

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Sixth Amendment with insights about the jury as a public institution gained from the Fourteenth Amendment.

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

—*Peters v. Kiff*¹

[O]nly by banning peremptories entirely can . . . discrimination be ended.

—*Batson v. Kentucky*²

I. Introduction

Justice Marshall's trenchant observation about the harm caused to the jury by the systematic exclusion of groups of jurors from jury service, though made over twenty years ago in *Peters v. Kiff*, a case pertaining to racially segregated venire lists, remains both timely and telling today. When a group is systematically excluded from jury service, the jury is deprived of a range of experiences, backgrounds, and perspectives that

1. 407 U.S. 493, 503-04 (1972) (Marshall, J., plurality opinion) (footnote omitted).

2. 476 U.S. 79, 108 (1986) (Marshall, J., concurring).

would enhance its deliberations. The loss to the jury arises not because jurors, by virtue of their group identity, will vote a certain way, but rather because jurors, by virtue of their various life experiences, bring to the jury room different values and approaches to deliberations that are unpredictable and, in Justice Marshall's words, even "unknowable." When groups in the community are systematically excluded from jury service, whether by narrowly drawn venire lists, automatic exemptions, or peremptory challenges, the result is the same: a jury that no longer has the opportunity of reflecting the diversity of the community. This does not mean that every petit jury must mirror the community, but only that no group should be singled out for exclusion from the petit jury. Such exclusion affects not only the functioning of the jury, but also the way in which different communities perceive the jury and whether they are willing to embrace the jury's verdict.³ Such exclusion also conveys a harmful lesson to those who are excluded: It signals to them that they are not full members of the community. Finally, the exclusion teaches a harmful lesson to those who are included: It reinforces stereotypes regarding those who are full citizens and those who are not.

Peremptory challenges no longer serve as a mask just for race-based discrimination; other groups are systematically excluded through peremptory challenges as well. Today, for example, there is a growing awareness that lawyers are using their peremptory challenges to exclude jurors based on gender.⁴ Gender-based peremptories, as they are called, have been permitted by a number of state and circuit courts.⁵ The Supreme Court

3. For a discussion of the different ways in which communities may respond to a jury verdict, see *infra* text accompanying notes 73-82.

4. One indication of this growing awareness is the number of reported cases in the last few years in which litigants have alleged that peremptories were exercised in a gender-based manner. For example, a Westlaw search revealed that between 1980 and 1986, there were three state cases and no federal cases raising the issue of gender-based peremptory challenges. In contrast, since 1987, there have been 30 reported state cases and 5 reported federal appellate cases in which one party alleged that the other side had exercised gender-based peremptories and the court addressed the issue. See *infra* notes 17-25. In addition, since 1989, there have also been at least 10 reported state cases in which one party raised the issue, but the court found reason not to reach it. See *infra* note 27.

5. E.g., *United States v. Broussard*, 987 F.2d 215, 217 (5th Cir. 1993); *United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 502 U.S. 1080 (1992); *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. dismissed sub nom. Washington v. United States*, 489 U.S. 1094 (1989), *and cert. denied*, 493 U.S. 1069 (1990); *Knight v. State*, No. CR-92-1840, 1994 WL 94515 (Ala. Crim. App. Mar. 25, 1994), *withdrawn*, 1994 WL 226684 (Ala. Crim. App. May 27, 1994); *Bankhead v. State*, 625 So. 2d 1141, 1142 (Ala. Crim. App. 1992), *rev'd sub nom. Ex parte Bankhead*, 625 So. 2d 1146 (Ala. 1993); *Mims v. State*, 591 So. 2d 120, 123 (Ala. Crim. App. 1991), *aff'd*, No. CR93-1661, 1994 WL 484373 (Ala. Crim. App. Sept. 9, 1994); *Fisher v. State*, 587 So. 2d 1027, 1030 (Ala. Crim. App.), *cert. denied*, 587 So. 2d 1039 (Ala. 1991), *and cert. denied*, 503 U.S. 941 (1992); *Daniels v. State*, 581 So. 2d 536, 539 (Ala. Crim. App. 1990), *cert. denied*, 581 So. 2d 541 (Ala.), *and cert. denied*, 502 U.S. 914 (1991); *Stariks v. State*, 572 So. 2d 1301, 1303 (Ala. Crim. App. 1990); *Dysart v. State*, 581 So. 2d 541, 543 (Ala. Crim. App. 1990), *cert. denied*, 581 So. 2d 545 (Ala. 1991); *Cleveland v. State*, 865 S.W.2d 285, 293 (Ark. 1993), *vacated and remanded*,

has recently addressed the question and has held that gender-based peremptories, like race-based peremptories, are impermissible under the Equal Protection Clause.⁶ Although the Court has answered the question whether gender-based peremptories are permissible, it has left open the question whether peremptories exercised against other groups are permissible. The newly recognized category of gender-based peremptories should serve as a catalyst for rethinking whether any peremptory challenges should be permitted.

One way to think about the question is to consider the various roles we expect the jury to fulfill and to ask whether peremptories hinder or help the jury to fulfill these roles. The jury plays an important role in making public value decisions; jury verdicts often reflect the values of the community. Peremptories are harmful to this public value decisionmaking function because they exclude from the jury a range of values and perspectives, so that different communities may no longer believe that the jury's verdict reflects their values. This skepticism may translate into an unwillingness to accept the jury's verdict. Another function of the jury is to render accurate verdicts; however, the use of discriminatory peremptories may impede accuracy by systematically eliminating jurors with a range of perspectives who might have challenged erroneous or mistaken ideas. The jury must also appear to be a fair, and fairly constituted, decisionmaking body. Peremptories compromise the fairness of the jury; they suggest that jury composition can be manipulated and that discrimination has a place in the judicial process. Finally, the jury plays a critical role in educating citizens about the workings of the justice system. Jury duty and voting are two instances in which citizens have an opportunity to participate directly in their own governance. Peremptories deny access to a civic duty. They teach those who are excluded that they are not fit to serve and are not full citizens. They teach those who are permitted to serve that they have a higher status than those who have been denied access.

There are, however, several justifications for retaining the peremptory challenge. One argument is that if a party has some control over jury selection, it will believe that it was tried by a fair jury and be willing to accept the jury's verdict. Another argument is that by no longer performing the task of selecting a jury, lawyers would be relinquishing one of

114 S. Ct. 1828 (1994); *Martins v. City of Stamford*, No. CV-85-0078-712-S, 1993 WL 21460, at *1 (Conn. Super. Ct. Jan. 26, 1993); *Hannan v. Commonwealth*, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989); *State v. Aubrey*, 609 So. 2d 1183, 1186 (La. Ct. App. 1992); *State v. Adams*, 533 So. 2d 1060, 1063 (La. Ct. App. 1988), *cert. denied*, 540 So. 2d 338 (La. 1989); *Simon v. State*, 633 So. 2d 407, 411 (Miss. 1993), *vacated and remanded*, 115 S. Ct. 413 (1994); *State v. Culver*, 444 N.W.2d 662, 666 (Neb. 1989); *State v. Oliviera*, 534 A.2d 867, 870 (R.I. 1987); *see infra* text accompanying notes 23-27.

6. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

their roles in the adversarial system, and the task of jury selection would fall to a judge, whose biases and institutional concerns could not be easily challenged or corrected. Finally, another justification for leaving peremptories in place is that the peremptory is part of our jury tradition; it has served us well in the past and is therefore worth preserving.

Underlying this debate about peremptory challenges are competing visions of the jury. One vision of the jury is that of a public institution. According to this conception of the jury, jury duty should be available to all citizens who are competent to serve. The jury, because it is a public institution, should be accessible; stereotypical notions about group identity, which often form the basis for peremptory challenges, should not be permitted to bar access to the jury and, concomitantly, to performance of a civic duty. Another, and competing, vision of the jury is that of an institution designed to protect a party's rights. According to this view, the peremptory is a valued mechanism because it ensures that parties believe that fair juries have tried their cases. Because a party is able to use peremptories to remove any prospective juror about whom it has doubts, the party is likely to be satisfied with the process and to see the jury as fair.

Which of these competing visions should control? For me, the image of the jury as a public institution should predominate. One reason that the balance should shift toward the vision of the jury as a public institution is that the community that can potentially serve on the jury has changed over time. No longer is the jury drawn only from white male property owners. Now the jury is open to all citizens, and if the jury is to reflect a heterogeneous society such as ours, exclusion by peremptory—which is often based on stereotypes about group identity—should be unacceptable. Another reason is that the struggle to serve on the jury—which some groups such as African American men and all women have experienced—has given additional meaning to jury service. In light of these past exclusions, jury service is not limited to the actual tasks of deliberating and judging; it also signifies the political acts of belonging to a community and participating as a full and equal citizen.

The Supreme Court's Fourteenth and Sixth Amendment jury cases manifest these two competing visions of the jury. In those cases decided under the Fourteenth Amendment, the Court describes the jury as a public institution, and treats peremptory challenges exercised on the basis of race or gender as an affront to democratic ideals like equality and full citizenship and as a threat to the integrity of the jury and the justice system. Under the Sixth Amendment, the jury stands as a bulwark, protecting the party from governmental overreaching and power.

One problem is that the vision of the jury as a public institution free from all discrimination, a vision which is so eloquently described by the

Supreme Court in the Fourteenth Amendment jury cases, has proven elusive. *Batson v. Kentucky*⁷ is a compromise. As a result, the framework it relies on to eliminate discrimination is one that reaches some forms of discriminatory peremptories, such as those exercised on the basis of race or gender, but may not reach others. Thus, discrimination is still permitted during jury selection, and as long as it is permitted, the integrity of the jury is under threat. One answer is to re-examine the Sixth Amendment and to approach it with the view of the jury gleaned from the Fourteenth Amendment. A rereading of the Sixth Amendment that recognizes peremptories as interfering with the requirements of impartiality and judgment by a fair cross section of the community may provide a means for eradicating discrimination during jury selection by eliminating all peremptories.

It is not difficult to re-imagine the jury without the peremptory, particularly if the peremptory is replaced by a slightly expanded for-cause challenge. The jury can perform its proper roles only if jury selection is open and if jurors with a broad range of perspectives are permitted to serve. Although I believe that the selection process must be nondiscriminatory and, therefore, that no prospective juror should be excluded based on group identity, I do not go so far as to insist that the jury consist of a proportional number of representatives of various groups.

My approach to peremptories is to look at them in the context of the jury and to consider whether they hinder or help the jury in the performance of its roles. I am driven by policy arguments, and I offer a legal argument only in support of a position that I have reached for policy reasons. I limit myself to juries in federal court and make no claims regarding state courts. I also direct my argument to the judiciary; I do not address the actions that other institutions, such as Congress, are free to take. After giving a synopsis of the current state of the law on peremptories in Part II, I describe in Part III the jury's several roles and explore the ways in which peremptories hinder its performance of these roles. In Part IV, I examine possible arguments for retaining the peremptory, and in Part V, I describe the competing visions of the jury that underlie the moves to eliminate or to preserve peremptories. In Part VI, I consider how jury selection might proceed without the peremptory challenge. Finally, in Part VII, I provide a legal basis for eliminating the peremptory.

Throughout this Article, I will be referring to the "jury" without limiting the discussion to the jury in either the civil or the criminal system. Although I recognize that I make my task more difficult by trying to describe the jury as an institution, rather than by focusing on the jury in one setting or the other, I think there are compelling reasons for undertaking

7. 476 U.S. 79 (1986).

such a challenge. First, it is more useful to think about the jury as one institution because we demand no more or less of one than of the other. We regard the right to a civil jury and to a criminal jury as fundamental.⁸ Even though impartiality is mentioned in the Constitution only with respect to the criminal jury in the Sixth Amendment,⁹ few would argue that the civil jury mentioned in the Seventh Amendment is meant to be partial.¹⁰ The demands that we make of the jury and the descriptions that we offer of the institution span across civil and criminal boundaries.¹¹ Second, the civil and criminal juries share many features. The peremptory challenge, for example, is part of both civil and criminal jury selection.¹² Even Congress has adopted a unified approach to the jury; the procedures it sets forth for jury service are applicable to both civil and criminal juries.¹³ Third, a decision pertaining to either the civil or criminal jury is likely to affect the other.¹⁴ And finally, as a historical matter, it is likely that the

8. *Local 391, Chauffeurs v. Terry*, 494 U.S. 558, 581 (1990) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence . . . [a] right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts." (quoting *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942))); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("[W]e believe that trial by jury in criminal cases is fundamental to the American scheme of justice . . .").

9. See U.S. CONST. amend. VI (guaranteeing the right to trial "by an impartial jury").

10. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 348-49 (1979) (Rehnquist, J., dissenting) ("The essence of [the right to a jury trial] lies in its insistence that a body of laymen . . . participate along with the judge in the factfinding necessitated by a lawsuit. And that essence is as much a part of the Seventh Amendment's guarantee in civil cases as it is of the Sixth Amendment's guarantee in criminal prosecutions."); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." (emphasis added) (citations omitted)).

11. Harry Kalven and Hans Zeisel entitled their landmark work on the jury *The American Jury*, see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966), perhaps because "they spoke to the jury as a unified institution." ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE*, at v (1979).

12. FED. R. CIV. P. 47(b); FED. R. CRIM. P. 24(b); JON M. VAN DYKE, *JURY SELECTION PROCEDURES* app. at 282-84 (1977); Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 550-51 (1975).

Furthermore, even though governed by separate rules of procedure, civil and criminal juries go through the same stages—from the drawing of the venire, to the questioning of jurors during *voir dire*, to the instructions by the judge, to the selection of the foreperson, and then to the deliberation by the jurors.

13. See 28 U.S.C. §§ 1861-1878 (1988).

14. Professor Méndez recognizes this point:

Although [*Hernandez v. New York*, 500 U.S. 352 (1991)] was a criminal case, the effect of excluding minorities from juries—whether on account of their race or foreign language proficiency—is the same on the excluded venirepersons, irrespective of whether the case is criminal or civil, or the excluding party is the state, the accused, a civil plaintiff or defendant.

Miguel A. Méndez, *Hernandez: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193, 200 n.3 (1992/1993).

framers of the Bill of Rights had one conception of the role of the jury, whether civil or criminal.¹⁵

II. Current State of the Law

Peremptory challenges are challenges allotted to both parties that allow them to exclude prospective jurors during jury selection without having to give any reason.¹⁶ Recently, the United States Supreme Court held in *J.E.B. v. Alabama ex rel. T.B.*¹⁷ that gender-based peremptories, which are peremptory challenges exercised on the basis of gender, are impermissible.¹⁸

Before the Court stepped in, widespread conflict existed among the lower courts. The Fourth Circuit had concluded that gender-based peremptory challenges were permissible,¹⁹ whereas the Ninth Circuit had held that they violated the Equal Protection Clause because, like race-based peremptories, they were "not based upon an individual's qualifications" and did not serve any important governmental function.²⁰ The Seventh Circuit had weighed in, albeit without much analysis, on the side of the Fourth Circuit,²¹ and the Fifth Circuit had joined the Fourth and Seventh Circuits in holding that *Batson* should not be extended to gender-based peremptory challenges.²²

The split among state courts was far wider than the split among federal appellate courts. The courts in eight states (Alabama, Arkansas, Connecticut, Kentucky, Louisiana, Mississippi, Nebraska, and Rhode Island) had held that gender-based peremptories were permissible,²³ whereas the

15. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) ("Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching.").

16. See *infra* note 321.

17. 114 S. Ct. 1419 (1994).

18. *Id.* at 1429-30.

19. *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. dismissed sub nom. Washington v. United States*, 489 U.S. 1094 (1989), and *cert. denied*, 493 U.S. 1069 (1990).

20. *United States v. De Gross*, 960 F.2d 1433, 1439 (9th Cir. 1992).

21. *United States v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied*, 502 U.S. 1080 (1992).

22. *United States v. Broussard*, 987 F.2d 215, 217 (5th Cir. 1993).

23. *E.g.*, *Knight v. State*, No. CR-92-1840, 1994 WL 94515 (Ala. Crim. App. Mar. 25, 1994), *withdrawn*, 1994 WL 226684 (Ala. Crim. App. May 27, 1994); *Bankhead v. State*, 625 So. 2d 1141, 1142 (Ala. Crim. App. 1992), *rev'd sub nom. Ex parte Bankhead*, 625 So. 2d 1146 (Ala. 1993); *Mims v. State*, 591 So. 2d 120, 123 (Ala. Crim. App. 1991), *aff'd*, No. CR 93-1661, 1994 WL 484373 (Ala. Crim. App. Sept. 9, 1994); *Fisher v. State*, 587 So. 2d 1027, 1030 (Ala. Crim. App.), *cert. denied*, 587 So. 2d 1039 (Ala. 1991), and *cert. denied*, 503 U.S. 941 (1992); *Daniels v. State*, 581 So. 2d 536, 539 (Ala. Crim. App. 1990), *cert. denied*, 581 So. 2d 541 (Ala.), and *cert. denied*, 502 U.S. 914 (1991); *Dysart v. State*, 581 So. 2d 541, 543 (Ala. Crim. App. 1990), *cert. denied*, 581 So. 2d 545 (Ala. 1991); *Stariks v. State*, 572 So. 2d 1301, 1303 (Ala. Crim. App. 1990); *Cleveland v. State*, 865 S.W.2d 285, 293 (Ark. 1993), *vacated and remanded*, 114 S. Ct. 1828 (1994); *Martins v. City of*

courts in eleven states (Arizona, California, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, New York, North Dakota, and Washington) had held that they were impermissible.²⁴ Intermediate courts in Missouri had gone both ways, and the issue had been brought to the state supreme court.²⁵ In nine of the nineteen states to consider the issue, the issue had been resolved by the highest court of the state.²⁶ Additional state courts had faced the issue of gender-based peremptories but decided such cases on other grounds.²⁷

Stamford, No. CV-85-0078-712-S, 1993 WL 21460, at *1 (Conn. Super. Ct. Jan. 26, 1993); Hannan v. Commonwealth, 774 S.W.2d 462, 464 (Ky. Ct. App. 1989); State v. Aubrey, 609 So. 2d 1183, 1186 (La. Ct. App. 1992); State v. Adams, 533 So. 2d 1060, 1063 (La. Ct. App. 1988), *cert. denied*, 540 So. 2d 338 (La. 1989); Simon v. State, 633 So. 2d 407, 411 (Miss. 1993), *vacated and remanded*, 115 S. Ct. 413 (1994); State v. Culver, 444 N.W.2d 662, 666 (Neb. 1989); State v. Oliviera, 534 A.2d 867, 870 (R.I. 1987).

24. *E.g.*, State v. Anaya, 825 P.2d 961 (Ariz. Ct. App. 1991); Di Donato v. Santini, 283 Cal. Rptr. 751, 762 (Ct. App. 1991); State v. Levinson, 795 P.2d 845, 849 (Haw. 1990); People v. Lann, 633 N.E.2d 938, 950-52 (Ill. App. Ct. 1994); People v. Mitchell, 593 N.E.2d 882, 888 (Ill. App. Ct. 1992), *aff'd in part and vacated in part*, 614 N.E.2d 1213 (Ill. 1993); Tyler v. State, 623 A.2d 648, 651 (Md. 1993); Commonwealth v. Hyatt, 568 N.E.2d 1148, 1150 (Mass. 1991); State v. Gilmore, 511 A.2d 1150, 1159 (N.J. 1986); State v. Gonzales, 808 P.2d 40, 49 (N.M. Ct. App.), *cert. denied*, 806 P.2d 65 (N.M. 1991); People v. Blunt, 561 N.Y.S.2d 90, 92 (App. Div. 1990); People v. Irizarry, 536 N.Y.S.2d 630, 631 (Sup. Ct. 1988), *rev'd on other grounds*, 560 N.Y.S.2d 279 (App. Div. 1990); City of Mandan v. Fern, 501 N.W.2d 739, 744 (N.D. 1993); State v. Burch, 830 P.2d 357, 361-62 (Wash. Ct. App. 1992).

Among these states, California, Hawaii, Maryland, Massachusetts, New Jersey, and New Mexico decided the issue on state constitutional grounds.

25. The intermediate courts in Missouri were divided on the issue while *J.E.B.* was under consideration. In State v. Clay, 779 S.W.2d 673 (Mo. Ct. App. 1989), the court held that gender-based peremptories are permissible because *Batson* applies only to race, and "women are not a cognizable racial group." *Id.* at 676. The court in State v. Pullen, 811 S.W.2d 463 (Mo. Ct. App. 1991), reached the same conclusion only because it did not wish to depart from the holding of a sister court, but the court acknowledged that logic would lead it to the opposite conclusion: "While we feel that, logically, *Batson* should extend to gender based strikes, we are loathe to quickly disagree with our sister district with such a paucity of precedent to rely on." *Id.* at 467. When the issue returned to that court, it engaged in an extended discussion of the history of women on the jury and concluded, in light of intervening developments in the case law, that at the very least, "independent state statutory and constitutional grounds exist to preclude gender-based discrimination," State v. Pullen, Nos. 56820, 58075, 1992 WL 121791, at *9 (Mo. Ct. App. June 9, 1992); accordingly, the court transferred the case to the Missouri Supreme Court for resolution of the apparent conflict between the state's intermediate courts. The judges of the supreme court began to debate whether *Batson* should be extended to gender, State v. Parker, 836 S.W.2d 930, 941 (Mo.) (concurring opinions of Benton & Price, JJ.), *cert. denied*, 113 S. Ct. 636 (1992), but when the question was presented in State v. Pullen, 843 S.W.2d 360 (Mo. 1992) (en banc), *cert. denied*, 114 S. Ct. 200 (1993), the court decided to leave resolution of the issue for another day. *Id.* at 364.

26. *Cleveland*, 865 S.W.2d at 285 (Arkansas); *Di Donato*, 283 Cal. Rptr. at 751 (California); *Levinson*, 795 P.2d at 845 (Hawaii); *Tyler*, 623 A.2d at 648 (Maryland); *Hyatt*, 568 N.E.2d at 1148 (Massachusetts); *Simon*, 633 So. 2d at 407 (Mississippi); *Culver*, 444 N.W.2d at 662 (Nebraska); *City of Mandan*, 501 N.W.2d at 739 (North Dakota); *Oliviera*, 534 A.2d at 867 (Rhode Island).

27. *See, e.g.*, Baxter v. United States, 640 A.2d 714, 717 (D.C. 1994) (holding that the gender-based peremptory issue was not preserved for appeal); Nelson v. United States, 601 A.2d 582, 590 (D.C. 1991) (refusing to decide whether gender was an improper basis for peremptory challenges).

The Supreme Court stepped in to resolve the lower courts' widespread conflict. In *J.E.B. v. Alabama ex rel. T.B.*,²⁸ the Court reasoned that the Equal Protection Clause prohibits intentional discrimination on the basis of gender, just as it does on the basis of race, and, therefore, gender-based peremptory challenges, like race-based challenges, violate the Fourteenth Amendment.²⁹ Thus, the Court extended *Batson* so that gender-based peremptories are now subject to challenge. Justice Blackmun, writing for the Court, explained that peremptories exercised on the basis of gender are no less harmful than those exercised on the basis of race. Discrimination based on either ground causes harm to the litigants, the community, and the individual jurors "who are wrongfully excluded from participation in the judicial process."³⁰ The "[d]iscriminatory use of peremptory challenges" has a deleterious effect on society because it "may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the 'deck has been stacked' in favor of one side."³¹ Discriminatory peremptories denigrate those whom they exclude and convey a harmful message to those who witness such discrimination by state actors in a state-sanctioned setting.³²

Now that the Court has decided that gender-based peremptories violate the Equal Protection Clause, the debate should shift to another level. The question is no longer whether such peremptories are permissible or impermissible—they are impermissible. The question that *J.E.B.* now brings in to stark relief is can we continue to justify any peremptories? Although the Court was careful to try to limit its holding in *J.E.B.* and to say that the

because the record did not support the inference that the challenges were gender-motivated); *Brown v. State*, 402 S.E.2d 725, 726 (Ga. 1991) (finding that the record did not support a claim of gender discrimination during jury selection); *State v. Steffes*, 500 N.W.2d 608, 615 (N.D. 1993) (ruling that the issue was not preserved because the defendant failed to challenge the state's use of peremptories at trial); *Commonwealth v. Correa*, 620 A.2d 497, 502 n.6 (Pa. Super. Ct.) (declining to reach the gender discrimination issue because the government did not exercise its peremptories in a discriminatory manner), *appeal denied*, 639 A.2d 24 (Pa. 1993); *Adams v. State*, 862 S.W.2d 139, 146 (Tex. App.—San Antonio 1993, writ ref'd) (finding that the appellant failed to preserve the issue by failing to object to the state's exercise of peremptories on the basis of gender); *Munson v. State*, 774 S.W.2d 778, 779-80 (Tex. App.—El Paso 1989, no writ) (finding that the record supported the trial court's conclusion that the prosecution's exercise of strikes was not racially motivated); *State v. Harrison*, 805 P.2d 769, 779 (Utah Ct. App.), *cert. denied*, 817 P.2d 327 (Utah 1991) (holding that the gender-based peremptory question was not raised in a timely manner); *Salt Lake County v. Carlston*, 776 P.2d 653, 655 (Utah 1989) (declining to address the peremptory issue because the appellant failed to present it to the trial court in a timely manner); *Elvers v. State*, 478 N.W.2d 68, 70 (Wis. Ct. App. 1991) (declining to consider an expansion of *Batson* to include gender because the appellant failed to make a timely objection to the peremptory strikes).

28. 114 S. Ct. 1419 (1994).

29. *Id.* at 1421.

30. *Id.* at 1427.

31. *Id.*

32. *See id.* ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes . . .").

opinion “does not imply the elimination of all peremptory challenges,”³³ we need to ask whether any peremptories should be permitted. The reasons animating the Court’s decision, such as the need to eliminate discrimination in the courtroom and to encourage respect for the jury and acceptance of its verdicts, suggest that the question whether to permit peremptories should be examined from a “jury-centric” perspective. In other words, whether peremptories harm or help the jury in the performance of its roles should be the issue.

III. Why Peremptories Harm the Jury in the Fulfillment of Its Roles

A. *The Jury’s Role in Articulating Public Values*

1. *Finding Public Values in Jury Verdicts.*—One critical role that the jury plays is to decide cases that articulate public values. The jury is often called upon to address value-laden issues, for which there may be no right or wrong answers, but only answers that are more or less consistent with societal norms at a given time. The jury strives, of course, to reach answers that are consistent with the facts of the case, as well as with the ideals of our society.

Alexis de Tocqueville might have had this role in mind when he analyzed the institution of the jury in *Democracy in America*.³⁴ He recognized the dual capacity of the jury to serve both as a judicial and political institution, but it was on the latter, rather than the former, that he focused:

To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society itself is much greater still. The jury is therefore above all a political institution, and it is from that point of view that it must always be judged.³⁵

De Tocqueville urged that the jury be viewed “as one form of the sovereignty of the people” because it is responsible for the execution of the laws, just as the legislature is responsible for the creation of the laws.³⁶ In de Tocqueville’s view, it is when the jury operates in its civil, rather than criminal, capacity that it assumes its most influential role.³⁷ The

33. *Id.* at 1429.

34. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270-76 (J.P. Mayer ed. & George Lawrence trans., Doubleday & Co. 1969) (13th ed. 1850).

35. *Id.* at 272.

36. *Id.* at 273. The jury’s role as legislature was even more clear in de Tocqueville’s day than it is today because the jury decided both the facts and the law, rather than being instructed on the law by the judge, as is the current practice. Shari S. Diamond, *Instructions Frequently Baffle Jurors*, NAT’L L.J., June 6, 1994, at C1.

37. See 1 DE TOCQUEVILLE, *supra* note 34, at 274. In de Tocqueville’s view, the average citizen does not come into contact with the criminal system in his day-to-day affairs; however, with civil

jury, particularly the civil jury, is a powerful force in society; its influence extends well beyond the individual case that is being decided:

Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.

It spreads respect for the courts' decisions and for the idea of right throughout all classes.

Juries teach men equity in practice. Each man, when judging his neighbor, thinks that he may be judged himself.

Juries teach each individual not to shirk responsibility for his own acts, and without that manly characteristic no political virtue is possible.

Juries invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government.³⁸

For de Tocqueville, the jury requires citizens to decide issues, the effects of which they can see in their everyday lives. The jury allows citizens to see that the cases they decide can have implications well beyond the two parties before them.

Today's observers of the jury have not lost sight of de Tocqueville's lessons. They recognize that the jury's decisions often articulate public values that extend beyond the private, civil dispute at hand:

[T]he jury brings broadly based community values to dispute resolution. Civil disputes are both private and public affairs. They are private in the sense that they arise only out of circumstances unique to the parties that bring them to the courts. But they are public because the standards used to resolve disputes on public standards are based on the community's sense of justice. Thus, the manner in which civil disputes are resolved also provides continued guidance to the rest of the society as to what is appropriate behavior.³⁹

And the jury, even in private disputes, is often called upon to weigh competing public values:

We believe juries provide the best mechanism for bringing broadly based community values to bear on the issues involved in private disputes but doing so with their public function in mind. It is in the courtroom that the community's sense of fairness, of justice,

matters, juries are "constantly attracting some attention; they then impinge on all interests and everyone serves on them; in that way the system infiltrates into the business of life, thought follows the pattern of its procedures, and it is hardly too much to say that the idea of justice becomes identified with it." *Id.*

38. *Id.*

39. ABA/BROOKINGS SYMPOSIUM, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 9 (1992) [hereinafter CHARTING A FUTURE].

of right and wrong is expressed. It is here that the conflict between the regulation of society and its impact on organizations and individuals gets adjusted and integrated, and where competing values are balanced.⁴⁰

The jury's role in deciding cases, and thereby in articulating public values, has its analogue in other areas of procedure as well. For example, the casebook *Procedure*, by Professors Robert Cover, Owen Fiss, and Judith Resnik,⁴¹ challenges the traditional paradigm of civil litigation as a private dispute between two individuals and introduces the alternative "'Brown Paradigm' of group rights, judicial involvement in a polycentric dispute, and ongoing transformation of the status quo."⁴² This paradigm recognizes that the nature of adjudication has undergone a shift. Many cases no longer entail a dispute between two parties that can be resolved by a passive judge who simply declares which party is right. Rather, the issues raised by many lawsuits are more intricate, involving various inter-related groups and interests and calling for more active management on the part of the judge.⁴³ The resolution of issues does not entail a return to the status quo, but rather a transformation of institutions so that they no longer threaten constitutional values.⁴⁴ Professor Fiss has argued that according to this paradigm, which he labelled "structural reform,"⁴⁵ adjudication should be viewed not as a process whose primary purpose is to resolve disputes, but rather as one by which judges articulate "public values."⁴⁶

40. *Id.*

41. ROBERT M. COVER ET AL., *PROCEDURE* (1988).

42. William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 958 (1989) (reviewing COVER ET AL., *supra* note 41).

43. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1284-304 (1976) (elaborating on the substantial differences between the modern public law judicial role, in which the "[t]he judge is the dominant figure in organizing and guiding the case," and the traditional passive judicial role); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 386-414 (1982) (observing that judges are playing a more active role in pretrial case management and expressing concern because such management is often initiated by the judge, is subject to few institutional restraints, and is rarely exposed to public scrutiny).

44. This transformation of institutions has not been limited to the desegregation of schools; it has also affected conditions in prisons and mental hospitals and procedures in welfare administration. This shift in the nature of adjudication, moreover, continues to play a role in the treatment of mass tort suits, such as Agent Orange and the "asbestos litigation." Judith Resnik et al., *Individuals Within the Aggregate: Representation and Fees* 37-38 (April 8, 1995) (preliminary draft on file with author).

45. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 121 (1982) [hereinafter Fiss, *Foundations of Adjudication*].

46. See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) [hereinafter Fiss, *The Forms of Justice*] ("To my mind courts exist to give meaning to our public values, not to resolve disputes."); Fiss, *Foundations of Adjudication*, *supra* note 45, at 121 (propounding that "[a]djudication is the process by which the values embodied in an authoritative legislative text, such as the Constitution, are given concrete meaning and expression" and that this process has always been one of the functions of the judiciary).

Although not all of the authors of *Procedure* share this thesis,⁴⁷ they do seem to agree, at least according to one reviewer, that “‘public rights’ are often involved in adjudication . . . [and that] courts have an obligation to mold procedural requirements to meet public needs.”⁴⁸

What is missing from Fiss’s account of the relation between public values and the court is the role of the jury.⁴⁹ Fiss does not mention the jury at any point in his article *The Forms of Justice*. Rather, he identifies the judge as the appropriate person to articulate aspirational public values because the judge is independent and can engage in a special kind of dialogue.⁵⁰ This dialogue arises from the nature of the judicial process: the judge must address issues as they are presented to him;⁵¹ he must listen to all who come before him; he must respond; and finally, he must give reasons for his decisions.⁵² The jury is also independent,⁵³ and because

47. See, e.g., Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 44 (1983) (“By posing the question as one involving a choice between the judicial articulation of values . . . and nihilism, Fiss has made too easy the answer to his question about the institutional virtue of the judiciary and of the political system of which the judiciary is a part.”); COVER ET AL., *supra* note 41, at 729-30 (expressing skepticism that the federal courts will always articulate public values); Judith Resnik, *From “Cases” to “Litigation,”* LAW & CONTEMP. PROBS., Summer 1991, at 5, 63 (asserting that the paradigm does not consist solely of class action civil rights litigation, but now includes non-civil rights cases such as mass torts).

48. Eskridge, *supra* note 42, at 960.

49. I am grateful that Professor Fiss did address the role of the jury in his first-year Procedure course, in which I had the good fortune to be a student. His love of procedure inspired me to go into teaching; his respect for judges and courts inspired me to clerk for several wonderful judges at every level of the federal system; and his reservation about the jury sparked my interest in the subject, shaping my research interests ever since that first year in law school.

50. See Fiss, *Forms of Justice*, *supra* note 46, at 13-14 (arguing that a judge should give meaning to public values and should use the adjudication process as a vehicle for revealing or elaborating that meaning); Fiss, *Foundations of Adjudication*, *supra* note 45, at 125 (suggesting that the distinctive social function of the judiciary is to give concrete meaning and application to public values).

51. I use “him” and “he” intentionally because the vast number of federal judges are men. See, e.g., NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS 10 (1993), reprinted in 67 S. CAL. L. REV. 745, 772 (1994) (concluding that “the world of the federal courts is still predominantly male”). Only seven percent of federal appellate judges and six percent of federal district court judges are women. *Id.* at 12. One of the advantages, therefore, that the jury has over the judge is that it is a far more representative body. Whereas federal judges tend to fit a certain profile (white men over the age of 50), *id.* at 13, the jury potentially reflects a much more diverse group. This profile of the federal judge mirrors that of many state judges as well. See, e.g., John K.C. Mah, *Diversity of Bench Takes the Stand in Simpson Case*, L.A. TIMES, Aug. 8, 1994, at B5 (discussing statistics showing that, in California, “most judges are white”). According to the Commission on the Future of the California Courts, 5% of the state’s 1554 judges are African American, 5% are Hispanic, 3% are Asian or Pacific Islanders, and 0.1% (a single judge) is Native American. *Id.*

52. Fiss, *The Forms of Justice*, *supra* note 46, at 13; Fiss, *Foundations of Adjudication*, *supra* note 45, at 125.

53. Although both judge and jury can be said to be “independent,” each has constraints on its independence. For example, the jury receives its instructions from the judge, and those instructions limit its role. (Although in the case of jury nullification, the jury chooses to abandon that constraint. See *infra* note 56.) In addition, throughout the trial it is left to the judge to make rulings on the law and evidence and to direct a verdict if appropriate. See FED. R. CIV. P. 50(a) (providing for a judgment

members of a jury come together for only one case, they are able to approach the issue with a fresh eye.⁵⁴ The jury also engages in a dialogue, although it does not give reasons for its decisions, at least not to those outside the jury room.⁵⁵ But the jury, no less than the judge, is called upon to make judgments as to public values. The jury, even more than the judge, embodies the community and represents the conscience of the community.⁵⁶ It makes judgments in many of the same areas as the judge, from police brutality to prison conditions, and from sexual harassment to rape. Although the jury clearly plays a different role than the judge—and does not play the extended supervisory role that Fiss envisages the judge playing in the case of structural reform—the jury's role is no less important

as a matter of law). As a result, the jury does not control the information it receives, cannot choose the standard it will apply, and in some cases does not even have the opportunity to give its opinion. The jury, however, is independent to the extent that its members are drawn from the citizenry and the verdict it reaches does not have to be explained or justified; furthermore, the verdict cannot be altered unless it is contrary to the law. *See* FED. R. CIV. P. 50(b) (providing for a judgment after trial).

Federal judges are independent in the sense that they have life tenure and salary protection and do not have to answer to any other branch of government. U.S. CONST. art. III, § 1. But they too operate under constraints. For example, the administrative need for efficiency may influence judges to encourage the settlement of cases before trial. *See, e.g.,* Richard Lempert, *Jury Size and the Peremptory Challenge*, 22 LAW QUADRANGLE NOTES, Winter 1978, at 8, 10 (noting that judges preoccupied with bureaucratic efficiency have at times engaged in considerable "arm-twisting" to promote out-of-court settlements). Also, when judges preside over the same types of cases again and again, their responses may become predictable and formulaic. Finally, lower court federal judges are aware that their decisions will be reviewed, and they may take steps to limit the chance that they will be reversed by appellate judges.

54. Jurors' "very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye." KALVEN & ZEISEL, *supra* note 11, at 8.

55. In recent years, there have been a number of instances in which jurors in high-profile cases have been asked by members of the press and others to recount what occurred in the jury room after a verdict has been reached. *See, e.g.,* Seth Mydans, *Menendez Lawyer Enlists Sympathetic Jurors to Defend Client*, N.Y. TIMES, Feb. 1, 1994, at A10 (noting that one lawyer arranged for jurors "to give reporters striking accounts of their deliberations and of their support for her client"). Although some jurors do provide lawyers and members of the press with such information, the legal system does not provide a mechanism for explanations of jury decisionmaking. Such inquiries should raise some concern because deliberations are supposed to take place in secret. *See* Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 297 (noting that due to the media's postverdict inquiries, "there is a genuine risk that the authority of jury verdicts will decline—and that the jury will be less able to perform its distinctive constitutional role of restraining an arbitrary government").

56. The most extreme example of the jury as conscience arises in cases of jury nullification. *See, e.g.,* MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 45-66 (1973) (noting that a jury may sometimes depart from following the judge's instructions and decide based on considerations of fairness or common sense); Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 1, 83 (1977) ("Unless the jury renders a verdict in which the community sense of justice is articulated, an accused may not feel that he has been judged, but rather may feel he has been processed."); Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 51, 79 ("A jury that is denied the nullification instruction is less apt to act as the common-sense conscience of the community and may be apt to disrespect the system that deliberately withholds vital information necessary for its performance.").

and no less integral to articulating public values than that of the judge. While the jury does not explain its reasons, as the judge does, it must nonetheless grapple with important value judgments, and from its decisions, we, as a society, draw important lessons.

The joint involvement of both judge and jury in the important task of articulating public values is evident in several trials that have captured newspaper headlines. In one trial in federal district court, for example, Professor Leonard Jeffries alleged that City University of New York (CUNY) violated his right to free speech when, after he had delivered a speech that was viewed as anti-Semitic, the university removed him as chairman of the black studies department.⁵⁷ The jury decided that the college had dismissed Jeffries from his position as chairman as a result of the speech and in violation of his right to due process.⁵⁸ Judge Conboy, after weighing Jeffries's right to free speech against the college's right to choose its administrators and to control disruptions on campus, held that Jeffries's right should prevail.⁵⁹ The jury also determined that the Chancellor of CUNY and five other officials were responsible for depriving Jeffries of his right to free speech.⁶⁰ Finally, the jury had to decide whether Jeffries should receive any monetary damages; it set the amount at \$400,000.⁶¹ It remained for Judge Conboy to decide that Jeffries should be reinstated as chairman.⁶² Although judge and jury had their separate

57. Maria Newman, *CUNY Violated Speech Rights of Department Chief, Jury Says*, N.Y. TIMES, May 12, 1993, at A1.

58. *Black Study Chairman's Firing Ruled Violation of His Rights*, WASH. POST, May 12, 1993, at A14.

59. *Jeffries v. Harleston*, 21 F.3d 1238, 1244 (2d Cir. 1994); see *infra* note 65 (detailing the subsequent history of *Jeffries*).

60. Maria Newman, *Jury Faults CUNY Officials in Jeffries Lawsuit Decision*, N.Y. TIMES, May 18, 1993, at B6.

61. Maria Newman, *Jeffries Wins \$400,000 in Damages*, N.Y. TIMES, May 19, 1993, at B1. Jeffries had sought \$25 million in punitive damages. The award was assessed against the former City College President, who had recommended Jeffries's removal, against the City University Chancellor, who had endorsed the recommendation, and against the four trustees who had publicly announced that they wanted to take action against Jeffries because of the speech. *Id.* The other nine trustees were not found liable. *Id.* One juror explained: "We decided, especially with regard to the First Amendment violation, that punitive damages were in order to wake up the slumbering moral fiber of the CUNY administration." *Id.* at B4.

The Second Circuit upheld the reinstatement of Jeffries, but overturned the jury's award of damages against CUNY. *Jeffries*, 21 F.3d at 1249-50.

62. Newman, *supra* note 60, at B6; Newman, *supra* note 61, at B1, B4. One op-ed writer urged Judge Conboy not to reinstate Jeffries. The writer argued that Jeffries had simply invoked the talismanic phrase "free speech" to justify his racist doctrines, ill-deserved tenure, and 20-year reign as chairman, and that his dismissal should have been decided by the "properly constituted academic authorities" rather than by a "Federal judge and jury." Nathan Glazer, *Academic Freedom? Academic Farce*, N.Y. TIMES, May 21, 1993, at A27. Judge Conboy, however, did reinstate Jeffries as chairman of the black studies department at City College. *Jeffries v. Harleston*, 828 F. Supp. 1066, 1098 (S.D.N.Y. 1993). The judge reasoned that the government-funded university had tried to remove Jeffries for delivering an inflammatory speech; such a basis for removal violated Jeffries's First

responsibilities, both participated in a *pas de deux*, in which each played a role in ascertaining how far the First Amendment extends to protect speech that may be offensive.⁶³ Such a decision involves values; there is no clear, bright-line rule. Thus, both judge and jury had to determine where to draw the line in this case,⁶⁴ knowing that whatever accommodation they reached was subject to appellate review⁶⁵ and was also likely to have implications for future cases.⁶⁶

The jury, like the judge in Fiss's structural reform suit, is often asked to resolve issues that go beyond simple dispute resolution. Public values are necessarily called into play. For example, civil rights⁶⁷ cases clearly implicate such values; however, tort cases do as well.⁶⁸ The jury defines

Amendment rights. *Id.* at 1071-72; see also Richard Bernstein, *Judge Reinstates Jeffries as Head of Black Studies for City College*, N.Y. TIMES, Aug. 5, 1993, at A1 (reporting the strongly worded decision of Judge Conboy, who decided to reinstate Jeffries to his chairmanship position). Judge Conboy noted that Jeffries could have been removed for "serious improprieties" in the way he ran the department, but the university, having chosen not to act on those improprieties in the past, could not now claim they were the basis for his removal. *Jeffries*, 828 F. Supp. at 1097; see also Richard Bernstein, *Jeffries Reinstated*, N.Y. TIMES, Aug. 8, 1993, § 4, at 2.

63. The press also perceived the decision as one that resulted from the collaborative efforts of both jury and judge, even though each was performing its respective role. For example, an editorial in the *New York Times* explained: "Judge and jury held that the demotion amounted to punishment for exercising a constitutional right to speak and a denial of property without due process of law. Now the jury is deciding which state officials are liable, and the judge must decide whether to order reinstatement." *Due Process for Leonard Jeffries?*, N.Y. TIMES, May 14, 1993, at A30 (emphasis added); see also Patricia Cohen & William Douglas, *Jeffries Wins CCNY Fight*, NEWSDAY, May 12, 1993, at 4 ("[A] federal jury and judge decided that City College officials violated [Jeffries's] constitutional rights" (emphasis added)).

64. Cf. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1311 (1993) ("[I]t is wiser to argue and decide one case at a time . . . than it is to attempt to craft absolute propositions of law to answer a host of questions that have not yet been tested in adversary litigation.").

65. After the Second Circuit upheld Jeffries's reinstatement, *Jeffries v. Harleston*, 21 F.3d 1238, 1249 (2d Cir. 1994), the Supreme Court granted, vacated, and remanded the case to the Second Circuit, *Harleston v. Jeffries*, 115 S. Ct. 502 (1994), so that the court could consider it in light of *Waters v. Churchill*, 114 S. Ct. 1878 (1994). In *Waters*, a decision involving a public hospital's dismissal of a nurse who had criticized its training program, a plurality of the Court held that the administrators' "reasonable predictions" of disruption should have received more weight in balancing an employee's rights against the employer's needs. *Id.* at 1887. Upon remand, the Second Circuit held that CUNY acted within its rights in dismissing Jeffries from his position as chairman of the department. *Jeffries v. Harleston*, 1995 U.S. App. LEXIS 7639 (Apr. 4, 1995); see also Richard Pérez-Peña, *In Reversal, Court Upholds University in Jeffries Lawsuit*, N.Y. TIMES, Apr. 5, 1995, at A1.

66. An earlier case involving Michael Levin, a City College professor who had espoused the view that blacks were inferior to whites, foreshadowed the case of Leonard Jeffries. In Levin's case, the court held that City College violated Levin's constitutional rights by investigating him and by creating alternative classes for those who were offended by his views. *Levin v. Harleston*, 966 F.2d 85, 88 (2d Cir. 1992).

67. The Civil Rights Act of 1991 provides to those whose civil rights have allegedly been violated an opportunity to have their cases heard by a jury rather than a judge. 42 U.S.C. § 1981a(c) (Supp. V 1993).

68. See Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2389 (1990) ("[M]any of the standards that tort law invokes are, like negligence, simply appeals to the jury's own common sense judgment."); *United States v.*

for the community the duties that its members owe to each other and the standard of conduct to which a reasonable person is held. The reach of the jury's decision extends beyond the individual parties before it and sends a powerful message about issues that may be strongly held in our society.⁶⁹ As the Rodney King cases made clear, the message the jury sends can have reverberations in the community.⁷⁰ Although the jury's verdict does not usually result in riots,⁷¹ it may elicit a response from the community, particularly when the jury has reached a value judgment with which the larger community disagrees.⁷²

Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, J., concurring and dissenting) ("The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is 'unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary.").

69. See, e.g., *Oklahoma Rapist Gets 30,000 Years*, UNITED PRESS INT'L, Dec. 23, 1994, available in LEXIS, News Library, WIRES File (noting that a judge carried out the jury's recommendation and sentenced a convicted child rapist to 30,000 years in prison; the judge said, "the jurors obviously felt that the Oklahoma criminal justice system was too lenient").

70. See generally Symposium, *Los Angeles, April 29, 1992 and Beyond: The Law, Issues, and Perspectives*, 66 S. CAL. L. REV. 1313 (1993); *Colloquy: Racism in the Wake of the Los Angeles Riots*, 70 DENV. U. L. REV. 187 (1993) (both exploring the legal issues brought to the fore by the Los Angeles riots).

71. Some recent cases have involved explosive issues and have led to similarly explosive community responses. See, e.g., Marc Lacey & Shawn Hubler, *Rioters Set Fires, Loot Stores; 4 Reported Dead*, L.A. TIMES, Apr. 30, 1992, at A1 (observing that, after the announcement of the verdict in the King trial, "[n]o signs of law enforcement were evident for hours as mobs dragged motorists from their vehicles and beat them, hurled rocks and bottles at passing cars and looted a nearby liquor store"); Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted; Violence Follows Verdicts*, L.A. TIMES, Apr. 30, 1992, at A1 (reporting that "the largest rioting to erupt in Los Angeles since the Watts riots of 1965" followed the announcement of verdicts acquitting four L.A. police officers of charges stemming from the videotaped beating of Rodney King); David Treadwell, *Violence Erupts in Atlanta as Other Cities Brace for Trouble*, L.A. TIMES, May 1, 1992, at A9 ("Hundreds of black youths went on a rampage through downtown Atlanta on Thursday, while in cities elsewhere officials and police braced for possible violence as the verdicts in the Rodney G. King beating case appeared to touch a raw nerve around the country."). As a result, some judges have become more attuned to the composition of the jury. See, e.g., Larry Rohter, *Mixed Jury Picked to Try Policeman*, N.Y. TIMES, May 15, 1993, at A6 ("[A] Judge . . . said he intended to seat blacks on the jury 'to the maximum extent permitted by law' in order to diminish what he described as the 'alienation' of blacks from the criminal justice system."). However, Judge W. Thomas Spencer's efforts to seat a racially mixed jury in the case of William Lozano, a Spanish-speaking, Columbian-born police officer who was being retried for the deaths of two young African American men, raises questions about jury representativeness. Judge Spencer has taken jury selection one step further: Rather than avoiding the exclusion of jurors belonging to certain groups, he has affirmatively attempted to create a certain mix of people on the jury. See Larry Rohter, *Lozano Case Tests How Racially Balanced a Jury Must Be*, N.Y. TIMES, May 16, 1993, § 4, at 3 (debating the merits of Judge Spencer's decision to require a jury to reflect the racial make-up of the community). For a discussion of proportional jury representation, or what I call the quota method, and why I do not think it is the best solution for jury selection, see *infra* subpart VI(B).

72. Although the jury must reach judgments on issues involving public values, its role is not to surmise what the larger community might expect the verdict to be. Rather, its task is to hear the

There are different levels of community, and each may differ in its response to a jury's verdict. Thus, it will not always be clear which community's values are being articulated. The term "community" can embrace both the local area from which the jurors are drawn and in which the trial takes place, as well as the larger, national community, which learns about the case through the media.⁷³ Communities beyond the national community may exist, and these communities may have different responses as well. For example, on October 17, 1992, Rodney Peairs fatally shot Yoshihiro Hattori, a Japanese high school exchange student who mistakenly knocked on Peairs's door while searching for a Halloween party. Many in the local community in Baton Rouge did not sense anything wrong with the acquittal of Rodney Peairs, who claimed that he had felt threatened in his own home.⁷⁴ Meanwhile, the case received extensive coverage in Japan, where people reacted to the verdict with bewilderment and outrage.⁷⁵ For many Japanese, the trial called into question the American justice system, particularly when the defense was permitted to use its peremptories to exclude all who did not believe in the right to keep a gun at home.⁷⁶ In this country, national reaction was intense; the case served as "nonstop fodder for talk shows" and sparked a protest march by the Guardian

evidence and witnesses, to deliberate, and to reach a verdict that accords with its sense of values. The public may disagree—sometimes vehemently—but if the process is seen as fair, then the verdict will be accepted. For example, in Crown Heights, Hasidic Jews did not agree with the jury's acquittal of Lemrick Nelson, Jr., but they responded, not by questioning the legal system, but by playing according to its rules and filing a lawsuit against New York City. Alison Mitchell, *Reliving Crown Heights Violence*, N.Y. TIMES, Aug. 24, 1993, at B1, B2. For further discussion of Crown Heights, see *infra* text accompanying notes 80-82.

73. Even though I will be using "community" in the singular, I will be using it to represent these different levels of community.

74. See, e.g., *Acquittal in Doorstep Killing of Japanese Student*, N.Y. TIMES, May 24, 1993, at A1, A11 ("[T]here was evidence that many in this city of about 220,000 believed Mr. Peairs . . . had acted reasonably."); Gary Owen, *A Right to Self-Defense*, TIMES-PICAYUNE (New Orleans), May 30, 1993, at B6 ("As an American citizen, it's my right to own a weapon and protect my property, family and myself from harm."). As one professor from Tulane Law School in New Orleans explained: "There's at least a community sense that using deadly force is not problematic. I mean guns are really part of the milieu in Louisiana." Peter Applebome, *Verdict in Death of Student Reverberates Across Nation*, N.Y. TIMES, May 26, 1993, at A14 (quoting Professor Katherine Federle).

75. See *Grief Spans Sea as Gun Ends a Life Mistakenly*, N.Y. TIMES, Oct. 21, 1992, at A16 ("In Japan, the incident is creating shock waves . . . [T]he shooting has reinforced the image of America as a society ridden with guns and shooting."). Japanese editorialists and television commentators interpreted the verdict as reinforcing the stereotype of America as a "nation of gunwielding paranoids, an out-of-control society where .44 Magnum revolvers are as common as toaster ovens." David E. Sanger, *After Gunman's Acquittal, Japan Struggles to Understand America*, N.Y. TIMES, May 25, 1993, at A1. According to one account, "[t]he verdict seemed to bolster Japan's growing conviction that, despite government proclamations to the contrary, its own values are very different from America's." *Id.* at A17.

76. Sanger, *supra* note 75, at A17.

Angels in New York.⁷⁷ For gun control advocates, the case reinforced the need for tighter gun control laws.⁷⁸ Of course, communities, even as understood on these various levels, do not respond in monolithic ways. For example, some members of Peairs's local community were appalled by the verdict.⁷⁹

A decision that angers one group in a community may appease another. Crown Heights may be an extreme example of such tensions. A car in the motorcade of the Lubavitcher Grand Rabbi accidentally struck and killed Gavin Cato, an African American child in Crown Heights. Violence erupted, culminating in the murder of Yankel Rosenbaum, a rabbinical scholar visiting from Australia. He was surrounded by a group of African Americans yelling "Kill the Jew" and stabbed to death in retaliation.⁸⁰ When Lemrick Nelson, Jr. was tried for the murder of Rosenbaum and acquitted by a jury, the Hasidic community interpreted the verdict as evidence of anti-Semitism. It responded by filing suit in federal court alleging that the Dinkins Administration had prevented the police from acting forcefully to protect Jews and, instead, had allowed African American youths "to vent their rage."⁸¹ Although the two groups share the same physical space, and on that level can be characterized as "a community," relations have been marked by suspicion and animosity. Thus, while they are a community on one level, they do not necessarily give the same interpretation to shared events. In response to the jury's verdict, a group of African Americans shouted, "Yay! Yay! . . . It's about time! Wake up New York!" while a group of Hasidic Jews chanted the African American slogan: "No justice, no peace!"⁸²

77. Applebome, *supra* note 74, at A14.

78. *Id.* An editorial in the *New York Times* explained the verdict in light of our "gun crazy" society: "Just think stupidity, intolerance, a warped interpretation of the 'right to bear arms' and a refusal to learn anything from the deaths of several famous Americans, countless ordinary ones and, now, Yoshihiro Hattori." *Gun Crazy*, N.Y. TIMES, May 25, 1993, at A22; see *An Inevitable Death*, STAR TRIB. (Minneapolis/St. Paul), June 1, 1993, at 12A (arguing that there is only one way to avoid a death such as Hattori's: "Get rid of the guns").

79. See, e.g., Chris Anderson, *Forewarning*, TIMES-PICAYUNE (New Orleans), May 30, 1993, at B6 (claiming that the lives of meter readers, mail carriers, and delivery persons were in danger in light of Peairs's verdict); Janie B. Ellis, *Bad Precedent*, TIMES-PICAYUNE (New Orleans), May 30, 1993, at B6 ("The Peairs verdict was inconceivable and will not sit well with a large portion of thinking people."); *Fear, Barbarism and Justice*, TIMES-PICAYUNE (New Orleans), May 30, 1993, at B7 ("[V]iolence is a kind of barbarism that is eroding the fabric of American civilization because it is teaching Americans to be afraid in their own homes."); Donna Schaferkotter, *Outraged by Verdict on Peairs*, TIMES-PICAYUNE (New Orleans), May 30, 1993, at B6 ("I was sickened, appalled and literally moved to tears when I heard of the verdict in the Rodney Peairs trial in Baton Rouge.").

80. Mitchell, *supra* note 72, at B1, B2.

81. *Id.* at B2.

82. Robert D. McFadden, *Teen-Ager Acquitted in Slaying During '91 Crown Heights Melee*, N.Y. TIMES, Oct. 30, 1992, at A1, B2.

Although such jury trials are few in number,⁸³ their effect on public discourse can be far reaching. For example, the O.J. Simpson case, in which Simpson has been charged with the murder of his ex-wife and her friend, has received extensive coverage⁸⁴ and has drawn attention to issues ranging from domestic abuse⁸⁵ to race⁸⁶ to the death penalty;⁸⁷ to

83. See JEFFREY ABRAMSON, *WE, THE JURY* 6 (1994) ("In the civil area, jury trials take place in fewer than 1 percent of the cases disposed of in state courts and in only 2 percent of cases terminated in federal courts. In criminal litigation, two-thirds of all cases are disposed of in state courts through guilty pleas." (footnotes omitted)); JOHN BALDWIN & MICHAEL MCCONVILLE, *JURY TRIALS* 1, n.1 (1979) ("Most defendants, both in England and in the United States, plead guilty and the vast majority of cases are in any event disposed of in the lower courts without a jury."); JAMES P. LEVINE, *JURIES AND POLITICS* 34 (1992) ("Only about 5 percent of all felony cases are resolved through jury trials . . ."); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 922 (1994) ("[O]ne statistic dominates any realistic discussion of criminal justice in America today. Ninety-three percent of the defendants convicted of felonies in state courts plead guilty.").

84. For example, a LEXIS search revealed that in the *L.A. Times* alone there were 300 articles about O.J. Simpson from the time the murder was reported on June 14, 1994 until the time O.J. Simpson was bound over for trial on July 9, 1994. Search of LEXIS, News Library, LAT File (Feb. 28, 1995). Coverage of O.J. Simpson in the *L.A. Times* reached a high on June 19, 1994, when there were 20 articles on that day alone. *Id.* Of course, the coverage in one newspaper does not begin to reflect the widespread coverage the case received. The story received national press coverage as well, and the court proceedings were broadcast live by television networks and news radio stations.

85. See, e.g., Cynthia H. Craft, *Budget to Benefit Women's Shelter*, L.A. TIMES, July 9, 1994, at B1 (noting that abused women's housing organizations benefited "from the notoriety of the O.J. Simpson double-murder case"); Jane Gross, *Simpson Case Galvanizes U.S. About Domestic Violence*, N.Y. TIMES, July 4, 1994, at 6 ("As a trigger for social change, the Simpson case is being likened to Anita F. Hill's Senate testimony To be sure, it is too early to say if the national spotlight will remain fixed on the issue of domestic violence."); Carl Ingram, *Spousal Abuse Is Targeted*, L.A. TIMES, July 6, 1994, at A3 ("Gov. Pete Wilson and the Legislature, spurred by the O.J. Simpson case, are about to approve spending an unprecedented \$30 million to assist battered women and intensify prosecution of spousal abusers."); Marc Lacey & Carla Rivera, *Domestic Abuse Shelters Will Get \$6.1 Million*, L.A. TIMES, June 29, 1994, at A24 ("The issue of domestic violence jumped to the top of the national agenda after Simpson was arrested in the killings of Nicole Brown Simpson and her friend Ronald Lyle Goldman earlier this month."); Lynn Smith, *Calls to L.A. Domestic Abuse Hot Lines Soar*, L.A. TIMES, June 24, 1994, at A1 ("Both men and women are flooding domestic violence hot lines as a result of the O.J. Simpson murder investigation.").

86. See, e.g., Richard Banks, *It's His Celebrity, Not His Race*, L.A. TIMES, July 11, 1994, at B7 ("Simpson has been treated more in accord with his class and celebrity status than his race."); Richard L. Colvin, *Half Say They Are Sympathetic Toward Simpson*, L.A. TIMES, June 28, 1994, at A16 ("African Americans [are] almost twice as likely as whites to sympathize with the black sports star."); Kimberle Crenshaw, *Racism Play Can Only Hurt Blacks*, L.A. TIMES, July 24, 1994, at M5 ("In a case that until recently mainstream pundits regarded as 'race-free,' race is now emerging as the hidden, potentially explosive subtext."); Sam Fulwood III, *Separating Black and White*, L.A. TIMES, July 22, 1994, at A1, A16 ("As in the Simpson case, the exposure of black celebrities to seemingly harsh treatment by the courts and media focuses black outrage on white institutions."); R. Lynell George, *Focus on Simpson Troubling for Blacks*, L.A. TIMES, July 10, 1994, at A1 ("Beyond Simpson's innocence or guilt . . . [,] for many African Americans the Simpson saga brings up a host of thorny, unresolved issues—about race, about class and about privilege."); Earl O. Hutchinson, *Race and Sex—The Last Taboo Lives*, L.A. TIMES, June 30, 1994, at B7 ("[W]e worry that if O.J. is put on trial, so will we [black men].").

87. See, e.g., Jeff Jacoby, *Forget the Phony Arguments—Without a Death Penalty, Innocents Will Die*, BOSTON GLOBE, June 21, 1994, at 13, available in LEXIS, News Library, BGLOBE File ("The

describe it simply as one criminal jury trial is to ignore the extraordinary impact the case has had on the public imagination.⁸⁸

2. *Peremptories Exclude Perspectives.*—Juries are often called upon to decide issues that involve public values, and a range of perspectives assists the jury in this task.⁸⁹ The exclusion of prospective jurors based

death penalty debate is back in full swing.”); Seth Mydans, *Debating Death Penalty in Simpson Case*, N.Y. TIMES, July 19, 1994, at A12 (discussing the factors involved in a decision to seek the death penalty and asserting that ultimately it is a determination that some defendants are “beyond the pale” and do not deserve to live); Lionel Van Deerlin, *Death Penalty for O.J.? It’s a Political Decision*, SAN DIEGO UNION-TRIB., July 12, 1994, at B5, available in LEXIS, News Library, SDUT File (“[S]omething far more important may be tested by this case: the standard by which society invokes ultimate justice, the way it decides which crimes are heinous enough to warrant execution.”); Henry Weinstein & Alan Abrahamson, *Death Penalty Unlikely for Simpson, Experts Say*, L.A. TIMES, July 10, 1994, at A1, A30 (detailing the process the state goes through to decide whether to seek the death penalty).

88. Alschuler and Deiss point out that criminal jury trials are becoming more rare these days. See Alschuler & Deiss, *supra* note 83, at 922 (reporting that nearly half of all criminal convictions result from nonjury trials). Although they are undoubtedly right about the numbers, my point is that even if there are only a limited number of criminal jury trials, those few trials nevertheless teach us important lessons about who we are and the values we hold. The O.J. Simpson case is only one case, but it has been transformed into a vehicle for teaching Americans about the criminal justice system and raising value-laden questions about how we treat domestic abuse, how we apply the death penalty, and how the justice system treats rich and poor and black and white. Some writers have recognized that the case has educated Americans, though not always correctly, about their legal system. See, e.g., David Margolick, *In Trial of O.J. Simpson, Prospects of Hung Jury*, N.Y. TIMES, Apr. 9, 1995, at 14 (expressing concern that the public “may not realize how exceptional the Simpson case is and may draw the wrong lessons from it” (citing criminal defense lawyer Gerald Chaleff)); Elizabeth Kolbert, *Our New Participatory Tabloid Videocracy*, N.Y. TIMES, July 17, 1994, § 4, at 3 (asserting that Americans find a sense of community in debating the details of an unscripted, unmediated, nationally televised trial).

James Levine, though providing numbers demonstrating that jury trials constitute only a small percentage of all cases, LEVINE, *supra* note 83, at 34, also points out that the absolute number of jury trials (300,000 per year) is not so small nor is the dollar figure (over \$200 million annually) spent on providing jurors. *Id.* at 36. Furthermore, jury trials are more prevalent in cases in which the defendant is accused of a serious crime, and in cases “involving public figures, sensational crimes, or highly visible social conflicts.” *Id.* He concludes: “So the jury is *not* a minor institution in terms of either the amount of business they get or the importance of that business.” *Id.* (emphasis in original).

McEldowney makes a similar argument when he explains that, when the Crown had a right to stand-by in England, the right was not diminished by the limited number of times the Crown had an opportunity to exercise the right. Sheer frequency of use does not determine the significance of the event: “[I]t may be argued that . . . jury trials account for a small number of criminal trials [so the Crown’s right to stand-by] is unimportant. This argument is only partly persuasive. As jury trial accounts for the trial of the more serious offences the Crown’s right to stand-by is accordingly important.” John F. McEldowney, *Stand by for the Crown: An Historical Analysis*, 1979 CRIM. L. REV. 272, 281. For a fuller discussion of stand-bys in England, see *infra* note 262.

89. See VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 50 (1986) (“[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate.”); see also Lempert, *supra* note 53, at 10 (“The greater heterogeneity of the larger [jury] makes it a setting in which individual prejudices are more likely to cancel out and in which individuals with valuable specialized knowledge or particularly astute insights are more likely to be available.”).

on their gender, for example, means that a range of perspectives or views may be unavailable to the jury to consider during its deliberations. Such deliberate exclusion is detrimental to the jury because, if a range of views is lost to the jury,⁹⁰ then the verdict is less likely to reflect public values, and the parties and the public are less likely to accept the verdict as speaking for the community.⁹¹

In addition, it is in cases that involve the most explicit and least settled gender-related issues that the parties are most likely to attempt to exercise their peremptories to exclude prospective jurors based on gender.⁹² For example, it is not surprising that the case in which the Court considered the constitutionality of gender-based peremptories involved a paternity suit.⁹³ Both sides exercised their peremptories against a gender they thought would be least likely to sympathize with their position,⁹⁴ and the result

90. The Court has recognized that this potential loss of perspectives, *see Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (observing that "the two sexes are not fungible" and that a jury may be less representative of the community if women are excluded from it), is analogous to that resulting from the systematic exclusion of African Americans from the jury, *see Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (asserting that the exclusion of African Americans from juries "deprives the jury of a perspective on human events that may have unsuspected importance"). Even Chief Justice Burger, who was writing in dissent in *Peters*, acknowledged that "juries should not be deprived of the insights of the various segments of the community, for the 'common-sense judgment of a jury' referred to in *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), is surely enriched when all voices can be heard." *Peters*, 407 U.S. at 510-11. In *Ballard*, the Court, relying on its supervisory powers, dismissed an indictment that had been returned by a grand jury from which women were systematically excluded. The Court reasoned as follows:

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

Ballard, 329 U.S. at 194-95 (footnotes omitted).

91. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 413 (1991) ("The verdict will not be accepted or understood . . . if the jury is chosen by unlawful means at the outset.").

92. *See* 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, 181 n.111 (1989) ("Prosecutors (and defense attorneys) frequently exercise their peremptory challenges on the basis of gender in sexual assault cases, 'battered-wife syndrome' cases, other domestic violence cases, abortion-related cases, child-victim cases, and others.").

93. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1421-22 (1994).

94. James E. Bowman, who brought the appeal, used 10 peremptory challenges to exclude 10 women from the jury, whereas the state used 9 peremptory challenges to exclude 9 men. Linda

was a twelve-woman jury.⁹⁵ It is precisely in the cases in which it is most important (or appears most important⁹⁶) to have both genders represented on the jury that both sides may try to skew the gender composition of the jury through the use of gender-based peremptory challenges.

The harm to the jury from such exclusionary practices is not limited to cases that have a gender component. As the Court recognized in *Peters v. Kiff*,⁹⁷ a case involving grand and petit juries from which African Americans had been excluded, assuming that racial exclusion takes place only in cases with racial overtones “does not provide a workable guide for decision in particular cases.”⁹⁸ The Court explained: “[T]he opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society.”⁹⁹ Thus, even though gender-related cases, like race-related cases,¹⁰⁰ might provide the starkest example of

Greenhouse, *High Court to Decide If Jurors Can Be Barred on Basis of Sex*, N.Y. TIMES, May 18, 1993, at A1, A1, A16. The petitioner, however, did use his eleventh peremptory to remove the remaining man on the jury, and the state used its fourth peremptory to strike a woman. Respondent's Brief in Opposition to Petition for Certiorari at 4, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239).

95. J.E.B., 114 S. Ct. at 1421-22. Twenty-three women and ten men remained on the venire after two men and one woman had been struck for cause. Petition for Writ of Certiorari at 11, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (No. 92-1239); Linda P. Campbell, *Court to Rule on Excluding Jurors on Gender*, CHI. TRIB., May 18, 1993, § 1, at 8; see Greenhouse, *supra* note 94, at A16 (“[B]ecause women far outnumbered men in the jury pool, the state was . . . able to create an all-female jury by using its peremptory challenges against men.”).

The jury found Bowman to be the father of the child. David G. Savage, *Justices to Review Juror Gender Screening*, L.A. TIMES, May 18, 1993, at A4. The court ordered Bowman to pay \$400 to \$500 per month in child support. Joan Biskupic, *Supreme Court to Rule on Exclusion from Juries by Gender*, WASH. POST, May 18, 1993, at A4.

96. The evidence supporting the paternity finding was so strong that it seems unlikely that jury composition would have had much of an effect on the outcome. See Savage, *supra* note 95, at A4 (noting that a blood test established Bowman's paternity to a 99.9% certainty).

97. 407 U.S. 493 (1972).

98. *Id.* at 503.

99. *Id.* Admittedly, the Court was making this observation in a case that did have a racial component. *Id.* at 497 (holding that a jury selection method that systematically excludes members on the basis of race violates a defendant's right to due process).

100. As the Court has observed,

Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the cause.

Powers v. Ohio, 499 U.S. 400, 412 (1991). The Court built upon this point in a later case:

The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.

cases in which the parties try to manipulate jury composition, such manipulation and its accompanying harms are not limited to those cases alone.

Gender-based peremptory challenges, therefore, limit perspectives available to the jury in making public value decisions. Gender-based peremptories, however, are not the only challenges that pose this problem. The systematic exclusion of any group through the use of peremptories increases the likelihood that the jury will not reflect the broad range of perspectives and views found in the community. How can we expect the community to accept jury verdicts when groups in the community are struck through peremptories? Whether peremptories are exercised on the basis of race, gender, religion,¹⁰¹ ethnicity,¹⁰² age,¹⁰³ or some other category,¹⁰⁴ the full range of views found in the community is lost to the jury through systematic exclusions, and the public value decisions that the jury is asked to make necessarily become less reflective of the community and more susceptible to rejection.

B. *Jury's Role in Factfinding*

1. *Jury as Factfinder.*—Another role of the jury is to engage in factfinding.¹⁰⁵ It is the jury's task to ascertain, as best it can, such points as

Georgia v. McCollum, 112 S. Ct. 2348, 2354 (1992); see, e.g., Alschuler, *supra* note 92, at 195-96 (describing the Miami riots that followed a trial by an all-white jury, after every potential black juror had been struck by defense attorneys exercising their peremptories).

101. See, e.g., State v. Davis, 504 N.W.2d 767, 768 (Minn. 1993) (allowing peremptory challenges on the basis of religion and holding that *Batson* does not extend to such strikes), *cert. denied*, 114 S. Ct. 2120 (1994).

102. See, e.g., United States v. Changeo, 1 F.3d 837, 840 n.1 (9th Cir. 1993) (noting that to make a *Batson* claim, a defendant must present evidence as to the venireperson's ethnicity and cannot rely solely on the venireperson's surname to support his challenge); United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (noting that the prosecutor removed a juror and an alternate who were Hispanic in a proceeding against two Hispanic defendants, and finding that the prosecutor's reasons for these strikes were insufficient); Commonwealth v. Carleton, 629 N.E.2d 321 (Mass. Ct. App. 1994) (holding that the prosecutor failed to satisfy her burden of establishing that three peremptories exercised against potential jurors with Irish surnames were not based on discriminatory intent).

103. See, e.g., United States v. Pichay, 986 F.2d 1259, 1260 (9th Cir. 1993) (*per curiam*) ("Neither the Supreme Court nor any circuit has held that the Equal Protection Clause prohibits the government from striking venire persons on account of youth.").

104. Although only certain groups have been recognized in other contexts as suspect classes under the Equal Protection Clause, see *infra* note 333, I do not intend to limit my discussion to these groups alone. Even when other groups that have not been afforded such protection are struck from the jury, the harm to the jury may be equally as great. Although it would be easier to limit the discussion to suspect classes, or at least to vulnerable or persecuted groups, the integrity of the jury and the acceptance of the verdict can be subject to question when other groups are struck as well. In my view, the jury can be harmed anytime a group is singled out for exclusion because of some stereotype about members of that group and their inability to be impartial. I acknowledge that any discussion about "groups" is further complicated by the fact that people belong to overlapping groups, see *infra* notes 232, 276, and may identify themselves more fully with one group than another depending on the context.

105. See, e.g., Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 387 (1954) ("The jury's central legal function is to resolve the factual disputes involved in

the sequence of events or the intent of the parties. The jury must determine what actually occurred and reach an accurate verdict. At one time, juries were charged with deciding both law and facts.¹⁰⁶ Eventually, judges assumed the function of deciding the law, thus leaving juries with the task of deciding the facts.¹⁰⁷ The two tasks, however, are not so clearly demarcated in practice. As Kalven and Zeisel observed over twenty-five years ago, although "[t]he conventional and official role of the jury . . . is that it is the trier of the facts and nothing else," it is "not clear that anyone believes this."¹⁰⁸

Although factfinding is not the jury's only function, or even its main function,¹⁰⁹ it is clearly one of its functions. It is important for juries to

a lawsuit."). Whereas Broeder questions the jury's ability to perform this task, *id.* at 390, others have concluded that the jury performs its factfinding role quite competently. *See, e.g.,* REID HASTIE ET AL., *INSIDE THE JURY* 230 (1983) ("In their task of factfinding, juries perform efficiently and accurately."); Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 745 (1991) ("[T]he empirical evidence consistently points to the general competence of the jury.").

106. *See* Diamond, *supra* note 36, at C1 (describing the jury in de Tocqueville's day as deciding both facts and law rather than being instructed on the law by the judge).

107. *See* Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 92 ("[In the late seventeenth century,] the jury underwent a basic change. Jurors ceased to be witnesses, functioning instead as factfinders . . .").

108. KALVEN & ZEISEL, *supra* note 11, at 116; *see also id.* at 494 ("Although a substantial part of the jury's work is the finding of facts, this, as has long been suspected, is not its total function in the real world.").

The Supreme Court has regarded the jury's factfinding function with ambivalence. In *Colgrove v. Battin*, 413 U.S. 149 (1973), it highlighted the civil and criminal jury's factfinding role: the jury is "to assure a fair and equitable resolution of factual issues." *Id.* at 157 (citing *Gasoline Prods. Co. v. Champlin Co.*, 283 U.S. 494, 498 (1931)); *see also* *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."). In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court held that a five-person civil jury is unconstitutional under the Fourteenth and Sixth Amendments, largely because of its concerns that such a reduction in jury size might contribute to "inaccurate fact-finding and incorrect application of the common sense of the community to the facts." *Id.* at 232.

On the other hand, in *Hernandez v. New York*, 500 U.S. 352 (1991), the Court held that Spanish-speaking jurors were permissibly challenged because of their hesitation to abide by the translation provided by the interpreter. *Id.* at 360, 372. It was more important to the Court that the jurors be willing to accept uncritically and unconditionally the official interpretation than it was that they bring an erroneous interpretation to the attention of the judge. *See id.* at 379 (Stevens, J., dissenting) (arguing that bilingual jurors could have been instructed to inform the judge of any disagreements they might have with the translation so that the court could resolve any disputes); Méndez, *supra* note 14, at 194 ("If in fact the interpreter is wrong, *Hernandez* would require the bilingual juror to ignore the error and refrain from bringing it to the attention of other jurors. Accurate fact-finding would dictate a different rule: one that would not disfavor the selection of bilingual jurors who can bring serious errors in interpretation to the judge's attention.").

109. Stephen Yeazell has observed:

Those who . . . debate the jury, ought to do so with a clear eye on the political character of the institution under discussion. For the jury is not now and never has been a simple, functional piece of the judicial machine, to be judged on how well it finds facts. Instead it plays a complicated role, simultaneously functional and symbolic, checking judicial

render accurate decisions because inaccurate decisions can have devastating consequences. Inaccurate verdicts, in their most extreme form, can result in the wrongful conviction of an innocent person.¹¹⁰

As an institution, the jury is well suited for performing its factfinding function.¹¹¹ The jury consists of a group of individuals who have to work together to reach a group solution. Studies have shown that groups perform better than individuals in terms of solving problems and reaching correct answers.¹¹² Each member of the jury can contribute his or her

power and strengthening judicial institutions, reshaping law as it gives a remarkable efficacy to the legal regime.

Yeazell, *supra* note 107, at 88.

110. See, e.g., *Accord in Wrongful Jailing*, N.Y. TIMES, June 22, 1986, § 1, at 26 (recounting the story of Nathaniel Carter, who was imprisoned for two years for murdering his former wife's foster mother but who was actually framed by his ex-wife); Peter Applebome, *Overtured Murder Conviction Spotlights Dallas-Style Justice*, N.Y. TIMES, Mar. 7, 1989, at A19 (discussing the case of Randall Dale Adams, whose 1977 conviction for the murder of a police officer was overturned 12 years later because the prosecutor had suppressed evidence and had allowed perjured testimony); Lee May, *Study Says 25 Innocent People Were Executed in This Century*, L.A. TIMES, Nov. 13, 1985, § 1, at 11 (describing an ACLU study concluding that at least 343 innocent people have been convicted of capital crimes in the U.S. since 1900 and that, among those, 25 were executed); Michelle Mittelstadt, *When It Comes to Freeing Inmates Unjustly Convicted, Dallas Stands Out*, L.A. TIMES, July 22, 1990, at A32 ("Five times in a little more than a year, Dallas County has freed prisoners who were unjustly convicted . . ."); Maria Newman, *Man Freed After Serving 7 Years for Rape*, N.Y. TIMES, June 3, 1992, at B1 (describing the case of Alberto Ramos, freed after spending seven years in jail because prosecutors failed to give defense lawyers documents that would have aided his not-guilty plea); Iver Peterson, *Freeing the Innocent from Behind Bars Is Centurions' Mission*, N.Y. TIMES, Apr. 1, 1992, at B6 (describing the work of Centurion Ministries, which assisted Clarence Chance to secure his release after he had been imprisoned for committing a crime that actually occurred while he was in jail for another crime); Terry Spencer, *L.B. Appeal Ruling Upholding Award in Wrongful Conviction*, L.A. TIMES, Nov. 12, 1987, § 9, at 1 (describing the wrongful conviction of Juan Francisco Venegas and his subsequent \$2 million award against the city of Long Beach); Ronald Sullivan, *Court Allows Damage Lawsuit Over a Disputed Imprisonment*, N.Y. TIMES, Sept. 9, 1992, at B4 (relating how a man who spent 19 years in prison for a crime he did not commit was able to sue New York City for damages from the "host of misdeeds by city employees that led to his wrongful conviction").

111. Of course, juries make mistakes, and their factfinding performance could be further enhanced if certain steps were taken, such as allowing jurors to take notes during the trial, instructing jurors at the beginning of the trial in language that is easy to understand, permitting jurors to ask questions, ensuring that final instructions are clearly written and understandable, and allowing jurors to take a copy of the instructions into the jury room for consultation during deliberations. E.g., CHARTING A FUTURE, *supra* note 39, at 18-20, 23-24; see Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1109-12 (1993); Curtis E. Von Kenn, *Reinventing the Jury Trial*, LEGAL TIMES, Jan. 2, 1995, at 20, 21.

112. See *Ballew v. Georgia*, 435 U.S. 223, 233 n.15 (1978) (listing a study indicating that individual prejudice is more easily overcome in group situations and that larger groups are more effective in this respect than are smaller ones); Dean C. Barnlund, *A Comparative Study of Individual, Majority, and Group Judgment*, 58 J. ABNORMAL & SOC. PSYCHOL. 55, 59-60 (1959) (concluding that "group decisions, reached through cooperative deliberation, are significantly superior to decisions made by individual members working alone" because group discussions "stimulate more careful thinking, . . . lead to a consideration of a wider range of ideas, and . . . provoke more objective and critical testing of conclusions"), cited in *Ballew*, 435 U.S. at 233 n.14; see also LAWRENCE J. SMITH & LORETTA A. MALANDRO, *COURTROOM COMMUNICATION STRATEGIES* § 4.39, at 409 (1985) ("Groups

recollection of the facts and evidence. Because different people may remember different things, the jury has available for its consideration more information than a single individual might recall.¹¹³ Also, a collective endeavor ensures that members of the jury can correct each other's mistaken ideas and faulty recollections.¹¹⁴ Each jury can consider how best to organize the material presented during the trial based upon different frameworks suggested by its members.¹¹⁵ Thus, the jury is valued as a

are usually able to conduct the problem-solving process in a manner superior to individual problem-solving.”).

113. See HASTIE ET AL., *supra* note 105, at 236 (“The group memory advantage over the typical or even the exceptional individual is one of the major determinants of the superiority of the jury as a legal decision mechanism.”); *id.* at 81 (describing the impressive collective memory of a jury and noting that jurors remember 90% of the evidence and 80% of the judge’s instructions); LEVINE, *supra* note 83, at 182 (“Remembering what was said is no small part of competent fact finding, and the collective memory of twelve jurors (or even six) is likely to be better than that of one individual.”); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1067 (1964) (“Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals.”); Daniel Goleman, *Jurors Hear Evidence and Turn It into Stories*, N.Y. TIMES, May 12, 1992, at C1, C11 (“[A] study of more than 700 jurors . . . found that the average rate at which individual jurors remembered evidence from a trial was 60 percent; for judge’s instructions the average was 44 percent. But for the jury as a whole, the memory rates were far better: 93 percent for facts and 82 percent for instructions.”); see also N.K. Clark et al., *Memory for a Complex Social Discourse: The Analysis and Prediction of Individual and Group Recall*, 25 J. MEMORY & LANGUAGE 295, 297 (1986) (“Generally group recall has been found to be superior to that of individuals.”); N.K. Clark et al., *Social Remembering: Quantitative Aspects of Individual and Collaborative Remembering by Police Officers and Students*, 81 BRIT. J. PSYCHOL. 73, 80 (1990) (summarizing the results of tests of individual versus group recall that demonstrated that “collaboration led to a consistent and significant increase in the number of accurate responses made by all subjects, with four-person groups producing the highest levels of accuracy . . . , individuals the lowest . . . and dyads falling between the two”).

114. See *Ballew*, 435 U.S. at 233 (citing studies indicating that group decisionmaking suffers when there are fewer members in the group because critical pieces of information may not be introduced or recalled, and prejudices are less likely to be counterbalanced); Norman R.F. Maier & Allen R. Solem, *The Contribution of a Discussion Leader to the Quality of Group Thinking: The Effective Use of Minority Opinions*, 5 HUM. REL. 277, 285 (1952) (“[F]ree discussion tends to increase the number of correct answers to a problem for which a variety of incorrect answers seems plausible.”).

115. See Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189 (1992) (“The Story Model is based on the hypothesis that jurors impose a narrative story organization on trial information”); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521 (1991) (“[O]ne central claim of the model is that the story the juror constructs determines the juror’s decision.”); *id.* at 525 (“Because all jurors hear the same evidence and have the same general knowledge about the expected structure of stories, differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world.”); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986) (finding that jurors organize trial evidence into a story framework); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 570-71 (1991) (“Pennington and Hastie note that jurors construct different stories and that jury deliberations often consist of a contest over which story is to prevail. . . . A major cause of different juror stories is the different background information that jurors bring to their deliberations.”); Goleman, *supra* note 113, at C1 (explaining that people “process [evidence] as they

factfinding body because its members can bring to the group deliberation different pieces of information and different frameworks by which to organize that information.

2. *Peremptories May Harm Accuracy.*— To the extent that peremptories eliminate groups of people who might bring to the jury different frameworks to remember and organize the surfeit of information that has been presented at trial, the factfinding function of the jury is impaired.¹¹⁶ To the extent that peremptories eliminate jurors with different perspectives who can correct mistaken views or recollections, the risk of an inaccurate verdict is increased.¹¹⁷ Finally, to the extent peremptories eliminate jurors who are minorities, prejudices are more likely to go unchallenged during the deliberation process¹¹⁸ and thus impair the jury's factfinding function.

One illustration of the way in which jury factfinding might be harmed by peremptory challenges is the connection between gender-based peremptories and a jury's tendency to overestimate the credibility of eyewitness testimony. Studies have shown that juries have an inordinate degree of confidence in the reliability of eyewitness testimony; once there has been an eyewitness identification, it is difficult to persuade jurors to question

go along, composing a continuing story throughout the trial that makes sense of what they're hearing"). *But see* Elizabeth F. Loftus & Edith Greene, 74 J. CRIM. L. & CRIMINOLOGY 315, 327 (1983) (reviewing W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981)) ("It is interesting to consider witnesses in the courtroom as storytellers, and jurors as story hearers and evaluators. Nevertheless, the storytelling analogy seems incomplete as a theoretical tool, and wanting as a guide to the practitioner.").

116. One article, while not suggesting that peremptories led to the wrongful conviction of individuals such as Lenell Geter (a young black engineer who was freed from prison in 1984) and Randall Dale Adams (the man who spent 12 years in a Texas prison due to prosecutorial misconduct), did suggest that more diverse juries would serve as a check on prosecutors who may be overzealous in their efforts to seek convictions. Applebome, *supra* note 110, at A19. According to one defense attorney: "You can't have a prosecutor's office that is overzealous unless it has jurors who are willing to go along with it It's one hand shaking the other. It's yin and yang. In other places, prosecutors can't get away with a lot of the garbage you can throw in front of a Dallas jury." *Id.* (quoting Mr. Bruder, the defense attorney who successfully represented Randall Dale Adams before the Supreme Court).

117. HASTIE ET AL., *supra* note 105, at 88 (finding that jurors corrected factual errors during deliberations almost half the time); *see* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205, 218 (finding that mock jurors discussed areas of disagreement and attempted to persuade each other of the correct interpretation of the facts).

118. *See* HANS & VIDMAR, *supra* note 89, at 50-51 (theorizing that the very presence of minorities is likely to suppress the expression of racial prejudices by other jury members); Deirdre Golash, *Race, Fairness, and Jury Selection*, 10 BEHAVIORAL SCI. & L. 155, 170 (1992) ("It is plausible that the presence of members of the defendant's or victim's racial group can be expected to inhibit the direct expression of racial bias in the jury room and thus to mute the social reinforcement of racial reasons for arriving at a particular verdict.").

it.¹¹⁹ Although both men and women tend to overestimate eyewitnesses' ability to identify a suspect, one study concluded that men tend to do so more than women.¹²⁰ The use of gender-based peremptories to exclude women would exacerbate a jury's tendency¹²¹ to overestimate the

119. See ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 9 (1979) ("Jurors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence." (emphasis in original)); ELIZABETH LOFTUS & KATHERINE KETCHAM, *WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL* (1991) (relating stories based on one of the author's personal experiences as an expert witness to illustrate the unreliability of eyewitness testimony); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 *LAW & HUM. BEHAV.* 19, 27 (1983) (noting that jurors find eyewitness evidence extremely persuasive); Peter Tague, *Seeing Isn't Believing*, *N.Y. TIMES*, June 2, 1991, § 7, at 26 ("[R]egardless of the shakiness of many eyewitness identifications, jurors tend to overvalue them, even in the absence of circumstantial evidence."); Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 *STAN. L. REV.* 969, 970 (1977) ("For the layperson, visual identification of the defendant by the victim or witness often provides the most persuasive evidence, which cannot be overcome by contrary evidence supporting the accused.").

Loftus, as well as Brigham and Bothwell, also argue that eyewitness identification should be viewed with circumspection because there are many factors, such as stereotypes, prejudice, temporary expectations, stress, weapon focus, cross-racial identification, and transference, that contribute to the unreliability of eyewitness identification. LOFTUS, *supra*, at 33-51; Brigham & Bothwell, *supra*, at 27; see also Ellen Nakashima, *Seeing It with Your Own Eyes Leaves Sizable Room for Error*, *HARTFORD COURANT*, Jan. 23, 1994, at B1, available in LEXIS, News Library, HTCOUR File (identifying as factors leading to erroneous eyewitness identification stress, cross-racial identification, faulty photo lineups, and the witnesses' confidence); Robert Buckhout, *Eyewitness Testimony*, *SCI. AM.*, Dec. 1974, at 23, 24-29 (describing factors that contribute to the unreliability of eyewitness testimony).

120. Brigham & Bothwell, *supra* note 119, at 26-27. Another study, which also found evidence of a gender difference, concluded that men and women tend to be accurate in their recollections about different items because they focus on and have interest in different things. Women were more accurate about and less susceptible to misleading information concerning female-oriented items (such as women's clothing), whereas men were more accurate about and less susceptible to misleading information relating to male-oriented items (such as a male thief's appearance). Peter A. Powers et al., *Eyewitness Accounts of Females and Males*, 64 *J. APPLIED PSYCHOL.* 339, 340, 345-46 (1979); see Nancy Mazanec & George J. McCall, *Sex, Cognitive Categories, and Observational Accuracy*, 37 *PSYCHOL. REP.* 987, 987 (1975) (indicating that individuals tend to observe persons of the same sex more accurately than persons of the opposite sex); Jerry I. Shaw & Paul Skolnick, *Sex Differences, Weapon Focus, and Eyewitness Reliability*, 134 *J. SOC. PSYCHOL.* 413, 417 (1994) ("The results support our prediction of an own-sex identification bias . . . ; own-sex identification was more accurate than other-sex identification.").

For other studies suggesting a correlation between gender and memory, see A. Daniel Yarmey, *Adult Age and Gender Differences in Eyewitness Recall in Field Settings*, 23 *J. APPLIED SOC. PSYCHOL.* 1921, 1928 (1993) ("Women were significantly superior to men in recall of primary characteristics [judged important for memory of a person]."); and Mazanec & McCall, *supra*, at 988 ("[A] small correlation was observed between sex of observer and overall observational accuracy . . . , which suggests that females were somewhat better observers than males.").

121. Another factor that may exacerbate this tendency may be women's more limited rate of participation during jury deliberations compared to that of men. See Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 *YALE L.J.* 593, 600 (1987) ("If women systematically choose not to speak or men choose not to listen when women do speak, then the jury is, in effect, reduced in size. Memory gaps in the group's collective knowledge increase."). Although researchers have noted "some evidence of a sex effect" between males' and females' assessments of eyewitness credibility, Brigham & Bothwell, *supra* note 119, at 27, they have overlooked the connection between the over-

reliability of eyewitness testimony.¹²² This tendency can have serious consequences for the factfinding capacity of the jury. Jurors' overestimation of the reliability of eyewitness testimony can result in mistaken convictions; such errors are well documented.¹²³

estimation of the reliability of eyewitness identification, on the one hand, and a greater representation of men on a given jury or a greater participation rate of men during jury deliberations, on the other.

122. Of course, gender-based peremptories could be used to exclude men from the jury as well, *see, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1422 (1994) (observing that the state had used peremptory challenges to exclude male jurors), which might result, according to my argument, in juries that do not overestimate eyewitness reliability. Although the argument I make might seem to lead to the conclusion that juries should consist wholly of women, I do not take such a position. The jury serves many purposes, and the assessment of eyewitness credibility is only one of the tasks the jury is asked to perform as part of its factfinding function. As this Article points out, the jury is also asked to recall and organize facts and evidence, and systematically excluding groups from the jury would impair its ability to do so. One of the advantages of having jurors with diverse backgrounds and life experiences is that they are able to put forth different perspectives and ideas for the group's consideration and to correct each other when mistakes are made or prejudices revealed. *See supra* notes 111-18 and accompanying text.

123. As the Supreme Court has long recognized: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967); *see, e.g.*, *DNA Tests Clear Man of Rape 8 Years After His Conviction*, N.Y. TIMES, Jan. 31, 1995, at A13 (reporting that after DNA tests established that Terry Leon Chalmers, who had been convicted of rape based on victim identification, could not have committed the crime, he was released from prison, where he had already spent eight years); Ben Dobbin, *Nearly 6 Years Later, DNA Test Frees Wrongly Convicted Man*, L.A. TIMES, Jan. 24, 1993, at A1 (describing the release of Lennie Callace after a DNA test proved he could not have committed the rape he was originally convicted of on the basis of an eyewitness identification); Faye Fiore, *Man Wrongly Imprisoned Walks Free*, L.A. TIMES, Oct. 3, 1989, § 2, at 1, 4 (noting that Napoleon Cotton, convicted of armed robbery after four eyewitnesses identified him, was freed after new evidence strongly implicated three other suspects); *id.* (reporting the deputy public defender's statement that misidentification is the leading cause of wrongful convictions); Robert Hermann, *The Case of the Jamaican Accent*, N.Y. TIMES, Dec. 1, 1974, § 6 (Magazine), at 95-96 (describing how an erroneous eyewitness identification led to the wrongful arrest of Ted Alston); Gina Kolata, *DNA Tests Provide Key to Cell Doors for Some Wrongly Convicted Inmates*, N.Y. TIMES, Aug. 5, 1994, at A20 (reporting on a project that has used DNA testing to overturn the convictions of at least eight men who had been convicted based on eyewitness testimony and flawed forensic data); *Look-Alike Named a Suspect, and a Woman Leaves Prison*, N.Y. TIMES, Apr. 17, 1995, at A12 (describing the case of Melissa Gammill, who was kept in prison for 10 months after being mistakenly identified as a burglar); Andrew Martin, *For Some in Prison Cells, DNA Can Spell Freedom*, CHI. TRIB., June 26, 1994, § 2, at 1, 2 (noting that "[e]yewitness identification has been the source of more erroneous convictions than any other source of evidence"); Nakashima, *supra* note 119, at B1 (describing the cases of Chad Johnson, who was erroneously identified in a line-up as the man who shot into a crowded DMV hallway, and Randall Lyn Ayers, who was mistakenly identified as a rapist and served nine years in prison); Larry Oakes, *A Miscarriage of Justice*, STAR TRIB. (Minneapolis/St. Paul), Oct. 17, 1993, at 1A, available in LEXIS, News Library, STRIB File (describing the case of Shaun Deckinga who was convicted of bank robbery as a result of a mistaken identity and noting one juror's observation that "[h]e was identified; that's what made the biggest impression on most of us"); Jonathan Rabinovitz, *Rape Conviction Overturned on DNA Tests*, N.Y. TIMES, Dec. 2, 1992, at B6 (discussing Kerry Kotler, who, after having been convicted of rape based on eyewitness identification and serving 11 years in prison, had his conviction overturned after DNA tests revealed that the semen found could not have been his); Robert W. Shomer, *Eyewitness Identification*, L.A. TIMES, July 10, 1993, at B7 (noting that a jury awarded Gordon Robert Hall \$4.4 million after he was wrongfully convicted of murder based on an eyewitness identification); Mark Arax, *A Long, Bitter Wait for Freedom Ends*, L.A. TIMES, Oct. 30, 1994, at A1, A27 (reporting

Although further studies are needed to support a connection between gender and an overestimation of eyewitness credibility, my suggestion is simply that the jury may lose some of the benefits of "group" factfinding when peremptories are used to limit the jury's diversity. Reducing diversity may also decrease the points of view contributed and limit the frameworks provided for analyzing the facts and evidence. These differences in perception do not result from any natural differences, but simply from an alternative way of viewing a situation that might arise from occupying a different place in society.¹²⁴

As an illustration, the men and women in Susan Glaspell's short story *A Jury of Her Peers*¹²⁵ explored the murder of John Wright in different ways, not because men and women have different ways of thinking, but because they occupied different roles in society at the time and viewed the facts and evidence through the prisms of their separate spheres.¹²⁶ The women were relegated to the kitchen, where their task was to gather a few household items for Minnie Wright, John Wright's wife, to use in jail.¹²⁷ The men, on the other hand, carried on the official investigation in the barn and the bedroom.¹²⁸ While the women focused on "the insignificance of kitchen things,"¹²⁹ such as the broken bird cage, the dead canary, and the uneven stitching in a patchwork quilt, the men looked for, but failed to find, signs of an outside intruder.¹³⁰ The women pieced

that Charles Tomlin, convicted of first-degree murder and imprisoned for 16 years, was released after an eyewitness confessed error in identification). See generally MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 17, 18 (1992) (identifying 416 cases in which the wrong person was convicted of murder, or of capital rape, and then sentenced to death and noting that the two most frequent causes of error "are perjury by prosecution witnesses and mistaken eyewitness testimony"); Warren E. Leary, *Novel Methods Unlock Witnesses' Memory*, N.Y. TIMES, Nov. 15, 1988, at C1, C15 ("Faulty eyewitness testimony . . . is the major cause of wrongful conviction in this country" (quoting Elizabeth Loftus)); EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932) (detailing 65 cases of wrongful convictions, 29 of which involved some form of mistaken identity).

124. See, e.g., Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 175 (1982) (attributing the difference in men's and women's perceptions to the difference in their respective life experiences); cf. ABRAMSON, *supra* note 83, at 167 ("[W]hites and blacks occupy different places in American society and . . . these differences affect attitudes toward the death penalty, police officers, and the criminal justice system." (footnote omitted)).

125. Susan Glaspell, *A Jury of Her Peers*, reprinted in THE BEST SHORT STORIES OF 1917, at 256-82 (Edward J. O'Brien ed., 1918).

126. It is important to note that not all women occupied a separate sphere, and that the relegation of white women to a separate sphere, for example, "offers little insight into the domination of Black women" who have "traditionally worked outside the home in numbers far exceeding the labor participation rate of white women." Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 155, 156 (emphasis in original).

127. Glaspell, *supra* note 125, at 256-66.

128. *Id.* at 263.

129. *Id.*

130. *Id.* at 277.

together a motive for the murder from the evidence they observed, while the men had a theory, but failed to find any evidence to support it. The different approaches to factfinding suggested by this story, however, are not immutable and are likely to change as men's and women's roles in society change.

C. *The Jury's Role in Appearing as a Fair Decisionmaker*

The use of peremptories to exclude groups from the jury can have a deleterious effect on public perception of the system's fairness because the exclusion takes place under the gaze of the public and with the imprimatur of the state and because when the peremptory is unmasked,¹³¹ it often reveals stereotypes and perpetuates discrimination. Although these claims are not empirical ones, they are claims about public symbolism and about what those in the courtroom see and what the public is taught. These messages, moreover, have already begun to reach a larger audience through such television programs as Court TV, and are likely to reach an even broader spectrum of the population once cameras are allowed in federal courtrooms.¹³²

131. The need to "unmask" the peremptory is contrary to Barbara Babcock's original approach, which was to celebrate peremptories because they enabled us to "avoid[] trafficking in the core of truth in most common stereotypes. . . . [W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not." Babcock, *supra* note 12, at 553, 554. She has since reconsidered that position in a more recent article at least insofar as race- and gender-based peremptory challenges are concerned. See Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CINN. L. REV. 1139, 1146-51, 1160-63 (1993) [hereinafter Babcock, *Women and Jury Service*].

132. Forty-seven states allow cameras in the courtroom, and thirty-five of those states allow filming of criminal trials. See Ruth A. Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128 (1994); *Let the People Observe Their Courts*, 78 JUDICATURE 116 (1994); see also Carolyn S. Dyer & Nancy R. Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 GEO. L.J. 1633, 1646 (1987) (noting that "the great majority of states now allow some electronic coverage of the judicial process"); Todd Piccus, Note, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1064 (1993) (explaining that "forty-seven states permit broadcast coverage of at least part of their court system"); Albert Scardino, *Courtroom TV is a Fixture, Even as New York is Deciding*, N.Y. TIMES, Jan. 22, 1989, § 4, at 7 (noting that in 1977, Florida became the first state to allow cameras in criminal courtrooms); Kolbert, *supra* note 88, at 3 (reporting that, in recent years, cameras have become widely allowed in courtrooms).

In spite of the success of a three-year experiment with cameras in federal courts, the U.S. Judicial Conference voted against extending the experiment or allowing cameras in federal court on a permanent basis. Strickland & Moore, *supra*, at 128; Tony Mauro, *Courtside: Camera Debate was Sloppy and Shallow*, LEGAL TIMES, Sept. 26, 1994, at 10; Henry J. Reske, *Rally for Court Cameras Falls Short*, A.B.A. J., Mar. 1995, at 30. At a recent meeting, however, the Judicial Conference expressed a willingness to reconsider the issue. Eva M. Rodriguez & Robert Schmidt, *Judicial Conference Tries a Little Openness*, LEGAL TIMES, Mar. 20, 1995, at 1, 24.

1. *Peremptories Take Place in the Public Eye.*—The exercise of the peremptory challenge takes place in the public forum of the courtroom, beneath the American flag and the judicial seal, and often before a room full of spectators.¹³³ The courtroom is a highly formal setting in which all of the participants have their proper place: the judge sits at a desk on a raised platform, the parties are directly before him,¹³⁴ the jury sits to one side, the clerks to the other, and the public and press sit in the back. Although there may be variations, the setting, as well as the procedures, are typically designed to reinforce the solemnity of the occasion. All rise when the clerk announces the court is in session, and the judge, cloaked in his robe, enters, and is seated.¹³⁵ A court stenographer transcribes the proceedings, and the judge is supposed to choose his words with care and precision. All who are present are expected to conduct themselves with proper decorum. The formality of the proceedings, from the established order in which the trial is conducted to the way in which witnesses are sworn in and exhibits are entered into evidence, is intended to inspire respect for the law and to impress upon those present that they are before a powerful arm of the state¹³⁶ and yet one that is committed to fairness above all. And it is in such a setting that gender-based peremptories, for example,¹³⁷ are introduced and displayed unabashedly before all who are present. As woman after woman, or man after man, is dismissed from the venire,¹³⁸ the reason for the dismissals is apparent to all who are

133. In fact, some become permanent spectators. They go to the courthouse regularly to watch trials and, therefore, have the best information about which trials are interesting and which lawyers are persuasive. As one article recounts, “[a]lmost every court has its watchers,” but at the federal courthouse in New York City’s Foley Square, five men have become “so well known that judges often keep them apprised of developments in cases, and newspaper reporters have been known to check with them on a trial’s progress.” *Catching Matinee at the Courthouse*, N.Y. TIMES, July 9, 1993, at B1.

The trial may also be seen by those not in the courtroom now that many state courts allow cameras in the courtroom and some federal courts have permitted them on a temporary and experimental basis. See *supra* note 132.

134. See *supra* note 51 and accompanying text (explaining my use of masculine pronouns when referring to judges).

135. Judge Abner Mikva, who was a Congressman before becoming a judge, said that it took him a long time to appreciate “the judicial mystique” that is part of the role: “The high bench, the black robe, the ‘oyez, oyez,’ are all part of trying to Wizard of Oz-ize us. But what’s the power of a judge? It’s partly mystical after all.” Linda Greenhouse, *Justices Guard Mystique*, N.Y. TIMES, May 27, 1993, at A1, A24.

136. Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986) (“[J]udges deal pain and death.”).

137. I will go on to argue that all peremptories compromise the fairness that is attributed to the proceedings; however, I think that the highly visible nature of peremptories based on gender or race makes them a particularly good example of the public nature of the harm.

138. Alternatively, they may be dismissed all at once if a “struck-panel method” of jury selection is employed. See *Swain v. Alabama*, 380 U.S. 202, 217-18 (1965) (refusing to hold unconstitutional Alabama’s use of the struck method of jury selection). The ABA described this method as follows:

Under this practice, jurors are first examined and challenged for cause by both sides.

Excused jurors are replaced on the panel, and the examination of replacements continues

present—the parties, the judge, the clerk, the press, the spectators, and the jurors. And these dismissals take place under the aegis of the judge, at least in federal court, in which the judge typically asks the questions during *voir dire*¹³⁹ and dismisses the prospective jurors who have been struck for cause or peremptorily.¹⁴⁰ It is the judge who serves as interpreter for those who are present, explaining what a peremptory challenge is and how it can be used. In *Edmonson v. Leesville Concrete Co.*,¹⁴¹ the Court expressed quite eloquently the public nature of the harm caused by the court's involvement in group-based peremptories:

Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.¹⁴²

Although the Court in *Edmonson* was describing the harm caused by peremptories based on race, those based on gender are no less pernicious. Exclusion based on gender, like exclusion based on race, taints the selection process, and with it the belief that the remainder of the proceedings will be conducted fairly.¹⁴³

until a panel of qualified jurors is presented. The size of the panel at this time is the sum of the number of jurors to hear the case plus the number of peremptories to be allowed all parties. The parties then proceed to exercise their peremptories, usually alternately or in some similar way which will result in all parties exhausting their challenges at approximately the same time This approach is not uncommon in the federal courts.

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 77 (Approved Draft 1968) [hereinafter ABA STANDARDS]. For a description of the struck-panel method, see Judge Leonard B. Sand, Instructions to Counsel Concerning Jury Selection (Feb. 1, 1982) (copy on file with author) (describing advantages of this method including: counsel will know who will replace the challenged panelist; the jurors will not know who challenged them or why; and the selection can proceed quickly, particularly in multi-party cases).

139. See Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy*, in THE TRIAL PROCESS 69, 79-81 (Bruce D. Sales ed., 1981) (reporting the results of a study in which over 70% of federal judges said they conduct *voir dire* questioning themselves but will often include questions suggested by counsel); SAUL KASSIN & LAWRENCE WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 52 (1988) ("In the federal courts [*voir dire*] is entirely within the judge's control. In the state courts, the procedures vary."); ABRAMSON, *supra* note 83, at 163 ("In federal courts, judges often do all the questioning.").

140. FED. R. CIV. P. 47(b), (c); FED. R. CRIM. P. 24(b).

141. 500 U.S. 614 (1991).

142. *Id.* at 628.

143. It is important that jury selection takes place before the parties and in the public eye so that the jury is accepted as fairly chosen. See, e.g., *Pointer v. United States*, 151 U.S. 396, 406 (1894) (explaining that, had the defendant not been present during the examination of jurors' qualifications or

Jury verdicts are not announced in a vacuum. The announcement is a public act from which the community draws lessons about what is acceptable and what is unacceptable behavior.¹⁴⁴ Such value-laden decisions are usually embraced by communities, even in contentious cases,¹⁴⁵ because the jury is seen as representing the voice of the community, and the process by which the decision was reached is regarded as fair.¹⁴⁶ If, however, jurors are excluded based on gender, and their views and perspectives are eliminated from consideration, then it is unlikely that the verdicts announced by such juries will be representative of the community, and it is unlikely that the community will perceive the process as fair and accept the verdict.

2. *Peremptories Perpetuate Stereotypes and Discrimination.*—The defining characteristic of the peremptory is that no explanation need be given for its use. The fact that no explanation is required, however, does not mean that no explanation is apparent, and when the explanation is a group-based stereotype (even if unspoken), then our notion of fairness is offended.¹⁴⁷ Also, while no explanation need be given by the lawyer exercising the peremptory, opposing counsel or the press may be “providing” an explanation, albeit informally. The O.J. Simpson trial provides an example. When Simpson’s counsel, Robert Shapiro and Johnnie Cochran, worried that the prosecution was questioning African Americans differently and would attempt to use its peremptories to strike African Americans from

the assertion of peremptory challenges, the Court would have reversed his conviction); *Lewis v. United States*, 146 U.S. 370, 375-76, 379-80 (1892) (reversing the judgment because the trial court allowed challenges to be made without the prisoner having been brought face to face with the jurors).

144. See *supra* section III(A)(1).

145. See *supra* notes 72, 80-82 and accompanying text (explaining that Hasidic Jews in Crown Heights accepted a verdict with which they disagreed and attempted to challenge it, not by attacking the process, but by turning to the legal system).

146. In the Senate Judiciary Committee hearings on jury selection, Judge Irving R. Kaufman explained that the process must be fair in order for the verdict to be accepted:

If the law is to reflect the moral sense of the community, the whole community—and not just a special part—must help to shape it. If the jury’s verdict is to reflect the community’s judgment—the whole community’s judgment—jurors must be fairly selected from a cross-section of the whole community, not merely a segment of it.

Federal Jury Selection: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 256 (1967) (statement of Irving R. Kaufman, Judge, U.S. Court of Appeals for the Second Circuit, and Chairman, Committee on Operation of the Jury System of the U.S. Judicial Conference).

147. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court noted that “the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an ‘appearance of unfairness.’” *Id.* at 175. The Court held, however, that a “death-qualified jury”—in which those potential jurors who say they could not vote for the death penalty are excluded from the jury—does not violate the fair cross-section requirement of the Sixth Amendment because groups based on shared attitudes are not distinctive groups for purposes of the fair cross-section requirement. *Id.* at 173-74.

the jury, all they had to do was explain this strategy to the press to make the public aware of it.¹⁴⁸

Although gender- and race-based peremptories may be more visible, peremptories exercised on the basis of other group identities are no less offensive. Peremptory challenges permit discrimination in a setting that should be free from all discrimination.¹⁴⁹ It is unclear why discrimination should be permitted against members of any group, whether they are women, men, Jews, Catholics, Muslims, African Americans, Asian Americans, Italian Americans, the elderly, homosexuals, lesbians, the rich, or the poor. It is particularly unclear why such discrimination should be permitted in cases that involve members of these various communities and, therefore, involve verdicts that will have to be accepted by these same communities. Furthermore, it is unclear why the state should sanction such discrimination, which it necessarily does because it provides the setting and the procedures.

The use of the peremptory to exclude members of any particular group starts from the premise that jurors will vote according to a group affiliation. A peremptory is often based on a stereotype, such as the idea that women jurors will favor a handsome man.¹⁵⁰ As one judge, who advocated the abolition of peremptories, explained: "Attorneys use peremptories to eliminate groups of people because of preconceived notions of how certain groups will judge a case."¹⁵¹ Jury selection should not perpetuate stereotypes, but peremptory challenges exercised on the basis of group membership necessarily do so. Typically, lawyers have limited

148. See, e.g., David Margolick, *Issues of Race are Raised in Simpson Jury Selection*, N.Y. TIMES, Oct. 28, 1994, at A29 (quoting Cochran as criticizing the prosecution's conduct: "We are very concerned about the tenor of questions and that they go after certain jurors. . . . In order for this jury to have credibility, it must have people from all walks of life and from all over the community"); Christine Spolar, *Majority-Black Jury Selected in O.J. Simpson Murder Trial*, WASH. POST, Nov. 4, 1994, at A2 ("Defense attorney Robert L. Shapiro said, outside the courtroom, that the defense was crying foul on racial grounds because the prosecution seemed to have a strategy to 'exclude black females and blacks in general [through peremptories].'").

149. In the context of jury selection, the exclusion of any juror based on immutable characteristics is, in my view, a form of discrimination and is harmful to the jury. The reason that such discrimination should not be permitted during jury selection, even though it may be permitted in other contexts, such as the military, is that jury service, like voting, is an exercise of the people's sovereignty, and no segment of the eligible citizenry should be excluded.

150. F. LEE BAILEY & HENRY B. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 104 (1971); see, e.g., *United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) (recounting the prosecutor's assertion that he exercised peremptories against two unmarried, female prospective jurors because he was afraid they would be attracted to the defendant's good looks). For other trial manuals offering advice about jury selection based on gender stereotypes, see HARRY S. BODIN, *SELECTING A JURY* 53 (1954) ("It is almost inevitable that women will be influenced by the experience of their husbands."); and ROBERT A. WENKE, *THE ART OF SELECTING A JURY* 88 (2d ed. 1988) ("Women react more to pain and suffering than men and are generally more emotional and sympathetic.").

151. Judge Phyllis Bamberger, *The Criminal Jury Selection Process: Should New York State Adopt the Federal System of Jury Selection and Should the Use of Peremptory Challenges Be Eliminated*, N.Y. COUNTY BAR ASSOCIATION (June 3, 1993) [hereinafter *The Criminal Jury Selection Process*].

information available on which to base their peremptories.¹⁵² Lawyers often know little more than jurors' names and the locality in which they reside, their occupations and those of their spouses and children, whether they are acquainted with anyone involved in the case, and whether they have ever served before on a jury and whether their past service was in civil or criminal court. This paucity of information is particularly pronounced in federal courts where the judge usually conducts *voir dire*.¹⁵³ On the basis of the prospective juror's responses to these questions, the lawyer must exercise her peremptory challenges. In the face of limited information, the lawyer may rely on stereotypes handed down from trial manuals and fellow litigators.¹⁵⁴ For example, one 1992 trial manual unabashedly perpetuates stereotypes when it advises practitioners:

152. For example, the lawyer in *J.E.B. v. Alabama ex rel. T.B.* made this argument before the trial judge when he challenged the state's exercise of its peremptory challenges to strike nine men from the jury:

Judge, before the jury is impaneled, I propose to the court that . . . we would challenge the state's strikes on the *Batson* decision and other decisions that have followed that I have heard and understand that gender based strikes based upon gender are just as [in]valid as race strikes based on the race—the state's strikes with the exception of one were males. *Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the court that they were basically struck solely upon gender.*

Petition for Writ of Certiorari, *supra* note 95, at A-2 to A-3 (emphasis added) (quoting Reporter's Official Transcript on Appeal).

153. See Babcock, *supra* note 12, at 548, 549 ("Increasingly, judges are conducting *voir dire* examinations rather than allowing counsel to propound questions. . . . [T]he limited questions put by the judge to the panel as a group greatly reduce the information produced by the *voir dire*."). As Hans and Vidmar explain,

False stereotypes can easily develop and even flourish under typical *voir dire* and challenge procedures. Attorneys are usually forced to exercise their peremptories on the basis of only limited information about prospective jurors. They never receive feedback on their choices, since those challenged jurors are eliminated. On the other side of the coin, the jury renders its verdict as a group. Attorneys thus seldom learn whether their hunches are correct.

HANS & VIDMAR, *supra* note 89, at 76.

154. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court acknowledged that lawyers have limited information on which to exercise their peremptories and that the basis may well be group affiliation:

[The peremptory] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

Id. at 220-21 (footnotes omitted). In *Batson v. Kentucky*, 476 U.S. 79 (1986), Chief Justice Burger noted that, "in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information and hunch." *Id.* at 123 (Burger, C.J., dissenting). Alan Dershowitz has noted the difficulty of relying on hunches: "Lawyers' instincts are often the *least* trustworthy basis on which to pick jurors. All those neat rules of thumb, but no feedback. Ten years of accumulated experiences may be 10 years of being wrong." Morton Hunt, *Putting Juries on the Couch*, N.Y. TIMES, Nov. 28, 1982, § 6 (Magazine), at 70, 82 (emphasis in original) (quoting Alan Dershowitz).

Housewives in the suburbs are thought to be conservative on damages and not particularly sympathetic. . . . Women's liberationist women may feel antagonism toward male plaintiffs or male lawyers. Such jurors may appear strident, self-assertive, or hostile. If a female juror demands to be addressed as Ms. and not Miss, you probably should take heed.¹⁵⁵

Why should we care that peremptories may be based on stereotypes? As a practical matter, lawyers' reliance on stereotypes to predict how jurors will vote is misplaced, even though many lawyers might believe otherwise.¹⁵⁶ Most efforts to predict how jurors will vote based on certain characteristics, such as race, gender, or ethnicity, have met with little success; study after study attests to this fact.¹⁵⁷ Such efforts at prediction

155. WARD WAGNER, JR., *ART OF ADVOCACY: JURY SELECTION* § 1.04[9], at 1-24 (1988).

156. Lawyers' attempts to use peremptories to select jurors who they think will be sympathetic to their clients have yielded mixed results at best. In one of the few empirical studies on the effectiveness of peremptory challenges, Hans Zeisel and Shari Diamond made use of "shadow juries," consisting of those who had been dismissed peremptorily. Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 498-99 (1978). They attempted to reconstruct the original juries as they would have existed if peremptory challenges had not been allowed. On that basis, they found that 7 of the 12 cases were only minimally affected by the use of peremptory challenges. *Id.* at 507. The study showed that prosecutors, and to a slightly lesser degree defense attorneys, were usually unable to use their peremptories to any advantage. *Id.* at 517. Zeisel and Diamond concluded that the "collective performance of the attorneys [was] not impressive." *Id.*

In another study, mock jurors were videotaped as they responded to *voir dire* questions in a high-profile case. Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409 (1990). As a follow up, the tapes were sent to prosecutors, defense attorneys, and trial judges, who were given additional information that would have been available at the time of *voir dire*. They were then asked to indicate which prospective jurors they would have excused. The researchers found that "[t]he judges' causal challenges and the defense attorneys' peremptory challenges were unrelated to jurors' verdicts. That is, those excused were no more or no less likely to convict than those who were acceptable to judges and defense attorneys." Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120, 126 (1994) (citing Geoffrey P. Kramer et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665 (1991)). In the Kramer et al. study, researchers found that attorneys thought that their predictions about how prospective jurors would vote were correct 71.9% of the time; in fact, they were correct only 45.4% of the time. *Id.* Thus, they did "about as well as one might do by flipping a coin." *Id.*

In three experiments, Olczak, Kaplan, and Penrod learned that trial lawyers tended to rely on two or three juror characteristics in deciding whether a juror will be sympathetic to a particular side; that trial lawyers relied on stereotypes and did not use more sophisticated reasoning than college sophomores in selecting jurors; and most importantly, that both trial lawyers and law students did not accurately select jurors favoring their side. Paul V. Olczak et al., *Attorneys' Lay Psychology and Its Effectiveness in Selecting Jurors: Three Empirical Studies*, 6 J. SOC. BEHAV. & PERSONALITY 431 (1991).

In an Australian study, researchers discovered that barristers used different characteristics than those often relied upon by American trial lawyers, suggesting that stereotypes used for jury selection may be culturally bound. Glenn F. Ross, *The Selection of Jurors in the Higher Courts of Queensland*, 15 AUSTRALIAN PSYCHOLOGIST 351, 357 (1980).

157. With the exception of death penalty and rape, social scientists have failed to find a correlation between individual characteristics and verdict preferences. See generally HANS & VIDMAR, *supra* note

fail to take into account that most jurors take their role quite seriously and, consistent with their oath, try to put aside personal predilections,¹⁵⁸ much as judges do,¹⁵⁹ that people cannot be reduced to one characteristic, and

89, at 76-77 (observing that lawyers are only minimally effective in securing favorable juries when they must rely on the obvious personal characteristics of jury members); James H. Davis et al., *The Empirical Study of Decision Processes in Juries: A Critical Review*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 326, 341-51 (June L. Tapp & Felice J. Levine eds., 1977) (reviewing empirical studies on jury deliberations); KASSIN & WRIGHTSMAN, *supra* note 139, at 45 ("Time and again, efforts to corroborate the assumption that juries' verdicts are predictable from their demographic composition have produced modest, inconsistent, and highly qualified results. . . . Personality variables fare little better in the predictive equation."); Steven Penrod et al., *The Implications of Social Psychological Research for Trial Practice Attorneys*, in *PSYCHOLOGY & LAW* 439 (D.J. Miller et al. eds, 1984) ("Th[e] traditional lore on jury selection consists largely of ethnic, occupational, sexual, and other stereotypes presumably adduced from the expert practitioner's own experiences. In fact, there is virtually no empirical support for these strategies.") (citations omitted); ABRAMSON, *supra* note 83, at 171 ("The most recent reviewers of empirical research on jury selection agree that demographic profiles fail to provide specific enough information to a lawyer faced with sizing up a prospective juror."); A.P. Sealy, *What Can Be Learned from the Analysis of Simulated Jurors*, in *THE BRITISH JURY SYSTEM* 20 (Nigel Walker ed., 1975) ("We were most disappointed to find so few correlations between social background, personality, and attitudinal variables on the one hand and the verdict on the other. Most factors of personal background (e.g. sex, age, socio-economic status, educational level, etc.) were unrelated to verdicts. Personality of the jurors also seems a relatively poor correlate of verdict" (footnote omitted)).

In one study, social psychologist Steven Penrod collected demographic material on 367 members of a Boston jury pool and asked them to reach verdicts in 4 different hypothetical cases. His analyses suggested that information about a juror's age, race, and gender were almost useless in predicting how that person would decide a case. Steven D. Penrod, *Study of Attorney and "Scientific" Jury Selection Methods* 121-51, 174 (1979) (unpublished Ph.D. dissertation, Harvard University).

Similarly, in a 21-month study of jury trials in Birmingham, England, researchers John Baldwin and Michael McConville collected background data on 3912 members of 326 juries in Birmingham. After comparing verdicts reached by juries that varied according to age, gender, and occupation, Baldwin and McConville noted few correspondences between demographic characteristics and verdicts. BALDWIN & MCCONVILLE, *supra* note 83, at 100-04; see John Baldwin & Michael McConville, *Does the Composition of an English Jury Affect Its Verdict?*, 64 *JUDICATURE* 133, 134 (1980) [hereinafter Baldwin & McConville, *English Jury*] (noting that the empirical evidence of links between jurors' backgrounds and behavior is "slender and sometimes contradictory").

158. See, e.g., CHARTING A FUTURE, *supra* note 39, at 8 ("The evidence indicates the jurors take their responsibilities very seriously and attempt to reach fair and just results."); Cecil et al., *supra* note 105, at 751 (discussing a study which "showed that jurors in both long and short trials took their task extremely seriously"); Kalven, *supra* note 113, at 1062 ("[T]here is much evidence that most people, once actually serving in a trial, become highly serious and responsible toward their task and toward the joint effort to deliberate through to a verdict. Whether they are good at the job may be open to question, but that they are serious about it and give it a real try is abundantly documentable."); Sealy, *supra* note 157, at 20 ("Jurors take their roles very seriously, at least in simulated trials. They not only try hard to understand the case, they also surrender prejudice and bias."); Edward Clarke, Q.C., *The Selection of Juries, Qualification for Service and the Right of Challenge*, in *THE BRITISH JURY SYSTEM*, *supra* note 157, at 48 (noting that the "vast majority [of jurors] do their work with a proper sense of responsibility"); see also WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 356 (Cambridge, Cambridge University Press, 2d ed. 1875) (observing that jurors must "promise, under the awful sanction of an oath, to lay aside anger, and hate, and fear; nor allow themselves to be swayed by love or friendship while they address themselves to their solemn duties").

159. Judges, in spite of their training, are not immune from drawing inferences about parties based on past criminal records and other information. HANS & VIDMAR, *supra* note 89, at 127; see Neil J.

from that one characteristic have their verdict derived; that lawyers are not trained in any way that makes them expert at interpreting body language or uncovering deep-seated prejudices or biases that even the individual might not recognize;¹⁶⁰ and that, in any event, the deliberation process is a complex one, and its dynamics cannot be predicted.¹⁶¹ The group endeavor allows for the airing of a variety of points of view,¹⁶² provides an opportunity for collective memory,¹⁶³ and exposes prejudices and weaknesses in an argument that the individual might not have been aware of beforehand.¹⁶⁴

Vidmar, *Social Psychology and the Law*, in *SOCIAL PSYCHOLOGY* 388, 397-98 (Arnold S. Kahn et al. eds., 1984) (reviewing research that details judges' susceptibility to drawing inferences); *see also* Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1745 (1990) ("[Judges'] judgments are relative to a perspective; they are situated in prior experience and affected by normative attitudes.").

160. *See* Olczak et al., *supra* note 156, at 443 ("Attorneys used the same stereotypes that civilians used, and in as cognitively simple a manner.").

161. Some lawyers, recognizing the importance of group deliberations, have engaged social scientists or jury specialists who conduct mock juries to learn how jurors might respond to their arguments and their case. BALDWIN & MCCONVILLE, *supra* note 83, at 87; KASSIN & WRIGHTSMAN, *supra* note 139, at 57 ("It is almost unusual now to come across an important case, criminal or civil, in which the jury is selected *without* the help of an expert." (emphasis in original)); Jeffrey Toobin, *Juries on Trial*, NEW YORKER, Oct. 31, 1994, at 42, 43 (observing that "deep-pocketed parties to civil and criminal litigation routinely use polls and focus groups to shape their efforts at picking juries"). Even if such cases result in acquittals or favorable awards, however, it is unclear that the jury selection techniques are responsible for the outcomes. It may be that other aspects of the case, such as strong evidence, were responsible instead. BALDWIN & MCCONVILLE, *supra* note 83, at 90.

Another problem with mock juries is that it is difficult to know if the mock jurors will act in the same way as actual jurors, who know that their efforts will result in an outcome that will affect others. Yet another problem is that mock juries often consist of students "so that the resulting panels do not in any way represent the social mix which would characterize virtually any real jury." *Id.* at 13.

162. *See, e.g.*, Maier & Solem, *supra* note 114, at 285 (arguing that "free discussion tends to increase the number of correct answers to a problem for which a variety of incorrect answers seems plausible.").

163. *See* Kalven, *supra* note 113, at 1067 ("Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals."); *see supra* notes 111-15 and accompanying text.

164. *See* *Ballew v. Georgia*, 435 U.S. 223, 233 (1978) ("When individual and group decision-making were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted." (citations omitted)); HANS & VIDMAR, *supra* note 89, at 50 ("The jury's heterogeneous makeup may also lessen the power of prejudice. Biases for and against the defendant, if evenly distributed on the jury, may cancel each other out."). The presence of minorities on a jury may also suppress the expression of racial, ethnic, and other prejudices. *Id.* at 50-51. Although the suppression of ideas suggests the dangers of "groupthink," in which group members conform to the prevalent view and effectively limit the range of ideas expressed and considered, IRVING L. JANIS, *GROUPTHINK* 9 (2d ed. 1982), not all ideas are worthy of the group's consideration. Certainly ideas that are based on prejudice and stereotype fit into this category.

Earlier research efforts ignored or undervalued the group deliberation process, *see, e.g.*, Jay Schulman et al., *Recipe for a Jury*, PSYCHOL. TODAY, May 1973, at 37, 83 (stating that "the psychological and interpersonal processes involved in reaching a verdict were much more complex than anything we could have predicted"), perhaps because it takes place behind closed doors and is therefore difficult to study. BALDWIN & MCCONVILLE, *supra* note 83, at 5 ("[A]ll researchers have been denied

Even if stereotypes could serve as a means for predicting individual voting patterns, however, peremptories still should not be exercised on the basis of stereotypes. The reason lies in the role of the jury in a democratic society. The subtext of peremptories—that discrimination is permissible and stereotypes are a legitimate basis for their exercise—teaches negative lessons about citizenship. Such prejudging of individuals based on a stereotype about group identity is inconsistent with democratic ideals such as equality and fairness.

D. The Jury's Role in Educating the Citizenry

1. *Peremptories Deny Access to Civic Duty.*—The jury plays an important role as educator of the citizenry in the lessons of democracy. As de Tocqueville suggested over 150 years ago,¹⁶⁵ as Francis Lieber, a student of Justice Story, reinforced not long after,¹⁶⁶ and as the Supreme Court reiterated four terms ago, the jury teaches citizens important lessons about democracy.¹⁶⁷

The jury is premised upon the notion that individuals will be able to serve. They are officially summoned from the citizenry and asked to

access to the very subject-matter under examination—the jury and its deliberations. It has not been possible for researchers to observe jury deliberations at first hand, or even, in England, to interview jurors after their service has been completed.”); GLENDON A. SCHUBERT, *JUDICIAL POLICY-MAKING* 81 (1974) (“Research in jury decisionmaking is difficult to carry out because the secrecy of the proceedings precludes direct observation of how real juries make decisions. Most work has been done either with simulated jury groups or with anecdotal materials provided by the reminiscences of ex-jurors.” (footnote omitted)). For example, Kalven and Zeisel concluded that most jurors made up their minds before beginning deliberations, but that conclusion was also necessary to their research efforts because they did not have access to jury deliberations. Compare KALVEN & ZEISEL, *supra* note 11, at 488 with *Recording of Jury Deliberations: Hearings on S. Res. 58 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 43 (1955) (testimony of Professor Harry Kalven). Kalven and Zeisel’s efforts to record jury deliberations served as a catalyst for the passage of a statute forbidding such recordings. 18 U.S.C. § 1508 (1982).

More recent jury research, however, has focused on the importance of deliberations and group dynamics. See, e.g., HASTIE ET AL., *supra* note 105, at 99-120; Marder, *supra* note 121, at 593 (both analyzing the effects of gender on the process of jury deliberation). As one writer pointed out: “In Brazil, federal juries do not deliberate. At the close of evidence, jurors are individually polled in writing, a secret ballot is taken, and the majority prevails. Such a procedure stands in stark contrast to our own, where deliberation is the essence of a juror’s duty.” ABRAMSON, *supra* note 83, at 205 (footnote omitted).

165. 1 DE TOCQUEVILLE, *supra* note 34, at 252 (arguing that the jury “should be regarded as a free school which is always open and in which each juror learns his rights . . . and is given practical lessons in the law”). The jury’s role as educator of the citizenry was one that guided the framers of the Bill of Rights as well. According to Professor Amar, the jury, along with the militia and the church, was understood at the time of the Bill of Rights as “a device for educating ordinary Citizens about their rights and duties.” Amar, *supra* note 15, at 1210.

166. See FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 239 (Philadelphia, J.B. Lippincott & Co. 1859) (“[The jury] teaches law and liberty, order and rights, justice and government, and carries this knowledge over the land; it is the greatest practical school of free citizenship.”).

167. *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991).

provide temporary service. Jury service provides citizens with the only opportunity, other than voting, to participate directly in their own governance.¹⁶⁸ That a stereotype about group identity should preclude an individual from serving on a jury should be anathema in a democratic society. The individual thus singled out not only is declared unfit based on a stereotype, but also is excluded from performing a public duty.¹⁶⁹ Thus, there is the symbolism of equality that service entails and there is the stigma that exclusion casts. Moreover, discrimination may follow from branding such individuals as unfit for jury service. By relying on stereotypes that perpetuate differences about who can serve and who cannot—who can fulfill the obligations of a citizen and who cannot—the peremptory undercuts notions of equality that are fundamental to a democracy.¹⁷⁰ Thus, even if one recognizes that people may have different perspectives based on different life experiences, these differences should not be permitted to serve as a basis for exclusion. For purposes of fulfilling the civic function of jury duty, which is a unique opportunity for self-governance, all eligible citizens must be regarded as equally able to serve. If citizens are improperly excluded from the jury, then they leave the experience with negative views about the fairness of their justice system; they may conclude that a system that engages in such exclusion is not a system that can be fair to them.

2. *Peremptories Convey a Harmful Message to Those Who Do Serve.*—Those who witness the improper exclusion of prospective jurors based on peremptories are also taught harmful lessons. They learn that exclusion based on stereotype and discrimination, which is unacceptable in other walks of public life, is acceptable in the courtroom.¹⁷¹ They may

168. One commentator has observed that jury duty is the only governmental function in which citizens still play a direct role. Tom C. Clark, *The American Jury: A Justification*, in *SELECTED READINGS: THE JURY* 1, 7 (Glenn R. Winters ed., 1971).

169. Of course, one could argue that the for-cause challenge, which also denies an individual the opportunity to serve on the jury, should also be eliminated for the reasons delineated in this section. While that may be true, the counterargument is that the for-cause challenge eliminates only those who say they cannot be impartial or who claim a relationship to the parties or the case, which would interfere with their ability to be impartial. Although I acknowledge that these exceptions undermine my claim about jury service as a badge of citizenship, I am willing to maintain these exceptions as necessary to preserve the appearance of fairness. For further discussion of the for-cause challenge, see *infra* text accompanying notes 284-85.

170. See, e.g., Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 *STAN. L. REV.* 1115, 1141-43, 1160 (1994) (arguing that women's jury service conveys an important message about citizenship, which debate about differences should not obscure).

171. Other forms of government-sanctioned, or at least government-countenanced, discrimination may still persist in the courtroom even if peremptories are eliminated. See, e.g., NINTH CIRCUIT GENDER BIAS TASK FORCE, *supra* note 51, at 49-76 (describing instances of gender discrimination in the courtroom by lawyers, judges, and others). For other studies that have examined and documented gender bias in the courts, see *id.* at E2-E5 (selected bibliography).

also conclude that there is hierarchy, rather than equality, among citizens, with those who are permitted to serve on juries being more highly valued citizens than those who are denied the opportunity.¹⁷²

If, however, all who are competent to serve¹⁷³ are permitted to serve, then they are likely to leave the experience with positive views about the functioning of the jury and the justice system.¹⁷⁴ Thus, the jury can effectively serve, as de Tocqueville and Lieber presciently noted, as a public school enabling citizens to participate in their government in an official, albeit temporary, capacity. At the same time, jury service teaches citizens important lessons about issues of public concern.¹⁷⁵

The jury plays an aspirational role in our collective psyche. We have imbued the jury with several ideals. By drawing its members from the citizenry, the jury embodies the conscience of the community; by relying on citizens rather than professionals, it represents democracy at work; and by adhering to procedures that are fair, the jury is seen as above manipulation, and thus able to make difficult decisions—decisions for which there are often no clear-cut, simple answers. Although the community's sense of the right answer might change over time, the fairness with which the jury's

172. See Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2183 (1993) ("[W]hen certain members of society are barred from jury service, not because of their duties to the community but because of who they are, they are denied the full measure of trust and respect accorded to equal citizens.").

173. To be considered competent for jury service, one must meet several criteria: residence in the judicial district for at least one year; eighteen years or older; citizenship; an ability to read, write, speak, and understand English; no physical or mental impairment that would interfere with jury service; and no charges pending or conviction for a crime punishable by imprisonment for more than one year. 28 U.S.C. § 1865(b) (1988). For the full text of the statute, see *infra* note 250.

174. See LEVINE, *supra* note 83, at 16 ("[M]ost ex-jurors report having positive feelings about their experience" (footnote omitted)); Arthur Austin, *Another Viewpoint on Juries*, NAT'L L.J., Mar. 22, 1993, at 15, 16 (relating that most of the jurors interviewed in the author's survey "agreed . . . that jury service was a positive experience").

175. Such lessons, however, do not always come without costs. For example, Mark Bassett, a juror in the much-publicized McMartin preschool child molestation case—a trial that spanned two and one-half years, cost taxpayers \$15 million, and earned the distinction of being "the longest and most expensive criminal trial in history"—found himself without a job at the trial's close and without the requisite knowledge of technological developments in his field of computers. Beverly Beyette, *A Juror's Trials*, L.A. TIMES, Feb. 1, 1990, at E1. He described the trial as "very draining. You're dealing with extremely emotional issues. And there's no one in the whole world you can talk to and say, 'This is rough,' and why." *Id.* On the whole, he considered the experience a positive one, but one that he could not fully appreciate until he "repair[ed] the damage" and was able to "get [his] life back to normal." *Id.* at E2. Jurors in the trial of Jeffrey L. Dahmer found the emotional toll so great in a trial replete with descriptions of cannibalism and sex with corpses that two psychiatrists were made available to them so that they would have an opportunity "to talk, cry or vent rage." Dirk Johnson, *Dahmer Jurors Tell of Emotional Impact*, N.Y. TIMES, Feb. 17, 1992, at A11. Several of the jurors in the first Rodney King trial described a panoply of feelings they experienced after their verdict: guilt about the riots, fear for their physical safety, and anguish that their verdict was greeted with such opprobrium. Seth Mydans, *Haunted Still, Jurors in Beating Trial Give Warning to Possible Successors*, N.Y. TIMES, Feb. 15, 1993, at A8. One juror, though acknowledging that "[j]ury service is a responsibility," believed that no juror or his family should be subjected to the threats of violence that he and his family had experienced. *Id.*

proceedings are conducted ensures the stability of the institution and the acceptance of its verdict. Thus, the procedures by which the jury is selected and the trial is conducted are inextricably linked to the high esteem in which the jury is held as an institution that embodies some of our noblest ideals.¹⁷⁶

IV. Possible Arguments for Retaining Peremptory Challenges

A. *The Parties' "Right" to Control the Jury*

The elimination of peremptory challenges would require parties to give up a tool from the adversarial arsenal. They would no longer be able to remove from the jury those prospective jurors who cause them general uneasiness.¹⁷⁷ A defendant in a criminal case, for example, would not be able to remove a prospective juror whom she disliked for whatever reason or who she thought disliked her. These reasons may be difficult to articulate because they are based on the prospective juror's "habits and associations,"¹⁷⁸ or upon "grounds normally thought irrelevant to legal proceedings or official action, namely . . . race, religion, nationality, occupation or affiliations."¹⁷⁹ Blackstone defended the peremptory challenge on two grounds. His first defense is:

As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.¹⁸⁰

His second defense is that the defendant should be able to remove a prospective juror who appears to resent the questions during *voir dire* and thus forms a dislike of the defendant.¹⁸¹

176. There is historical evidence that the jury has played this role before. At the time of the debates over the Bill of Rights, for example, "[t]he jury summed up—indeed embodied—the ideals of populism, federalism, and civil virtue that were the essence of the original Bill of Rights." Amar, *supra* note 15, at 1190. The jury, however, may not have always played this role. For example, during Reconstruction, Professor Amar notes that Article III judges with life tenure may have been in a better position to protect the First Amendment rights of politically weak groups, such as African Americans, than local juries of 12 white men susceptible to prevailing prejudices. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1280-81 (1992).

177. It is important to keep in mind that jurors could still be removed for cause. See *infra* text accompanying notes 281-93 (discussing for-cause challenges and the ways in which they would be revised under a regime that eliminated peremptory challenges).

178. *Hayes v. Missouri*, 120 U.S. 68, 70 (1887).

179. *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

180. 4 WILLIAM BLACKSTONE, COMMENTARIES *353.

181. *Id.*

Both of these reasons are based on the view that the parties need to believe that they have been tried by a fair jury. Whether the defendant believes that the juror dislikes her initially or has formed an unfavorable opinion of her after her attorney has questioned the prospective juror during *voir dire*, seating such a juror may cause the defendant to believe that she will not receive a fair trial.

A related point is that the peremptory protects the challenge for cause because it permits the attorney to engage in questioning that might alienate the prospective juror.¹⁸² This point is more relevant in state court than in federal court because in the former, the lawyer might conduct the *voir dire*, whereas in the latter, the judge typically undertakes the questioning.¹⁸³ The availability of peremptories means that a lawyer can engage in careful, and perhaps even intrusive, questioning without fearing the wrath of the prospective juror. As a result, a lawyer may persist in her questioning, with the goal of uncovering sufficient bias to justify a for-cause challenge and, in so doing, use her limited number of peremptories carefully.

Many practitioners also believe the peremptory allows them to remove prospective jurors whom they are convinced are biased but who do not meet a judge's standard for a for-cause challenge.¹⁸⁴ Their belief in the prospective juror's bias may be based on a stereotype ("[h]omosexual jurors are generally thought to be sympathetic and thus, pro-plaintiff"¹⁸⁵), or it may arise from a response that the prospective juror has given during *voir dire*. In the latter case, the response may not be so strong as to indicate that the prospective juror cannot serve impartially. However, it may be suggestive enough to allow the lawyer to conclude that another juror would be preferable and that a peremptory is in order. For example, the lawyer may decide that the person is marginally qualified and that another prospective juror would be more qualified.

182. See, e.g., *Swain*, 380 U.S. at 219-20 ("[T]he very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."); *Lewis v. United States*, 146 U.S. 370, 376 (1892) ("Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment." (quoting 4 BLACKSTONE, *supra* note 180, at *353)); see also Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 771 (1992) ("[T]he peremptory challenge provides a margin of protection for challenges for cause.").

183. See *supra* note 139.

184. See WAGNER, *supra* note 155, § 2.06[1], at 2-20 to 2-21 ("[A] party should not be compelled to use a peremptory challenge on a juror who is subject to challenge for cause. Remember as well, that the challenge of a juror for cause which fails, calls for exercising the right of peremptory challenge.").

185. *Id.* § 1.04[13], at 1-25.

Another possibility is that, without peremptories, prospective jurors who hold more extreme views than the average citizen would nonetheless be permitted to serve on the jury. Certainly, the Court accepted this argument when it observed in *Swain* that one of the functions of the peremptory is "to eliminate extremes of partiality on both sides."¹⁸⁶ One effect of increasing the number of jurors with extreme views could be to increase the number of hung juries.¹⁸⁷

Another practical consideration is that the absence of the peremptory challenge might lead to either an extended, or a shortened, *voir dire*. The former might result if lawyers, left with only for-cause challenges, feel the need to persist in their questioning, or to request that the judge do so, so that they can uncover bias sufficient to persuade the court that a for-cause challenge is in order. *Voir dire* might be shortened, on the other hand, if lawyers feel that there is little they can do to elicit information that would meet the high threshold of a for-cause dismissal. Critics of the jury system might lament an extended *voir dire* as yet another expensive feature that will lead to further court backlog. Lawyers are likely to lament a curtailed *voir dire* as yet another example of the movement towards truncating parties' rights and denying lawyers the information required to use their peremptories intelligently.

B. *The Correction of Judicial Error*

Perhaps the most significant effect of eliminating the peremptory challenge would be a structural one: a more limited role for the adversarial process during jury selection and a more prominent role for the judge. Currently, peremptory challenges are exercised by each party's respective lawyers. Whether justified or not, the belief is that, in striking potential jurors, lawyers function in their adversarial capacity to protect the interests of their clients and to secure the jury most sympathetic to the clients' interests.¹⁸⁸ Even if they engage in discrimination in pursuing their

186. *Swain v. Alabama*, 380 U.S. 202, 219 (1965); see *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (quoting *Swain*, 380 U.S. at 219, with approval).

187. This argument assumes that lawyers can identify from the *voir dire* those jurors who hold more extreme views and that these jurors would prevent the jury from reaching a decision by holding fast to their views and refusing to be influenced by what they hear during deliberations. But see KALVEN & ZEISEL, *supra* note 11, at 462 (concluding from a survey of juries and verdicts that "juries which begin with an overwhelming majority in either direction are not likely to hang"). Another assumption is that more hung juries are a bad thing. Hans Zeisel has called the hung jury a "treasured, paradoxical phenomenon." Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971). The hung jury is "treasured because it represents the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority," and it is paradoxical because the hung jury can only be tolerated in "moderation"—"too many hung juries would impede the effective functioning of the courts." *Id.* at 719 n.42.

188. There is little dispute that lawyers strive to obtain for their clients a "sympathetic" jury, one that is "partial" to the client rather than "impartial." See COVER ET AL., *supra* note 41, at 1188

"hunches" about juror sympathy, lawyers believe that doing so is part of their zealous representation. The understanding is that if both sides act in the same way (even if they are acting in a discriminatory way), then justice is served because the adversarial process is at work.¹⁸⁹ Without the peremptory challenge, therefore, lawyers cede some of their power to the judge during jury selection.

Lawyers fear that judges are unlikely to pursue vigorous questioning of prospective jurors.¹⁹⁰ Judges have an institutional bias in seeing that jury selection moves forward as quickly as possible.¹⁹¹ Even under the

("While the theoretical purpose of the *voir dire* is to search for impartial jurors, in practice each side is looking for sympathetic decisionmakers."); LEVINE, *supra* note 83, at 51 ("The use of peremptory challenges is supposed to eliminate people who are biased and leave a batch of open-minded jurors. But lawyers use their prerogatives to try to accomplish just the opposite—a jury packed with sympathizers or at least devoid of antagonists."); KASSIN & WRIGHTSMAN, *supra* note 139, at 50 ("[I]t is no secret that [trial lawyers] strive to obtain not an impartial panel, but a sympathetic one."); Babcock, *supra* note 12, at 551 ("Of course, neither litigant is trying to choose 'impartial' jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased for him." (emphasis in original)); Herald P. Fahringer, "In the Valley of the Blind"—*Jury Selection in a Criminal Case*, 3 TRIAL DIPL. J. 34, 34 (1980) (stating that lawyers desire favorability rather than impartiality in a jury); McEldowney, *supra* note 88, at 274 (noting that through peremptories "defence counsel can rid the jury panel of any juror likely to be unsympathetic to the accused"); Ralph Blumenthal, *Pool of Jurors Is Whittled Down in World Trade Center Bombing Trial*, N.Y. TIMES, Sept. 23, 1993, at B4 (quoting one defense lawyer as saying that "[t]he truth is no lawyer wants a fair jury. He wants a jury biased in favor of his client."); Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1, A29 ("Both prosecutors and defense attorneys attempt to guess how the other will use the 10 peremptory challenges to sculpt a jury of people most inclined to favor one side of the case."); cf. *Swain*, 380 U.S. at 220-21 ("For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.").

As a result, in some high-profile cases, lawyers will turn to investigators, jury specialists, or social scientists and activists to develop a profile of the juror that is most likely to be sympathetic to the case, so that the lawyer can search for such jurors during jury selection. See, e.g., Schulman et al., *supra* note 164, at 39-41 (noting that defense attorneys relied on a team of social scientists and activists that analyzed background characteristics to try to predict which jurors were most likely to be sympathetic to the defendants). See generally *supra* note 161.

189. Clearly, the adversarial process does not eliminate discrimination. The case of African Americans provides the starkest example. As cases from *Swain*, 380 U.S. at 202, through *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), demonstrate, African Americans have been eliminated from the petit jury by virtue of the peremptory for decades, in spite of (or perhaps because of) the adversarial process.

The view that the adversarial process yields a panel of neutral citizens has been described by one researcher as "more a myth than a reality." GORDON BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 23 (1977). Others have noted that the resulting panel "is probably more skewed in a particular direction than was the full panel that preceded the *voir dire*." KASSIN & WRIGHTSMAN, *supra* note 139, at 56.

190. See KASSIN & WRIGHTSMAN, *supra* note 139, at 52 (asserting that lawyers "argue that only they are familiar enough with their cases, skilled enough in the art of asking questions, and motivated enough by the demands of their role as advocates, to conduct an effective examination"); Babcock, *supra* note 12, at 549 ("[E]ven if the judge is willing to probe deeply into some issue, he will seldom go as far as counsel would.").

191. See Babcock, *supra* note 12, at 546 ("[I]n the name of efficiency, many courts curtail the number and kinds of questions that can be asked.").

current system, judges try to rehabilitate prospective jurors by asking if they can be impartial, and if they answer affirmatively, they are deemed acceptable from the court's point of view.¹⁹² Judges also assume an institutional role of neutral arbiter; they might find it unseemly to ask probing, and potentially intrusive, questions of prospective jurors during *voir dire*. Finally, lawyers worry that they would be turning over their power to select jurors to a decisionmaker who has his own biases, and those biases may be difficult for lawyers to challenge and for appellate courts to review. For all these reasons, lawyers are unlikely to want to give up any control over jury selection, and judges are unlikely to want to assume additional duties and make additional decisions that carry the potential for reversal.

C. *The Loss of Tradition*

The peremptory has always been part of our jury tradition, and some may feel reluctant to abandon that tradition because they believe it has served us well. The peremptory was imported from England along with the jury. In the American colonies, as in the English courts, the sheriff often chose jurors who were sympathetic to the Crown.¹⁹³ A defendant could challenge peremptorily or for cause.¹⁹⁴ A for-cause challenge could be exercised on the grounds of specific bias—for example a familial tie or economic relation to one of the parties—but not on the grounds of general bias, such as attitudes or political views.¹⁹⁵ The English courts and, consequently, the early American courts held the view that jurors should not be questioned about their political beliefs and biases because they, after all, were not the ones on trial.¹⁹⁶

The Court's reluctance to abandon the peremptory serves as a good illustration of our adherence to tradition. The Court, while recognizing that the peremptory is not mandated by the Constitution¹⁹⁷ and has been used in detrimental ways in the past, has nevertheless long supported the

192. See, e.g., *United States v. Torres*, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) (Transcript of jury selection). Even though Judge Knapp bent over backwards during jury selection in the *Torres* case (as a result of the defendant's refusal to be assisted by counsel and to be present in the courtroom) and seemed to excuse any juror who gave any type of reason why he or she could not serve, *id.* at 55-68, Judge Knapp still asked prospective jurors if they could be impartial, and upon receiving an affirmative response, he allowed them to serve. *Id.* at 70-71, 74, 77, 79, 83, 89, 91, 96, 98.

193. See HANS & VIDMAR, *supra* note 89, at 35 (describing the Crown's use of "every means possible to secure convictions" once trials with increasing political significance began to appear in the colonial courts).

194. *Id.*

195. See *id.* (discussing how in the 1696 trial of Peter Cook, the court disallowed the defense's questioning of potential jurors about their political beliefs and general biases against Catholic supporters like Cook).

196. *Id.*

197. See *infra* note 380.

peremptory. In *Swain*, the peremptory was lauded as “a necessary part of trial by jury”¹⁹⁸ and “one of the most important of the rights secured to the accused.”¹⁹⁹ It was praised both for its “very old credentials” and for “its actual use and operation in this country.”²⁰⁰ The Court did acknowledge, albeit haltingly, that if prosecutors were using peremptories to exclude African American men from the petit jury in case after case, then “it would appear that the purposes of the peremptory challenge are being perverted”;²⁰¹ however, the Court was not convinced that prosecutors were acting in such a manner, and accordingly, the evidentiary burden required of a defendant was a difficult one to meet. Twenty years later, as the exclusion of African Americans through the exercise of the peremptory continued to be a problem, the *Batson* Court revised the evidentiary burden required to establish an impermissible use of the peremptory challenge. At that point, the Court recognized the peremptory as a “historical privilege” and one that “traditionally” had been viewed as a “means of assuring the selection of a qualified and unbiased jury.”²⁰² However, it also recognized that the harm from the discriminatory peremptory threatened not merely the defendant or the excluded juror, but the entire community.²⁰³ Indeed, such procedures “undermine public confidence in the fairness of our system of justice.”²⁰⁴

The Court’s diminution of the peremptory and its elevation of the jury can be seen most clearly in *Powers v. Ohio*,²⁰⁵ *Edmonson v. Leesville Concrete Co.*,²⁰⁶ and *Georgia v. McCollum*.²⁰⁷ In all of these opinions the Court maintained a role for the peremptory, but reserved its highest praise for the jury and recognized that the latter can no longer be compromised by the former. In his opinion in *Powers*, Justice Kennedy crafted an elegant paean to the jury, beginning with quotations from Chief Justice Taft and Alexis de Tocqueville and continuing through the Court’s jury jurisprudence. He described jury service as “preserv[ing] the democratic element of the law”²⁰⁸ and as “a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.”²⁰⁹ He also fully delineated the manifold harms resulting from discriminatory peremptories: including the harm to the excluded juror, who

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

199. *Id.* (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

200. *Id.* at 212.

201. *Id.* at 224.

202. *Batson v. Kentucky*, 476 U.S. 79, 91 (1986).

203. *Id.* at 87.

204. *Id.*

205. 499 U.S. 400 (1991).

206. 500 U.S. 614 (1991).

207. 112 S. Ct. 2348 (1992).

208. *Powers*, 499 U.S. at 407.

209. *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting)).

is denied "a significant opportunity to participate in civil life"; the harm to the defendant, who is to be tried in a proceeding in which the "fairness" is "in doubt"; and the harm to the jury and the justice system because the integrity of both have been called into question.²¹⁰ In these opinions, the Court moved away from extolling the virtues of the peremptory and focused instead on the harms of discriminatory selection and the importance of the jury.²¹¹ Although the Court did not abandon the peremptory,²¹² its defense of the peremptory became more restrained and its recognition of competing concerns became more pronounced. As the Court concluded in *Edmonson*, "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution."²¹³

V. What Is at Stake

A. Competing Visions

Although the Court is still trying to preserve some role for the peremptory,²¹⁴ it will eventually have to confront whether the peremptory

210. *Id.* at 409, 411-12. The same emphases can be found in *Edmonson* and *McCullum* as well. For example, in *Edmonson*, the Court acknowledged that it had recognized, in the past, the "value of peremptory challenges . . . , particularly in the criminal context," but that "there is no constitutional obligation to allow them." *Edmonson*, 500 U.S. at 620. It then described the harms that would ensue if race-based peremptories were permitted, including the harm to the excluded juror, the harm to the court proceedings ("where the law itself unfolds") and the harm to "the integrity of the judicial system." *Id.* at 628. The Court explained that the harms it identified in *Powers* were not limited to the criminal sphere and that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Id.* at 630.

Similarly, in *McCullum*, the Court paid obeisance to the peremptory, *McCullum*, 112 S. Ct. at 2358 ("We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice."), but clearly emphasized the harms that the discriminatory peremptory can have on the excluded juror, the defendant, and the judicial system at large. *Id.* at 2353 (lamenting "the harm done to the 'dignity of persons' and to the 'integrity of the courts'" (quoting *Powers*, 499 U.S. at 402)).

211. The structure of the opinions reflects this shift as well. In *Swain*, for example, the Court commenced its opinion with an extended discussion of the history of the peremptory in an effort to ground this procedure in tradition if not in the Constitution. *Swain v. Alabama*, 380 U.S. 202, 212-22 (1965). In contrast, *Powers* begins with an extended discussion of the history of the jury and the fundamental role it has played in the sustenance of a democracy. *Powers*, 499 U.S. at 406-08.

Chief Justice Burger made a similar observation about the majority's opinion in *Batson*: "Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a violation of the Equal Protection Clause." *Batson v. Kentucky*, 476 U.S. 79, 121-22 (1986) (Burger, C.J., dissenting).

212. Even as the Court further diminished the scope of the peremptory in *J.E.B.*, it still took care to try to preserve the peremptory: "Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges." *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1429 (1994).

213. *Edmonson*, 500 U.S. at 630.

214. See *supra* note 212.

should be abandoned. For each of the main arguments offered by those who want to retain peremptories, there is a counterargument; however, a disputation is unlikely to persuade when what is at stake are competing visions of the roles of the jury.

Without question, if peremptories are eliminated, parties will have lost some means of controlling who is on their jury. Without peremptories, parties might experience greater unease about who is sitting in judgment of them and might believe that some jurors cannot be fair, even though the jurors claim they can be. Sometimes parties' unease may be attributed to benign reasons, but sometimes their unease may be the result of distrust, simply because the juror's background differs from their own. One response to parties is that these misgivings might become less pronounced over time as parties become more accustomed to jury selection without peremptories. Another response is to recognize that while party satisfaction is important, it has not always prevailed. For example, when parties have reservations about a prospective juror simply because they believe that that juror, based on race or gender, will be unable to decide their case fairly, they are not able to assuage their misgivings by striking such a juror for those reasons. When parties were permitted to strike prospective jurors based on race or gender, there were costs to the jurors and the jury system; these same costs are at issue when other groups are excluded as well.

Without peremptories, the decision about which prospective jurors can serve would be left entirely in the hands of the judge. Undeniably, lawyers would lose the check they now exercise on a judge's discretion. One justification for this structural shift, however, is that lawyers have already created a structural shift on their own; they have transformed jury selection from an exercise in selecting an impartial jury to an exercise in selecting a favorable jury, all in the name of the adversarial system.²¹⁵ They have used peremptories to strike prospective jurors based on reasons legitimate and illegitimate simply because their goal is to win. Institutionally, they are given little information during *voir dire* on which to base their decision about juror impartiality, and even when they are given guidance about reasons that are permissible and reasons that are not, they have often attempted to circumvent the courts by casting illegitimate reasons in the guise of legitimate ones.

Finally, the abandonment of the peremptory would inevitably mark a break with tradition, and those who support the peremptory argue that this is a tradition that has served us well. Those who argue adherence to

215. See, e.g., KASSIN & WRIGHTSMAN, *supra* note 139, at 52 ("[O]ne cannot help but be struck by the degree to which lawyers use the *voir dire* to subvert the impartial juror ideal."); Dale Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965) (concluding that abuse of *voir dire* by attorneys is prevalent); see *supra* note 188 and accompanying text.

tradition, however, fail to acknowledge that both the peremptory and the jury have changed over time and that adherence to tradition may not provide an adequate response to those changes.²¹⁶ The peremptory, which was once a device to exclude loyalists to the Crown, has been transformed into a mechanism for excluding prospective jurors based upon stereotypes. The jury, once a preserve of white, male property owners,²¹⁷ now has the potential to reflect more closely than ever before our heterogeneous society.²¹⁸ The heterogeneous jury is a worthy goal in a heterogeneous society such as ours, and the perversion of the peremptory to exclude people from the jury based on their race, gender, ethnicity, religion, or any other category, is inconsistent with that vision, as well as with the purpose once served by the peremptory.

At heart, however, are competing visions of the jury. Proponents of the peremptory see the jury as a means of safeguarding the parties' rights, particularly in the criminal context. Under a parties' rights' view of the jury, any curtailment of the peremptory would be cutting back on the protections afforded to a party. The elimination of the peremptory would mean that the parties would lose control over selecting jurors to sit on the jury, and as a corollary, they might be judged by those whom they are convinced, however irrationally, would be unable to judge them with an open mind. Nor would they have a check on the judge's discretion; rather,

216. What William Forsyth said about English law over 100 years ago is equally applicable to the peremptory in this country today:

It has too long been the disgrace of the English law that it pertinaciously adheres to forms which are inconsistent with truth. Nor can any reason be assigned for doing so, except the unsatisfactory one, that the falsehood deceives nobody. But surely it is better to make the form correspond with the reality, and not accustom ourselves to the use of language which is either unmeaning or untrue, and in some cases both.

FORSYTH, *supra* note 158, at 141.

217. Alschuler & Deiss, *supra* note 83, at 877-78. The jury in England has also become more heterogeneous with the abolition of the property requirement and the lowering of the age of eligibility for jury duty. BALDWIN & MCCONVILLE, *supra* note 83, at 96; *see also* McEldowney, *supra* note 88, at 281 ("The property qualification has been abolished and jurors are chosen from the electoral roll. Jury service has now become a citizen's right as well as his duty."). John Baldwin and Michael McConville, writing in 1979, noted the change: Jurors were more likely to be younger and from the working class than in the past; thus, Lord Devlin's description of the British jury as "predominantly male, middle-aged, middle-minded and middle-class" was no longer as apt. BALDWIN & MCCONVILLE, *supra* note 83, at 94 (quoting SIR PATRICK DEVLIN, TRIAL BY JURY 20 (Fred B. Rothman & Co. 1988) (1956)).

218. BALDWIN & MCCONVILLE, *supra* note 83, at 94 (remarking that juries are more heterogeneous today than in the past). On the jury's capacity to evolve over time, *see* Glasser v. United States, 315 U.S. 60, 85-86 (1942) ("Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."); HANS & VIDMAR, *supra* note 89, at 32 ("Even today, the jury is not a static institution but one which continues the process of gradual evolution."); and *id.* at 43 ("[T]he jury is in a process of continual evolution.").

they would have to accept random jury selection. The only exception would be provided by the for-cause challenge exercised by the judge.²¹⁹

In contrast, I focus on the public roles that a jury performs. Under this view, the peremptory threatens the jury on several levels: First, it undercuts the jury's capacity to make public value decisions, particularly in difficult cases in which a range of perspectives is required; second, it undermines citizens' belief in the fairness of the justice system and their willingness to accept its verdicts, particularly in emotionally charged, high-profile cases; and third, it teaches negative lessons about citizenship, such as the acceptability of stereotypes as the basis for the performance of a civic duty. For the jury to be perceived as fair, I place a high value on having a selection process that is free from discrimination, exclusion based on stereotyping, and other indicia of unfairness. To allow any peremptories is to compromise the integrity of the jury, to limit its capacity to articulate public values, and to diminish the public's willingness to accept its verdicts.²²⁰

Admittedly, the parties may feel less comfortable with the jury, but the parties have a right to an impartial jury,²²¹ which the elimination of the peremptory will not compromise. They do not, however, have a right to a sympathetic jury of their own creation, which the peremptory currently provides for them.

B. *Why the Balance Should Shift*

Why should the balance shift from a view of the jury as the protector of parties' rights to a view of the jury as a public institution that plays a unique role in shaping the attitudes and views of citizens toward each other and toward their justice system? In part, this shift has already begun, as witnessed by the Court's recent Fourteenth Amendment jury cases—*Batson*, *Powers*, *Edmonson*, *McCullum*, and *J.E.B.* And in part, this shift should continue to occur because of who can now serve on the jury and what that service signifies for all citizens. As the Court explained in *Taylor v. Louisiana*,²²² “[c]ommunities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.”²²³ We need to continue to acknowledge the shift, just as the Court had begun to do in 1975.

219. For a discussion of ways in which the for-cause challenge might need to be revised slightly in a regime without peremptories, see *infra* subpart VI(C).

220. For these reasons, even a limitation on the number of peremptories exercised by each side would be unacceptable. Although such a proposal would limit the extent to which peremptories may skew the composition of the jury, it would still permit exclusion based on stereotype and deny access to a civic function that is supposed to be available to all citizens.

221. See *infra* text accompanying notes 376-97.

222. 419 U.S. 522 (1975).

223. *Id.* at 537.

1. *Who Can Now Serve on Juries.*—In 1880, the Court struck down a West Virginia law that barred African American men from serving on juries.²²⁴ Even after *Strauder v. West Virginia*, however, African American men were precluded from jury service by virtue of the peremptory. More than eighty years after *Strauder*, the issue of discriminatory peremptories was brought before the Court. In *Swain v. Alabama*,²²⁵ Robert Swain was tried and convicted of rape by an all-white male jury.²²⁶ He argued that he had a right to be tried by a jury from which African American men had not been systematically excluded by the prosecutor's exercise of peremptories. The Court agreed that peremptories could not be used in a discriminatory manner, but declined to conclude that the prosecutor had acted in such a manner in Swain's case.²²⁷ The Court fashioned a test that would prove to be difficult for any defendant to meet: It was not enough for the defendant to show that the prosecutor had exercised race-based peremptories in his case; rather, he had to show that the prosecutor had done so in a number of cases over time.²²⁸ Twenty years later, the Court returned to the issue in *Batson v. Kentucky*²²⁹ and revised the test so that it no longer required such a "crippling burden of proof."²³⁰ After *Batson*, the defendant could establish that the prosecutor had used discriminatory peremptories by focusing on the evidence in his case alone.²³¹ What is significant about *Batson* is not simply that the evidentiary burden required by *Swain* was held to be too severe, but more importantly, that the exclusion of African Americans from the jury still persisted.

The story of the exclusion of all women from the jury has much in common with the exclusion of African American men.²³² As one commentator observed, "[a]lthough jury duty has long been viewed as an important aspect of citizenship, for most of American history, jury service

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

225. 380 U.S. 202 (1965).

226. *Id.* at 203.

227. *Id.* at 222-26.

228. *Id.* at 227.

229. 476 U.S. 79 (1986).

230. *Id.* at 92.

231. *Id.* at 95.

232. I am using the categories of "African American men" and "all women" as separate categories because the law did so for purposes of jury service. Too often, we use these categories as if all African Americans are men and all women are white. See Crenshaw, *supra* note 126, at 139 n.3 ("Although it may be true that some people mean to include Black women in either 'Blacks' or 'Women,' the context in which the term is used actually suggests that often Black women are not considered."). Here, however, African American women were excluded from jury service by virtue of their gender. Once women were permitted to serve and once *Batson* had been decided, then African American women could challenge their exclusion through peremptories based upon their race, but not their gender.

was restricted to men.”²³³ Women were excluded from service on federal juries if the state in which the federal court was located excluded women from serving on juries in state court.²³⁴ The Nineteenth Amendment,²³⁵ though it conferred on women the right to vote, was silent on the other badge of citizenship, the right to serve as a juror.²³⁶ In 1946, in *Ballard v. United States*,²³⁷ the Court, relying on its supervisory powers, dismissed an indictment returned by a grand jury from which women had been systematically excluded.²³⁸ The Court recognized the potential loss of perspectives if women were systematically excluded from the jury.²³⁹ In the Civil Rights Act of 1957,²⁴⁰ Congress created federal jury service qualifications independent of state jury qualifications, thus making women eligible for federal jury service even in states that still barred women from serving on state juries. In the 1960s, however, at approximately the same time that *Swain* was decided, women, though officially permitted to serve on juries, were still being excluded by means such as affirmative registration. In *Hoyt v. Florida*,²⁴¹ for example, the Court rejected Gwendolyn Hoyt’s Fourteenth Amendment claim that she had a right to be tried by a jury from which women had not been systematically excluded by virtue of affirmative registration.²⁴² It was not until 1975 that the Court overturned its earlier ruling and agreed that the fair-cross-section requirement of the Sixth Amendment required that women, along with men, be included in the jury lists from which the venire was drawn.²⁴³ Until *J.E.B.*, gender-based peremptories were available as another means to exclude women from jury service.

233. Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN’S L.J. 59, 59-60 (1986).

234. *Hoyt v. Florida*, 368 U.S. 57, 60 n.2 (1961) (“From the First Judiciary Act of 1789 to the Civil Rights Act of 1957—a period of 168 years—the inclusion or exclusion of women on federal juries depended upon whether they were eligible for jury service under the law of the State where the federal tribunal sat.” (citations omitted)). Section 29 of the First Judiciary Act of 1789 provided that “jurors shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state . . .” 1 Stat. 88; see *Taylor v. Louisiana*, 419 U.S. 522, 535-37 (1975) (recounting the history of women’s exclusion from federal jury service).

235. The Nineteenth Amendment provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” U.S. CONST. amend. XIX.

236. See *Brown*, *supra* note 172, at 2182-204 (discussing cases in which some state courts took an “emancipatory” view of suffrage, which included jury service for women, and other state courts took an “incremental” view of suffrage, which limited women to the right to vote only).

237. 329 U.S. 187 (1946).

238. *Id.* at 189-90.

239. *Id.* at 193-95.

240. Pub. L. No. 85-315, § 152, 71 Stat. 634, 638 (codified as amended at 28 U.S.C. § 1861 (1988)).

241. 368 U.S. 57 (1961).

242. See *id.* at 58 (noting that Florida required women, but not men, to register with the court clerk to qualify for jury service).

243. *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975).

With legal impediments removed and other barriers at least revealed, African American men and all women can serve on juries. As each history of exclusion reveals, this right was hardly a given, and even when given, there were still obstacles to its exercise. The point is simply that the story of who can serve on an American jury has changed, and this change has been fairly recent. For the first time in our history, the jury can truly reflect our heterogeneous society. The problem is that the transformation is still incomplete; the peremptory stands in the way. As *Batson* and *J.E.B.* signal, both African American men and all women are still being excluded from jury service by means of the peremptory. Although they were excluded from jury service by law and then by other means such as peremptories, they are not the only groups who have been the subject of such exclusions. Peremptories have been directed against those who understand Spanish,²⁴⁴ those with a particular religious affiliation,²⁴⁵ and those with Irish last names,²⁴⁶ to name just a few.

2. *Political Symbolism of Jury Service.*—In view of our history of excluding groups from the jury, jury service takes on added meanings. Jury service represents not simply acts of deliberation and judgment, but also participation in one's governance as part of what it means to be a citizen in a democracy.²⁴⁷ One African American, a sanitation worker named Mr. Cox, was called to serve on a jury in federal court sometime between 1954 and 1955. He recalled it as being

one of the proudest moments of my life. Ever since I was a little kid . . . I've had a desire to serve. . . . Of course, [black] people [we]re not permitted to serve I've read many books on the jury and when I was first called to serve I went to the library and read up on the jury system and what a fine institution it is. . . .

244. *E.g.*, *Hernandez v. New York*, 500 U.S. 352, 363-70 (1991); *see* *Pemberthy v. Beyer*, 19 F.3d 857, 862 (3d Cir. 1994) (holding that peremptories exercised against Spanish-speaking prospective jurors were not exercised on the basis of ethnicity); *Recent Cases*, 108 HARV. L. REV. 769 (1995) (criticizing *Pemberthy*).

245. *See, e.g.*, *State v. Davis*, 504 N.W.2d 767, 768 (Minn. 1993) (permitting religion-based peremptories), *cert. denied*, 114 S. Ct. 2120 (1994); *Casarez v. State*, No. 1114-93, 1994 WL 695868, at *22 (Tex. Crim. App. Dec. 14, 1994) (holding that peremptories may not be exercised on the basis of religion); *see infra* note 332.

246. *See Ethnic Peremptories Reverse Conviction*, NAT'L L.J., Nov. 28, 1994, at A10 (reporting cases in which prosecutors impermissibly exercised peremptories when they struck prospective jurors with Irish-sounding names); *Jury and Jurors: Peremptory Challenges—Ethnicity*, MASS. LAW. WEEKLY, Nov. 21, 1994, at 18, available in LEXIS, Mass Library, MALAWR File (affirming the appellate court's decision, the Massachusetts Supreme Judicial Court concluded that the prosecution, in exercising peremptories against jurors with Irish-sounding surnames, "failed to satisfy its burden of demonstrating that the challenges were not based on the jurors' membership in a discrete ethnic group").

247. *See supra* subpart III(D).

When I got my summons . . . I got a sense of really belonging to the American community.²⁴⁸

Just as voting does not simply describe the act of casting a ballot, but is also an exercise of one's right and responsibility as a citizen, jury service also has both practical and symbolic implications. The political symbolism is particularly striking for those who have been denied the right for so long, but the significance of jury service is not limited to only those who have been denied.²⁴⁹ Those who have always been able to serve as jurors must now share the responsibility and power and recognize as equals those who have been previously excluded.

VI. Re-Imagining Jury Selection

A. Assumptions

What would jury selection look like without the peremptory challenge? The answer starts with the assumption that the individual is competent to serve if he or she meets the criteria established by statute.²⁵⁰ This proposition has long been accepted in theory, but not in practice. In *Thiel v. Southern Pacific Co.*,²⁵¹ the Court explained:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective

248. Dale W. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 26.

249. Some commentators would limit *Batson* only to those groups that have suffered from exclusion or discrimination in the past. See, e.g., Babcock, *supra* note 131, at 1161-62 & n.78 (suggesting that *Batson* be extended to peremptories exercised against women); Tanya E. Coke, Note, *Lady Justice May be Blind, But Is She a Soul Sister?: Race Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 365-68 (1994) (proposing that *Batson* be limited to minority jurors).

250. Current federal law establishes that an individual is "qualified to serve on grand and petit juries in the district court unless" that individual:

- (1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
- (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;
- (3) is unable to speak the English language;
- (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
- (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

28 U.S.C. § 1865(b) (1988).

251. 328 U.S. 217 (1946).

jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. *Jury competence is an individual rather than a group or class matter. . . . To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.*²⁵²

Although *Thiel* involved the deliberate and intentional exclusion of daily laborers from the jury list by the clerk of the court and the jury commissioner, rather than their exclusion from the petit jury by lawyers through the exercise of peremptory challenges, the effect is the same: the systematic and deliberate exclusion of jurors based upon group identity. Wage earners, like women, Catholics, Hispanics, or the elderly,

constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate²⁵³

Despite the Court's admonition almost fifty years ago that group-based exclusion is not to be condoned,²⁵⁴ such exclusion persists today with use of the peremptory.

Today, jury selection seems to begin with the assumption that prospective jurors are biased in some way or another, and it is up to the jurors to prove themselves unbiased in order to be selected as jurors.²⁵⁵ It is

252. *Id.* at 220 (emphasis added) (citation omitted); see *Ballard v. United States*, 329 U.S. 187, 192-93 (1946) (citing *Thiel*, 328 U.S. at 220, with approval). In *Glasser v. United States*, 315 U.S. 60 (1942), the Court noted that federal jurors could not be selected from lists designed by private organizations, no matter how benign their purposes, because such actions would compromise the representativeness of the jury. *Id.* at 86. The Court identified the jury's representativeness as fundamental to the jury system: "[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class." *Id.* The Court committed itself to safeguarding the jury's representativeness: Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.

Id. Although *Glasser* involved the compilation of jury lists, and not the use of peremptories, the characteristics of the jury that are to be safeguarded should be applicable at either stage.

253. *Thiel*, 328 U.S. at 223 (footnote omitted).

254. See *Cassell v. Texas*, 339 U.S. 282, 286 (1950) (plurality opinion) ("Jurymen should be selected as individuals . . . , and not as members of a race.").

255. Jury selection in the O.J. Simpson case provides an extreme example of this assumption. Prospective jurors who received summons for jury duty had to complete a questionnaire that consisted

also up to the lawyers to discover and disclose jurors' biases and prejudices. In my view, jury service should begin with the assumption that the individual who satisfies the statutory criteria is competent to serve and should not be excluded from jury service unless there is an individual basis for disqualification.²⁵⁶ Certainly, this is the presumption in England,²⁵⁷ where jury selection is virtually random. Barristers do not question jurors about their biases during *voir dire*.²⁵⁸ According to a Practice Direction issued by the Lord Chief Justice in 1973,

[a] juror should be excused if he is personally concerned in the facts of the particular case, or closely connected with a party to the proceedings or with a prospective witness. . . . It is contrary to

of 294 questions. DAILY JOURNAL COURT RULES SERV., THE O.J. SIMPSON JUROR QUESTIONNAIRE (1994). Prospective jurors underwent intense scrutiny in order to prove themselves unbiased enough to serve. See *id.* at 44, 46, 52 (asking questions such as "How important would you say religion is in your life?"; "Have you ever provided a urine sample to be analyzed for any purpose?"; "Do you believe it is immoral or wrong to do an amniocentesis to determine whether a fetus has a genetic defect?"; and "Have you ever written a letter to the editor of a newspaper or magazine?").

256. For a discussion of revised for-cause challenges under the post-peremptory-challenge regime, see *infra* subpart VI(C).

257. England still has jury trials in criminal cases, but the number of defendants exercising their right to a jury trial is decreasing:

[T]he jury system remains the corner-stone of the criminal trial both in England and in the United States. . . . [E]ven though only a small minority of defendants in criminal trials opt for trial by jury, the right to jury trial is still regarded as fundamental in all cases involving major criminal charges.

BALDWIN & MCCONVILLE, *supra* note 83, at 1 (footnotes omitted).

The civil jury trial in England became less prevalent after World War II, see Edson L. Haines, *The Disappearance of Civil Juries in England, Canada and Australia*, 4 DEF. L.J. 118, 119 (1958) (noting that World War II contributed to an already rapid decline in the popularity of civil jury trials), and was abolished for all intents and purposes by the Court of Appeal in 1966, see *Ward v. James*, 1 Q.B. 273, 295 (1966) ("[I]n personal injury cases trial by jury has given place of late to trial by judge alone, the reason being simply this, that in these cases trial by a judge alone is more acceptable to the great majority of people."); SIR JACK I.H. JACOB, *THE FABRIC OF ENGLISH CIVIL JUSTICE* 157 (1987) (concluding that *Ward v. James* delivered the "final fatal blow" to civil jury trials). There is still a statutory right to jury trial in a few types of civil cases, including actions for libel, slander, malicious prosecution and false imprisonment, or in cases in which a charge of fraud is made against a party. Supreme Court Act, 1981, ch. 54, § 69(1) (Eng.). But according to one writer, "even in these cases the parties forgo their right and are content with a trial by judge alone." JACOB, *supra*, at 158. The loss of the civil jury trial has been lamented as "a serious impairment of the fabric of English civil justice." *Id.* at 159.

258. As Baldwin and McConville observed, "there is no English equivalent of the *voir dire*." Baldwin & McConville, *English Jury*, *supra* note 157, at 135; see also Samuel J. Cohen, *The Regulation of Peremptory Challenges in the United States and England*, 6 B.U. INT'L L.J. 287, 306 (1988) ("English law does not permit litigants to question jurors prior to their selection." (footnote omitted)). One reason that the British might not see a need for *voir dire* is that pretrial publicity is greatly restrained under their system. This explanation, however, is adequate only for the most notorious cases; it does not explain the typical case in which there is little press coverage. More likely, the explanation has to do with what the British perceive as an invasion of privacy: "Many barristers rejected the common American practice of questioning prospective jurors about their background and attitudes, calling it not only useless but basically improper." HANS & VIDMAR, *supra* note 89, at 48.

established practice for jurors to be excused on more general grounds such as race, religion, or political beliefs or occupation.²⁵⁹

As one barrister explained,

I think if I knew what the backgrounds of the jurors were . . . I still wouldn't challenge them. I don't think I would be able to handle the American system, actually . . . because I happen to take the view that whatever one's personal prejudices, the chances are that a juror called to jury service and knowing the weight of responsibility upon him will do his utmost to discard prejudice.²⁶⁰

As a result of the Criminal Justice Act of 1988,²⁶¹ which took effect on January 5, 1989, criminal defendants in England no longer exercise peremptory challenges and the Crown does not generally exercise standbys,²⁶² except in limited circumstances. The British have abolished peremptories and limited standbys so that the jury will reflect more closely the heterogeneity of British society.²⁶³ But even when the British had

259. 1 All E.R. 240 (1973); see BALDWIN & MCCONVILLE, *supra* note 83, at 98 (noting that although jurors may be excused for cause, "the circumstances under which excusals may be granted are circumscribed").

260. HANS & VIDMAR, *supra* note 89, at 49 (quoting Valerie P. Hans, unpublished data (1983)).

261. Criminal Justice Act, 1988, ch. 33, § 118(1) (Eng.); see Judith Heinz, Note, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT'L & COMP. L.J. 201, 217 (1993).

262. "Standing by" is a procedure by which the Crown can reserve judgment on a prospective juror until all other prospective jurors are considered. See McEldowney, *supra* note 88, at 276 ("Crown was not obliged to state the grounds of challenge until the whole panel was gone through."). "In effect the practice of standing by a juror gives the Crown a far wider right of peremptory challenge than that accorded by statute to the defendant." R.J. WALKER, THE ENGLISH LEGAL SYSTEM 509 (6th ed. 1985).

263. See McEldowney, *supra* note 88, at 282. The British have recognized the need for the jury to reflect the growing heterogeneity of British society. See, e.g., *id.* ("As English society becomes more heterogeneous, the power of selecting jurors becomes all the more crucial.").

The U.S. Supreme Court, in comparing the British and American jury systems, has explained that the American system may have a need for peremptory challenges because our "juries here are drawn from a greater cross-section of a heterogeneous society." *Swain v. Alabama*, 380 U.S. 202, 218 (1965). That explanation, however, is far from persuasive, and in fact, the opposite seems more likely to be true—we should not permit the peremptory to interfere with the heterogeneity of the jury so that the jury more closely reflects the heterogeneous nature of our society. Moreover, if peremptory challenges can be used to cut back on the heterogeneous character of the jury, then it puts peremptory challenges on a collision course with the requirement that juries represent a fair cross section of the community.

Canada, like the United States, still permits the peremptory challenge, Heinz, *supra* note 261, at 227, but like England (and unlike the United States), it does not allow for an extended *voir dire* that includes questions about personal biases, *id.* at 206; HANS & VIDMAR, *supra* note 89, at 31. The use of the peremptory and the stand-aside (the Canadian equivalent of the British standby) may explain why aboriginal people and members of other minorities are underrepresented on Canadian juries. ABORIGINAL JUSTICE INQUIRY OF MANITOBA, PUBLIC INQUIRY INTO THE ADMINISTRATION OF JUSTICE AND ABORIGINAL PEOPLE 380, 384 (1991) ("Both the Crown and defence counsel have too many opportunities, through the use of peremptory challenges and stand-asides, to make decisions on the basis of racist or sexist stereotypes.").

peremptories and standbys, the barristers could not question prospective jurors about their views or attitudes and did not view it as their job to look for and expose biases or prejudices.²⁶⁴

Just as federal judges are presumed to be competent to hear a case and must recuse themselves only in a limited set of circumstances,²⁶⁵ prospective jurors who satisfy the statutory criteria also should be presumed eligible to serve and should be disqualified only in a limited set of circumstances.²⁶⁶ Federal judges are presumed to be competent to preside over a case regardless of their race, gender, ethnicity, religion, or other group characteristics, even though parties have, from time to time, tried to use these factors as a basis for recusal.²⁶⁷ On the one hand, federal judges receive legal training and go through a confirmation process that attests to their qualifications and judicial temperament, which might suggest that a comparison between judges and jurors is inappropriate. On the other hand, although the task of putting aside one's personal feelings is a difficult one, whether for judge²⁶⁸ or juror, it is a task that people from all walks of life are expected to perform in their daily jobs.

B. *A Range of Solutions*

If peremptories are eliminated, then how should jury selection be modified, if at all, to accommodate that change? The elimination of peremptories could be a catalyst for rethinking jury selection methods. For example, we could adopt a "quota system," in which people in a community are divided according to group identification, and each group is represented proportionally on the jury. If the community contained a certain number of Catholics, Jews, or Muslims, or Irish Americans, Native Americans, or Asian Americans, then they would be represented proportionally on the jury. Or, we could have "strictly random selection," in which names are drawn randomly from the community, but everyone who is selected has to serve because there would be no mechanisms, such as

264. Likewise, even when defendants were able to exercise peremptories, they were not permitted "to question jurors, for example, as to their occupations or political views." *McEldowney*, *supra* note 88, at 508.

265. 28 U.S.C. § 144 (1988); *id.* § 455 (1988).

266. For a discussion of a revised for-cause challenge, see *infra* subpart VI(C).

267. See, e.g., *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975) (Baker Motley, D.J.) ("[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds."); *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 156-57 (E.D. Pa. 1974) (Higgenbotham, D.J.) (concluding that African American judges should not disqualify themselves from presiding over cases involving racial issues just as white judges are not asked to disqualify themselves on matters of race relations).

268. See *supra* note 159.

challenges for cause or peremptories, for avoiding service. Another possibility would be a "revised for-cause," in which additional reasons for for-cause challenges are made available, but these reasons would still have to be articulated, as they do for all for-cause challenges, and the judge would still remain the final arbiter.

There are at least three criteria by which we should evaluate any method of jury selection based on the assumptions that the jury makes public value decisions, that decisions are most likely to be accepted when the jury is seen as fairly constituted, and that jury duty must be accessible to citizens both because it provides a rare opportunity for direct participation in governance and because it teaches critical lessons about democracy.²⁶⁹ First, jury selection should be conducted without discrimination so that no group is intentionally excluded; second, it should be conducted in a manner that appears to be fair and beyond manipulation; and third, the method chosen should be a practical one.

Among the proposed solutions, the strictly random selection and the quota system fail to satisfy all three of these criteria. The strictly random method does not appear fair because even those jurors who are related to the parties, who are connected to the case, or who say they cannot be impartial, would still be required to serve. A strictly random method does not allow *any* mechanism for the exclusion of jurors, including the for-cause challenge.

The quota method fails to satisfy the "practical" criterion.²⁷⁰ It is an unworkable solution on several levels. First, dividing people according to distinctive groups is a difficult task and one that is likely to seem unfair to, and be divisive within, the community. It would be difficult to agree on which groups are distinctive, how many people belong to them,²⁷¹ and

269. See *supra* Part III.

270. See, e.g., *Holland v. Illinois*, 493 U.S. 474, 500 (1990) (Marshall, J., dissenting) ("[T]his Court's refusal to read the fair-cross-section requirement as mandating a petit jury representing all of the community's distinctive groups is born not of principle, but of necessity, of the recognition that no such requirement could as a practical matter be enforced."); *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986) ("The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury . . ."); *Batson v. Kentucky*, 476 U.S. 79, 85 n.6 (1986) ("[I]t would be impossible to apply a concept of proportional representation to the petit jury . . ."); *Akins v. Texas*, 325 U.S. 398, 403 (1945) ("The number of our races and nationalities stands in the way of evolution of such a conception . . .").

271. The Court has noted this problem as well: "Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society." *Batson*, 476 U.S. at 85 n.6. Two scholars, Professors Albert W. Alschuler and Fred L. Morrison, have noted that the Supreme Court has been reluctant to approve laws or regulations based on racial quotas, particularly when past discrimination has not been established. See David Margolick, *Idea of Jury of Peers Is Questioned: Must a Jury Reflect the Population?*, N.Y. TIMES, Feb. 17, 1992, at A11. Moreover, such classifications would be difficult in "a polyglot culture: Would a grand jury including a native American and a Vietnamese satisfy the standard? How about Chinese-Americans, Filipinos,

how to account for people who see themselves as members of several groups.²⁷² Second, it would require the involvement of the state in a way that is likely to undermine people's faith in the jury system. The state would be placed in the untenable position of deciding how to categorize²⁷³ and count people, and both these processes are easily open to disagreement and manipulation.²⁷⁴ As one writer recently asked in response to the Census Bureau's efforts to categorize his daughter: Is she, as the product of an English father and a Chinese mother, "white" or "Asian," and why must the government decide? She was born in the United States; therefore, it should suffice to call her a "citizen."²⁷⁵ Third, the process of categorizing people would be destructive to our notions of

or people with one black grandparent? And what if others, like homosexuals, women, Italo-Americans or the handicapped, demand similar representation?" *Id.*

272. See *infra* note 276 and accompanying text (discussing ways in which people identify themselves as belonging to multiple groups).

273. The difficulty the federal government has in categorizing people is already apparent when it conducts the census. For example, one man who was listed as white on his birth certificate found himself newly categorized as Hispanic when a Census Bureau worker observed his name, olive-toned skin, and dark hair. Steven A. Holmes, *U.S. Urged to Reflect Wider Diversity in Racial and Ethnic Classifications*, N.Y. TIMES, July 8, 1994, at A18. According to one administrator at the Office of Management and Budget, as the number of ethnic groups in the United States continues to grow, "the current terms are less useful in expressing and depicting the diversity of our nation's population." *Id.* The growing number of interracial marriages will only add to the problem of classification. *Id.* Nor is the process free from political considerations; one change under consideration is to move native Hawaiians from the Asian-Pacific Islander classification to the American Indian category so that they can be eligible for some minority scholarships; however, changes made to satisfy one group "could create problems for others." *Id.* As the assistant division chief for special population statistics at the Census Bureau aptly summed up the problem: "This can be a can of worms." *Id.*

State agencies can also be faulted for the way in which they engage in racial classification. One writer criticizes the policy by which children can be adopted only by parents who share the same race as the child. Julie C. Lythcott-Haims, Note, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531 (1994). She argues that such a policy is harmful because it allows the state to decide how to classify a person by race rather than leaving that decision up to the individual, *id.* at 542; the state tends to limit its classifications to certain races, failing to recognize that people may be multiracial and should not be compelled to abandon part of their racial heritage, *id.* at 541; and it leaves children without parents while the state waits to make a racial match, *id.* at 554-58.

274. See, e.g., *New York City v. Department of Commerce*, 34 F.3d 1114, 1129 (2d Cir. 1994) (holding that the Secretary's decision not to adjust the 1990 census for undercounting of minorities violates the Fifth Amendment's equal protection guarantee unless the government can show that undercounting is essential to achieve a legitimate governmental objective).

275. See John Derbyshire, *Which Box to Check? White, Asian or None of the Above?*, N.Y. TIMES, July 17, 1994, at 16 (letter to the editor) ("Perhaps [the United States] should consider following the example of South Africa and get out of the racial classification business altogether."). As the federal government prepares for the year 2000 census, several issues are being debated. One issue is whether existing racial categories should be modified, and another more fundamental issue is whether "it is proper for the government to classify people according to arbitrary distinctions of skin color and ancestry." Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 46. There are some who argue that there should be a new category called "multiracial" to reflect a combination of heritages, *id.* at 47-48, while others argue that such a category would diminish all existing categories, *id.* at 54-55. Still others claim that a government agency should not be in the business of defining racial and ethnic categories at all. *Id.* at 55.

the full equality of all citizens and jury service based on individual competence and would involve the jury in teaching lessons that undermine democratic ideals. As a related matter, such a process would necessarily be reductionist because we are not defined only by our gender or ethnicity or class or race, but by a multiplicity of attributes,²⁷⁶ and any attempt to have a representative jury according to some factors may distort others. And finally, a quota system may politicize the process of jury deliberations as each juror is faced with the quandary of whether to vote as her conscience dictates or as a member of some group she is supposed to "represent" in some undefined sense.²⁷⁷

One commentator has proposed a modified quota system as a way of ensuring that minorities are represented on the jury.²⁷⁸ However, even

276. African American women, for example, have argued that they should not have to choose whether they are African Americans first or women first, but should be able to recognize themselves as "multiplicitous." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990); see BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 15 (1984) (arguing that black women have a "special vantage point" on the problems of sexism and racism because they experience both); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 122-23 (1988) (arguing that the history of black women is not simply the intersection of women's history and black history, but must be understood as distinct from both); Crenshaw, *supra* note 126, at 139 (contrasting the "multidimensionality of Black women's experience with the single-axis analysis that distorts these experiences" and that perpetuates "the tendency to treat race and gender as mutually exclusive categories of experience and analysis"); Harris, *supra*, at 601 ("Black women are not white women with color." (quoting Barbara Omolade, *Black Women and Feminism*, in *THE FUTURE OF DIFFERENCE* 247, 248 (Hester Eisenstein & Alice Jardine eds., 1980))); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 121 (1989) (recognizing that women of color "find it difficult, if not impossible, to separate experiences they attribute to their gender from experiences they attribute to their race, class or other characteristics"). Similarly, Margaret Montoya describes the experience of having to assume a mask so that she would fit into the dominant culture and not be exposed as an "Outsider": "I do not have separate masks for my female-ness and Latina-ness. The construction of my public persona involves all that I am. My public face is an adjustment to the present and a response to the past." Margaret E. Montoya, *Mascaras, Trenzadas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1, 13 (1994).

Race and ethnicity are not the only characteristics that influence how one sees the world and how one is, in turn, seen by it. See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 213 (1989/1990) (faulting feminism for focusing on white heterosexual women); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 39-40 (1990) ("[I]n addition to race, class, and sexual preference, . . . age, physical characteristics . . . , religion, marital status, the level of male identification . . . , birth order, motherhood, grandmotherhood, intelligence, rural or urban existence, . . . sources of income (self, spouse, or state), degree of poverty or wealth, and substance dependency . . . shape how individual women experience the world.").

277. VAN DYKE, *supra* note 12, at 18 ("[A] juror selected under this [quota] system might feel that she or he is filling some predetermined 'slot' and might attempt to give the view generally associated with those demographic characteristics rather than the juror's personal feelings about the case."). Jon Van Dyke identified an additional problem as well: "The jurors might find it harder to work together as a group because they may be more conscious of their identified differences than the much stronger common bonds that unite them as people." *Id.*

278. See Nancy J. King, *Racial Jurymaning: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (suggesting that "courts analyze

a modified quota system would raise problems similar to those raised by the quota system. For example, if we insist that racial minorities be represented proportionally on every jury, then why not other groups as well? Should not their perspectives and views be represented and considered by the jury? Moreover, a focus on race alone “would likely distort the jury’s reflection of other groups in society, characterized by age, sex, ethnicity, religion, education level, or economic class.”²⁷⁹ By differentiating among groups, the modified quota system appears to favor some groups over others, thus undermining our view of the jury as a fairly selected body.²⁸⁰

Only the revised for-cause system satisfies all three criteria. Under such a system, jurors are still chosen by random selection, but unlike strict random selection, there is a mechanism for excusing jurors who could not be impartial, and thus, it would satisfy the criterion of fairness. Such a system would also be nondiscriminatory because it eliminates peremptories. This method would lead to more representative juries than we currently have, but would avoid the practical difficulties of the quota method. The revised for-cause method presents a middle ground: On the one hand, it is not as ambitious as the quota system, which would be fully inclusive but unworkable; on the other hand, it is not as laissez-faire as the current system, which allows discrimination to flourish under the guise of the peremptory. The revised for-cause system presents a middle ground in another way—it does not guarantee any particular result as to the composition of each and every jury as does the quota method, but it does provide a fair and open process by which jurors are selected, unlike the current peremptory challenge method.

C. *The Revised For-Cause Challenge as the Preferred Method*

Without the peremptory, it seems appropriate to revise the for-cause challenge slightly. Of course, eliminating the peremptory does not *require* any adjustments to the for-cause challenge; it is simply that one change to the system makes it likely that other slight adjustments might be needed as well. The revision I propose does not mean expanding the for-cause challenge so much that it essentially becomes a peremptory, but it does mean revising the for-cause challenge in at least two ways: first, by granting for-cause challenges more often, and second, by adding an additional ground for dismissal, which might be described as individual conduct or behavior.

which race-conscious reforms are reasonably necessary to maintain public confidence in the impartiality of jury proceedings by considering [six circumstances]”).

279. *Holland v. Illinois*, 493 U.S. 474, 512 (1990) (Stevens, J., dissenting).

280. *See supra* subpart III(C).

As to the first point, federal judges are typically quite sparing in granting a for-cause challenge because they know that peremptories are available. Without peremptories, however, judges will have to recognize that they might have to grant for-cause challenges more frequently than they currently do. Even if revised for-cause challenges become a more common occurrence, however, the essential nature of the for-cause challenge would not change: a reason must always be given; the judge must either accept or reject the reason, and the reasons that are deemed acceptable will still be narrowly drawn.

Jury selection without the peremptory and with the revised for-cause challenge would proceed as follows. Names of prospective jurors would still be randomly drawn from as many diverse lists as possible.²⁸¹ The assumption would be that all prospective jurors who meet the statutory requirements for jury service should be permitted to serve.²⁸² Counsel may move to strike a prospective juror for cause, but would have to give a reason, as is the current practice, and the judge would decide based on counsel's reason, after asking additional questions, or after conducting a hearing.²⁸³

In the past, the Court has provided the following guidance for determining when a for-cause challenge is appropriately granted:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;
2. Standing in the relation of guardian or ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

. . . .

281. As I suggest later, *see infra* note 396, my discussion assumes that the venire is drawn from as many diverse lists as possible so that it will bring together as broad a cross section of the community as possible. *See, e.g.,* Junda Woo, *Arizona Panel Suggests Package of Reforms to Empower Jurors*, WALL ST. J., Oct. 25, 1994, at B5 (recognizing the need to increase the jury pool's diversity and recommending that the jury pool include people on welfare rolls); Frances A. McMorris, *New York State to Call Neediest for Jury Duty*, WALL ST. J., Oct. 13, 1994, at B1 (explaining that New York will draw its jury pool from welfare and unemployment rolls, in addition to lists of registered voters, licensed drivers, and state taxpayers). Obviously, if the venire is skewed, then even my proposal to eliminate the peremptory will not make the jury as representative as it should be. There have been relatively few recent studies on the way in which the venire is drawn, and this is an area ripe for further study.

282. *See supra* notes 250-68 and accompanying text.

283. This method would be no more cumbersome than the current practice of *Batson* hearings, and in fact, it should be less cumbersome because the judge would not have to make the same kind of credibility finding that the judge now does in determining whether peremptories are being exercised for neutral or for race- or gender-based reasons. *See infra* notes 288, 301, 344-49 and accompanying text.

8. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.²⁸⁴

Some statutes provide additional grounds, such as

that he has served as a juror within the preceding year . . . ; that he is or has been engaged in carrying on a business in violation of the law, where the defendant is indicted for a like offense; that he has been indicted within 12 months for a felony or an offense of the same character as that with which the defendant is charged; that he is a party to a suit pending in that court at that term.²⁸⁵

Under the “revised” for cause, these conditions would still pertain.

As to the second point, the addition that I propose is that individual behavior or action might constitute a legitimate excuse for cause. This may be the current practice among some federal judges, but it would need to be put into practice in a more formal and widespread way. One’s status or other immutable characteristics, however, would never be acceptable for-cause excuses; thus, the peremptory would not be permitted to enter through the back door of the revised for-cause challenge.

The distinction that I want to make is one between status and conduct. Several hypotheticals might best illustrate the revised for cause. Religion or ethnicity could not be the basis of a for-cause challenge. For example, a juror who is Jewish could not be eliminated for cause even though the defendant is an Arab; nor could a juror whose family was from India even though the defendant’s family was from Pakistan. Similarly, a juror who is a woman or a man could not be eliminated for cause even though the case involves the crime of rape, and each side might be trying to eliminate one gender or the other. Nor could the juror who was raised in a poor part of town where drug use is prevalent be eliminated for cause even though the crime involves the sale of drugs. Nor could the juror who does not look directly in the eyes of a criminal defendant be eliminated for cause even though the defendant says he feels uneasy about the juror. However, a juror who is a member of the Ku Klux Klan may be eliminated for cause in a case involving racial bias because this juror has taken an individual action that suggests bias. This juror has joined an organization that is committed to the superiority of the white race and to the denigration of the African American.²⁸⁶ Her bias is not assumed because of some

284. *Hopt v. Utah*, 120 U.S. 430, 433 (1887).

285. ABA STANDARDS, *supra* note 138, at 69.

286. What about an example of a woman who is a member of a feminist organization? Should she be excluded for cause in a case involving wife battering? The first point is that feminism is not committed to the denigration of any group, and the second point is that there is no one “feminist” position. Feminists embrace a wide range of views, just as Republicans and Democrats do, and thus,

immutable characteristic or unchosen status, such as religion, ethnicity, or economic class, but is imputed to her on the ground that she made an individual choice. Thus, she is still judged as an individual who has taken a deliberate action.²⁸⁷ Of course, as with the traditional for-cause challenge, any of these jurors could still be eliminated for cause if they said that they could not be impartial.

Although the revised for-cause gives more control to the judge, the judge's decisions would be reviewable, just as for-cause challenges and modified peremptories under *Batson* are currently reviewable. Although one objection might be that this would burden the review process, it would be no more burdensome than the modified peremptory, particularly now that the modified peremptory has been expanded to include gender.

This revision of the for-cause challenge would ensure that the jurors who serve can be impartial. Impartiality is a requisite for jurors so that the trial can be a fair one, and one that is in compliance with the constitutional command of the Sixth Amendment that the party be tried by an "impartial jury." Impartial in this context does not mean without any perspective or viewpoint, but it does mean a willingness to approach the case without prejudging the party. By providing a little more leeway for the for-cause challenge, we can eliminate, without reservation, the peremptory, which serves as the last bastion of state-sanctioned discrimination in the

the decision would need to be made on a case-by-case basis. Of course, the problem with this approach is that it requires the judge to make inquiries about the nature of the organization and the beliefs that the member adheres to, and this seems to leave too much discretion to the judge. However, one point to keep in mind is that this category is to be used quite sparingly—only when it becomes quite clear that the prospective juror holds such extreme views that her impartiality is in question, or at the very least, that the appearance of her impartiality is in question. A third point is that the determination depends upon the context, much the same way that the decision about whether a judge can be impartial, though outlined by statute, depends on the particular context of a case. Just as a judge who happens to be a woman should not recuse herself in a case involving sex discrimination, *see Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975), because everybody has a gender, so too a juror should not be excused for cause in the case of wife battering simply because she belongs to a feminist organization; further inquiry would need to be made.

287. Granted, I am willing to make a generalization about a step an individual has taken, and this generalization may appear to be inconsistent with my earlier discussion about the need not to stereotype. But I think there is a difference between an inference that is based on an unchangeable characteristic, such as one's race or gender, and one that is based on an individual decision to join a group or activity. The latter indicates a deliberate, individual choice and expresses certain values or beliefs, whereas the former reveals very little about that particular individual's actual values or beliefs. Moreover, we should minimize the instances in which it is acceptable for inferences based on stereotypes to be the basis for excluding people from a governmental benefit such as jury duty. Although some commentators have argued that there is no way to eliminate stereotyping because it is part of the human condition, *see, e.g.,* Barbara Underwood, Panelist, *The Criminal Jury Selection Process*, *supra* note 151 (discussion with author following panel), it does not follow that stereotypes should provide a legitimate basis for determining access to a government function, such as jury duty. We do not allow stereotypes to serve as a basis for voting or for other government services, such as housing, employment, or benefits; similarly, it should not be the basis for determining participation on the petit jury.

courtroom and impedes the proper functioning of the jury in its various roles.

1. *How the Revised For-Cause Challenge Differs from the Modified Peremptory.*—The revised for-cause challenge differs from the current modified peremptory²⁸⁸ in at least three significant ways. First, the revised for-cause requires that the lawyer *always* give reasons to explain why the prospective juror should not be permitted to serve.²⁸⁹ The lawyer must always give reasons and the judge must always either accept or reject those reasons and say why. Although the revised for cause always requires such explanations, a modified peremptory regime does not. Under the modified peremptory, a lawyer has to give a reason for the peremptory only when opposing counsel has established a *prima facie* case that the peremptory is being exercised based on an impermissible reason, such as race or gender. When a lawyer suspects that an impermissible reason is the basis, but is unable to establish a *prima facie* case, no reason need be given. When a lawyer suspects that an impermissible reason is the basis, but chooses not to challenge the peremptory, the discriminatory peremptory proceeds without challenge and without a reason. When a lawyer suspects that a juror is being struck for a discriminatory reason other than race or gender and challenges the exercise of the peremptory, the lawyer exercising the discriminatory peremptory will not have to give reasons.

Second, and as a related matter, a revised for-cause system requires that the judge always pass judgment on the reason proffered by the lawyer seeking to challenge a prospective juror. The reason is either accepted or rejected by the judge, and the judge must explain. In contrast, under a

288. The Court created the so-called “modified peremptory” in *Batson v. Kentucky*, 476 U.S. 79 (1986). See *infra* note 320 and accompanying text. *Batson* permits a prosecutor to exercise peremptories without any explanation except when defendant’s counsel can establish a *prima facie* case that the prosecutor used the peremptory based on race. *Batson*, 476 U.S. at 93. To establish this, defendant’s counsel has to show the following: defendant was a member of a cognizable racial group; the prosecutor had exercised peremptories to remove from the venire members of defendant’s race; peremptories permit discrimination by those “who are of a mind to discriminate,” and these and other circumstances raise an inference of discrimination. *Id.* at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). After defendant has made a *prima facie* showing, the burden then shifts to the prosecution to come forward with a race-neutral reason for its peremptory challenges. *Id.* at 97. The trial judge then determines if the prosecution’s reason is race-neutral; if it is, then the peremptory is permitted. *Id.* at 98. In *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), the Court held this procedure to be applicable to the criminal defendant as well as to the prosecutor. *Id.* at 2359.

289. See *supra* note 131. Although some argue that it is less offensive to allow such reasons to remain unspoken, see, e.g., Babcock, *supra* note 12, at 553–54 (“The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . [I]t allows the covert expression of what we dare not say but know is true more often than not.”); *Batson*, 476 U.S. at 121 (Burger, C.J., dissenting) (citing this view with approval). But see Babcock, *Women and Jury Service*, *supra* note 131, at 1146–47 (re-examining and rejecting her earlier view). I believe that if lawyers are permitted to act on stereotypes but do not have to admit them, much damage is done because there is no mechanism for challenging and correcting these ideas.

modified peremptory scheme, there are several scenarios in which a judge can decline to pass judgment on whether the peremptory is discriminatory. One situation is if he decides that the lawyer challenging the peremptory has failed to meet the threshold of a *prima facie* case. Another is if the judge decides that the reason put forth by the lawyer is ostensibly race- or gender-neutral (such as, "the prospective juror lives in a bad neighborhood"), the judge need look no further to see if the lawyer's reason is truly non-pretextual (such as "does the neighborhood consist only of African Americans?"). Also, a judge need not consider whether the peremptory is discriminatory on some basis other than race or gender; at the moment, that is all the Court has said that a judge must consider.²⁹⁰ Finally, a judge need not consider *sua sponte* whether the peremptory is discriminatory if opposing counsel has declined to challenge the peremptory.²⁹¹

Third, a system of revised for-cause challenges operates under a different presumption than a system of modified peremptories. Under a system of revised for-cause challenges, all prospective jurors are presumed eligible to serve unless they meet a limited number of enumerated exceptions.²⁹² In contrast, under a modified peremptory regime, prospective jurors can be struck for any reason as long as the reason is not based on race or gender. Thus, there is a shift in presumptions between the two systems. The presumption under the revised for-cause system is that any prospective juror can serve, except in a limited number of circumstances; the presumption under the modified peremptory system is that any prospective juror can be struck, except for reasons of race or gender.

2. *Revised For-Cause Challenge Is Not Without Its Shortcomings.*—

The revised for-cause challenge is not without its limitations, though some of these might prove unfounded once the system were put in place. One problem may be that this system fails to constrain a judge's biases. Having only a for-cause system may mean that a judge's biases go unchecked; lawyers would no longer have peremptories to compensate for a judge's bias in deciding whether to grant a for-cause challenge. Having a revised for-cause system may exacerbate this problem by increasing the categories (but only by one) for which the judge is permitted to consider a for-cause

290. Once the Court extended *Batson* to gender in *J.E.B.*, Justice Thomas, joined by Justice Scalia, urged the Court to consider whether other classifications receiving intermediate scrutiny under equal protection analysis, such as religious affiliation, would also be subject to *Batson*: "Once the scope of the logic in *J.E.B.* is honestly acknowledged, it cannot be glibly asserted that the decision has no implications for peremptory strikes based on classifications other than sex, or that it does not imply further restrictions on the exercise of the peremptory strike outside the context of race and sex." *Davis v. Minnesota*, 62 U.S.L.W. 3771, 3772 (May 24, 1994) (Thomas, J., dissenting from denial of certiorari). The Court, however, declined to take such action. *Id.*

291. *But see infra* note 341.

292. *See supra* note 284 and accompanying text.

challenge. A response to this concern is that judges must give their reasons for granting the revised for-cause challenge, and that the judges' reasons are subject to public scrutiny, as well as to appellate review.

Another problem with the revised for-cause challenge may be that the proposed ground for dismissal does not truly capture what is decisive for people about how they see the world. It may be that the groups people join voluntarily, such as the Jaycees or the 4-H Club, do not reflect their world views, and thus basing a for-cause challenge on such individual actions may not be legitimate. One answer to this problem is to recognize that the revised for-cause challenge is a compromise; it is an effort to allow as many people as possible to serve on the jury without seating someone who has actually prejudged the case. The revised for-cause challenge assumes that an individual's action is a better proxy for that person's strongly held beliefs (which might interfere with their ability to serve impartially) than any other proxy available.²⁹³

3. *Revised For-Cause Challenge Will Foster Public Dialogue.*—In spite of the limitations of the revised for-cause challenge, its chief virtues are that it creates a public process and structures a public dialogue about jury selection, and these benefits are consistent with the view of a jury as a public institution. The revised for-cause system creates an open, public process for selecting a jury: It requires that lawyers give reasons for a for-cause challenge, that the reasons be given in public, that the judge either reject or accept the reasons and explain why, and that the judge's reasons be subject to public and appellate review. Secrecy is a large part of the problem with the peremptory. Secrecy allows stereotypes to flourish, and the stereotypes inflict a serious harm—they serve as the basis for exclusion from a civic duty. As long as secrecy prevails, there is no means for exposing and challenging these stereotypes and broadening the base of those who can serve on a jury.

The revised for-cause system also establishes a public dialogue each and every time a prospective juror is about to be excluded from jury service. The system creates an ongoing public dialogue, by which lawyers and judges can negotiate the contours of the for-cause challenge. Whether

293. There is a need to rely on such a proxy when the person has not admitted that he or she cannot be impartial. With such an admission, of course, there would be no reason to rely on a proxy. At this point, I do not have any empirical work to back up my claim that individual action is a good proxy for strongly held beliefs. I am not the first to lament the lack of empirical studies on the workings of the jury. See, e.g., Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 167 (Robert E. Litan ed., 1993) (describing methods available for empirical research and arguing that "systematic empirical research is needed if policymakers are to draw sound conclusions about proposals for modifying the civil jury system"); Letter from Neil Vidmar, Professor of Social Science and Law, Duke University School of Law, to Nancy Marder, Assistant Professor, University of Southern California Law Center 2, 3 (Nov. 16, 1994) (on file with author).

individual action will ultimately prove to be a viable category in the revised for-cause system is less important than establishing a public dialogue by which that decision is reached. Whatever the precise contours of the revised for-cause challenge that may be settled upon, the goal should be to make jury service accessible to as much of the citizenry as possible and to move toward the British view that almost all who are summoned can serve.²⁹⁴

VII. A Legal Basis for the Elimination of the Peremptory

Batson and *J.E.B.* provide a legal basis for prohibiting peremptories exercised on the basis of race and gender respectively; they do not, however, provide a legal prescription for the wholesale elimination of the peremptory.²⁹⁵ It is true that the Equal Protection Clause framework adopted in these cases will allow each new group that is subject to discriminatory peremptories to come forward and make its claim, but such a process is destined to be a slow one and will come at a cost to the jury. As long as discriminatory peremptories are permitted against any group, the jury's roles in reflecting public values and reaching accurate verdicts will be impeded, the fairness of the jury will be open to question, and the lessons the jury teaches will be ones that undermine, rather than underscore, messages of equality and fairness.

A. Current Legal Approach to Peremptory Challenges

In *Batson v. Kentucky*,²⁹⁶ the Court held that the Equal Protection Clause of the Fourteenth Amendment²⁹⁷ prohibited a prosecutor from using peremptory challenges to strike prospective jurors on the basis of race.²⁹⁸ *Batson* establishes that the defendant could raise such a claim by showing that in his case the prosecutor used peremptories to exclude members of defendant's race.²⁹⁹ No longer would a defendant have to look to prosecutorial practice over an extended period of time as the Court had suggested in *Swain v. Alabama*.³⁰⁰ Rather, based on the way in which the prosecutor exercised peremptories in the defendant's case only, a defendant could attempt to establish a prima facie case of purposeful discrimination in jury selection.³⁰¹ After the defendant has made a prima facie

294. See *supra* notes 256-64 and accompanying text.

295. See *supra* note 212.

296. 476 U.S. 79 (1986).

297. U.S. CONST. amend. XIV, § 1 (stating that no state shall "deny to any person within its jurisdiction the equal protection of the laws").

298. *Batson*, 476 U.S. at 89, 97-98.

299. *Id.* at 96.

300. 380 U.S. 202, 223-24 (1965).

301. See *supra* note 288 for the elements the defendant must establish under *Batson*.

showing, the burden then shifts to the State to come forward with a race-neutral explanation for its peremptory challenges. The task is then left to the trial judge to determine if the State's reason is race-neutral; if it is, then the peremptory is permitted. The *Batson* progeny have simply built upon this framework. *Powers v. Ohio*³⁰² establishes that white defendants can challenge a prosecutor's use of a race-based peremptory; *Edmonson v. Leesville Concrete Co.*³⁰³ makes clear that a private litigant in a civil suit cannot use peremptory challenges to exclude jurors on account of their race,³⁰⁴ and *Georgia v. McCollum*³⁰⁵ holds that defendants are bound by the same rules as prosecutors with respect to race-based peremptories.³⁰⁶ Most recently, *J.E.B. v. Alabama ex rel. T.B.*³⁰⁷ extends *Batson* to gender-based peremptories.³⁰⁸

1. *The Strengths of Batson and the Fourteenth Amendment.*—The vision that animates *Batson* and its progeny is one that is consonant with a view of the jury as a public institution. In *Batson*, the Court recognized the harms that race-based peremptories could cause, not only to the defendant, but also to the excluded juror and the community at large.³⁰⁹ The Court explained that purposeful race discrimination in the selection of the petit jury violates a defendant's right to equal protection because it denies him or her the right to a jury that is indifferently chosen and is free from governmental control.³¹⁰ However, the harm caused by race-based peremptories is not limited to the accused, but also encompasses the excluded juror who has been singled out and told, in effect, that he or she cannot be an impartial juror by virtue of race. Finally, the discriminatory peremptory harms the community at large because the purposeful exclusion

302. 499 U.S. 400 (1991).

303. 500 U.S. 614 (1991).

304. *Id.* at 616.

305. 112 S. Ct. 2348 (1992).

306. *Id.* at 2359.

307. 114 S. Ct. 1419 (1994).

308. *Id.* at 1421, 1429-30. I do not include *Hernandez v. New York*, 500 U.S. 352 (1991) (holding that the exercise of a peremptory against Spanish-speaking prospective jurors who were unsure whether they would abide by the interpreter's version of court proceedings did not violate *Batson*), because in *Hernandez* the Court relied heavily on the prospective jurors' hesitation, *id.* at 356, 360, 362, and thus the case was more fact-specific and limited in its reach.

309. *Batson*, 476 U.S. at 87. The Court laid the groundwork for this approach in *Peters v. Kiff*, 407 U.S. 493 (1972), in which it recognized that the harm from the systematic exclusion of African Americans from the grand and petit juries extended beyond the harm to the defendant and included harm to the excluded jurors and to other defendants as well. *Id.* at 499-500; see *Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The injury [caused by systematically excluding women from the venire] is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.").

310. *Batson*, 476 U.S. at 87.

of "black persons from juries undermine[s] public confidence in the fairness of our system of justice."³¹¹

The multiple public harms that the Court identified in *Batson* were also present in *Powers*. In *Powers*, a white defendant challenged the prosecution's removal of African American jurors through the exercise of its peremptory challenges. The Court reiterated that a defendant has "the right to be tried by a jury whose members are selected by nondiscriminatory criteria."³¹² To allow anything less would be to invite "cynicism respecting the jury's neutrality and its obligation to adhere to the law."³¹³ As the Court explained, nondiscriminatory jury selection is essential; without such a practice, stigma attaches to those who are excluded for discriminatory reasons;³¹⁴ we lose the opportunity to educate the citizenry through jury service;³¹⁵ and the institution of the jury suffers because both the defendant and the community may no longer believe that the trial process is fair.³¹⁶ The difficulty in *Powers* was that the Court had to establish that Powers, a white man, had standing to challenge the prosecution's exclusion of African Americans from his petit jury. The Court held that the defendant had third-party standing because the defendant suffered a cognizable injury, because the defendant shared with the excluded juror an interest in eliminating race discrimination from the courtroom, and because the excluded juror, as a practical matter, was unlikely to be able to pursue the claim on his own.³¹⁷

Gender-based peremptories cause the same types of harms as race-based peremptories. Just as the exclusion of jurors based on race adversely affects the way in which the jury is perceived by the larger community, so too the exclusion of jurors based on gender compromises the integrity of the jury as an institution.³¹⁸ Similarly, the use of gender-based

311. *Id.*

312. *Powers*, 499 U.S. at 404.

313. *Id.* at 412.

314. The *Powers* Court acknowledged a lesson learned over a century ago:

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

Id. at 408 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

315. See *id.* at 406 ("The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.").

316. The wrongful exclusion of a juror, "often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Id.* at 412.

317. *Id.* at 413-14.

318. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 (1994).

peremptories harms the individuals who are excluded as well as the litigants who may begin to suspect that the entire proceedings are marked by the same prejudice manifested during jury selection.³¹⁹ From *Batson* to *Powers* to *J.E.B.*, the Court has expressed concern about the harms caused not only to the parties, but also to the excluded jurors and the community. These concerns have to do with how jurors and the community will perceive the jury if jury selection is marred by discrimination. The jury, as depicted by this line of cases, becomes an institution owned by the public, and the peremptory is the vehicle by which prospective jurors are introduced to that institution.

2. *The Limitations of Batson and the Fourteenth Amendment.*—The problem with *Batson*, and its progeny, is not its vision of the jury, but the limit of its reach. *Batson* reflects a compromise. The Court tried to reconcile competing concerns; it wanted both to preserve the peremptory challenge and to stamp out race as a basis for jury selection by the government. The compromise it devised was what became known as a “modified peremptory.”³²⁰ According to the compromise, the prosecution would have to give a reason for its peremptory challenge only if the defendant had made a *prima facie* showing that the peremptory had been exercised in a racially discriminatory manner. The fact that the prosecution had to explain its peremptory meant that it was, in effect, no longer a peremptory because a peremptory is a challenge for which no explanation is required.³²¹ The Court in *Batson* attempted to strike a balance that maintained the peremptory except for a narrowly drawn category of peremptories for which there had been a *prima facie* showing of racial discrimination.

The broader question that *Batson*, and more recently *J.E.B.*, avoids is how far the concept of discrimination should reach during jury selection. Should discriminatory peremptories be permitted against *any* group other than those based on race and gender? And implicitly, which “groups” should qualify as groups? The *Batson* Court did not confront these

319. *Id.*

320. Babcock, *Women and Jury Service*, *supra* note 131, at 1179; Underwood, *supra* note 182, at 761. The *Batson* Court appeared to take seriously Justice Goldberg’s advice to devise “practical accommodations” to preserve the peremptory and yet to protect racial minorities from exclusion from the jury. *Swain v. Alabama*, 380 U.S. 202, 246 (1965) (Goldberg, J., dissenting).

321. Babcock, *supra* note 12, at 550 (“Peremptory challenges—totally unlike the narrowness of those for cause—are exercised ‘without a reason stated, without inquiry, without being subject to the court’s control.’” (quoting *Swain*, 380 U.S. at 220)); McEldowney, *supra* note 88, at 274 (“A peremptory challenge was one where no cause need be shown.”); Underwood, *supra* note 182, at 762 (“[A] peremptory challenge is defined as one ‘for which no reason need be assigned.’” (footnote omitted)).

questions,³²² nor did the *J.E.B.* Court. *Batson* and its progeny decide only that race cannot be a basis for the exercise of peremptory challenges because of the harm to the litigants, the excluded juror, and the community at large. In *J.E.B.*, the Court merely added gender to the list; it did not choose to consider whether there is any principled stopping point when nondiscriminatory jury selection is the goal.³²³

Discriminatory peremptories directed against other groups, however, would also result in harm to the litigants, the community, and the excluded juror. The fears that the Court voiced about discrimination during jury selection are fears that are not limited to discrimination against any one group. The use of discriminatory peremptories, which necessarily takes place in open court, is an "overt wrong, often apparent to the entire jury panel" and "casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."³²⁴ The verdict "will not be accepted or understood" by the litigants or community "if the jury is chosen by unlawful means at the outset."³²⁵ The venireperson who is excluded because that person is African American or wears a yarmulke or walks with a cane nevertheless "suffers a profound personal humiliation heightened by its public character" and "may lose confidence in the court and its verdicts."³²⁶ The Court, which noted that to condone race discrimination in jury selection is to "condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service,"³²⁷ should be no less willing to protect other groups, whether based on ethnicity, religion, or age, from discrimination as well. The Court should be unwilling to do any less because nondiscriminatory jury selection is a "measure of the judicial system's own commitment to the commands of the Constitution."³²⁸

Equal protection analysis often raises a line-drawing problem. Some commentators are prepared to say that gender discrimination, like race

322. *But see Batson*, 476 U.S. at 124 (Burger, C.J., dissenting) ("But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, age, religious or political affiliation, number of children, living arrangements, and employment in a particular industry, or profession." (citations omitted) (footnote omitted)).

323. One commentator has recognized:

[I]f race-based peremptories are impermissible, so should be gender-based ones. And why draw the line at gender? While sexual orientation and age do not receive special scrutiny under equal protection doctrine, thus the argument goes, our system should be no more tolerant of discrimination based on those characteristics than discrimination based on race or gender in jury selection.

Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 65 (1992) (footnote omitted).

324. *Powers v. Ohio*, 499 U.S. 400, 412 (1991).

325. *Id.* at 413.

326. *Id.* at 413-14.

327. *Id.* at 415.

328. *Id.* at 416.

discrimination, should not be permitted as part of jury selection, but they are unprepared to go further and protect other groups from discrimination as well. Rationales for such an approach have varied from "the unequal treatment or political powerlessness suffered by minorities and females"³²⁹ to "their reinvocation of a shared history of exclusion from political participation."³³⁰ Admittedly, African American men and all women have had a history of exclusion from the jury,³³¹ and discrimination based on race and gender has been particularly pronounced in ways that other groups may not have experienced. However, although undoing the effects of discrimination directed against African Americans and women during jury selection is necessary, it is not sufficient. The modified peremptory created by *Batson* does not address the harms to jurors and the community when groups beyond those defined by race and gender are the subject of discrimination during jury selection.

Thus, the Court's equal protection approach is too limited in several respects. First, if the goal is nondiscriminatory jury selection, then the approach fails insofar as it allows discrimination to continue against groups whose protection the Court has not yet secured³³² (even though some of these groups might ultimately receive such protection because they have been recognized as eligible in other contexts).³³³ Although this approach

329. S. Alexandria Jo, Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305, 1329 (1991).

330. Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1935 (1992).

331. See *supra* text accompanying notes 224-46.

332. See, e.g., *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to peremptory strikes based on religious affiliation), *cert. denied*, 114 S. Ct. 2120 (1994); see also *Recent Cases*, 107 HARV. L. REV. 1164, 1166 (1994) (contending that courts, in considering religion-based peremptories, should look to jurors' rights under the First Amendment's Free Exercise Clause); Linda Greenhouse, *Justices Rule Repeat Offenders Can't Challenge "Career-Criminal" Sentences*, N.Y. TIMES, May 24, 1994, at A15 (noting that Justices Thomas and Scalia dissented from the Court's denial of certiorari in *Davis* by arguing that the case should have been reconsidered in light of *J.E.B.*). But see *Casarez v. State*, No. 1114-93, 1995 WL 695868, at *22 (Tex. Crim. App. Dec. 14, 1994) (holding that peremptories may not be exercised based on religion).

Since *J.E.B.*, at least one lower court has had the opportunity to consider peremptories exercised on the basis of ethnicity and has held that such peremptories are impermissible. See *supra* note 246.

333. In other contexts, the Court has accorded strict or intermediate scrutiny to classifications based on race, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1, 11 (1967), gender, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976), ethnicity, e.g., *Oyama v. California*, 332 U.S. 633, 640 (1948), illegitimacy, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988), and alienage, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971). However, other groups that represent vulnerable populations have not been given the same protection. These include groups based on age, see, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976) (*per curiam*) (holding that old age does not constitute a suspect class for purposes of equal protection), sexual orientation, see, e.g., *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (urging the Court to consider whether state action against homosexuals should be subject to strict or heightened scrutiny), and disabilities, see, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (refusing to regard mentally retarded persons as a quasi-suspect class).

to equal protection is acceptable in other contexts, in the context of the jury it inflicts ongoing harms that go to the heart of our justice system. As the Court explained in *Powers*, discriminatory jury selection, which occurs in full view of the public,³³⁴ “casts doubt”³³⁵ upon the legitimacy of the rest of the trial proceedings and may raise questions about the verdict itself. Both the parties and the community may not accept or understand the verdict if the jury is chosen by illegitimate means.³³⁶ By allowing discrimination against some groups to persist in the selection of jurors, we put at risk the integrity of the judicial system.

Second, there is little gained by requiring each group to come forward and ask the question: Should discrimination be permitted against us in the context of jury selection? If we truly aspire to nondiscrimination in jury selection, then the answer ought to be a resounding “no” in every case. Why do we require the question to be asked? Moreover, the way it is asked makes race discrimination the benchmark against which all other discrimination must be measured. In *J.E.B.*, the Court considered the prosecution’s argument that past discrimination based on gender had not been as virulent as past discrimination based on race.³³⁷ The Court, after alluding to women’s long history of discrimination in this country, declared that it need not decide that question because African Americans and women have a shared history of exclusion when it comes to jury service in this country.³³⁸ But why should that comparison be required? Why require those who are disabled or who are homosexual³³⁹ to argue that their treatment has been worse than another group’s and that their history shows greater persecution than another’s? By statute, jury service is available to all citizens who are competent to serve; one group should not be required to show that its mistreatment in the past equals or surpasses another group’s in order to avoid discriminatory peremptories in the present.

Third, the equal protection framework, as applied in *Batson*, both demands too much and too little: it demands too much of groups by requiring them to appear, one at a time, and to ask whether discrimination

334. See *supra* text accompanying notes 133–43.

335. *Powers v. Ohio*, 499 U.S. 400, 412 (1991).

336. See, e.g., Nathaniel R. Jones, *Introduction to Colloquy*, *supra* note 70, at 195, 196 (“When [the legal] system breaks down and no redress is afforded, the likely result is an unleashing of collective rage. . . . Simply put, this is what occurred in Los Angeles.”); Alschuler, *supra* note 92, at 195–96 (recounting the 1980 Miami riots resulting from an all-white jury’s acquittal of four white police officers accused of beating an African American to death).

337. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994).

338. *Id.*

339. I realize that these groups have not yet been accorded full protection under the Equal Protection Clause, see *supra* note 333, but it is unclear to me why discrimination during jury selection against such groups would be any less harmful than discrimination against groups that are already recognized under the Equal Protection Clause.

against them should be permitted, and it demands too little of parties insofar as they can pursue discriminatory behavior if they so choose. Under current law, one party must object to the other party's peremptory. If, however, both sides decide that they would prefer the exclusion of the juror even if it is based on an impermissible challenge, then the discrimination goes unchecked.³⁴⁰ One possibility is that the judge might step in *sua sponte*,³⁴¹ but *Batson* does not explicitly provide for such intervention. Thus, the judge, potential jurors, and the public may witness the exercise of a discriminatory peremptory, or a plethora of them, but if both sides have decided to close their eyes to the discrimination for whatever reasons, it is allowed to persist. Discrimination that occurs because one side chooses to engage in it and the other chooses not to object to it compromises the integrity of the court proceeding:

[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.³⁴²

Although the Court in *Edmonson* was confined to a discussion of race discrimination, it seems fair to say that any discrimination "within the court-

340. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court recognized that in some cases, "the prosecution agreed with the defense to remove Negroes." *Id.* at 224-25. Justice Goldberg provides another, though perhaps extreme, example of the kind of collusion permitted by prosecutor and defense. *Id.* at 234-35 (Goldberg, J., dissenting). Justice Goldberg recounted the testimony of the state prosecuting attorney, who said:

Many times I have asked, Mr. Love for instance, I would say there are so many colored men on this jury venire, do you want to use any of them, and he would say, my client doesn't want them, or we don't see fit to use them. And then if I didn't see fit to use them, then we would take them off. We would strike them first, or take them off.

....

If I am trying a case for the State, I will ask them what is their wish, do they want them [Negro jurors], and they will as a rule discuss it with their client, and then they will say, we don't want them. If we are not going to want them, if he doesn't want them, and if I don't want them, what we do then is just take them off. Strike them first.

Id. at 234.

341. A Maryland appellate court recently upheld a trial judge's decision to consider *sua sponte* whether peremptories had been exercised in a discriminatory manner against eight white prospective jurors. *Brogden v. State*, 649 A.2d 1196, 1199-1200 (Md. Ct. Spec. App. 1994). It concluded: "A trial judge need not sit idly by when he or she observes what he perceives to be racial discrimination in the exercise of peremptory challenges. He is clearly entitled to intervene." *Id.* at 1200.

342. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

room raises serious questions as to the fairness of the proceedings conducted there."³⁴³

Fourth, the equal protection framework as sketched out in *Batson* has been implemented by lower courts in erratic ways. The *Batson* Court was careful to leave implementation to the trial courts, but it offered them little guidance.³⁴⁴ Among the advantages to this approach are that trial judges can develop procedures that are appropriate to the situation, and that they are usually in the best position to know which procedures are feasible. Among the disadvantages, however, are that procedures may vary from court to court and trial judges differ considerably in their views as to what constitutes a race-neutral reason. Predictability and consistency are therefore sacrificed. One judge may interpret a reason to be race-neutral that another may interpret to be racially discriminatory.³⁴⁵

Fifth, and related to *Batson*'s implementation, is that over time parties learn which reasons are acceptable and which are not and simply adjust their reasons accordingly, without necessarily abandoning the underlying stereotypes that might actually motivate the peremptory.³⁴⁶ Before *Batson*, prosecutors did not have to give reasons for any of their peremptories, but their reasons, which were racially explicit, became known through other channels. For example, manuals and newspaper accounts revealed that some prosecutors were taught to use their peremptories based on race.³⁴⁷ With *Batson*, prosecutors learned to avoid explicitly race-based reasons and began giving other reasons that might also be based on

343. *Id.*

344. See *Batson*, 476 U.S. at 99 n.24 (explaining that because of the different jury selection procedures followed by lower courts, "we make no attempt to instruct those courts how best to implement our holding today").

345. Compare *United States v. Alvarado*, 951 F.2d 22, 23-24 (2d Cir. 1991) (holding that a peremptory exercised against a minority juror with children the same age as the defendant was non-discriminatory) with *Jones v. Ryan*, 987 F.2d 960, 973 (3d Cir. 1993) (holding that a peremptory exercised against a minority juror with children the same age as the defendant was pretextual in light of *Batson*, particularly when white jurors with children of the same age were permitted to serve).

346. According to one attorney:

Judges have to take a closer look at these challenges and make prosecutors and other attorneys give real reasons for excluding Blacks. Once you start getting the same explanations over and over and you start seeing a pattern of exclusion, then judges have to invoke *Batson* and deny these strikes.

Charles Whitaker, *Is There a Conspiracy to Keep Blacks Off Juries?*, EBONY, Sept. 1992, at 54, 58 (quoting Dennis Sweet, a Mississippi attorney).

347. See, e.g., *Batson*, 476 U.S. at 104 & n.3 (Marshall, J., concurring) (noting that a prosecutor's office manual used in Dallas County, Texas, instructs prosecutors to use peremptories to eliminate members of minority groups from juries); Memorandum from Justice Marshall to the Conference (Mar. 24, 1986) (located in the Justice Marshall Papers at the Library of Congress) (copy on file with author) (sharing with the Court articles from Dallas newspapers that revealed that prosecutors used their peremptories to exclude African Americans and other minorities because of a stereotypical view that they would be more sympathetic to the defense).

race, but were far more ambiguous.³⁴⁸ Judges began to accept those reasons as race-neutral because that was the only test; it often seemed not to matter how irrational those reasons appeared to be.³⁴⁹

The same transformation is likely to occur with gender-based peremptories as well; the reasons given for the exercise of a peremptory might change, but the underlying stereotypes may not. Whereas until *J.E.B.* parties were willing to admit to using gender stereotypes as the basis for their peremptories,³⁵⁰ after *J.E.B.* parties will know that gender is an unacceptable reason and that another reason must be found. Lawyers will soon learn from their experience which reasons are successful at evading further court review.

Finally, the way in which *Batson* has been put into practice has allowed race-based, and will now allow gender-based, peremptories to continue. As described above, judges may vary in their view about what constitutes a discriminatory reason. An even more harmful effect may be that by requiring parties to give reasons in order to eliminate race- and gender-based peremptories, we, as a society, may believe that we are eliminating race- and gender-based discrimination from the jury selection process, when all that we are doing is limiting the form that the dialogue about discrimination must take. After we require the party to give a reason, and the reason meets an individual judge's criteria for neutrality, then we

348. See Toobin, *supra* note 161, at 42-43 ("[I]t didn't take a genius to recognize that a prosecutor could come up with any number of pretexts for camouflaging the selection of jurors on the basis of race.").

349. One reason that is often given by prosecutors to exclude African Americans from the jury is that the prospective juror and the defendant live near each other. That reasoning, according to attorneys, "defies all logic," Whitaker, *supra* note 346, at 58, and is likely a subterfuge simply to remove minorities from the jury. As one lawyer reasoned:

Who is going to be more concerned about crime in a given area than someone who's from the same neighborhood If the person is guilty, I would want him prosecuted and off the streets where I live. If he's innocent, I'd want to see the right person found, so the reasoning just doesn't make sense.

Id.; see ABRAMSON, *supra* note 83, at 136 (recounting an example of a judge who accepted a prosecutor's strike of the only African American on the jury panel because she reminded the prosecutor of the defendant's mother); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 514, 594-96 (providing examples of when "the so-called acceptable race-neutral explanations approach the absurd").

350. For example, in one case in which the defendant was charged with incest and sexual battery, his defense attorney attempted to strike all female prospective jurors. The attorney explained, quite candidly, that he was doing so because he wanted an all-male jury, which he believed would be more sympathetic to his client's case. *State v. Turner*, 879 S.W.2d 819, 820 (Tenn. 1994). In another case, the prosecutor, when asked to explain why he had exercised his peremptory against one woman, responded: "Because she was a single female and my concern, frankly, is that she, like the other [female] juror I struck, is single and given defendant's good looks would be attracted to the defendant." *United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993). In another pre-*J.E.B.* trial, the prosecutor, when asked to explain his 15 peremptories exercised against women, said that he thought that the women would feel sympathy for the defendant's mother. *People v. Blackwell*, No. 73240, 1995 WL 19281, at *5 (Ill. Jan. 19, 1995).

permit ourselves to believe that discrimination has been eliminated from the process. If the reason is not explicitly based on race or gender, the party will have satisfied its burden, and that will be the end of the discussion even though the reason may have a disproportionate effect on a particular race or gender. Discrimination may still serve as the underlying basis for the exercise of the peremptory, but the discussion may never reach that level. A trial court may, but need not, look below the surface of any reason given.³⁵¹ As a result, we believe that we have “solved” the problem of race and gender discrimination during jury selection even though all we have done is to limit the way in which it can be discussed. The irony is that while gender was added to race as another group to be protected from discrimination during jury selection, all that may have happened is that we have simply limited the ways we will talk about gender discrimination during jury selection.

Although the Court’s extension of *Batson* and the equal protection framework to gender was logical and necessary, it was also inadequate. The *Batson* Court tried to reconcile our commitment to nondiscrimination during jury selection with our tradition of the peremptory challenge. *Batson* was a compromise, and its limitations are highlighted by the addition of gender to the list of forbidden peremptories. *Batson* permits discrimination to persist—it permits discrimination against other groups not singled out for court protection and pits one persecuted group against another; it permits discrimination if both parties agree to overlook the discrimination; and it permits discrimination because trial judges are free to fashion their own criteria as to neutral reasons, and parties may adjust their reasons to satisfy those criteria. If the Court is truly committed to nondiscrimination in jury selection,³⁵² as it claims in *Powers*, then it needs to eliminate the peremptory, which can serve as a mask for discrimination. In order to eliminate the peremptory entirely, the Court should reconsider the Sixth Amendment.

351. The only guidance that the *Batson* Court gave was to say that while the “prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause,” it would not be sufficient for the prosecutor to rebut the defendant’s prima facie case by “stating merely that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race” or by “denying that he had a discriminatory motive or ‘affirm[ing] [his] good faith in making individual selections.’” *Batson*, 476 U.S. at 97, 98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

352. Of course, the Court is not the only institution that is able to end discriminatory peremptories; Congress is also free to act. In this Article, however, I have developed arguments that I think are best directed to federal courts. I leave for another day arguments that Congress is likely to find persuasive.

B. *The Intersection of the Sixth and Fourteenth Amendments*

Batson and *Holland v. Illinois*³⁵³ mark turning points in the Court's thinking about the appropriate legal rubric under which challenges to discriminatory peremptories should be made. *Batson* was argued primarily as a Sixth Amendment case, but was decided by the Court on Fourteenth Amendment grounds. The question presented in the petition for writ of certiorari was whether petitioner had been tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community."³⁵⁴ At the beginning of oral argument, petitioner was asked whether his claim was "based solely on the Sixth Amendment," and he responded "Yes."³⁵⁵

The Court, however, decided *Batson* on Fourteenth Amendment grounds. The Justices did not explain this preference for the Fourteenth Amendment over the Sixth Amendment,³⁵⁶ except to say that "resolution of petitioner's claim properly turns on application of equal protection principles."³⁵⁷ One possible explanation is that they thought the Fourteenth Amendment would provide a more contained approach, whereas the Sixth Amendment might prove to be a Pandora's Box.³⁵⁸ They did, however, explicitly leave open the Sixth Amendment question for future consideration.³⁵⁹

353. 493 U.S. 474 (1990).

354. *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting) (quoting Petition for Certiorari at i).

355. Transcript of Oral Argument at 5, *Batson* (No. 84-6263). The Court asked a follow-up question of counsel for petitioner as well:

Question: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

Mr. Niehaus: We have not made an equal protection claim.

Id. at 5-6.

356. See Alschuler, *supra* note 92, at 184 ("For reasons that appeared mysterious, the Court rested its decision on the Equal Protection Clause rather than on the Sixth Amendment and, indeed, went to unusual lengths to do so.").

357. *Batson*, 476 U.S. at 85 n.4.

358. Prior to *Holland*, the Sixth Amendment claim was interpreted to require the inclusion of a fair cross section of the community. Thus, rather than forbidding discrimination, it was argued that the Sixth Amendment conferred an affirmative right to a jury composed of a fair cross section. One indication that this line of thinking was not far from at least one Justice's mind is found in a bench memo to Justice Marshall from one of his clerks. The law clerk suggested to the Justice that "under a Sixth Amendment approach . . . intentional exclusion by the prosecutor of any 'cognizable group' may lead to a valid claim, and the whole area becomes somewhat messier." Memorandum from Law Clerk to Justice Marshall 6 (Dec. 11, 1985) (located in the Justice Marshall Papers at the Library of Congress) (copy on file with author).

Justice Kennedy, though not on the Court at the time of *Batson*, seems to have shared this view that the Sixth Amendment would lead to uncontrollable results. In his concurrence in *Holland*, he explained: "[W]e must reject petitioner's claim that the fair-cross-section requirement under the Sixth Amendment was violated. The contention . . . admits of no limiting principle to make it workable in practice." *Holland v. Illinois*, 493 U.S. 474, 488 (1990).

359. *Batson*, 476 U.S. at 85 n.4 ("We agree with the State that resolution of petitioner's claim

In *Holland*, the parties took up the challenge left open by footnote four in *Batson*.³⁶⁰ The case was argued on Sixth Amendment grounds.³⁶¹ Justice Scalia, in an opinion for the Court, was quite adamant that all that was at issue was the Sixth Amendment,³⁶² and Justice Kennedy, in his concurrence, made it clear that his position was limited to cases brought under the Sixth Amendment, but that his vote would be different in cases brought under the Fourteenth Amendment.³⁶³ Other Justices, however, writing in dissent, asserted that the links between the Sixth and Fourteenth Amendments in the jury context were not so easily severed and that both Amendments were violated when the prosecutor used race-

properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.").

In the meantime, Justice Stevens and Chief Justice Burger debated in their respective concurrence and dissent the appropriateness of resolving *Batson* on Fourteenth Amendment grounds. Justice Stevens argued that the Fourteenth Amendment was raised in the case by respondent and by several amici in their briefs, *id.* at 109-10 (Stevens, J., concurring), and therefore, was properly before the Court, whereas Chief Justice Burger argued that petitioner failed to raise the Fourteenth Amendment claim before the Kentucky Supreme Court and the U.S. Supreme Court, and that the case should not be decided on Fourteenth Amendment grounds in light of those omissions. *Id.* at 112-13 (Burger, C.J., dissenting). At the very least, according to Chief Justice Burger, the Court should have ordered supplemental briefing or re-argument so that the question could be more fully addressed by the parties. *Id.* at 118. Chief Justice Burger then went on to reject the Fourteenth Amendment as a basis for limiting the peremptory because the Court had limited equal protection analysis to race alone and it was unclear what level of scrutiny other groups should be subject to and because the peremptory, once open to question, was no longer a peremptory. *Id.* at 123-24.

360. *See supra* note 359.

361. *See Holland*, 493 U.S. at 487 n.3 ("Our grant of certiorari was limited to the Sixth Amendment question, and the equal protection question has been neither briefed nor argued."); *id.* at 490 (Marshall, J., dissenting) ("For reasons that are not immediately apparent, petitioner expressly disavows the argument that a white defendant has standing to raise an equal protection challenge, based on our decision in *Batson v. Kentucky* . . . to a prosecutor's racially motivated peremptory strikes of Afro-American venirepersons.").

Petitioner thought he was limited to the Sixth Amendment because that is what he had argued before the state trial court (even though he raised *Batson* as an issue before the Illinois Supreme Court) and because he thought that his standing to bring an equal protection claim would be difficult to establish. Transcript of Oral Argument at 21, *Holland* (No. 88-5050). However, in petitioner's view, his Sixth Amendment argument had "elements of equal protection analysis to it because there is concern for excluded jurors." *Id.* at 13. At a later point during oral argument, petitioner again sought to show that both Sixth and Fourteenth Amendment principles might be involved: "Well, we're certainly not precluding the equal protection argument as being persuasive in this case because in effect there's that argument and there's more, because there are Sixth Amendment—" *Id.* at 19. Respondent went even further in noting the connections between the two:

This is why we think that even though [petitioner] has denominated this claim as a Sixth Amendment claim, he really is not making a Sixth Amendment claim at all, as Justice White suggested earlier. What Petitioner *Holland* appears to be doing is attacking by the back door the standing requirement of the Equal Protection Clause.

Id. at 31.

362. *See Holland*, 493 U.S. at 487 ("All we hold is that [petitioner] does not have a valid constitutional challenge based on the Sixth Amendment" (emphasis in original)); *id.* ("[O]nly the Sixth Amendment claim, and not the equal protection claim, is at issue" (emphasis in original)).

363. *Id.* at 488-90 (Kennedy, J., concurring).

based peremptories, regardless of whether the defendant was black or white.³⁶⁴

Justice Marshall, writing for Justices Brennan and Blackmun in dissent, noted that under the Fourteenth Amendment and *Batson*, the harms to the defendant, the excluded juror, and the community were not affected by the race of the defendant and that five Members of the Court agreed to that position.³⁶⁵ Because petitioner Holland did not raise a Fourteenth Amendment claim, Justice Marshall considered Holland's Sixth Amendment claim, which he found persuasive because the fair-cross-section requirement, while not mandating a quota system for the petit jury, does require that distinctive groups not be excluded from the petit jury by means of the peremptory.³⁶⁶

Justice Stevens, also writing in dissent, would have reached petitioner's Fourteenth Amendment claim, just as the Court had in *Batson*. He noted that in *Batson*, petitioner raised a Sixth Amendment claim, but the Court decided in his favor based on the Fourteenth Amendment.³⁶⁷ In Justice Stevens's view, the Court should have recognized Holland's Fourteenth Amendment claim as well, particularly because the Sixth and Fourteenth Amendment "claims overlap; indeed, the requirement of impartiality is, in a sense, the mirror image of a prohibition against discrimination."³⁶⁸ His view that "petitioner should have been permitted to prove that the exclusion of black jurors violated the Equal Protection Clause" also led him to the conclusion "that petitioner should be entitled to prove that the State ha[d] violated the fair-cross-section principle of the Sixth Amendment."³⁶⁹ Under the Sixth Amendment, explained Justice Stevens, a defendant is to be tried by a petit jury that has been selected by neutral procedures; the Sixth Amendment is not "so frail" that it ends with the drawing of the venire.³⁷⁰ Here, the prosecutor systematically eliminated African American members of the venire not on the ground that they were partial, but on the ground that no African American was competent to serve; thus, petitioner had stated a claim under the Sixth Amendment. *Batson*, though based on the Fourteenth Amendment, has implications for the Sixth as well: "The operation of a facially neutral peremptory challenge

364. *Id.* at 492-93 (Marshall, J., dissenting); *id.* at 517 (Stevens, J., dissenting). In *Duren v. Missouri*, 439 U.S. 357 (1979), then-Justice Rehnquist, writing in dissent, argued that the Court's analysis under the Sixth Amendment was strikingly similar to its analysis under the Equal Protection Clause, reinforcing the notion that the two are not always easy to disentangle. *Id.* at 370-71.

365. *Holland*, 493 U.S. at 491-92 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting); *id.* at 488-90 (Kennedy, J., concurring); *id.* at 505-08 (Stevens, J., dissenting).

366. *Id.* at 495-500 (Marshall, J., dissenting).

367. *Id.* at 507 (Stevens, J., dissenting).

368. *Id.* at 506 n.4.

369. *Id.* at 508.

370. *Id.* at 515.

procedure in a discriminatory manner is no less a violation of the defendant's Sixth Amendment right to a jury chosen from a fair cross section of the community than it is a violation of the juror's right to equal protection."³⁷¹

After the Court's opinions in *Batson* and *Holland*, however, it became clear that the Fourteenth Amendment is the accepted route for challenging discriminatory peremptories. This notion has been reinforced by *Powers*,³⁷² *Edmonson*,³⁷³ *McCollum*,³⁷⁴ and now *J.E.B.*,³⁷⁵ all of which were decided on equal protection grounds. Although these cases establish the Fourteenth Amendment as the only viable approach now, what *Batson* and *Holland* show is the unsettled nature of the question in 1986 and 1990 respectively and the way in which the two amendments have converged in the past. Although the Fourteenth Amendment may now be the more feasible route as a matter of legal strategy, the Sixth Amendment is a better approach as a matter of legal theory for prohibiting overt discrimination during jury selection. Otherwise, the Court will have to take a wait-and-see approach until each group that finds itself the subject of discriminatory peremptories finally sues or has a suit brought on its behalf. The Fourteenth Amendment could serve as the basis for eliminating peremptories, but only if the Court were willing to reach beyond the particular group seeking protection. Without that step, however, the Fourteenth Amendment will do little to protect the jury, except in a piecemeal fashion.

C. Revisiting the Sixth Amendment

1. *Revising Notions of Impartiality.*—The Sixth Amendment provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the State and district wherein the crime shall have been committed.”³⁷⁶ The amendment provides that the accused is entitled to an “impartial jury”; however,

371. *Id.* at 517.

372. *Powers v. Ohio*, 499 U.S. 400 (1991). In *Powers*, petitioner initially sought review based on the Sixth and Fourteenth Amendments. *Id.* at 403. However, while the petition was pending, the Court decided *Holland*. After *Holland*, the Court granted *Powers*'s petition for a writ of certiorari, but limited it to the question whether “a white defendant may object to the prosecution's peremptory challenges of black venirepersons” based on the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 404.

373. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991). *Edmonson* was decided on equal protection grounds based on the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 616. The Fourteenth Amendment's guarantee of equal protection of the laws has been held to apply to the federal government as a component of the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

374. *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

375. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

376. U.S. CONST. amend. VI (emphasis added).

it does not provide that the accused is entitled to a "sympathetic jury." Professor Babcock, among others, agrees that peremptories are, in fact, exercised *not* to secure an impartial jury (though that might have been the initial goal), but to secure a partial jury—namely one that the defendant believes will be sympathetic to her case.³⁷⁷

Professor Babcock, in advocating for an extensive *voir dire*, has explained that the questioning of jurors is necessary so that a defendant has sufficient information about potential jurors in order to "realize his right to 'select' the jury by challenges for cause and by peremptory strikes."³⁷⁸ Although a defendant may have a statutory "right to select," she does not have a constitutional right to select;³⁷⁹ nowhere in the Sixth Amendment is she provided with such a right. A defendant has a right to an impartial jury under the Sixth Amendment, but the Amendment does not give her a right to select such a jury nor to use peremptories to attempt to create a partial jury. In fact, the peremptories, even if they were being used properly, do not have any constitutional grounding at all, as has long been recognized by the Court.³⁸⁰

377. Babcock, *supra* note 12, at 551. One of the questions asked by the Court during oral argument in *Holland* lends support to this view as well:

Question: If you're really—if you're really honest about your principle, peremptory challenges in general—the whole notion of a peremptory challenge is contrary to having a fair cross-section, isn't it, because the whole purpose of it is to eliminate a fair cross-section and somehow load the jury in such a way that it's more likely to be in your favor.

Transcript of Oral Argument at 10, *Holland* (No. 88-5050).

Lawyers have admitted to doing as much when questioned about the exercise of their peremptories. One prosecutor who struck women from the jury conceded that he did so because "he believed that he had a better chance to obtain guilty verdicts from a jury composed of men . . . than one composed of women." *Tyler v. State*, 623 A.2d 648, 653 (Md. 1993). Another prosecutor who was asked to explain the exercise of his peremptories said that "[w]e struck those who we believed would acquit. Those strikes were not based on race but on just our exercising our right to strike jurors we feel would be most favorable to acquit." Petition for Writ of Certiorari at 8, *Bui v. Alabama*, *cert. denied*, 113 S. Ct. 2970 (1993) (No. 92-8280).

378. Babcock, *supra* note 12, at 549. But in *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court, in its interpretation of the Fourteenth Amendment, described the defendant as having "a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color." *Id.* at 305 (emphasis added). Notably, the Court did not say that the defendant had "a right to select a jury for the trial of his case."

379. Parties in a civil case have a statutory right to peremptory challenges, 28 U.S.C. § 1870 (1988), and in criminal cases, Congress has authorized peremptory challenges, 18 U.S.C. § 3442 (1988), in accordance with Federal Rule of Criminal Procedure 24(b), *see* FED. R. CRIM. P. 24(b) (providing that the number of peremptories varies according to the punishment for the offense).

380. *See J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 n.7 (1994) ("Although peremptory challenges are valuable tools in jury trials, they 'are not constitutionally protected fundamental rights.'" (quoting *Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992))); *McCollum*, 112 S. Ct. at 2358 ("[I]t is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial."); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) ("While we have recognized the value of peremptory challenges . . . there is no constitutional obligation to allow them."); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("[W]e reject the notion that loss of a peremptory

One reason the definition of an "impartial jury" has been subject to such corruption in practice is that we do not have a precise understanding of the phrase.³⁸¹ *Black's Law Dictionary* defines "impartial" as "[f]avoring neither; disinterested; treating all alike; unbiased; equitable, fair and just."³⁸² It explains that an "impartial jury" is one that is "not partial, not favoring one party more than another, unprejudiced, disinterested, equitable, and just, and that the merits of the case shall not be prejudged."³⁸³ "Impartial," however, does not mean a blank slate.³⁸⁴ Obviously, jurors have different experiences and perspectives that shape the way in which they view the world.³⁸⁵ People with different backgrounds and experiences can contribute their various views and interpretations.³⁸⁶

challenge constitutes a violation of the constitutional right to an impartial jury."); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) ("[T]he Constitution does not confer a right to peremptory challenges."); *id.* at 108 (Marshall, J., concurring) ("[T]his Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial."); *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (noting that despite the significance of peremptory challenges, they are not secured by the Constitution); *id.* at 243 (Goldberg, J., dissenting) ("[W]e have long recognized that the right to challenge peremptorily is not a fundamental right, constitutionally guaranteed, even as applied to a defendant, much less to the State."); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948) ("[T]he right [to peremptory challenges] is in the nature of a statutory privilege."); *United States v. Wood*, 299 U.S. 123, 145 (1936) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." (quoting *Stilson v. United States*, 250 U.S. 583, 586 (1919))).

381. I will not attempt to answer the question what is meant by an impartial jury in this Article; it is a topic that deserves its own article, if not book. It is a fascinating, but difficult, question, and one that I hope to be able to address in a later piece. For the purposes of this Article, however, I will merely be scratching the surface of this larger problem.

382. BLACK'S LAW DICTIONARY 752 (6th ed. 1990). *The Oxford English Dictionary* offers essentially the same definition of "impartial": "Not partial; not favouring one party or side more than another; unprejudiced, unbiased, fair, just, equitable." THE OXFORD ENGLISH DICTIONARY 700 (2d ed. 1989).

383. BLACK'S LAW DICTIONARY, *supra* note 382, at 752.

384. An impartial jury "cannot mean . . . that there is a possibility of drawing many jurors who have no opinions that they will bring to bear on the evidence or on what happens in the courtroom and jury room." *Babcock*, *supra* note 12, at 551; see Erwin Chemerinsky, *Pretrial Publicity Isn't a Hinderance*, L.A. TIMES, June 28, 1994, at B7 ("The Constitution does not dictate that prospective jurors be unfamiliar with O.J. Simpson, the murders or even the purported evidence. Rather, what is required is careful selection to find 12 individuals who can be trusted to decide solely based on the evidence presented in the courtroom."); cf. Jeffrey Abramson, *When Lawyers Play the Race Card*, N.Y. TIMES, Sept. 9, 1994, at A27 ("Historically, the right to an impartial jury never meant that jurors needed to approach the case with complete ignorance.").

385. Wells, *supra* note 68, at 2402-04; see Wells, *supra* note 159, at 1741-42 ("Inevitably, what these decisionmakers come to regard as salient and objective features of the decisional terrain will depend upon their own particular situation."); David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 782 n.44 (1977) ("No one is without attitudes and preferences concerning various social, political, economic, cultural and religious issues, and such attitudes and preferences affect one's judgment and perception regarding factual and legal questions and the credibility of witnesses.").

386. See *Taylor v. Louisiana*, 419 U.S. 522, 531-33 (1975) (holding that the exclusion of women from the venire will result in lost perspectives and will make the jury less representative); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (concluding that exclusion of a segment of the community from jury

That is one reason the Court has concluded that it is important to have a jury drawn from a fair cross section of the community.³⁸⁷ Regrettably, the Court has described only the venire in this way—groups may still be excluded from the petit jury by virtue of the peremptory under the Sixth Amendment;³⁸⁸ the only exceptions thus far are for race and gender under the Fourteenth Amendment.³⁸⁹

Although we may not have a precise understanding of the impartial juror, we can say something about impartiality. At one end of the impartiality continuum is the “blank slate juror,” in whose existence we do not really believe.³⁹⁰ The blank slate juror does not read the newspaper, watch television, or listen to the radio. She knows nothing about the case, the parties, or even the larger issues that might be involved. She might even claim to have no thoughts on the subject whatsoever. At the other end of the impartiality continuum is the juror who says that she cannot be impartial (the “admitted partial juror”). This person recognizes that she has a prejudice that will not allow for evenhanded decisionmaking in the case. Between these two extremes are people who have different life experiences and perspectives that they will bring to a hearing of the facts of the case;³⁹¹ while they may have general opinions, they do not have a personal stake in the case and will be open to the arguments of both sides.³⁹² Perhaps one indication of our reticence in coming up with a

service deprives the jury of “a perspective on human events”); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (noting that a distinct quality is lost if either gender is excluded from the jury).

387. See, e.g., *Taylor*, 419 U.S. at 528 (noting that selection from a representative cross section is an “essential component” of the right to a jury trial).

388. See *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (“In *Holland*, the Court held that a defendant could not rely on the Sixth Amendment to object to the exclusion of members of any distinctive group at the peremptory challenge stage.”).

389. See *id.* at 409 (holding that under the Fourteenth Amendment, “race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage” (quoting *Holland v. Illinois*, 493 U.S. 474, 479 (1990))); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1430 (1994) (“[T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender As with race, the ‘core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors’ [gender].” (quoting *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986))).

390. See Chemerinsky, *supra* note 384, at B7 (asserting that being impartial does not mean being ignorant or uninformed); Mickey Kaus, *A Modest Proposal for Untainted Juries*, L.A. TIMES, July 1, 1994, at B7 (proposing, in jest, the creation of a “jury preserve” in which we keep prospective jurors so that they remain blissfully unaware of cases like O.J. Simpson’s until they are called to serve). Mark Twain, conflating impartial and ignorant, described the challenge of our jury system as follows: “We have a jury system that is superior to any in the world, and its efficiency is only marred by the difficulty of finding twelve men everyday who don’t know anything and can’t read.” Mark Twain, *Americans and the English*, in 28 WRITINGS OF MARK TWAIN 34, 35 (Albert B. Paine ed., 1929).

391. See ABRAMSON, *supra* note 83, at 195 (“To acknowledge that jurors enter the jury room with views and values shaped in part by their creed, race, or gender is not to accuse the jurors of bias in need of silencing. It is to treasure the particularly rich conversations a democratic assembly inspires, precisely because it brings into one communal conversation persons from different subcommunities.”).

392. We also recognize that people have prejudices, but that the prejudices do not necessarily

shared understanding of the meaning of impartiality is that we allow individual jurors to decide for themselves if they can be impartial. During *voir dire* in federal court, in which the judge typically asks the questions, there will often be a point when the judge asks the prospective juror if she can be impartial.³⁹³ Once the prospective juror responds in the affirmative, there is little that counsel can do to establish a for-cause challenge. We leave it to the individual juror to decide for herself whether she can be impartial, in accordance with her individual, common-sense notion of impartiality.³⁹⁴

Under my reading of the Sixth Amendment, a defendant does not have the right to a sympathetic jury, nor does she have the right to a jury of her own choosing; she does, however, have a constitutional right to an impartial jury, which means a jury drawn from a venire in which groups have not been systematically excluded through the exercise of discriminatory peremptories. Thus, I share the dissenters' view in *Holland* that the extension of the Sixth Amendment's fair-cross-section requirement from the venire to the petit jury does not mean that all groups must be present on any particular petit jury, but it does mean that during the selection process, no group can be systematically excluded from the petit jury.³⁹⁵ If we assume that the venire is fairly drawn and truly representative of the community,³⁹⁶ then the use of discriminatory peremptories to exclude

brand them as partial because the deliberation process can expose those prejudices. One of the values of group deliberation is that through interaction with others, jurors can become aware of their own prejudices and can avoid letting them dictate their vote. See *Ballew v. Georgia*, 435 U.S. 223, 233 (1978) (noting that group decisionmaking is superior to individual decisionmaking because the former counterbalances prejudices).

393. See, e.g., Transcript of *Voir Dire* at 70-71, 74, 77, 79, 83, 89, 91, 96, 98, *United States v. Torres*, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) (providing instances during *voir dire* when the judge asked prospective jurors if anything in their background would prevent them from being impartial).

Whether the inquiry should end there, however, is open to question: "A juror may not fully understand either the meaning or the demands of impartiality; the juror may miscalculate his or her ability to put aside knowledge that could prejudice judgment. In addition, the simple appearance of bias may damage the basic commitment to a fair trial process." Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1204 (1992).

394. Similarly, we allow the individual judge to decide whether he can be impartial. When a party seeks to recuse a judge on the basis of partiality, we permit that judge to decide the recusal motion in the first instance. See 28 U.S.C. § 144 (1988) (allowing a party to seek recusal of a judge based on a belief that the judge has bias or prejudice); see also *Pennsylvania v. Local Union 542 Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 181-82 (E.D. Pa. 1974) (holding that a black judge should not have to disqualify pursuant to 28 U.S.C. § 144 simply because he is black and the case involves blacks); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975) (holding that a judge who is black and female should not recuse herself from a case involving sex discrimination). Of course, the recusal decision is subject to review by appellate courts at a later stage.

395. *Holland*, 493 U.S. at 494.

396. I am assuming that the venire is drawn from a fair cross section of the community and that no group is being excluded at the venire stage. Some commentators have noted, however, that venire lists are often limited to voter registration lists, and when jurors are drawn from only one type of list,

members of a particular group narrows the range of perspectives of the petit jury, and the jury may veer precipitously toward partiality.³⁹⁷ This is so because as both sides use discriminatory peremptories to eliminate the group they think will be less sympathetic, they are likely to be eliminating jurors that give the jury diversity, such as the few members of the venire from a racial, religious, or ethnic minority. The jurors who remain may well constitute a more homogeneous jury than if discriminatory peremptories had not been allowed to skew the composition of the jury. Thus, the defendant is being denied her right under the Sixth Amendment to an "impartial jury." The Sixth Amendment as applied to the petit jury would not require that all groups be present on any particular petit jury, but only that the selection process be conducted in a nondiscriminatory fashion so that all groups have the opportunity to be fairly represented.

My understanding of "impartial" would require the Court to put into practice what it has long expressed in case law: prospective jurors are to be judged on an individual basis and no prospective juror should be excluded because of an immutable characteristic. From *Thiel*³⁹⁸ to *Cassell*³⁹⁹ to *McCree*⁴⁰⁰ to *Batson*⁴⁰¹ to *Powers*⁴⁰² to *J.E.B.*,⁴⁰³ the

the representativeness of the venire is compromised. See, e.g., Kairys et al., *supra* note 385, at 803-11. To overcome this problem, some recommend supplementing the voter registration list with multiple lists, such as lists of those who have driver's licenses, pay utilities, or receive welfare benefits or unemployment compensation. See, e.g., *id.* at 826; *supra* note 281.

397. One counterargument is that if each side is using discriminatory peremptories to exclude groups it thinks will disfavor its cause, then each will counteract the other and the remaining jurors will form an impartial jury. The problems with that argument are several. First, one side may have more peremptories than the other and be able to skew the jury more successfully. Second, the lawyers may not be evenly matched at discerning who will be more favorable to their cause, and while some may say that that is one of the unavoidable consequences of an adversarial system, it is unclear that the adversarial system should be charged with the task of producing an impartial jury. See Zeisel & Diamond, *supra* note 156, at 491. Third, the discriminatory behavior of each side, whose aim is to produce a partial jury, does not become more acceptable if by happenstance the jury created turns out to be impartial.

398. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) ("Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.").

399. See *Cassell v. Texas*, 339 U.S. 282, 286 (1950) (plurality opinion) ("Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.").

400. See *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) ("[T]he exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably [gives] rise to an 'appearance of unfairness.'").

401. See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial.").

402. See *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("A person's race simply 'is unrelated to his fitness as a juror.'" (quoting *Batson*, 476 U.S. at 87 (quoting *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting))))).

403. See *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994) ("Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically

Court has reiterated this point.⁴⁰⁴ I would take these assertions seriously and start with the premise, as courts do in England, that all prospective jurors who meet the statutory criteria are competent to serve. Some may still be excluded from the petit jury for cause either because they are related to the parties, because they are connected to the litigation, or because they enter with a closed mind and believe that they cannot be impartial.⁴⁰⁵ We should start, however, with the view that is deeply embedded in our democratic society that people will be judged as individuals and will not be presumed to be unfit to serve as jurors because of some stereotypical notion about their group identity.

2. *Limitations of Returning to the Sixth Amendment.*—The most serious limitation of returning to the Sixth Amendment is that the Amendment is limited to criminal cases, and I believe the peremptory should be eliminated from civil as well as criminal trials.⁴⁰⁶ Although the Sixth Amendment contains the phrase “impartial jury,” and the Seventh Amendment does not, the absence of the phrase from the Seventh Amendment cannot mean that the jury in a civil case is permitted to be partial. My claim that discriminatory peremptories are inconsistent with the creation of an impartial jury should be equally applicable to the civil jury and to the criminal jury, even if there is less textual support for the former than the latter because in both cases we expect and require the jury to be impartial.

The Court has already begun to lay the groundwork for viewing the jury as a public institution that performs public functions whether it is hearing a civil or criminal case. In *Edmonson*, the Court held that the prohibition of race-based peremptories extends to parties in a civil case, just as it does to parties in a criminal case.⁴⁰⁷ The Court expanded the concept of “state actor” to embrace a private party engaged in the act of jury selection because it views the jury, at least under the Fourteenth Amendment, as a public institution, which should be held to the same, if not a higher, standard as other governmental bodies when it comes to the principle and practice of nondiscrimination.

Another limitation of returning to the Sixth Amendment is that the Court’s Sixth Amendment view of the jury has been that it serves as an

a brand upon them, affixed by law, an assertion of their inferiority.” (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880))).

404. One striking exception is the Court’s admission in *Swain* that prospective jurors could be denied the opportunity to serve because of peremptories “exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.” *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

405. See generally *Hopt v. Utah*, 120 U.S. 430, 433 (1887) (providing guidance for determining when a for-cause challenge should be granted); *supra* note 284 and accompanying text.

406. See *supra* text accompanying notes 8-15.

407. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

institution to protect the defendant's rights,⁴⁰⁸ whereas the Court's Fourteenth Amendment view of the jury has been that it serves as a public institution committed to fairness and nondiscrimination.

In its Sixth Amendment jury cases, the Court has understood the right of a criminal defendant to be tried by "an impartial jury of the State and district wherein the crime shall have been committed"⁴⁰⁹ to mean that the criminal defendant was entitled to a jury in which the venire had been drawn from a fair cross section of the population. The right was one that attached to the defendant so that he or she could have the benefit of a wide range of points of view. Although the defendant did not have a right to a petit jury drawn from a fair cross section of the community, he or she did at least have the right to a venire that would reflect such diversity.

In its Fourteenth Amendment cases, the Court has acknowledged that while the jury affords the defendant protection, the jury also functions as a public institution. As such, there are competing demands made on the jury. Although the jury protects the parties, the jury itself must be preserved as an institution that reflects the citizenry and is respected and regarded as fair and above manipulation. Its integrity is important so that its verdicts will be accepted by the community. Thus, in its Fourteenth Amendment line of jury cases, the Court recognized that the jury plays an important public function. Race- and gender-based peremptories were prohibited because they threatened these public values. Discrimination could not be condoned, even though it meant cutting back on the protections traditionally afforded to private parties through the peremptory in both civil and criminal contexts.

What is gained by revisiting the Sixth Amendment and trying to introduce notions of the jury as a public institution into a new reading of the Sixth Amendment? Perhaps the most significant gain is that the meaning of who can be a juror has changed, and the Court has struggled with these changes over the past 100 years, from *Strauder* to *Swain* to *Batson* to *J.E.B.* Much of this struggle about the changing nature of the community from which the jury is drawn and what it means to be a citizen and serve on the jury have taken place under the rubric of the Fourteenth Amendment. However, the jurisprudence should not be so compartmentalized that

408. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); *Singer v. United States*, 380 U.S. 24, 31 (1965) ("The [jury trial] clause was clearly intended to protect the accused from oppression by the Government . . .").

409. U.S. CONST. amend. VI.

this evolving notion of community can be recognized only under one line of cases. Similarly, our understanding of the jury as an institution, and how it has changed because of who can now serve, should not be recognized under only one amendment. Although there has been a long-standing tension in the Court's jury-selection jurisprudence depending on whether the case was decided under the Sixth or the Fourteenth Amendments, there is no reason that ideas from one line of cases should not be introduced into the other. I am proposing such a commingling, and I think it not only useful but also necessary because the limitations of the equal protection framework introduced in *Batson*, expanded in the *Batson* progeny, and articulated most recently in *J.E.B.*, have become particularly apparent. The goal of nondiscrimination will remain elusive if the only tool available is the framework established in *Batson*. The notion of the "impartial jury" found in the Sixth Amendment is not a panacea, but it provides a way of looking at impartiality not as a fixed concept, but as a process by which the jury, like the venire, is truly drawn from a fair cross section of the community.

VIII. Conclusion

Over time, the roles of the jury have changed, as have our views about who can serve as jurors and what jury service means. We need to assess peremptories in light of these changes and ask whether peremptories help or hinder the jury to perform its roles and to make jury duty accessible to those who are now eligible to serve. The jury is responsible for articulating public value decisions, and thus it must be chosen from as broad a swath of the community as possible in order to include a range of perspectives and viewpoints. The jury must also strive for accurate verdicts, and accuracy can be enhanced if there are jurors who recollect different facts and are willing to correct the mistaken views of others. The jury also must be seen as fairly constituted, and thus it must be chosen in a way that maintains integrity and respect and increases the likelihood that jury verdicts will be accepted. Finally, the jury performs a unique educational function in a democracy and conveys powerful messages about the responsibilities of citizenship.

Peremptories are harmful for several reasons: they limit the perspectives that the jury will have available to it, they are most likely to be exercised in cases in which a full range of perspectives is most desperately needed, and they teach negative lessons in a public forum about who is a full citizen and who is worthy of serving on the jury. Although peremptories based on race and gender are among the more visible, certainly there is no place in the courtroom for discrimination against any group. Furthermore, the exercise of discriminatory peremptories runs counter to our

notion that all individuals will be judged fit for civic duty based on their individual competence and not on their group characteristics.

The elimination of the peremptory involves trade-offs. Without the peremptory, parties will exercise less control over who sits on the jury, and they may feel greater reservation about accepting the jury as fair. Without peremptories, parties will no longer exercise any oversight about who can be excused, thus making the correction of judicial error more difficult. And finally, the elimination of peremptories would mark a departure from tradition, and some would argue that the tradition should not be discarded because it has served us well. Although there is some validity to these arguments, what they fail to take into account is the way in which the potential membership of the jury has changed; no longer is it a homogeneous body consisting of white, male property-holders. The jury should reflect the heterogeneous nature of the citizenry now permitted to serve as jurors. Mechanisms such as the peremptory, which serve to limit the diversity of the jury, do harm not only to the functioning of the jury, but also to the symbolism of the jury, which includes a powerful political message about equality and full citizenship.

With the elimination of the peremptory, we have an opportunity for rethinking the process of jury selection. There are several alternatives, such as a quota, a strictly random, or a revised for-cause selection. In my view, it would be preferable, though not essential, to revise slightly the for-cause challenge. If the for-cause challenge includes a category for individual behavior (as opposed to status) and if the for-cause challenge is granted less begrudgingly than is the current practice, then such a revised for-cause challenge will provide a solution for the few cases in which a juror may be partial even though she does not satisfy the traditional criteria for a dismissal for cause. Of course, additional categories could be added if they became necessary, but the main point is that the for-cause challenge makes the process public and requires a public dialogue by which we would decide which prospective jurors could be excluded. Challenges for cause require parties to give reasons; they require judges to accept or reject the reasons, and they require judges to explain their decision. This process ensures that the reasons for exclusion cannot include assumptions based on status or immutable characteristics. In this way, even if the for-cause challenge is expanded slightly over time, it will not become a peremptory in disguise because the process is one based on openness rather than secrecy.

Although the elimination of the peremptory is consistent with the vision of the jury described in *Batson* and its progeny, the *Batson* framework, a compromise at best, falls short of its goal. Equal protection analysis is limited in scope in the jury context; it permits the Court to dismantle discriminatory peremptories, but only in a piecemeal fashion,

thus allowing discrimination to continue unhampered and the integrity of the jury to remain under threat. Revisiting the Sixth Amendment, with insights about the jury gained from the Fourteenth Amendment, may prove helpful. The Sixth Amendment requires that a party be tried by an "impartial jury." Unfortunately, peremptories have been used in practice to create partial, or sympathetic, juries. Such a practice distorts the meaning that the Court has given to an impartial jury as a body drawn from a fair cross section of the community. Although the Court has applied this understanding to the venire only and has not extended it yet to the petit jury, such an extension is appropriate. An impartial jury should mean one from which no group has been systematically excluded. By returning to the Sixth Amendment and reinvigorating it with an understanding of the jury as a public institution, we may find a legal approach that will allow us to achieve at last the vision of the jury articulated under the Fourteenth Amendment.