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JUSTICE STEVENS, THE PEREMPTORY CHALLENGE, AND THE JURY

Nancy S. Marder*

INTRODUCTION

This Symposium devoted to the Jurisprudence of Justice Stevens provides an ideal opportunity to examine the dual aspirations that shape Justice John Paul Stevens's jurisprudence with respect to the peremptory challenge. His opinions reveal both a commitment to preserving the peremptory challenge and a commitment to eliminating discrimination during jury selection. One question is whether both of these commitments can be maintained.

The framework that the U.S. Supreme Court developed in *Batson v. Kentucky*¹ embodies both of Justice Stevens's commitments. The *Batson* framework preserves the peremptory challenge and tries to eliminate discrimination based on race during jury selection. In a line of cases that I will refer to as the *Batson* progeny,² the Court expanded the scope of *Batson*. *Batson* and its progeny now prohibit peremptories based on race, ethnicity, and gender, whether the discrimination is engaged in by the prosecutor or the defense attorney, and whether exercised in a criminal or a civil case.

In *Batson* and its progeny, the Court expressed its commitment to nondiscrimination during jury selection, but its commitment has not been unwavering. At times, the Court has appeared to lose its way. A brief per curiam opinion in *Purkett v. Elem*³ undercut much of the strength and logic

* Professor of Law, Chicago-Kent College of Law. I want to thank Justice John Paul Stevens for giving me the opportunity to serve as his law clerk during the 1990-1992 Terms of the U.S. Supreme Court. The clerkship was an extraordinary experience and Justice Stevens was a wonderful teacher. I was particularly fortunate that during those two Terms the Supreme Court decided a number of peremptory challenge cases. I also want to thank Professor Abner Greene for organizing this long overdue conference devoted to the Jurisprudence of Justice Stevens.

1. 476 U.S. 79 (1986).

2. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that gender-based peremptory challenges violate the Equal Protection Clause of the Fourteenth Amendment); *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* to defense attorneys); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that race-based peremptory challenges exercised in a civil case violate the Equal Protection Clause of the Fourteenth Amendment); *Powers v. Ohio*, 499 U.S. 400 (1991) (holding that a *Batson* challenge can be made regardless of the defendant's race or ethnicity).

3. 514 U.S. 765 (1995).

of *Batson*, and Justice Stevens, writing in dissent, pointed out the ways in which it did so.⁴ *Johnson v. California*,⁵ a recent Court opinion that Justice Stevens wrote for the majority, suggests that the Court has regained its footing under Justice Stevens's watchful eye. As long as *Batson* remains on the books it must retain its integrity, and Justice Stevens has assumed the role of watchdog.

On the twentieth anniversary of *Batson*, however, it seems appropriate to reconsider whether the Court's approach can truly rid jury selection of discrimination. *Batson* was a compromise.⁶ At the time many worried that *Batson* sounded the death knell for the peremptory challenge. Although peremptory challenges still exist, this Article considers whether *Batson* actually eliminated discrimination during jury selection. Relatedly, what do we have to show for twenty years of *Batson*? What have we lost and what have we gained?

This Article will explore whether Justice Stevens's dual commitments to preserving the peremptory challenge and to eliminating discrimination in jury selection can and should be maintained. If not, what should the next step be? My own view is that the peremptory challenge should be eliminated. If Justice Stevens were to take this step, doing so would be consistent with a broad view of the jury and its several roles, a view which Justice Stevens has supported in his opinions and other writings.

This Article proceeds in five parts. Part I explores Justice Stevens's commitment to maintaining the peremptory challenge. Part II examines his watchdog role in maintaining the integrity of *Batson*. Part III revisits *Batson* and the trade-offs it has entailed. Part IV suggests the next step—the elimination of the peremptory and how it would further other values that Justice Stevens has expressed, such as respect for lower court judges. Finally, Part V considers how the elimination of peremptories would enhance many of the key roles that the jury plays and that Justice Stevens has long protected.

I. A COMMITMENT TO PRESERVING THE PEREMPTORY CHALLENGE

Justice Stevens's commitment to preserving the peremptory challenge reflects both a lawyer's respect for maintaining a useful litigation tool and a judge's regard for preserving legal traditions.

4. See *id.* at 775 (Stevens, J., dissenting).

5. 125 S. Ct. 2410 (2005).

6. *Batson*, 476 U.S. at 126-27 (Burger, C.J., dissenting) (describing the Court's *Batson* framework as a "curious hybrid" and an ill-fated attempt by the Court to "decree a middle ground" where none can exist: "Analytically, there is no middle ground: A challenge either has to be explained or it does not.").

A. The Peremptory as a Litigation Tool

Few trial lawyers want to relinquish the peremptory challenge.⁷ They view jury selection as one key to winning their trial and the peremptory challenge as a vital tool in securing the most favorable jury possible. The peremptory challenge allows lawyers to remove those prospective jurors whom they think will be unsympathetic to their client without having to explain why they think so. The peremptory challenge is exercised by lawyers, unlike the challenge for cause, which is left to the judge's discretion. If a lawyer cannot persuade the judge that a prospective juror should be removed for cause, the lawyer has the option of removing that prospective juror with a peremptory challenge. Thus, the peremptory challenge allows lawyers and their clients to feel that they have some control in selecting the jury and to feel comfortable with the jury that will hear their case.⁸

Although the number of peremptory challenges varies depending on the type of case and whether it is in federal or state court, the number is fixed by statute and/or rule, unlike the challenge for cause. For example, in civil jury trials in federal court, each side has three peremptory challenges.⁹ In criminal jury trials in federal court, the number varies depending on whether the case is a capital case (twenty peremptories for each side), a felony (six for the government and ten for the defendant), or a misdemeanor (three for each side).¹⁰ In all cases, the limited number means that while lawyers can remove those prospective jurors about whom they have the gravest doubts, they must use their peremptories carefully.¹¹ Thus, the peremptory challenge serves as a safety valve in the selection process; it allows lawyers to tinker around the edges, but not to remake the jury completely.

One indication of lawyers' unwavering support for the peremptory challenge is that recent jury reform efforts, whether undertaken by national

7. See, e.g., David Berg, *The Trial Lawyer*, Litigation, Summer 2005, at 8, 11 ("Because you can exercise 'peremptories' against a panelist for any reason (save race and gender), they are invaluable."); John Gibeaut, *Challenging Peremptories*, A.B.A. J., Aug. 29, 2005, at 16 ("[The peremptory challenge is] just too deeply ingrained It's hardwired into our justice system" (quoting Charles L. Hobson, an attorney with the Criminal Justice Legal Foundation, a group that backs prosecutors)).

8. See, e.g., Dennis Hale, *All Rise: Trial by Jury Is Probably the Worst Way To Administer Justice, Except All Others*, B.C. Magazine, Summer 2005, at 26, available at http://www.bc.edu/publications/bcm/summer_2005/features.html ("[Peremptories] give attorneys some control (or perhaps only the illusion of control) over the unpredictability of juries, and, with the right questions, increase the odds of avoiding the least desirable jurors and seating the friendlier ones.").

9. 28 U.S.C. § 1870 (2000) ("In civil cases, each party shall be entitled to three peremptory challenges."); Fed. R. Civ. P. 47(b) ("The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.").

10. See Fed. R. Crim. P. 24(b).

11. See, e.g., Berg, *supra* note 7, at 11 ("[Y]ou get so few peremptories (rarely more than six, often as few as three) that there is little margin for error in the exercise of each one.").

organizations or states, have come out in favor of maintaining the peremptory challenge. Even though these organizations or committees, usually consisting of lawyers, judges, and academics, recognize that the peremptory challenge has been difficult to police and has led to juries that are less diverse than they might otherwise be, they have been unwilling to recommend the elimination of the peremptory.

The American Bar Association ("A.B.A."), a national organization consisting exclusively of lawyers, recently adopted *Principles for Juries and Jury Trials*¹² ("*A.B.A. Principles*") that recommend maintaining the peremptory challenge. A group of lawyers, judges, and academics working under the heading of the American Jury Project created jury principles and standards to serve as aspirations and guidelines respectively for state and federal jury trials. The *A.B.A. Principles* were approved by the American Jury Project in November 2005, and by the A.B.A. at its mid-year meeting in February 2005. Although the *A.B.A. Principles* are cutting-edge in many ways—from the recommendation that jurors be permitted to ask written questions of witnesses¹³ to the recommendation that jurors be allowed to engage in pre-verdict discussions¹⁴—with respect to the peremptory challenge the *A.B.A. Principles* preserve the status quo. The *A.B.A. Principles* simply recommend that "[p]eremptory challenges should be available to each of the parties."¹⁵

In general, the *A.B.A. Principles* were written so that the prefatory principles express aspirations for jury trials and the detailed standards contain nuts-and-bolts recommendations.¹⁶ Although the final version no longer uses the term "standards," the structure remains unchanged. There are principles, which are aspirational, and recommendations, which are practical. However, with respect to peremptory challenges even the workaday recommendations seem to take an overly optimistic view of peremptories.

The *A.B.A. Principles* reflect how lawyers want to believe peremptory challenges are used, rather than how they actually are used. For example, the *A.B.A. Principles* "presume" that each party will exercise its peremptory challenges properly and not engage in discriminatory peremptories.¹⁷ However, past practice belies this presumption. As Justice Thurgood

12. Am. Bar Ass'n, *Principles for Juries and Jury Trials* (2005) [hereinafter *A.B.A. Principles*], available at <http://www.bna.com/bnabooks/ababna/annual/2005/023.pdf>.

13. *Id.* Principle 13.C (questioning witnesses).

14. *Id.* Principle 13.F (describing pre-verdict discussions).

15. *Id.* Principle 11.D.

16. See, e.g., *American Jury Project Sets Standards for Juries*, Center Ct., Winter 2005, at 2, 7. "[T]he format of the 19 standards differs from the previous ones in that each standard is prefaced by a stated principle. Then the standard, using the same number, gives the means by which the principle is achieved or approached." *Id.* (paraphrasing G. Thomas Munsterman, Director, Center for Jury Studies at the National Center for State Courts).

17. *A.B.A. Principles*, *supra* note 12, Principle 11.F.1 ("It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.").

Marshall illustrated twenty years ago in *Batson*¹⁸ when he referred to Dallas prosecutors' practice of using peremptories to exclude African-Americans from the jury, and as Justice David H. Souter illustrated more recently in *Miller-El v. Dretke*¹⁹ when he looked at Dallas prosecutors' peremptories to exclude African-Americans from a jury in a capital case, such a presumption is unrealistic. To "presume" that peremptories are exercised in a permissible manner is to turn a blind eye to the history of this practice as it has been highlighted in Supreme Court cases from *Swain v. Alabama*²⁰ to *Batson*²¹ and now in the recent cases *Johnson v. California*²² and *Miller-El*.²³

At the same time that the *A.B.A. Principles* make a presumption that is not borne out by past practice, they retreat from limiting the number of peremptories available to each side. In a rather vague formulation, the *A.B.A. Principles* recommend a number that is "sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury."²⁴ In addition, the *A.B.A. Principles* call for courts to be able to provide additional peremptory challenges if they are necessary.²⁵ In sum, the *A.B.A. Principles* maintain the peremptory as it is, with numbers varying based on jurisdiction and type of case, and presume that lawyers will exercise them in an appropriate manner. Although this document is in many respects at the forefront of jury reform, when it comes to the peremptory challenge the *A.B.A. Principles*, which speak for lawyers, simply want to maintain the status quo.²⁶

Arizona, a state at the vanguard of jury reform, also maintained the status quo when it came to the peremptory challenge. In the early 1990s, at the behest of the Arizona Supreme Court, a committee consisting of lawyers, judges, academics, and even some former jurors undertook a study of the Arizona jury system.²⁷ Its mandate was to produce "innovative recommendations for major changes."²⁸ The committee issued a report,

18. 476 U.S. 79, 104 (1986) (Marshall, J., concurring).

19. 125 S. Ct. 2317, 2332, 2338-39 (2005).

20. 380 U.S. 202 (1965).

21. 476 U.S. at 79.

22. 125 S. Ct. 2410 (2005).

23. 125 S. Ct. at 2317.

24. *A.B.A. Principles*, *supra* note 12, Principle 11.D.2.

25. *See id.* Principle 11.D.3.

26. One way in which the *A.B.A. Principles* seek to return to the past is that they instruct courts to follow the *Batson* framework but do not acknowledge the changes wrought by *Purkett v. Elem*, 514 U.S. 765 (1995). *See A.B.A. Principles*, *supra* note 12, Principle 11.F. In *Elem*, the Court established that as long as a reason for exercising a peremptory is race neutral and not pretextual, that is all the Equal Protection Clause requires. 514 U.S. at 769. The reason for exercising the peremptory need not be "related" to the case at hand, as *Batson* had required. *Id.* at 768-69.

27. For a more complete description of Arizona's jury reform efforts, particularly with respect to its jury instructions, see Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 *Notre Dame L. Rev.* (forthcoming 2006).

28. B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 *Judicature* 280, 280 (1996).

Jurors: The Power of 12,²⁹ in which it recommended fifty-five reforms,³⁰ many of which were quite far-reaching. One of its more innovative proposals, which was ultimately adopted, is that if a jury informs the judge that it has reached an impasse in its deliberations, the judge, rather than delivering an *Allen* charge,³¹ can engage in further dialogue with the jury. The judge can ask the jury whether it would be useful for the judge or counsel to provide additional information or clarification on the issues over which the jurors are still divided.³² Other innovative proposals included allowing jurors to discuss the case even while the trial is in progress, permitting jurors to submit written questions to the witnesses, and allowing lawyers to deliver mini-summaries of the case before voir dire to help detect juror bias.³³ Each of these reforms was adopted. Of the fifty-five recommendations, eighteen were initially adopted by the Arizona Supreme Court after the report was issued.³⁴

In this maelstrom of reforms, however, the peremptory challenge remained remarkably unchanged. One newspaper account described the committee's report as a 200-page behemoth in which "[n]othing is untouched"³⁵—nothing, that is, other than the peremptory challenge. Recommendation 23 of the report states as follows: "Continue Peremptory Strikes in Present Form and Number[:] Peremptory strikes should be retained in their present number, as they are necessary for the selection of a fair jury."³⁶ As the chair of the committee, then Maricopa County Superior Court Judge B. Michael Dann, explained in an article offering an insider's view of the process and reforms, the issue of peremptory challenges was one of "a few issues [that] sparked controversy and produced division

29. Ariz. Supreme Ct. Comm. on More Effective Use of Juries, *Jurors: The Power of 12* (1994) [hereinafter *The Power of 12*].

30. *Id.* at 3.

31. *Allen v. United States*, 164 U.S. 492 (1896) (holding that there was no error when the jury returned for further instructions and the trial court judge instructed the jurors to reexamine their views). The *Allen* charge has been described by one court as "a sharp punch to the jury, reminding [the jurors] of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict." *United States v. Anderton*, 679 F.2d 1199, 1203 (5th Cir. 1982). The *Allen* charge is used in federal courts and in many state courts, even though it puts pressure on a jury to reach a verdict. *But see* *People v. Gainer*, 566 P.2d 997, 1006 (Cal. 1977) (en banc) (prohibiting the use of the *Allen* charge in California state courts).

32. *See, e.g.*, *The Power of 12*, *supra* note 29, at 26-27, 120-22 (describing Recommendation 49, "Offer the Assistance of the Judge and Counsel to Deliberating Jurors Who Report an Impasse"); Dann & Logan, *supra* note 28, at 283 ("Dialoguing on an impasse").

33. *See, e.g.*, *The Power of 12*, *supra* note 29, at 59-60, 90-92, 95-97 (recommending mini-summaries, juror questions, and pre-verdict discussions); Dann & Logan, *supra* note 28, at 281, 283 (describing juror questions and discussion of evidence); William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions: Power to the Jurors*, *Christian Sci. Monitor*, Feb. 22, 1996, at 1 (describing attorneys' mini-summaries).

34. *See* Carlile, *supra* note 33, at 1.

35. Christopher Johns, *Jury Overhaul Needed, Now More Than Ever*, *Ariz. Republic*, Apr. 12, 1995, at B5.

36. *The Power of 12*, *supra* note 29, at 67.

among committee members.”³⁷ According to Dann, although most members recognized that peremptories had been abused, they still voted in favor of retaining them in their current number.³⁸ They believe that peremptories are necessary “if jury selection was to be fair in fact and seen to be fair by the litigant, who would see that he or she had some degree of control over an otherwise random selection process.”³⁹

Only a few years prior to the Arizona reforms, the A.B.A. and the Brookings Institution had convened a conference attended by lawyers, academics, and judges. Although this conference resulted in national newspaper coverage⁴⁰ and several publications,⁴¹ its main purpose was to reach consensus on next steps for jury reform. The recommended reforms were sensible and modest. Perhaps the most radical was the recommendation to allow jurors to take notes,⁴² which at the time was not widely permitted. As to the peremptory challenge, however, the conference participants rejected any change. They concluded as follows: “Some have suggested that juror representativeness can best be assured by sharply limiting or even prohibiting peremptory challenges, or challenges for which no stated reason is required to be given. We question this premise and believe, on balance, that peremptory challenges serve a useful purpose.”⁴³ The conference was held only a few years after *Batson* and the participants recognized that *Batson*⁴⁴ and its progeny⁴⁵ put courts in the uncomfortable position of deciding whether reasons were nondiscriminatory. However, the final report of the conference members went no further than merely

37. Dann & Logan, *supra* note 28, at 285.

38. *Id.*

39. *Id.*

40. See, e.g., Cris Carmody, *Deliberations Underway on Jury Trial System*, Chi. Daily L. Bull., June 19, 1992, at 1 (“Legal experts will debate the jury’s role and its performance this weekend at The Future of the Civil Trial, a symposium co-sponsored by the American Bar Association and the Brookings Institution.”); Cris Carmody, *Jury System Wins Ringing Endorsement*, Chi. Daily L. Bull., June 22, 1992, at 1 (“[W]hat emerged [from the symposium] was a ringing endorsement of the American jury.”); *Civil Juries Endorsed By ABA Panel; Enhancements Are Proposed*, Legal Intelligencer, Jan. 6, 1993, at 1 (“A sweeping examination of the nation’s civil jury system by more than 100 of the nation’s top legal experts and citizen groups has resulted in overwhelming support for the civil jury system.”); Claudia MacLachlan, *Panel Says High-Tech Helps Jurors*, Nat’l L.J., July 13, 1992, at 7 (“Lawyers and judges should take advantage of new technology to make decisions easier for jurors, especially in complex, long-running cases, said a panel of legal experts brought together recently by the Brookings Institution and the American Bar Association.”); David Margolick, *A Call for the Jurors to Take Bigger Roles in Trials*, N.Y. Times, Jan. 1, 1993, at A19 (describing a study “summariz[ing] the results of a three-day gathering in Virginia last June during which practicing lawyers, judges and law professors submitted papers and discussed the problems”).

41. See generally A.B.A./Brookings Institution, *Charting a Future for the Civil Jury System* (1992); *Verdict: Assessing the Civil Jury System* (Robert E. Litan ed., 1993).

42. A.B.A./Brookings Institution, *supra* note 41, at 18 (“Perhaps the most widely suggested reform for enhancing juror comprehension is to allow jurors to take notes during a trial.”).

43. *Id.* at 31-32.

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

45. See *supra* note 2.

noting that “[a]s a result, the issues raised by peremptory challenges warrant further study.”⁴⁶

These initiatives, which offer some of the most forward-thinking and innovative proposals on the jury, all recommended maintaining the peremptory challenge. This suggests that lawyers feel strongly about the peremptory challenge and believe that it is necessary for securing a fair trial—or, at the very least, for reassuring a client that he will receive a fair trial. Lawyers see the peremptory challenge as a vital tool of the litigator. It is not surprising that Justice Stevens, as a former trial lawyer, would share this view and have an abiding respect for the peremptory challenge. As these reform efforts suggest, lawyers’ commitment to the peremptory challenge is deep-seated and widely shared.

B. *The Peremptory as Part of Our Legal Tradition*

Judges also have respect for the peremptory challenge, perhaps because it has always been part of the American legal tradition. When the colonists came to America, they brought the jury trial, along with the peremptory challenge, from England.⁴⁷ In colonial America, the sheriff often selected jurors who would be sympathetic to the British Crown.⁴⁸ A defendant could try to remove jurors by recourse to a challenge for cause or a peremptory challenge.⁴⁹ However, the challenge for cause would only be granted by the judge on the grounds of specific bias, such as a familial tie or an economic relation to one of the parties, and not on the grounds of general bias, such as attitudes or political views.⁵⁰ The early American courts, like the English courts, held the view that jurors should not be questioned about their political beliefs and biases because they were not on trial. Thus, the peremptory challenge was a mechanism for removing those jurors who might be unsympathetic to the defendant because of their loyalties to the Crown, but who could not be questioned during voir dire as to those loyalties.

Even when loyalty to the British Crown was no longer an issue, the peremptory remained part of our legal tradition. Jury trials, whether in federal or state court, have always included peremptory challenges. The peremptory challenge’s intended use today is to allow lawyers to remove those jurors whose attitudes or beliefs might in some subtle way color their view of the case, even though the impairment does not rise to the level of partiality required of a for-cause challenge. Today, as in colonial times, the for-cause challenge requires specific grounds, such as familial connection

46. A.B.A./Brookings Institution, *supra* note 41, at 32.

47. See Valerie P. Hans & Neil Vidmar, *Judging the Jury* 32-35 (1986).

48. *Id.* at 35 (describing the Crown’s use of “every means possible to secure convictions” once trials with increasing political significance began to appear in colonial courts).

49. *Id.*

50. *Id.*

or financial interest in the case,⁵¹ whereas the peremptory challenge does not. The peremptory challenge remains in the lawyers' hands, whereas the for-cause challenge does not.

The peremptory challenge also relieves some of the judge's burden by having both the judge and the lawyers participate in the selection of a jury. Lawyers can seek to remove jurors with a for-cause challenge in a few limited circumstances, such as when a juror has a familial relation with one of the parties, a financial stake in the outcome of the case, or has said that he cannot be impartial. The judge decides whether to grant the for-cause challenge. There is no fixed number of for-cause challenges; it is simply left to the judge's discretion. However, if the judge denies the for-cause challenge, a lawyer can still remove that juror with a peremptory challenge—the peremptory serves as the “back-up” to the for-cause challenge. The result is a jury that the lawyer and client feel comfortable with and one about which they cannot complain on appeal (except if the judge erroneously denied a for-cause challenge after the lawyer used up his peremptories, so a juror who should have been removed actually served on the jury).⁵²

It is not surprising then that judges, with a few exceptions,⁵³ continue to embrace the peremptory challenge.⁵⁴ The peremptory challenge has always been part of our legal landscape; it has, as the Supreme Court once stated, “very old credentials.”⁵⁵ There is also a practical reason for judges to support it: The peremptory serves as a further check on the judge's decision about a for-cause challenge. If the lawyer disagrees with the judge's decision she can use a peremptory to remove the juror in question. Without the peremptory, the lawyer would have no alternative but to go

51. In *Hopt v. Utah*, 120 U.S. 430, 433 (1887), the Supreme Court described circumstances under which the for-cause challenge should be granted. The guidance it gives to lower court judges is still relevant today:

1. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offence charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Standing in the relation of guardian and 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 offence charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

...

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

Id. at 433.

52. See *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) (“After objecting to the District Court’s denial of his for-cause challenge, Martinez-Salazar had the option of letting Gilbert [a biased juror] sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal.”).

53. See *infra* Part III.B.4.

54. But see Morris B. Hoffman, *Peremptory Challenges: Lawyers Are From Mars, Judges Are From Venus*, 3 Green Bag 2d 135 (2000) (“What I do want to talk about is the following strange phenomenon: trial lawyers love peremptory challenges and trial judges don’t.”).

55. *Swain v. Alabama*, 380 U.S. 202, 212 (1965).

through the entire trial, and then raise the issue on appeal. With the peremptory, the lawyer can still remove that juror and be satisfied that the jury is one that will hear the case fairly.

There are both powerful historical and practical reasons for preserving the peremptory challenge. Justice Stevens has both a deep respect for history and for the difficult work that trial judges do. Either one of these reasons might lead him to maintain the peremptory; when both reasons are present, as they are here, it becomes much more difficult to reject the practice.

II. A COMMITMENT TO ELIMINATING DISCRIMINATION DURING JURY SELECTION

*Batson v. Kentucky*⁵⁶ marked a turning point in the Supreme Court's jurisprudence with respect to the peremptory challenge, and Justice Stevens played a key role in helping the Court to reach that turning point. One of his earlier opinions, *McCray v. New York*,⁵⁷ helped to pave the way for *Batson*.

A. Laying the Foundation

In *Swain v. Alabama*,⁵⁸ decided in 1965, before Justice Stevens was on the Court, the peremptory seemed sacrosanct. When the Court described the peremptory challenge in *Swain* it waxed eloquent on the peremptory's "very old credentials"⁵⁹ and described it as "one of the most important of the rights secured to the accused"⁶⁰ and "a necessary part of trial by jury."⁶¹ The Court was reluctant to take any steps that would hamper a party's free exercise of its peremptory challenges. Although the Court was disturbed that prosecutors might be using the peremptory to strike African-Americans from petit juries in case after case, and suggested that if this were true "it would appear that the purposes of the peremptory challenge are being perverted,"⁶² it chose to believe that prosecutors were not acting in this manner.⁶³ After *Swain*, a defendant would have to show that the prosecutor was exercising race-based peremptories not just in his case but in prior cases as well; this evidentiary burden, as the Court later acknowledged, proved to be "crippling"⁶⁴ for a defendant. In spite of the exceedingly

56. 476 U.S. 79 (1986).

57. 461 U.S. 961 (1983).

58. 380 U.S. at 202.

59. *Id.* at 212.

60. *Id.* at 219 (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

61. *Id.*

62. *Id.* at 224.

63. *Id.* at 222 ("The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court.").

64. *Batson v. Kentucky*, 476 U.S. 79, 92 (1986).

difficult evidentiary burden established in *Swain*, the issue of race-based peremptories continued to be raised.

The issue resurfaced in *McCray v. New York*,⁶⁵ in which several criminal defendant petitioners claimed in their petitions for writs of certiorari that the prosecutor's exercise of peremptory challenges to exclude African-Americans from their petit juries violated their right to an impartial jury drawn from a fair cross section of the community, as guaranteed by the Sixth Amendment to the United States Constitution. Justice Stevens, joined by Justices Harry A. Blackmun and Lewis F. Powell, Jr., wrote a brief opinion "respecting the denial of the petitions for writs of certiorari"⁶⁶ in which he explained his vote to deny the petitions. He noted that while the issue was an important one, he thought it wise to let the issue percolate.⁶⁷ At the time, there were no conflicts among the federal circuits and only two states had held that the prosecutor's use of discriminatory peremptories violated provisions of their state constitutions.⁶⁸ He thought it "a sound exercise of discretion" for the Court to let the states serve "as laboratories,"⁶⁹ as Justice Louis D. Brandeis had once advised,⁷⁰ and to let the states and lower federal courts consider the issue before the Court did. Thus, the Court would have the benefit of the lower courts' reasoning before it addressed the issue.

Justice Stevens's opinion was significant in at least two ways. First, it signaled to potential petitioners that three justices, in addition to Justices Marshall and William J. Brennan, Jr., who dissented from the Court's denial of the petitions for writs of certiorari, thought that the issue was important and one that the Court should ultimately, though not immediately, address. If Justice Stevens had not written an opinion there would only have been the Court's denial of certiorari and the two dissenting Justices' opinion. Potential petitioners would not have been able to gauge how close the Court was to hearing the issue. It takes four Justices to grant a petition for a writ of certiorari. With the aid of Justice Stevens's opinion potential petitioners knew that five Justices thought the issue was one that the Court should resolve.

Second, Justice Stevens's sense that the Court should wait proved to be prescient. By waiting, the Court not only had the benefit of other lower court judges' reasoning, but also the Court was able to take a case that raised the issue on both Sixth and Fourteenth Amendment grounds,⁷¹

65. 461 U.S. 961, 963 (1983).

66. *Id.* at 961.

67. *Id.* at 962.

68. *Id.*

69. *Id.* at 963.

70. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

71. There was some debate about this. *Compare Batson v. Kentucky*, 476 U.S. 79, 108-11 (1986) (Stevens, J., concurring) (explaining why the Fourteenth Amendment claim was

whereas *McCray* had raised the issue on Sixth Amendment grounds only. The difference proved to be critical. *Batson v. Kentucky*, decided on Fourteenth Amendment grounds, held that a prosecutor's exercise of race-based peremptories violated a defendant's right to equal protection. Once the Court decided *Batson*, its logic became inexorable. If *Batson* applied to prosecutors, then it should apply to defense attorneys; if it applied in criminal cases, then it should apply in civil cases. Each incremental extension of *Batson* seemed inevitable. In contrast, *Holland v. Illinois*,⁷² decided on Sixth Amendment grounds, held that a prosecutor's exercise of race-based peremptories did not violate a white defendant's Sixth Amendment right to an impartial jury drawn from a fair cross section of the community.⁷³ The Fourteenth Amendment proved to be a viable route for challenging discriminatory peremptories, whereas the Sixth Amendment became a dead end.⁷⁴ If the dead-end route had come first—a distinct possibility if the Court had granted certiorari in *McCray*—then the only successful route to challenge discriminatory peremptories might not have been discovered or might not have been successful after the dead-end route had been announced.

B. Nondiscrimination in *Batson* and Its Progeny

In *Batson*, the Court began to acknowledge the importance of nondiscrimination during jury selection and it expanded this principle in the *Batson* progeny. Justice Stevens was part of the majority in *Batson* that recognized the importance of eliminating discrimination during jury selection, and in later cases he reminded the Court of its commitment to nondiscrimination even when a majority seemed to have strayed from it.

In *Batson*, and later in the *Batson* progeny, the Court identified harms that discriminatory peremptories caused, including harms not only to the defendant, but also to the excluded juror and to the community at large.⁷⁵

included in the question presented), with *id.* at 112-18 (Burger, C.J., dissenting) (explaining why the Fourteenth Amendment claim was not properly before the Court).

72. 493 U.S. 474 (1990).

73. *Id.* at 487.

74. I have written elsewhere why I think the Sixth Amendment would have provided a better approach than the Fourteenth Amendment to eliminating discriminatory peremptory challenges. See Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041, 1114-36 (1995). The incremental approach required by the Fourteenth Amendment, which I have criticized as piecemeal, seemed more manageable than the Sixth Amendment to a majority of the Justices. For example, Justice Anthony Kennedy explained in his concurrence in *Holland v. Illinois* that he joined the Court's opinion because he thought the Sixth Amendment had no "limiting principle to make it workable in practice" for a white defendant to challenge the prosecutor's exercise of a race-based peremptory challenge, but if a white defendant raised the same claim under "the Fourteenth Amendment Equal Protection Clause, it would have merit." 493 U.S. at 488 (Kennedy, J., concurring).

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

Although earlier cases, such as *Peters v. Kiff*⁷⁶ and *Ballard v. United States*,⁷⁷ recognized that discrimination at the venire stage—namely, the systematic exclusion of African-Americans or women from the venire—harmed others in addition to the defendant, *Batson* was the first case to focus on these harms when the peremptory challenge was at stake.

Batson recognized multiple harms from race-based peremptory challenges. Race-based peremptories violated a defendant's right to equal protection under the Fourteenth Amendment because such peremptories denied him the right to a jury that is indifferently chosen and free from governmental control.⁷⁸ However, race-based peremptories also harmed the excluded jurors who were, in effect, being told that they were less desirable than white jurors because of their race. Members of the community also were harmed because a jury selection process that is tainted by discrimination leads them to question "the fairness of our system of justice."⁷⁹ African-Americans might question whether a jury system in which lawyers could remove jurors because of their race was one whose verdicts they should accept. Similarly, whites might question whether a jury system that could be so flagrantly manipulated was one whose verdicts they should accept.

In *Powers v. Ohio*,⁸⁰ the next in the *Batson* line of cases, the majority expounded on the multiple harms caused by race-based peremptory challenges. In *Powers*, a white defendant challenged the prosecutor's exercise of peremptory challenges to remove African-American jurors from his jury. The Court noted that a defendant of any race has "the right to be tried by a jury whose members are selected by nondiscriminatory criteria."⁸¹ To allow anything less would be to invite "cynicism respecting the jury's neutrality and its obligation to adhere to the law."⁸²

Nondiscriminatory jury selection, the Court explained, is essential; otherwise, jurors who are excluded based on discriminatory peremptories will feel stigmatized. The excluded jurors also will lose the opportunity that other citizens have to be educated by jury service. Alexis de Tocqueville, writing 170 years ago, had identified the education of the citizenry as one of the greatest contributions of the jury system. According to Tocqueville, the jury serves as a "free school" for its citizens, teaching

76. 407 U.S. 493, 499-500 (1972) (recognizing 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 the community as well).

77. 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.").

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

79. *Id.*

80. 499 U.S. 400 (1991).

81. *Id.* at 404.

82. *Id.* at 412.

them about self-governance in a democracy.⁸³ Citizens who are struck from the jury by virtue of their race are denied that education, which is one of the badges of citizenship.

Finally, community members are harmed because they lose faith in the fairness of the trial process. The exercise of peremptories takes place in open court, beneath the American flag, the judicial seal, the watchful eye of the judge, and often before a courtroom filled with members of the public and press. When peremptories are exercised based on race, it is apparent for all to see, as one African-American juror after another is dismissed.⁸⁴ Exclusions based on race, as the Court recognized in *Powers*, taint not only the jury selection process, but also the remainder of the trial, and leave those who witness it with the belief that the proceedings cannot be fair. In sum, discriminatory peremptories do harm to the "dignity of persons and the integrity of the courts."⁸⁵

The other *Batson* progeny, including *Edmonson v. Leesville Concrete Co.*,⁸⁶ *Georgia v. McCollum*,⁸⁷ and *J.E.B. v. Alabama ex rel. T.B.*,⁸⁸ all built upon the framework established in *Batson* and developed more fully in *Powers*.⁸⁹ Each of these cases expanded the reach of *Batson* and reinforced the Court's commitment to nondiscrimination during jury selection. *Edmonson* established that race-based peremptories were impermissible in civil cases⁹⁰ and that "discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial."⁹¹ *McCollum* held that criminal defendants are also prohibited from exercising race-based peremptories in criminal cases and noted that "[i]t is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race."⁹² *J.E.B.* extended *Batson* so that peremptories could no longer be exercised on the basis of gender. In reaching this ruling, the Court was careful to note

83. Alexis de Tocqueville, *Democracy in America* 275 (J.P. Mayer ed., George Lawrence trans., Anchor Press 1969) (1840).

84. See *Powers*, 499 U.S. at 412.

A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, 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.

85. *Id.* at 402.

86. 500 U.S. 614 (1991).

87. 505 U.S. 42 (1992).

88. 511 U.S. 127 (1994).

89. *Powers*, 499 U.S. at 400. I do not include *Hernandez v. New York*, 500 U.S. 352 (1991), in this line of cases because it was decided on fact-specific grounds.

90. *Edmonson* was decided on equal protection grounds, but it was based on the equal protection component of the Fifth Amendment's Due Process Clause, rather than on the Fourteenth Amendment's Equal Protection Clause, see *Edmonson*, 500 U.S. at 616, which the Court has long recognized to afford the same protections against federal, as opposed to state, actors. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

91. *Edmonson*, 500 U.S. at 619.

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

that this did not signal the end of all peremptory challenges; rather, it simply meant that gender could “not serve as a proxy for bias.”⁹³

C. *Justice Stevens's Role in Maintaining the Integrity of Batson*

After almost a decade of *Batson* and its progeny, the Court suddenly veered away from the delicate balance it had struck in *Batson* between preserving the peremptory and protecting the principle of nondiscrimination in jury selection. In *Purkett v. Elem*,⁹⁴ a per curiam opinion, the Court undermined *Batson* by allowing parties to give any race-neutral reason at step two of the *Batson* analysis even if this reason was unrelated to the case or entirely implausible. Justice Stevens, writing in dissent, took issue with the Court's approach and urged it to return to the principles underlying *Batson*.⁹⁵

In *Elem*, the Court undermined the protections of *Batson*. *Elem* had objected to the prosecutor's use of peremptory challenges to exclude two African-American men from the jury. The trial judge never ruled on whether *Elem* had established a prima facie case of race-based peremptories; instead, the prosecutor simply offered an explanation for his strikes. He said that he had struck both jurors because of their hair. One had “long hair” and “a mustache and a goatee type beard” and the other also had a “mustache and goatee type beard.”⁹⁶ The prosecutor explained that he did not “like the way they looked” and that their facial hair “look[ed] suspicious” to him.⁹⁷ He further explained that the second juror had been the victim of a robbery with a shotgun and might assume that guns were necessary to robberies. The trial judge overruled *Elem*'s objections and empanelled the jury. After his conviction, *Elem* raised his *Batson* challenge on appeal, but the Missouri Court of Appeals affirmed, finding that the prosecutor's explanation “constituted a legitimate hunch.”⁹⁸ On habeas review, the Eighth Circuit reversed as to the first juror because it believed that *Batson* required “some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror.”⁹⁹

The Supreme Court reversed the Eighth Circuit, and in doing so, altered the *Batson* test. In *Batson*, the Court established a three-step test to challenge the exercise of a peremptory challenge. Step one requires the objecting party to establish a “prima facie case of purposeful discrimination.”¹⁰⁰ Step two shifts the burden to the party attempting to exercise the peremptory to give neutral reasons that are “related to the

93. *J.E.B.*, 511 U.S. at 143.

94. 514 U.S. 765 (1995).

95. *Id.* at 770 (Stevens, J., dissenting).

96. *Id.* at 766.

97. *Id.*

98. *Id.*

99. *Id.* at 767 (citations omitted).

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

particular case to be tried.”¹⁰¹ Finally, step three requires the trial judge to decide whether the reasons are pretextual.¹⁰² The Court in *Elem* reinterpreted *Batson* so that a lawyer’s reasons given at step two need not be related to the particular case and can even be silly and fanciful as long as the reasons are race neutral.¹⁰³ At step two, “a ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection.”¹⁰⁴ The Court explained that it is only at step three that the trial judge might find those silly or fanciful reasons to be pretextual.¹⁰⁵

Justice Stevens dissented from this alteration to the *Batson* test. On procedural grounds, he thought the Court should not have altered the *Batson* test without providing for full briefing and oral argument.¹⁰⁶ On substantive grounds, this change undercut the effectiveness of *Batson*. Whereas *Batson* had required that the reason given for a peremptory be related to the case, the Court now permitted any reason, no matter how ludicrous, as long as it did not mention race. As Justice Stevens explained, it is difficult to see the difference between any reason at all, such as “‘the juror had a beard,’ or ‘the juror’s last name began with the letter ‘S’” and the statement, “‘I had a hunch,’”¹⁰⁷ which *Batson* expressly prohibited.¹⁰⁸ The Court’s distinction between reasons given by a lawyer at step two that were fanciful but race neutral and the judge’s ruling at step three on whether a fanciful reason was actually pretextual made little sense. Justice Stevens pointed out that “preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried.”¹⁰⁹ Justice Stevens agreed with the Missouri Supreme Court in *State v. Antwine*¹¹⁰ and the Eighth Circuit in *Elem v. Purkett*:¹¹¹ Silly reasons that are irrelevant to a case make a charade of *Batson* and “demean[] the importance of the values vindicated by [the U.S. Supreme Court’s] decision in *Batson*.”¹¹²

Justice Stevens’s dissent in *Elem* was an attempt to maintain *Batson*’s integrity. Although he did not persuade a majority of the Court to join him

101. *Id.* at 98.

102. *Id.*

103. *Elem*, 514 U.S. at 768.

104. *Id.* at 769.

105. *Id.* at 768.

106. *Id.* at 770 (Stevens, J., dissenting).

107. *Id.* at 775.

108. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (“Nor may the prosecutor rebut the defendant’s case merely by denying that he had a discriminatory motive or affirm[ing] [his] good faith in making individual selections.” (internal quotation omitted) (alteration in original)).

109. *Elem*, 514 U.S. at 777 (Stevens, J., dissenting).

110. 743 S.W.2d 51, 65 (Mo. 1987) (en banc) (“Were facially neutral explanations sufficient without more, *Batson* would be meaningless. . . . We do not believe the Supreme Court intended a charade when it announced *Batson*.”).

111. 25 F.3d 679, 683 (8th Cir. 1994).

112. *Elem*, 514 U.S. at 778.

in *Elem*, he did in *Johnson v. California*,¹¹³ which was another effort to maintain *Batson*'s integrity.

In *Johnson*, the Court considered the validity of California's practice which required an objector to a peremptory challenge to show that "it [was] more likely than not"¹¹⁴ that the other party's peremptory was based on race. The Court, in an opinion by Justice Stevens, struck down this practice under *Batson*. The defendant, an African-American, had objected after the prosecutor exercised three of his twelve peremptory challenges to remove the three African-American jurors from the venire. The trial judge did not require the prosecutor to explain his strikes because under California precedent a party had to show "a strong likelihood" that the peremptories were based on race and the trial judge thought that the three African-American jurors' questionnaires contained answers that could explain their removal.¹¹⁵ The California Court of Appeals reversed, reasoning that *Batson* required only an "inference" of discrimination in order to establish a prima facie case.¹¹⁶ The California Supreme Court reinstated the conviction on the grounds that *Batson* permitted states to define the standards to be used for establishing a prima facie case.¹¹⁷

In his opinion, Justice Stevens made clear that while states are free to design procedures for implementing *Batson* they are not free to recast the standards created by *Batson*.¹¹⁸ Step one of *Batson* provides that a defendant can establish a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."¹¹⁹ At step one, *Batson* requires only "an inference of discriminatory purpose," and that inference can be met in a number of ways.¹²⁰ Once the objecting party has satisfied that inference, then the burden shifts, and at step two, the prosecutor must give reasons for using the peremptory. From the objecting party's prima facie case and the prosecutor's reasons, the trial judge must decide whether the peremptory was improperly motivated.¹²¹ As Justice Stevens explained, the *Batson* Court did not intend to make the first step "so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination."¹²² Rather, the defendant can meet *Batson*'s first step by providing the trial judge with evidence sufficient to draw "an inference" that discrimination has occurred. Thus, the Court held that California's "more likely than not" standard was inconsistent with the *Batson*

113. 125 S. Ct. 2410 (2005).

114. *Id.* at 2413 (citations omitted).

115. *Id.* at 2414.

116. *Id.* at 2414-15.

117. *Id.* at 2415.

118. *Id.* at 2416.

119. *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986).

120. *Id.* at 96.

121. *See supra* notes 100-03.

122. *Johnson*, 125 S. Ct. at 2417.

standard.¹²³ Indeed, it was requiring objecting parties to do more than *Batson* required at the first step.

Justice Stevens's opinion in *Purkett v. Elem* was a valiant effort to convince the Court not to whittle away the *Batson* requirements. His opinion in *Johnson v. California* was a successful defense of *Batson* from one of the more onerous burdens imposed upon objectors to the exercise of a peremptory challenge. His efforts to protect the integrity of *Batson* are admirable, and as long as *Batson* remains in place, they are necessary. The question, however, is whether the protections *Batson* offers are too ineffectual to prevent discrimination during jury selection. Quite simply, is *Batson* worth the struggle? Or, is it time for a more effective way of eliminating discrimination during jury selection?

III. REASSESSING BATSON AFTER TWENTY YEARS

The twentieth anniversary of *Batson* marks an appropriate time to reassess whether *Batson* has been effective in eliminating discrimination during jury selection. There was a little more than a twenty-year interval between *Swain* and *Batson*,¹²⁴ which gave the lower courts time to implement *Swain* and gave the Supreme Court time to observe how *Swain* worked in practice. Twenty years after *Swain*, the *Batson* Court reconfirmed its commitment to nondiscrimination in jury selection,¹²⁵ reassessed the evidentiary burden it had created in *Swain*, and held that the evidentiary burden was too onerous for defendants to meet.¹²⁶ Another twenty years have gone by since *Batson* and lower courts have now had sufficient experience in implementing it. An appropriate interval has elapsed to consider what *Batson* has accomplished. The *Batson* framework was a compromise shaped by two competing goals—preserving the peremptory challenge and eliminating discrimination during jury selection—so it is not surprising that it has produced mixed results. It has preserved the peremptory, but to what extent has it eliminated discrimination during jury selection?

A. The Benefits of *Batson*

1. Requiring Lawyers and Judges To Think About Race and Gender

One of the benefits of *Batson* is that it makes lawyers think about race and gender during jury selection. Whenever lawyers exercise a peremptory challenge, they must consider whether it will raise a *Batson* challenge from the other side, and if so, whether they can give acceptable reasons for its

123. *Id.* at 2416.

124. *Swain v. Alabama*, 380 U.S. 202 (1965), was decided in 1965 and *Batson* was decided in 1986.

125. *Batson*, 476 U.S. at 84 (explaining that the Court has been consistent in its views that discrimination should play no role in jury selection).

126. *Id.* at 92.

exercise. Although the reasons required of lawyers are not demanding, this process requires lawyers to take care when exercising their peremptories. Lawyers might still exercise discriminatory peremptories, but they might not do it as often and certainly not in as obvious a manner as pre-*Batson*. *Batson* shapes lawyers' exercise of peremptories because it forces them to think about whether they could defend their exercise of peremptories if challenged by the other side.

Batson also makes judges think about race and gender during jury selection. Every time lawyers object to the other side's peremptory challenge judges must determine whether the objecting side has established a prima facie case of race or gender discrimination, and if so, whether the reasons given for the peremptory are race neutral and not pretextual. Trial judges are in the trenches when it comes to *Batson* challenges. Trial judges, unlike appellate judges who have only the transcript of the proceedings below, have the lawyers and jurors before them. They have facts that might not end up on the record, such as the juror's race, body language, or tone of voice, and they often have to assess the credibility of lawyers when they provide their reasons. With the adoption of the *A.B.A. Principles*, judges must give even greater thought than before to race and gender during jury selection.¹²⁷ Rather than leaving it only to lawyers to raise *Batson* challenges, the *A.B.A. Principles* explicitly instruct judges that they can raise *Batson* challenges sua sponte.¹²⁸

Some psychologists' empirical studies of race and jury decision making suggest that when race is made salient for jurors, either by asking about race during voir dire or by seating a racially diverse jury, white jurors expressed greater concern about racial prejudice during deliberations.¹²⁹ It could be that *Batson* challenges serve a similar function for white lawyers and judges. *Batson* challenges could make race and gender more salient issues for white lawyers and judges and perhaps make them more aware of gender and race issues throughout the trial, just as race-related questions during voir dire encourage white jurors to think about race during the deliberations.

According to two mock juror studies¹³⁰ conducted by Professors Samuel R. Sommers and Phoebe C. Ellsworth, white jurors were more attuned to potential prejudice against an African-American defendant when they were

127. See *A.B.A. Principles*, *supra* note 12.

128. See *id.* Principle 11.F.5. ("When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under [Principle] F.3. above.").

129. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003).

130. I use "mock juror studies" to refer to Samuel R. Sommers and Phoebe C. Ellsworth's two studies that examined individual mock jurors' verdict preferences. I use "mock jury study" to refer to Sommers's study in which mock jurors were assigned to juries and had an opportunity to deliberate.

asked questions about race during voir dire.¹³¹ In one mock juror study, for example, white mock jurors rated the African-American defendant guilty more often and assigned him a longer sentence when no racial context was provided.¹³² However, when the white mock jurors were made to think about race beforehand by being given a racial context for the incident in question, they were equally likely to vote to convict the defendant whether they were told he was white or African-American.¹³³

Sommers and Ellsworth replicated their results in a later mock juror study. Using a different trial scenario, the authors presented white mock jurors with an assault case involving high school basketball teammates. In one version of the scenario, a defense witness mentioned the racial tension that had permeated the locker room all season; in another, the witness provided a race-neutral context for the assault. White mock jurors were more likely to convict the African-American defendant than the white defendant when the racial issues were not presented than when they were. The results of these studies led the authors to hypothesize that “[w]hite juror bias is actually more likely to occur in trials *without* salient racial issues, where norms regarding race are weak.”¹³⁴

In a later mock jury study conducted by Sommers, mock jurors were shown a videotape of a rape trial involving an African-American defendant and then given an opportunity to deliberate as part of six-person juries.¹³⁵ Some of the mock jurors had been asked about their attitudes on race and racial bias in the legal system as part of a written voir dire questionnaire. The purpose of these questions, according to the author, was “to force mock jurors to think about their racial attitudes and, more generally, about social norms against racial prejudice and institutional bias in the legal system.”¹³⁶ One finding of this study was that both white and African-American mock jurors were less likely to vote to convict the African-American defendant when they were forced to think about racial issues beforehand.¹³⁷ The study also showed that racially mixed juries tended to deliberate longer, discuss more facts, raise more questions, and discuss more racial issues than all-white juries.¹³⁸ In addition, racially mixed juries made fewer factual errors than the all-white juries, and when there were factual inaccuracies they were more likely to be corrected in the racially mixed juries than in the all-white juries.¹³⁹ Finally, white jurors on racially mixed juries were less likely to vote to convict an African-American defendant than white jurors

131. See Sommers & Ellsworth, *supra* note 129, at 1015-16, 1026-28.

132. *Id.* at 1015.

133. *Id.*

134. *Id.* at 1016.

135. *Id.* at 1026.

136. *Id.* at 1027.

137. *Id.*

138. *Id.* at 1028.

139. See Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. (forthcoming 2006).

on all-white juries.¹⁴⁰ These findings led Sommers and Ellsworth to conclude that “membership on a racially mixed jury might be another way in which White jurors’ motivations to avoid prejudice are activated, thereby affecting subsequent trial judgments.”¹⁴¹

Although it has not been tested empirically, my hypothesis is that the *Batson* framework, and the discussion it requires among lawyers and judges about race and gender, could serve a similar function as the race-related voir dire questions used by Sommers and Ellsworth. Lawyers and judges who are forced to think about race and gender during the voir dire may be more aware of these issues throughout the rest of the trial.¹⁴² Thus, *Batson* might serve a useful triggering function for lawyers and judges even if the test is not a stringent one and does not effectively weed out discriminatory peremptories.

2. Allaying Jurors’ Concerns

Empirical evidence also suggests that jurors do not take offense at lawyers’ exercise of peremptory challenges, and so *Batson* could raise issues of race and gender without actually leaving struck jurors feeling disillusioned or betrayed by the process.

In Professor Mary Rose’s study of 207 North Carolina jurors in a single courthouse who were struck from thirteen criminal juries, she found that they generally understood and accepted that this was part of the adversarial process.¹⁴³ Rose observed the entire jury selection and then interviewed those jurors who were struck from the jury either by for-cause or peremptory challenges. She found that those jurors who thought they might have been excused based on some personal characteristic (which could be a personal characteristic related to the case, such as the case involved a homicide and the juror’s relative had been the victim of a homicide, or one unrelated to the case, such as the juror’s race or gender) were the least satisfied with the decision.¹⁴⁴ However, Rose also found that even those jurors still had a positive view of jury selection, believed that they had been treated fairly, and were willing to serve again.¹⁴⁵ Rose concluded that “[there is] little support for those who worry that excused jurors will feel that they have been treated unfairly at the hands of the court. All jurors,

140. Sommers & Ellsworth, *supra* note 129, at 1028.

141. *Id.*

142. Instead of having a positive effect, however, the attention given to *Batson* challenges during voir dire could have a negative effect. Just as the attention given to death-qualification during voir dire in capital cases leaves jurors thinking that they must impose the death penalty during the sentencing phase, the attention given to *Batson* during voir dire could leave jurors thinking about race or gender in a negative light. The effects, whether positive or negative, are in need of empirical testing. I thank Justice Stevens for bringing this comparison to my attention. See *infra* Part V.E.

143. See Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors’ Views Regarding the Peremptory Challenge*, 78 Chi.-Kent L. Rev. 1061, 1066-67 (2003).

144. See *id.* at 1075-77, 1085.

145. See *id.* at 1090.

including those who had been excused, had high ratings of fair treatment.”¹⁴⁶ Overall, excused jurors had an understanding of jury selection as part of the adversarial process and were generally accepting of it.¹⁴⁷

3. Reassuring Parties

As discussed in Part I.A, parties and their lawyers take solace in the peremptory challenge and by preserving the peremptory challenge *Batson* continues to reassure parties that their jury has been fairly selected. The peremptory challenge allows parties to exercise some control over the selection of the jury. They are able to excuse a limited number of jurors with peremptories. Typically, they will not have to give any reason for the exercise of their peremptories. Moreover, parties can hope that their lawyer is particularly adept at removing unsympathetic or hostile jurors and that this will give them an advantage at trial. Whether their lawyers are truly able to do this is another question,¹⁴⁸ but at the very least, parties are reassured that the jury was fairly chosen because their lawyers had some role in shaping it.

Batson reassures parties not only by preserving the peremptory, but also by providing some recourse for the party who feels that the other side has engaged in discrimination during jury selection. If there were no check on either side's exercise of the peremptory one or both sides might exercise discriminatory peremptories with impunity. The exercise of one discriminatory peremptory is enough to raise a *Batson* challenge. Without any check a party might try to eliminate all jurors who are members of racial or ethnic minorities. Given their small numbers in the population and their small numbers on the venire, it does not take many peremptories to eliminate all minorities from the jury. *Batson* provides some basis for a party to challenge the other side's use of discriminatory peremptories. It might not provide a strong basis, but it does provide something. The party who raised the *Batson* challenge might feel reassured that at least the other side had to explain itself.

Batson is most effective when a party claims to have excluded a minority juror for a particular reason but does not strike a white juror for that same

146. *Id.* at 1094.

147. *Id.* at 1097. But for a contrary view, based on judicial experience rather than empirical study, see Hoffman, *supra* note 54, at 137. Judge Morris B. Hoffman observed that jurors who were removed through peremptory challenges were “angry” and those in the courtroom who witnessed the peremptory process found it “bizarre and irrational.” *Id.* at 137-38.

148. See, e.g., Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491 (1978). This Article described an empirical study comparing twelve actual criminal juries' verdicts with twelve shadow juries' verdicts in the same cases and found that the lawyers' selection of jurors made no difference to the verdicts in seven trials, and had only a marginal effect in two trials. *Id.* However, in three cases, the selection might have made a difference. *Id.*

reason. In this situation, courts have often found the party's proffered reason to be a pretext for discrimination. In one case, in which the prosecutor exercised peremptories against the only Latino juror and alternate, the Ninth Circuit reversed because the reasons the prosecutor gave did not lead the prosecutor to strike a white juror as well.¹⁴⁹ The prosecutor explained that he had struck the Latino juror because of his residence and employment, but he did not strike a white juror with the same residence.¹⁵⁰ However, courts have not always been consistent in their practices.¹⁵¹

4. Changing Societal Norms

Batson has changed acceptable discourse about race and gender in the courtroom. After *Batson*, lawyers learned that they could no longer identify a juror's race as the basis for excluding that juror from the jury. After *J.E.B.*, lawyers learned that they could no longer identify a juror's gender as the basis for excluding her from the jury. After *Batson* but before *J.E.B.*, a lawyer could explain that he was exercising his peremptory challenge against a juror not because she was African-American, which *Batson* prohibited, but because she was a woman.¹⁵² For example, in *United States v. Omoruyi*,¹⁵³ a case from the Ninth Circuit, the prosecutor who struck an unmarried African-American woman, but not an unmarried white woman, explained his strike in this way: "Because she was a single female and my concern, frankly, is that she, like the other juror I struck, is single and given defendant's good looks would be attracted to the defendant."¹⁵⁴ The prosecutor stated this on the record and in open court, and the judge accepted it as a valid reason for the exercise of his peremptory.¹⁵⁵ At that time, as long as the prosecutor did not rely on race he was free to discriminate on any other ground, according to Supreme Court precedent, though not according to Ninth Circuit precedent.¹⁵⁶ After *J.E.B.*, however, lawyers learned that gender was no longer an acceptable basis for exclusion. Although a lawyer exercising a peremptory might still be influenced by a juror's gender that lawyer must provide a different reason upon demand by the other side. Lawyers' public reasons for exercising peremptories had to

149. *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989).

150. *Id.*

151. For a list of reasons that some judges accepted as race neutral, whereas other judges did not, see *Reasons To Exclude a Juror*, <http://www.dallasnews.com/s/dws/spe/2005/jury/strikes.html> (last visited Dec. 8, 2005) [hereinafter *Reasons to Exclude*]. Among the reasons that some judges upheld as race neutral whereas others considered them to be a pretext for race bias were the following: "Had no teeth," "Jewelry," "Foreign-born," "Gave bad first impression." *Id.*

152. See, e.g., *United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993).

153. *Id.* at 880.

154. *Id.* at 881.

155. See *id.*

156. The Ninth Circuit had extended *Batson* to gender several years before the Supreme Court did so in *J.E.B.* See *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992) (en banc) (extending *Batson* to gender-based peremptory challenges).

change, even if their personal attitudes changed more slowly. One benefit of the *Batson* line of cases is that the reasons that could be given in the public setting of the courtroom had changed, and this was a first step toward ridding jury selection of discriminatory peremptories.

B. *The Harms of Batson*

1. Permitting a Charade

One of the harms of *Batson* is that lawyers have learned to play the “*Batson* game.” As long as they give a reason—any reason—that does not involve a juror’s race or gender, then they have satisfied *Batson*’s command. Although this is a benefit of *Batson*—that lawyers no longer explain that they are striking a juror because of her race or gender—this is also a serious harm. Lawyers still might be motivated to exclude a juror because of her race or gender but they have learned to provide other explanations for the exercise of their peremptories.

Although *Batson* was an earnest attempt to root out discriminatory peremptories, *Batson* is so easy to circumvent that it allows a charade in the courtroom. Instead of giving race or gender as a reason for excluding jurors, lawyers can give any other reason no matter how “silly or superstitious.”¹⁵⁷ They have adjusted their reasons to those that have passed the *Batson* test. They know to explain away the dismissal of jurors because of their profession,¹⁵⁸ clothing,¹⁵⁹ or even the way they wear their hair.¹⁶⁰ They can rely on a juror’s body language, including hesitation in responding to a question,¹⁶¹ staring,¹⁶² or lack of eye contact.¹⁶³ One judge compiled a list, supported by Illinois case law, which he suggested that

157. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

158. *See, e.g., United States v. McMillon*, 14 F.3d 948, 951, 953 (4th Cir. 1994) (holding that a prosecutor’s reasons for exercising a peremptory against the only African-American woman on the jury because of her age, number of children, and profession (computer analyst) were race neutral and not a pretext for racial bias).

159. *See, e.g., United States v. Clemons*, 941 F.2d 321, 323 (5th Cir. 1991) (holding that a prosecutor’s reason for exercising a peremptory against an African-American because he dressed “like a rock star” was race neutral).

160. *See Elem*, 514 U.S. at 766 (“I struck [juror] number twenty-two because of his long hair. He had long curly hair. . . . And juror number twenty-four also has a mustache and goatee type beard. . . . And I don’t like the way they looked, with the way the hair is cut, both of them.” (quoting the prosecutor)).

161. *See Hernandez v. New York*, 500 U.S. 352, 356-57 (1991) (“I didn’t feel, when I asked [these two jurors] whether or not they could accept the interpreter’s translation of it, I didn’t feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could. . . .” (quoting the prosecutor)).

162. *See, e.g., United States v. Ferguson*, No. 92-5571, No. 92-5587, 1993 U.S. App. Lexis 22373, at *1, *10 (4th Cir. Sept. 1, 1993) (holding that the prosecutor’s reasons for exercising a peremptory against an African-American juror who “stared” at the prosecutor and might have difficulty with the complexities of the case were acceptable reasons).

163. *Hernandez*, 500 U.S. at 357 n.1 (“I just felt from the hesitancy in [the jurors’] answers and their lack of eye contact that they would not be able to do it.” (quoting the prosecutor)).

prosecutors could distribute under the heading of “‘Handy Race-Neutral Explanations’ or ‘20 Time-Tested Race-Neutral Explanations.’”¹⁶⁴ According to the *Dallas Daily News*, such a list was distributed by the Texas District and County Attorney Association in its 2004 Prosecutor Trial Skills Course.¹⁶⁵

The difficulty with the *Batson* approach is that it allows lawyers to appear as though they are acting without discriminatory purpose, even when they might be motivated by such purpose. Lawyers have simply learned how to mask discriminatory peremptories. However, when those who are struck are African-American and/or female, the lawyers’ reasons, though permissible under *Batson*, will appear disingenuous to the party objecting to the challenge, to the excluded juror, and to the community at large. These are the multiple harms that *Batson* recognized and sought to prevent.¹⁶⁶ Thus, *Batson* can end up causing harm to the “dignity of persons and the integrity of the courts”¹⁶⁷ despite the Court’s intent to protect against those harms. *Batson* allows lawyers to give reasons that do not include race or gender and allows judges to confirm that the reasons are permissible, while everyone else in the courtroom sees the race and gender of the excluded jurors.¹⁶⁸ The “overt wrong,” as the *Powers* Court noted, is “often apparent to the entire jury panel” and “casts doubt” on the trial proceedings¹⁶⁹ even though this is what *Batson* and its progeny tried to prevent.

2. Producing Inconsistencies

Some trial judges have tried to conduct a more searching inquiry under *Batson* and this creates uncertainty as to which reasons satisfy *Batson*. What might be an acceptable reason for a peremptory in one courtroom may be rejected in another. For example, prosecutors have justified excusing African-American jurors in drug cases because they live in or near the neighborhood where the crime allegedly occurred. In some courtrooms, this has been an acceptable reason for the exercise of a peremptory and has

164. *State v. Randall*, 671 N.E.2d 60, 65-66 (Ill. App. Ct. 1996) (suggesting that the list could include “too old, too young, divorced, ‘long, unkempt hair,’ free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, ‘lived in an area consisting predominantly of apartment complexes,’ single, over-educated” (footnotes omitted)).

165. *Reasons To Exclude*, *supra* note 151 (including the following reasons: “Agreed with O.J. Simpson verdict”; “[f]avorite TV show was Judge Judy”; “[d]istrust of newspapers”; “[l]imited reading material: ‘mystery, romance novels and the Bible’”; “[n]o religious preference; participated in church activities”; “[w]atched gospel TV programs”).

166. *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.”).

167. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

168. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (“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.”).

169. *Powers*, 499 U.S. at 412.

withstood a *Batson* challenge.¹⁷⁰ In other courtrooms, however, judges have recognized that it could be another way of striking African-Americans because the neighborhood at issue consists largely of African-American residents.¹⁷¹ Thus, when judges examine the reasons more thoroughly they reach a different result than when judges accept the reasons at face value. What is acceptable in one courtroom as satisfying the command of *Batson* proves to be unacceptable in another courtroom.

3. Deferring to Trial Judges

Although appellate review could correct this problem, at least by ensuring consistency within a circuit, appellate review of *Batson* challenges tends to be quite deferential to the trial judge.¹⁷² This is understandable because the trial judge sees the lawyers and jurors before her, but the appellate panel does not. In addition, the record does not always reflect all the information available to the trial judge. Sometimes the record does not even include the race of the juror and the trial judge declines to ask the juror to identify his or her race. Yet, race is important to a *Batson* challenge. Because of the inherent limitations on appellate review, appellate judges tend to defer to the rulings of the trial judge on *Batson* challenges.

For example, in the Seventh Circuit between 1986 and 2005 forty-two *Batson* challenges were raised on appeal in published opinions that appear in the Lexis database.¹⁷³ In thirty-four of these cases, or eighty-one percent, the Seventh Circuit affirmed the ruling of the district court judge on the *Batson* claim. There were eight cases, or nineteen percent, in which

170. See, e.g., *United States v. Johnson*, No. 96-4002, 1997 U.S. App. LEXIS 16315, at *5 (4th Cir. July 3, 1997) (holding that the prosecutor's peremptory challenge against an African-American female juror in a drug case "because she lived in a neighborhood known for drug trafficking activities and that during questioning she stared coldly at the prosecutor" constituted "an adequate, race-neutral reason for striking the juror"); *United States v. Uwaezhoke*, 995 F.2d 388, 393 (3d Cir. 1993) (accepting as "race-neutral on its face" the government's explanation that it exercised a peremptory challenge against an African-American female juror "because of [her] likely place of residence, she was more likely to have had direct exposure to a drug trafficking situation than other potential jurors as a class"); *United States v. Briscoe*, 896 F.2d 1476, 1488-89 (7th Cir. 1990) ("The government explicitly stated that [an African-American male juror's] last three separate addresses where he had resided in the immediate past were geographically close to the addresses of [two witnesses]. . . . [W]e affirm the trial court's determination that the government's reasons for challenging [this prospective juror] were legitimate.").

171. See, e.g., *United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992) ("While residence may sometimes be a valid reason for a challenge, in this case the prosecutor's invocation of residence rested on a stereotypical racial reason. As a result, we cannot find that race was not a factor in his decision."). But see *Boyde v. Brown*, 404 F.3d 1159, 1171 (9th Cir. 2005) ("It may be unpersuasive for a prosecutor to use residence without attempting to tie it to the facts of the case. . . . To the extent *Bishop* suggests that the race-neutrality of an explanation depends on its persuasiveness, it has been effectively overruled by *Purkett*.").

172. See, e.g., *United States v. Chinchilla*, 874 F.2d 695, 697-98 (9th Cir. 1989) ("Since the district court's determination of whether a peremptory challenge constituted purposeful discrimination turns on an evaluation of credibility of the prosecutor's explanation, we should give those findings great deference.").

173. This LEXIS search covered the period from April 30, 1986, to September 13, 2005.

a *Batson* challenge was raised but the district court ruling was not affirmed. In five of these cases, the state trial judge had followed some unorthodox procedure with respect to peremptory challenges, and in one, the case was remanded for the prosecutor to give reasons. In the remaining two, the cases were before the Seventh Circuit on collateral review and there had been a change in the law (after *Holland* and *Powers*). The deference to the trial judge is not surprising given that the trial judge is called upon to decide whether the reason is race neutral and not pretextual, and this determination often depends upon whether the trial judge finds the attorney who exercised the challenge to be credible. As the Seventh Circuit explained, "The trial judge is clearly in the best position to make that factual determination."¹⁷⁴ The Seventh Circuit will not disturb such a factual finding unless it is "completely outlandish" or there is other evidence that indicates its "falsity."¹⁷⁵

The Seventh Circuit's approach illustrates the difficulty of successfully pursuing a *Batson* challenge on appeal. When this difficulty is combined with the difficulty of succeeding with a *Batson* challenge at the trial level, where almost any reason (except a race- or gender-based reason) will suffice, the *Batson* challenge becomes exceedingly difficult to establish. The "crippling" evidentiary burden established in *Swain* has been replaced by a different, but no less "crippling," burden with *Batson* itself.

4. Spurring Judicial Self-Help Measures

The difficulty of establishing a *Batson* challenge combined with the harms caused by discriminatory peremptories has led a small number of judges to take self-help measures with respect to *Batson*. These efforts have included a judge who has prohibited peremptories in her own courtroom¹⁷⁶ and a judge who has refused to seat a jury unless it is racially diverse.¹⁷⁷ Although these pockets of resistance have been fairly limited, they are nonetheless striking. It is rare to see a judge resist a judicial precedent or practice and it is also rare for a judge to speak outside of judicial opinions.

Almost a decade ago, Judge Constance Baker Motley, then a senior federal district court judge in the Southern District of New York and one of the few African-American women on the federal bench, explained that she was barring peremptory challenges in her courtroom. Admittedly, she already had senior status, which meant she heard a limited number of cases, and her decision to bar peremptories in her courtroom would therefore have a limited effect. Nevertheless, there are only a few other examples of judges declaring that they disagreed with Supreme Court precedent and would take some action to express their disagreement. Judge Motley's ban

174. *Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 703 (7th Cir. 2002).

175. *Id.*

176. See *infra* text accompanying notes 178-89.

177. See *infra* text accompanying notes 190-96.

on peremptories is one example; Judge Jack B. Weinstein and Judge Whitman Knapp's refusal to hear drug cases is another.¹⁷⁸

Judge Motley announced her decision in *Minetos v. City University of New York*,¹⁷⁹ a case involving a charge of discrimination based on race and national origin in violation of Title VII of the Civil Rights Act of 1964. Judge Motley found that the defendants had used their peremptories to strike two African-American jurors and one Latino juror for discriminatory reasons and that the plaintiff had used her peremptories to exclude white men for discriminatory reasons.¹⁸⁰ The defendants explained that they struck the Latino juror based on his views about speaking English on the job, and that they struck the African-American woman because she was a teacher and the African-American man because he was a blue-collar worker who had never worked in an office.¹⁸¹ The plaintiff explained that she exercised her peremptories to remove white professional men because they were pro-management.¹⁸² Judge Motley found that both sides' reasons masked discriminatory purposes. For Judge Motley, the "case illustrate[d] the bedeviling problems associated with peremptory challenges which, by their very nature, invite corruption of the judicial process."¹⁸³

Although neither side requested it, Judge Motley raised the question sua sponte whether peremptories were constitutional, and held that they were not. She observed that ten years of *Batson* had failed to root out discrimination and *Elem* was bound to add further complications.¹⁸⁴ In her opinion, Judge Motley referred to an article by another judge, who had listed reasons that had been accepted or rejected in *Batson* challenges in New York state court opinions, and who had tried to categorize them as pretextual or non-pretextual.¹⁸⁵ Judge Motley saw this as a cry for help from litigants and judges, but not as an answer because the list also served as a how-to guide for those who were of a mind to discriminate. The answer, she wrote, was to eliminate peremptories. She held that

178. See, e.g., Joseph B. Treaster, *2 Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. Times, Apr. 17, 1993, at A1 (stating that "[t]wo of New York City's most prominent Federal judges said yesterday that they would no longer preside over drug cases, going public with a protest that calls attention to what dozens of Federal judges are doing quietly across the country," and that "[t]he decisions, by Jack B. Weinstein of Brooklyn and Whitman Knapp of Manhattan, were made in protest against national drug policies and Federal sentencing guidelines"); Jack B. Weinstein, Op-Ed., *The War on Drugs Is Self-Defeating*, N.Y. Times, July 8, 1993, at A19 ("Largely because of mandated and unnecessarily harsh sentences for minor drug offenders, which fail to deter, I have exercised my option as a senior Federal judge not to try minor drug cases.").

179. 925 F. Supp. 177 (S.D.N.Y. 1996).

180. *Id.* at 180.

181. *Id.* at 181-82.

182. *Id.* at 182.

183. *Id.* at 183.

184. *Id.*

185. *Id.* at 184 (citing Donald P. De Riggi, *Appellate Court Guidance On Batson Challenges*, N.Y. L.J., Mar. 12, 1996, at 48).

peremptories “per se violate equal protection,”¹⁸⁶ even though the Supreme Court had never so held. Her explanation was as follows:

It is time to put an end to this charade. We have now had enough judicial experience with the *Batson* test to know that it does not truly unmask racial discrimination. In short, lawyers can easily generate facially neutral reasons for striking jurors and trial courts are hard pressed to second-guess them, rendering *Batson* and *Purkett*’s protections illusory.¹⁸⁷

Her opinion, described in the press as an extraordinary ruling,¹⁸⁸ held that “judicial experience with peremptory challenges proves that they are a cloak for discrimination and, therefore, should be banned.”¹⁸⁹

In a courtroom in the Midwest, Cook County Circuit Judge Evelyn Clay, also an African-American woman, announced during jury selection in at least three criminal trials that she refused to seat all-white juries. In one jury selection, after eight jurors had been selected, she announced: “I’m telling you folks, I don’t know what you all intend to do, but I have no intention of seating an all-white jury.”¹⁹⁰ In another jury selection, after nine jurors were seated to hear a first-degree murder case, she made a similar comment. According to press review of the transcript, the judge explained: “I should have . . . given you my rules. I don’t seat an all-white jury.”¹⁹¹ In the third trial, also a murder case, she discussed the issue with the Assistant State’s Attorney. At that point, there were still no African-Americans seated on the jury. The judge explained that she thought all-white juries denied a defendant a jury of his peers and that the government needed to be willing to seat qualified African-American jurors as well. The government eventually accepted an African-American woman as the twelfth juror. One law professor, when questioned about the judge’s remarks, described them as “extraordinary.”¹⁹²

It is unclear whether Judge Clay was acting in response to lawyers’ efforts to use their peremptories to exclude African-Americans and phrased her concerns in an unfortunate manner or whether she had attempted to move the law beyond *Batson* in her own courtroom. Although the Supreme Court has prohibited race as the basis for a peremptory challenge, it has never said that the petit jury must mirror the community. Even the dissenters in *Holland*¹⁹³ agreed that it would be unworkable to insist that

186. *Id.* at 185.

187. *Id.*

188. Mark Hansen, *Peremptory-Free Zone: A Federal Judge Won’t Allow Such Challenges in Her Courtroom*, A.B.A. J., Aug. 1996, at 26.

189. *Minetos*, 925 F. Supp. at 185.

190. Jeff Coen, *Judge Lays Down Own Law: No All-White Juries*, Chi. Trib., July 25, 2005, at A1.

191. *Id.*

192. *Id.* (quoting Ronald Allen, a professor at Northwestern University School of Law).

193. *Holland v. Illinois*, 493 U.S. 474 (1990) (holding that a prosecutor’s exercise of peremptory challenges against African-Americans did not violate a white defendant’s Sixth Amendment right to a fair and impartial jury).

the twelve-person jury be as diverse as the community.¹⁹⁴ At most, the Court has said that no group can be systematically excluded from the venire, but not that a defendant is guaranteed a petit jury that looks any particular way.¹⁹⁵ If Judge Clay truly meant that she would not seat an all-white jury, she created a rule that is unsupported by current law.

Whether Judge Clay's remarks were borne of frustration, as Judge Motley's holding seemed to be, or of resistance to the current law and an effort to remake it, *Batson* will likely spur judges to move in this direction in the future.¹⁹⁶ If judges take *Batson*'s goals seriously and want it to produce nondiscrimination during jury selection, then they are likely to be frustrated. Their frustration can lead to self-help measures. So far, only a few judges have taken self-help measures in their courtroom. However, if a growing number of judges feel frustrated with *Batson* and express their frustration through self-help measures, these actions will undermine the high regard in which courts are generally held. The Supreme Court can stem this tide by reconsidering whether *Batson* is performing the tasks it was designed to do and, if not, the Court should consider the appropriate next step.

IV. THE NEXT STEP

The next step, supported by a growing number of judges, is to eliminate the peremptory challenge. The Supreme Court has recognized that although the peremptory challenge has long been part of our legal tradition it is not guaranteed by the Constitution.¹⁹⁷ Whereas equal protection is protected by

194. *Id.* at 498-99 (Marshall, J., dissenting) ("The majority's apparent concern that applying the fair-cross-section requirement to the petit jury would, as a logical matter, require recognition of a right to a jury that mirrors the population of distinctive groups in the community is chimerical."); *id.* at 512 (Stevens, J., dissenting) ("The fair-cross-section requirement mandates the use of a neutral selection mechanism to generate a jury representative of the community. It does not dictate that any particular group or race have representation on a jury.").

195. *See, e.g.,* *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

196. Judges and lawyers have observed a similar practice in Wayne County, Michigan. Chief of the Wayne County Prosecuting Attorney's appellate section, Timothy Baughman, said it was "'not uncommon' for county judges to manipulate jury selection to guarantee at least minimal minority representation." Brian Dickerson, *Rule Is Drafted on Race, Juries*, *Det. Free Press*, Sept. 29, 2005, at 1B, available at http://www.freep.com/news/mich/jury29e_20050929.htm ("There are some judges who believe that if there is too low a proportion of some racial, ethnic or gender group on the jury, the judge may deny a proper peremptory challenge in order to protect the jury from becoming further imbalanced." (quoting Baughman)). Michigan Supreme Court justices are considering a new rule that would bar judges from "manipulating jury selection to boost the number of minority jurors." *Id.*

197. *See, e.g.,* *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) ("While the Constitution does not confer a right to peremptory challenges, . . . those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury The Court went on to observe, however, that a State may not exercise its challenges in

the Constitution, the peremptory challenge is not.¹⁹⁸ The elimination of the peremptory could lead to some other changes during jury selection,¹⁹⁹ such as an expanded voir dire and an expanded for-cause challenge. However, even an expanded for-cause challenge is distinct from the peremptory because it would still require specific reasons and would still remain within the discretion of the judge.

A. *A Small but Growing Dissent*

The chorus of judges calling for the elimination of the peremptory, while still small, is nonetheless growing. One of the early proponents of this position was Justice Marshall. In his concurrence in *Batson*, he joined the Court in overruling the “crippling” evidentiary burden²⁰⁰ established in *Swain*, but wrote separately to express his view that until the peremptory challenge is eliminated, discrimination would persist during jury selection.²⁰¹ He feared that *Batson* would provide too easy a cover for lawyers who were inclined to discriminate²⁰² as well as for those who might be unaware of their true motives.²⁰³ Although *Batson* was only limited to prosecutors’ peremptories, Justice Marshall was willing to eliminate defendants’ peremptories in an effort to eliminate all discrimination during jury selection.²⁰⁴

Since Justice Marshall’s concurrence, a number of trial judges who have had experience with *Batson* in their courtrooms have come to share his view. In the mid-1990s, as mentioned above, Judge Motley observed that “[t]ime has proven Mr. Justice Marshall correct.”²⁰⁵ She went so far as to hold peremptories to be a per se violation of equal protection and to ban them in her courtroom.²⁰⁶ Judge Raymond Broderick,²⁰⁷ a senior federal

contravention of the Equal Protection Clause.”); *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (“Although there is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges, . . . nonetheless the challenge is one of the most important of the rights secured to the accused.” (internal quotations and citations omitted)).

198. See, e.g., *Batson*, 476 U.S. at 91.

199. Of course, the elimination of the peremptory does not require changes 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.

200. *Batson*, 476 U.S. at 92.

201. *Id.* at 102-03 (Marshall, J., concurring).

202. *Id.* at 106 (“Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.”).

203. *Id.* (“A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically.”).

204. *Id.* at 107-08 (“We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant’s peremptories as well.”).

205. *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 183 (S.D.N.Y. 1996).

206. See *supra* text accompanying notes 178-89.

207. See Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 Temp. L. Rev. 369 (1992).

district court judge in Pennsylvania, and Judge Morris Hoffman,²⁰⁸ a state court judge in Colorado, came to share Justice Marshall's view. Judge Gregory Mize,²⁰⁹ a former Superior Court judge in Washington, D.C., also recommended the elimination of peremptory challenges. Recently, Judge Arthur Burnett, Sr., a senior judge on the Superior Court of the District of Columbia, wrote that "peremptory challenges could and should be abolished altogether."²¹⁰

Justice Stevens's *Foreword* to a symposium issue on the jury in the *Chicago-Kent Law Review* suggested that he, too, had come to embrace this position.²¹¹ He described the different vantage points from which he had been able to view the peremptory: as a practicing lawyer who believed the peremptory to be an inalienable right, and as a judge who had to pore over voir dire transcripts and observe both the modest benefits of the peremptory as well as the serious costs it exacted.²¹² He noted the broader purposes that the jury serves, including the democratic function of allowing citizens to participate in their government, and the toll that their exclusion for impermissible reasons takes on them. Justice Stevens explained that "[a] citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not."²¹³ My interpretation of these sentences is that Justice Stevens had come to the view that peremptories should be eliminated and for-cause challenges preserved. These sentences suggest that the experience of jury duty is too important to preclude some citizens from serving as jurors for any or no reason at all, as peremptories do. Rather, if citizens are prevented from serving it should only be for a legitimate reason, articulated by an impartial judge that meets the threshold of a for-cause challenge.

Interestingly, when Justice Stephen G. Breyer took up Justice Marshall's position in a concurrence in *Miller-El v. Dretke*²¹⁴ Justice Stevens did not join him. In a later speech Justice Stevens praised Justice Breyer's concurrence as "thoughtful,"²¹⁵ but he joined only Justice Souter's opinion

208. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. Chi. L. Rev. 809, 810, 850 (1997).

209. See Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, Ct. Rev., Spring 1999, at 10.

210. Arthur L. Burnett, Sr., *Abolish Peremptory Challenges: Reform Juries To Promote Impartiality*, Crim. Just., Fall 2005, at 26, 27.

211. See John Paul Stevens, *Foreword*, 78 Chi.-Kent L. Rev. 907 (2003).

212. *Id.*

213. *Id.* at 907-08.

214. 125 S. Ct. 2317 (2005); *id.* at 2340 (Breyer, J., concurring).

215. John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.

for the Court.²¹⁶ It may be that Justice Stevens is waiting for the right time, as he was in *McCray*.²¹⁷

In his concurrence in *Miller-El*, Justice Breyer did not explicitly state that peremptories should be eliminated, but suggested a reconsideration of “*Batson’s* test and the peremptory challenge system as a whole.”²¹⁸ He reached this position only after having shown how difficult it is for parties to succeed on a *Batson* challenge and for trial judges to assess the reasons given for a peremptory.²¹⁹ All told, the toll on courts is significant: “[D]espite the strength of his claim, *Miller-El’s* challenge has resulted in 17 years of largely unsuccessful and protracted litigation—including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary.”²²⁰ Justice Breyer also noted that the Court’s commitment to nondiscrimination during jury selection has been voiced more strongly in recent years, yet despite this commitment, discriminatory peremptories remain pervasive: Articles in bar journals, jury consultant materials, and jury selection guidebooks continue to advise lawyers on how to make use of race- and gender-based stereotypes.²²¹ Justice Breyer surmised that the bar has reached the point where it could envision a jury selection in which the peremptory played no role.

B. *Eliminating the Peremptory and Expanding the For-Cause Challenge*

The elimination of the peremptory should be the next step. This would end the discrimination during jury selection that has persisted under *Batson*. Eliminating the peremptory might require a slightly expanded for-cause challenge, but this should not be reason for concern. As I have written elsewhere,²²² a slightly expanded for-cause should not create the same problems as peremptories and should allay some of the concerns of lawyers and litigants about securing an impartial jury.

The for-cause challenge has several features that distinguish it from the peremptory. For-cause challenges are decided by the trial judge, unlike the peremptory, which is exercised by the lawyer. For-cause challenges, unlike peremptories, are not limited in number and the number is left to the trial judge’s discretion. Any time a trial judge grants a for-cause challenge there must be a specific reason, unlike with a peremptory where a lawyer only has to provide a reason if challenged under *Batson*. Traditionally, a for-cause challenge is granted only if the juror has a familial connection to one

216. *Miller-El*, 125 S. Ct. at 2322.

217. *McCray v. New York*, 461 U.S. 961 (1983) (Stevens, J.) (respecting the denial of the petitions for writs of certiorari). For a more detailed discussion of *McCray*, see *supra* text accompanying notes 65-74.

218. *Miller-El*, 125 S. Ct. at 2344 (Breyer, J., concurring).

219. *Id.* at 2340-41.

220. *Id.*

221. *Id.* at 2342-43.

222. See Marder, *supra* note 74, at 1107-14.

of the participants in the trial, a financial stake in the outcome of the case, or an inability to be impartial.²²³ Trial judges typically exercise restraint in granting for-cause challenges, though this may be because they know that lawyers can still use a peremptory to remove the juror even if they deny a for-cause challenge.

If peremptories were eliminated, the for-cause challenge might have to be expanded in two ways. First, the trial judge would have to be willing to grant a greater number of for-cause challenges because the peremptory would no longer be available to the lawyer as a back-up. Second, the set of acceptable reasons for granting a for-cause challenge might have to be expanded. For example, for-cause challenges today are granted if the juror says he or she cannot be impartial. Without peremptories, for-cause challenges also might have to be granted if the juror cannot satisfy the appearance of impartiality due to some individual action he or she has taken.²²⁴

Trial judges would have to develop such an expanded for-cause standard as they gained experience with it in a jury selection in which there were no peremptory challenges. The *A.B.A. Principles*, though not recommending the elimination of the peremptory challenge, did recommend that “[e]ach jurisdiction should establish, by law, the grounds for and the standards by which a challenge for cause to a juror is sustained by the court.”²²⁵ Although I think that judges, rather than legislatures, are in the best position to develop such standards, I think that the *A.B.A. Principles* provide a useful starting point for judges:

At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially.²²⁶

The *A.B.A. Principles* also provide additional safeguards that should help to convince lawyers and litigants that the case will be heard by an impartial jury. The *A.B.A. Principles* suggest that trial judges base their for-cause decision on a juror’s demeanor and responses and that trial judges make a record of their reasons, including any factual findings that are appropriate.²²⁷ Finally, the *A.B.A. Principles* advise judges that if “there is

223. See *supra* note 51 and accompanying text.

224. See Marder, *supra* note 74, at 1109-10 (“[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. . . . Her bias is not assumed because of some 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.”).

225. *A.B.A. Principles*, *supra* note 12, Principle 11.C.1.

226. *Id.* Principle 11.C.2.

227. *Id.* Principle 11.C.3.

a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial.”²²⁸

Allowing only for-cause challenges, with a standard developed by trial judges over time, would result in an important shift in roles during jury selection. It would leave to trial judges, rather than to lawyers, the decision about when to remove a juror. Leaving the decision to an impartial trial judge, rather than an advocate, seems appropriate in light of the way in which peremptories frequently mask discrimination. Having for-cause challenges for which the trial judge provides reasons on the record, rather than peremptories that often do not require any explanation, should reassure participants in the courtroom that jurors are only excused for legitimate reasons that are subject to appellate review. Having the trial judge, rather than a legislature, develop a standard over time leaves these matters to the person who is present in the courtroom and who is in the best position to decide.

In his *Foreword*, Justice Stevens suggested a willingness to have only an impartial judge decide whether to remove a juror and only after the judge has given reasons on the record.²²⁹ Even though Justice Stevens was once a trial lawyer, he was also an appellate judge. In both roles, he has always had tremendous respect for trial judges and trusted them to perform their job properly. Shifting the power only to judges to remove jurors will benefit jurors who would otherwise have been excluded and will benefit juries, which will be drawn more broadly from the community without the skewing effect of discriminatory peremptories. Eliminating the peremptory will open up the jury and the jury experience to a broader swath of the community and will help the jury play several of its roles more effectively.

V. A BROAD VIEW OF THE JURY’S ROLES

A jury selection without peremptories will enhance several of the jury’s key roles, including several roles that Justice Stevens has highlighted in his opinions and other writings. Without peremptories, citizens who would otherwise have been removed will now be able to serve as jurors and their recollection of the evidence and testing of assumptions will contribute to jury fact-finding. Without peremptories, these jurors who would have been excluded will now benefit from the jury’s educational function, in which the jury serves as a “free school,”²³⁰ teaching citizens about the responsibilities of self-governance in a democracy. Their participation will, in turn, broaden the range of views and perspectives that are available to the jury. The jury that is actually seated, drawn from a broader swath of the community, will more fully represent the commonsense views of the community. Finally, the jury will become a more effective buffer between criminal defendants and the government, which was identified in *Duncan v.*

228. *Id.*

229. See Stevens, *supra* note 211, at 907-08.

230. Tocqueville, *supra* note 83, at 275.

*Louisiana*²³¹ as the criminal jury's main role, and which is perhaps the jury's most critical role in death penalty cases.

A. *Finding Facts*

One of the jury's main functions is to find facts. Indeed, the trial judge typically instructs the jury that its job is to find the facts and to apply the law as the judge gives it to the jury to the facts as the jurors find them.²³² Although the line between finding the facts and interpreting the law is not as clear cut as judges would have jurors believe,²³³ finding the facts is one task that the jurors are clearly supposed to perform.

The jury is well constituted for fulfilling its role as fact finder. Criminal juries typically consist of twelve jurors. They listen to the testimony and arguments, scrutinize exhibits, and assess witness credibility to decide what actually happened. In most courtrooms today, jurors are permitted to take notes,²³⁴ and in a few courtrooms they are even able to submit written questions to the judge to be asked of the witnesses.²³⁵ They do not need to remain passive during the trial. They have been given tools, like taking notes and asking questions, which should aid them in their fact-finding function. They also have the benefit of group deliberation to assist them in their fact-finding. The idea is that twelve jurors will recollect different pieces of information, offer different interpretations, challenge each other's assumptions, and correct each other's mistakes so that they can arrive at an accurate verdict.²³⁶ The jurors can consider each other's competing interpretations and organizing frameworks²³⁷ and decide which ones are the most compelling and withstand group scrutiny.

Peremptories can impair the fact-finding function of the jury. To the extent that peremptories limit who can serve, they deprive the jury of members who would have contributed different ways of interpreting the

231. 391 U.S. 145 (1968).

232. A typical instruction to the jury is as follows:

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you.

Manual of Modern Criminal Jury Instructions for the District Courts of the Ninth Circuit Nos. 1.1, 3.1 (2003).

233. See, e.g., Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 64 (1994) ("The fact/law distinction, so starkly posed in judges' instructions to juries today, is, however, a fiction that seldom corrals the behavior of actual jurors.").

234. See, e.g., *Jury Trial Innovations* 141 (G. Thomas Munsterman et al. eds., 1997) (describing the practice of juror note taking as "widespread").

235. In a few states, such as Arizona, Florida, and Indiana, juror questions are permitted by state procedural rules. See Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not To Ask, That Is the Question,"* 78 Chi.-Kent L. Rev. 1099, 1100 (2003).

236. See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 232-44 (1978).

237. See, e.g., 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).

evidence. Discriminatory peremptories exclude members of groups who can offer different perspectives that might not be shared by other members of the jury. Peremptories can deprive the jury of jurors who, because of their outsider status, are willing to question traditional assumptions and challenge prevailing views. For example, “[m]inority men typically have had more direct experience with police than have white men, which makes them ‘more willing to believe that police sometimes lie.’”²³⁸ Without such a mix of jurors, the jury might settle too quickly on its verdict²³⁹ and not engage in thorough deliberations; this, in turn, can impair the accuracy of the jury’s fact-finding and its verdict.

Justice Stevens has recognized the key role that the jury plays as a fact finder, and, in two landmark opinions, has sought to protect this role. In *Apprendi v. New Jersey*,²⁴⁰ an opinion written by Justice Stevens, the Court held that a judge could not enhance a sentence beyond the maximum term of imprisonment provided by statute unless a jury had found the facts upon which the trial judge was basing the enhancement. Apprendi had pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an antipersonnel bomb, after having been arrested for firing a gun into an African-American family’s home in an all-white neighborhood.²⁴¹ The state reserved the right to seek an “enhanced” sentence on one of the second-degree possession counts on the ground that it was committed with a biased purpose.²⁴² Apprendi reserved the right to challenge the hate crime sentence enhancement as a violation of due process.²⁴³ The enhancement would make a significant difference in the number of years that Apprendi would remain in prison.²⁴⁴

Although judges are free to exercise their discretion within the sentencing range prescribed by a state statute, any facts that justify the judge imposing a sentence beyond that range must be found by a jury beyond a reasonable doubt. Justice Stevens explained as follows: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”²⁴⁵ In this case, the trial judge held an evidentiary hearing and found upon a preponderance of the evidence that Apprendi had purposely intended to “intimidate” the family

238. Steve Bogira, *A Jury of Whose Peers?*, Chi. Reader, May 13, 2005, at 1, 26 (quoting private attorney Melinda Power).

239. See, e.g., Irving L. Janis, *Groupthink* 7, 270-71 (2d ed. 1983) (labeling as “groupthink” the situation in which group members conform to the prevalent view and effectively limit the range of ideas expressed and considered by the group).

240. 530 U.S. 466 (2000) (Stevens, J.).

241. *Id.* at 469.

242. *Id.* at 470.

243. *Id.*

244. *Id.*

245. *Id.* at 490.

members because of their race.²⁴⁶ The Court rejected judicial fact-finding as the basis for imposing a sentence beyond the statutory maximum.²⁴⁷ Such a practice marked, in Justice Stevens's words, "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."²⁴⁸

In *United States v. Booker*,²⁴⁹ the Court addressed the *Apprendi* problem in the context of the Federal Sentencing Guidelines ("Guidelines"). Specifically, the Court considered whether judicial fact-finding under a preponderance of the evidence standard violated a defendant's Sixth Amendment right to a jury trial when it resulted in an enhanced sentence under the Guidelines. The defendants in these cases were convicted of drug violations, and their sentences were increased based upon findings of the trial judges under the preponderance of evidence standard as to the quantity of drugs they possessed. Although one of the trial judges imposed a sentence based solely on the jury's verdict, the government appealed after its motion to enhance the sentence was denied.

In *Booker*, Justice Stevens, writing for the Court as to the applicability of the Sixth Amendment to the Guidelines,²⁵⁰ emphasized the important role that jury fact-finding has traditionally played. He noted that the recent practice in which judges render enhanced sentences based upon facts that they, rather than a jury, had found had "increase[d] the judge's power and diminish[ed] that of the jury."²⁵¹ *Booker* sought to restore this shift in power: "The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime."²⁵² *Booker* reaffirmed the holding in *Apprendi* and the primacy of jury fact-finding:

Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.²⁵³

B. *Educating Jurors in the Lessons of Democracy*

Writing about his journey to America, Alexis de Tocqueville was struck by the educational role of the jury, and described the institution as a "free

246. *Id.* at 470-71.

247. *Id.* at 491-92.

248. *Id.* at 497.

249. 125 S. Ct. 738 (2005).

250. Justice Stephen G. Breyer delivered the opinion of the Court as to the incompatibility of the Sixth Amendment's jury trial holding with the mandatory nature of the Federal Sentencing Guidelines, thus holding that the Guidelines are advisory rather than mandatory. *See id.* at 756.

251. *Id.* at 751 (Stevens, J.).

252. *Id.* at 752.

253. *Id.* at 756.

school.”²⁵⁴ He was not sure how well the jury performed its judicial function, but he was quite sure that it provided a rare opportunity, along with voting, for citizens to participate in and appreciate the importance of self-governance.

Surprisingly, Tocqueville thought that the experience of serving on a civil jury exerted a more powerful influence on jurors than the experience of serving on a criminal jury.²⁵⁵ Tocqueville suggested that jurors would view their role on a criminal jury as providing a buffer between the defendant and the government, and that they would be less inclined to follow the lead of the judge, whom they would view as part of the government.²⁵⁶ In contrast, on a civil jury, where cases could be more complicated, he thought that jurors would take their cues more readily from the judge and that the judge could teach jurors to think judiciously.²⁵⁷ They would take these lessons with them when they left the courtroom, and they would apply them in their daily lives, thus spreading the wisdom of the judge well beyond the particular case.²⁵⁸

Although Tocqueville’s views on the influence of the judge, particularly in civil cases, might be overly optimistic, his view of the educational value of jury duty remains apt. For some, jury service is their first experience with the legal system. Jury service teaches them about courts, procedures, and the law. For others, jury duty has particular significance because it is a badge of full citizenship. Voting and jury service are the two opportunities for citizens to participate in the democratic process. For women and African-Americans, who fought for these badges of citizenship, jury service has added meaning.²⁵⁹ For all jurors, jury duty provides an opportunity to see the law in action. The verdict that the jury reaches affects the parties directly in front of them. The immediacy and importance of the jury’s work is strongly felt by all present in the courtroom.

The Court in *Batson*,²⁶⁰ *Powers*,²⁶¹ and the *Batson* progeny²⁶² recognized the important educational role that jury service provides. Justice Stevens was part of the majority in these cases. The *Powers* Court relied on Tocqueville’s observations about the jury as a free school²⁶³ that provides a rare opportunity for citizens to learn about and participate in their democracy as the basis for the defendant’s third-party standing to raise the

254. Tocqueville, *supra* note 83, at 275.

255. *Id.*

256. *Id.*

257. *Id.* at 275-76.

258. One of the reasons Tocqueville might have made this point was because he was trying to convince French judges that a jury system would actually extend their influence and power, rather than detract from it, in an effort to persuade them to adopt such a system.

259. See, e.g., Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 888 & n.42, 889 & n.43 (1999) (describing the exclusion of African-American men and all women from jury duty).

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

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

262. See *supra* Part II.B.

263. *Powers*, 499 U.S. at 406-07.

excluded juror's claim to serve on the jury and to have this educational benefit.²⁶⁴ A juror's education, however, comes with costs. Jurors must forgo their daily work and other commitments in order to be available to serve. Justice Stevens recognized that "[u]nnecessary inconveniences, delays, and costs associated with jury duty make it a burden in many cases" and that it is "crucial" to "minimize those burdens."²⁶⁵ There is a need to treat these citizens, who are performing an important governmental function, with respect. When they are summoned, they should be permitted to serve unless there is a legitimate reason to excuse them. With the elimination of peremptories citizens will be treated with respect. They will be precluded from serving on a jury only in a limited number of circumstances and for nondiscriminatory reasons that are germane to the case.

C. *Providing the Commonsense Judgment of the Community*

Another role of the jury is to bring its commonsense judgment to bear in deciding a case. Jurors cannot, as judges do, draw upon legal knowledge and training to resolve the case. However, they can make use of their everyday, commonsense understanding to decide the case.

Jurors view the case with fresh eyes. Their very inexperience with the legal system provides a contrast to judges who can become "compliant, biased, or eccentric"²⁶⁶ over time. In criminal cases, jurors' mere presence can reassure the defendant that the decision maker in his case has no particular bias against him and might be better situated to understand the case from his perspective than the judge, who might seem distanced from the defendant.²⁶⁷ In civil cases, such as those involving "disputes in the factory, the warehouse, and the garage," the jury, with its "commonsense understanding," is "appropriately invoked."²⁶⁸

Because the jury's verdict serves as the judgment of the community, it is important that the jury is representative of the community. This does not mean that every petit jury will mirror the community at large. Nor does it mean that the petit jury must contain a quota of different groups from the community.²⁶⁹ The Court has said only that under the Sixth Amendment no

264. *Id.* at 410-15.

265. Stevens, *supra* note 211, at 908.

266. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

267. *Id.* ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.")

268. *Local 391 v. Terry*, 494 U.S. 558, 583 (1990) (Stevens, J., concurring in part and concurring in the judgment).

269. *Holland v. Illinois*, 493 U.S. 474, 512-13 (1990) (Stevens, J., dissenting). Justice Stevens explained as follows:

The Constitution does not permit the easy assumption that a community would be fairly represented by a jury selected by proportional representation of different races any more than it does that a community would be represented by a jury composed of quotas of jurors of different classes. . . . What the Constitution does require is "a fair possibility for obtaining a representative cross-section of the community."

group should be systematically excluded from the venire.²⁷⁰ Justice Stevens, however, has urged a broader view of a jury's representativeness. In his dissent in *Holland*, he explained the need for "neutral selection" in order "to generate a jury representative of the community."²⁷¹ Although the *Holland* Court held that a white defendant did not have a Sixth Amendment right to object to the exclusion of African-American jurors through peremptory challenges, Justice Stevens focused on the overlap between the Sixth and the Fourteenth Amendments.²⁷² He argued for an understanding of the Sixth Amendment that requires that "juries be drawn through fair and neutral selection procedures from a broad cross section of the community" and that this "insures a jury that will best reflect the views of the community—one that is not arbitrarily skewed for or against any particular group or characteristic."²⁷³

In a system without peremptory challenges, because a broader swath of the community will be permitted to serve as jurors, juries will be able to consider a wider range of perspectives and approaches than if the jury came from a more homogeneous segment of the community. Although Justice Marshall pointed out that jurors of a particular race or ethnicity do not vote in a particular way,²⁷⁴ nevertheless their exclusion from the jury works a more subtle deprivation: It "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."²⁷⁵

A jury drawn broadly from the community also will reassure the community that its verdict was fair. For example, to the extent that discriminatory peremptories exclude minority members from a jury minority communities are likely to be suspicious of the verdict.²⁷⁶ Why should they accept a verdict when it looked like members of their community were not included in the jury process?²⁷⁷

Id. (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

270. *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (holding that the fair-cross-section requirement was violated by the systematic exclusion of women from the venire).

271. *Holland*, 493 U.S. at 512 (Stevens, J., dissenting).

272. *Id.* at 517 ("The operation of a facially neutral peremptory challenge 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 a juror's right to equal protection.").

273. *Id.* at 515.

274. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) ("It is not necessary to assume that the excluded group will consistently vote as a class . . .").

275. *Id.* at 503-04.

276. See, e.g., Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285, 287-308 (1999) (comparing the ways that the verdicts in the criminal trials of defendants O.J. Simpson and Stacey Koon and Laurence Powell were seen by different communities and reported by the press).

277. For one academic's theory about why African-Americans should protest their treatment in the criminal justice system by engaging in race-based jury nullification, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677 (1995).

D. *Serving as a Buffer Between the Government and the Defendant*

At least since *Duncan v. Louisiana*²⁷⁸ the Court has recognized that a key role of the jury is to prevent governmental overreaching by serving as a buffer between the government and a criminal defendant. Indeed, this function is so central that the *Duncan* Court described it as “fundamental to the American scheme of justice”²⁷⁹ and held that a defendant’s Sixth Amendment right to a jury trial in serious cases was applicable to the states under the Fourteenth Amendment.²⁸⁰

The *Duncan* Court viewed the jury as a bulwark against governmental oppression. The jury’s role was to provide “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge.”²⁸¹ Although times have changed and judges are no longer appointed because they are loyal to the British Crown, the “[f]ear of unchecked power” remains as pressing today as it was during the colonial era, and has led, in Justice Byron R. White’s words, to our “insistence upon community participation in the determination of guilt or innocence.”²⁸²

Justice Stevens has respected this function of the jury and has tried to safeguard it. For example, when the Court held in *Lewis v. United States*²⁸³ that there was no right to a jury trial for a defendant charged with multiple offenses whose punishment exceeded six months’ imprisonment, Justice Stevens dissented.²⁸⁴ In earlier cases, the Court had used an authorized punishment of six months in prison as the line demarcating a “serious” crime from a “petty” one.²⁸⁵ Crimes that were serious received a jury trial; those that were petty did not. Although this line was not absolute, and could be moved depending upon accompanying punishments, the Court used it to determine whether the right to a jury trial attached. In *Lewis*, the Court held that there was no right to a jury trial even though the multiple charges could lead to imprisonment of more than six months for the defendant. Justice Stevens took the view that a prosecution that exposed the defendant to a prison term of more than six months, whether for a single offense or for multiple offenses, “is sufficiently serious to confer on the defendant the right to demand a jury.”²⁸⁶

The jury’s role as a bulwark against governmental oppression would be strengthened if peremptories were eliminated. Although the peremptory has long been seen as a protection for the defendant, a diverse jury actually

278. 391 U.S. 145 (1968) (White, J.).

279. *Id.* at 149, 153 (describing “the right to jury trial in criminal cases” as “fundamental to our system of justice”).

280. *Id.* at 156.

281. *Id.*

282. *Id.*

283. 518 U.S. 322 (1996).

284. *Id.* at 339.

285. *See, e.g.,* *Blanton v. City of N. Las Vegas*, 489 U.S. 538 (1989); *Baldwin v. New York*, 399 U.S. 66 (1970) (plurality opinion).

286. *Lewis*, 518 U.S. at 339.

provides defendants with better protection against governmental overreaching. If a jury is actually drawn from citizens from all walks of life, and is not skewed through the exercise of discriminatory peremptories, that jury is more likely to include a mix of jurors with different vantage points, including some who are skeptical of the government's case as well as some who are not. Such a mix of jurors, viewing the case from different vantage points, will have to engage in thorough and well-considered deliberation. The verdict in criminal cases in federal court²⁸⁷ and in many state courts²⁸⁸ must be unanimous. Only after one group has convinced the other through robust deliberation is a verdict likely to be reached. If a verdict is not reached, the resulting hung jury is a further protection against governmental overreaching. Professor Hans Zeisel observed that the hung jury represents "the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority," but can only be tolerated in moderation: "[T]oo many hung juries would impede the effective functioning of the courts."²⁸⁹

Thus, a diverse jury affords the best protection to a defendant that the government's case will be carefully and critically examined. If all of the jurors, no matter how varied their perspectives are to begin with, can agree on a verdict, the verdict is likely to be one that will reassure the defendant and the communities outside the courtroom that the process was fair and free of governmental overreaching.

E. *Guarding Against Governmental Overreaching in Death Penalty Cases*

Nowhere is the jury's function of protecting the defendant from governmental overreaching more critical than in death penalty cases. When the life or death of the defendant is at stake the jury must display the utmost vigilance.

Through discriminatory peremptories, many prosecutors have long sought to stack the jury in their favor in death penalty cases. Traditionally, they have used peremptories to remove African-Americans and members of other minority groups. They assumed that these citizens would be more critical of the government and its case because they have been treated less well by police and other governmental actors than those in the majority. This prosecutorial propensity has received coverage in newspapers,²⁹⁰

287. See Fed. R. Civ. P. 48 ("Unless the parties otherwise stipulate, the verdict shall be unanimous . . ."); Fed. R. Crim. P. 31(a) ("The verdict must be unanimous.").

288. See, e.g., Marder, *supra* note 276, at 319 n.160.

289. Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710, 719 n.42 (1971).

290. See, e.g., Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, Dallas Morning News, Mar. 9, 1986, available at http://www.dallasnews.com/cgi-bin/bi/gold_print.cgi (reporting that the newspaper's eight-month investigation showed that prosecutors "routinely manipulate the racial composition of juries through their use of peremptory challenges"). According to Arch McColl, President of the Dallas County Criminal Bar Association, "prosecutors adhere to jury selection guidelines suggested in a controversial 1969 paper . . . by then-Assistant

cases,²⁹¹ and guidelines for new prosecutors.²⁹² The practice has become especially pronounced in capital cases, perhaps because so much is at stake and many peremptories are available to each side. One of the most blatant examples appears in a videotape of former Assistant District Attorney Jack McMahon in the course of providing training on jury selection to other prosecutors in the District Attorney's Office in Pennsylvania. His advice is as follows:

And that is—and; let's face it, again, there's the blacks from the low-income areas are less likely to convict. It's just—I understand it. It's [an] understandable proposition. There is a resentment for law enforcement, there's a resentment for authority, and, as a result, you don't want those people on your jury. And it may appear as if you're being racist or whatnot, but, again, you are just being realistic. You're just trying to win the case.²⁹³

As to *Batson*, he instructed young prosecutors “to be aware of this case”:

[T]he best way to avoid any problems with [*Batson*] is to protect yourself. And my advice would be in that situation is when you do have a black jury, you question them at length. And on this little sheet that you have, mark something down that you can articulate [at a] later time if something happens, because if they—because the way the case is stated, that it's only after a *prima facie* showing that you're doing this that it becomes—that the trial judge can then order you to then start showing why you're striking them not on racial basis.

So if—let's say you strike three blacks to start with, the first three people. And then it's like the defense attorney makes an objection saying that you're striking blacks. Well, you're not going to be able to go back and say, oh—and make something up about why you did it. Write it down right then and there.

... So sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race. So that's how to pick a jury.²⁹⁴

District Attorney Jon Sparling” who “noted that minorities ‘almost always empathize with the accused’ and therefore do not make good jurors for the prosecution.” *Id.*

291. See, e.g., *Miller-El v. Dretke*, 125 S. Ct. 2317, 2332-33 (2005) (citing Dallas prosecutors' practices); *Batson v. Kentucky*, 476 U.S. 79, 104 (1986) (same).

292. See, e.g., *Wilson v. Beard*, 426 F.3d 653, 655-56 (providing quotations from former Pennsylvania Assistant District Attorney Jack McMahon's training videotape in which he “repeatedly advises his audience to use peremptory strikes to keep certain categories of African-Americans from serving on criminal juries, in apparent violation of *Batson*”); Patrick Mattimore, *Reality Check: Attorneys Do Have Juror Biases*, L.A. Daily J., Apr. 11, 2005, at 6 (describing former Alameda County, California Deputy District Attorney Jack Quatman's seminar in which he “encouraged hundreds of prosecutors never to allow Jews on capital juries”).

293. *Wilson*, 426 F.3d at 657.

294. *Id.* at 658.

With the elimination of peremptories, prosecutors and defendants would no longer have recourse to this practice.

Even without discriminatory peremptories, there are several ways in which a capital jury is not representative of the community at large. Jurors who sit on capital cases have to be “death-qualified.”²⁹⁵ This means that the juror has to be willing to consider a sentence of death. Those jurors who are unalterably opposed to the death penalty and who would never vote for a sentence of death are removed from the venire through a for-cause challenge. Only those jurors who support the death penalty or who are at least willing to consider it are deemed “death-qualified” and permitted to serve.²⁹⁶ Empirical studies show that this practice tends to have a disparate impact on women²⁹⁷ and African-Americans.²⁹⁸ They are more likely to be opposed to the death penalty, and therefore, to be removed from such juries. Death qualification also tends to seat jurors who are more “conviction-prone” than those jurors who are not death-qualified.²⁹⁹

In a recent speech, Justice Stevens noted that this process of death qualification “creates a risk that a fair cross-section of the community will not be represented on the [capital] jury.”³⁰⁰ He was also concerned that the extensive voir dire questioning about a juror’s willingness to impose the death penalty can lead jurors to believe that they must impose the death penalty.³⁰¹ Several empirical studies³⁰² and recent cases³⁰³ have suggested

295. *Lockhart v. McCree*, 476 U.S. 162, 167-69 (1986) (holding that “‘death qualification,’ or the removal for cause of the so-called ‘*Witherspoon*-excludable’ prospective jurors” from the guilt phase does not violate the fair-cross-section requirement of the Sixth Amendment); *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968) (holding that the State’s exclusion of prospective jurors who were not just unalterably opposed to the death penalty, but who simply “expressed conscientious or religious scruples against capital punishment and all who opposed it in principle” violated the requirements of an impartial jury under the Sixth and Fourteenth Amendments).

296. *Witherspoon*, 391 U.S. at 521-22 (“Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”).

297. See, e.g., Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors’ Predisposition To Convict and on the Quality of Deliberation*, 8 Law & Hum. Behav. 53, 67 (1984) (finding that potential jurors excluded from death-qualified juries are more likely to be women).

298. See, e.g., Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 Law & Hum. Behav. 31, 46 (1984) (finding that death-qualified juries are more likely to exclude women and African-American men).

299. See, e.g., Cowan et al., *supra* note 297, at 53.

300. Stevens, *supra* note 215.

301. *Id.*

302. See, e.g., Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993) (describing their empirical study in which they found that capital case jurors in South Carolina did not understand the alternatives to a death sentence and that their confusion led them to favor a sentence of death); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instructions*, 8 Law & Hum. Behav. 411, 424 (1994) (finding that mock jurors in California had difficulty defining aggravating and mitigating factors, particularly mitigating factors); Scott Burgins, *Jurors Ignore*,

that jurors in capital cases have trouble understanding some of the instructions. If information that they need to perform their task is withheld from them,³⁰⁴ or if the legal terms that are used are unclear to them,³⁰⁵ they will not be able to rely on the judge's instructions for direction and may succumb to the pressures they feel—from the gruesomeness of the facts to the victim impact statements³⁰⁶—to vote for the death penalty.

The process of death qualification would not be necessary if two separate juries heard the two distinctive phases—guilt and sentencing—in a capital case. If the jury deciding guilt was not the same as the jury deciding the sentence, then the jury deciding guilt would not need to be death-qualified because it would not be participating in the sentencing phase.³⁰⁷ Instead, in states with the death penalty where the jury decides or recommends a sentence, one jury participates in both phases and often proceeds from reaching a guilty verdict to the sentencing phase without a significant break. This compressed schedule puts added pressure on a jury, which might already be emotionally drained from the guilt phase. In addition, by using the same jury for both phases, there is pressure on the sentencing jury to justify the verdict of guilt it has reached by choosing a sentence of death.³⁰⁸

If death qualification already limits how representative the jury in a capital case can be, as Justice Stevens has suggested, then discriminatory

Misunderstand Instructions, A.B.A. J., May 1995, at 30 (describing a study by the Capital Jury Project, which found that jurors in seven states do not understand how to weigh aggravating and mitigating circumstances); Arthur S. Hayes, *Jurors' Grasp of Instructions May Stir Appeal*, Wall St. J., July 16, 1992, at B1 (describing an empirical study undertaken by Professor Hans Zeisel, who tested mock jurors' comprehension of Illinois pattern instructions used in capital cases and found that mock jurors did not understand the definition of mitigating circumstances and that the prosecutor had the burden of proof in seeking a sentence of death).

303. See, e.g., *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001) (holding that the jury must be told that life imprisonment means life imprisonment without the possibility of parole); *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (holding that where a capital defendant's future dangerousness is at issue, and the sentencing alternatives for the jury are death or life imprisonment without the possibility of parole, the jury must be told that the defendant is ineligible for parole).

304. See *supra* note 303 (describing *Shafer* and *Simmons* in which information was withheld from the jury).

305. See, e.g., *United States ex rel. Free v. Peters*, 806 F. Supp. 705 (N.D. Ill. 1992), *aff'd in part, rev'd in part*, 12 F.3d 700 (7th Cir. 1993); *United States ex rel. Free v. Peters*, 778 F. Supp. 431, 434-35 (N.D. Ill. 1991) (acknowledging that Zeisel's study pointed to deficiencies in the instructions actually used in Free's trial especially in terms of explaining mitigating factors and how they are to be used by jurors). But see *Free*, 12 F.3d at 706 (Posner, C.J.) (rejecting Zeisel's study because it failed to replicate how a jury actually worked).

306. Stevens, *supra* note 215.

307. But see *United States v. Green*, 407 F.3d 434, 437 (1st Cir. 2005) (vacating the district court's order to select two distinct juries, "one (non-death-qualified) to hear the guilt phase and the other (death-qualified) to hear the penalty phase," as violative of the Federal Death Penalty Act, 18 U.S.C. § 3593(b) (2000)).

308. See, e.g., Scott E. Sundby, *A Life and Death Decision: A Jury Weighs the Death Penalty* 34 (2005) (describing several jurors in one capital case who once they had "decided that [defendant] was guilty, they also had started to become personally and emotionally invested in the prosecution's view of [defendant] and his crime").

peremptories exacerbate the situation by further compromising the representativeness of the jury. Representativeness is important so that the jurors will regard the evidence with a critical eye and so that the verdict is accepted beyond the courtroom. If a jury drawn from a broad swath of the community is the most effective safeguard against government overreaching, then the capital jury, which confronts government overreaching when the consequences are most severe, is the least effectively constituted to play this role.

CONCLUSION

In his thirty years on the Supreme Court, Justice Stevens has been a staunch supporter of the jury system. He has long recognized the harms produced by discriminatory peremptories, as well as the benefits of peremptories when they are properly used. He was part of the majority in *Batson*, which sought a delicate balance that would both preserve peremptories and eliminate discrimination during jury selection. He joined in all of the *Batson* progeny that extended the reach of *Batson* to eliminate discriminatory peremptories in civil as well as in criminal cases and when exercised by the prosecutor as well as by the defense. When the Court began to stray from *Batson* and to undermine its effectiveness, Justice Stevens, in an eloquent dissent, reminded the Court of its commitment to nondiscrimination during jury selection.

As long as *Batson* governs, my hope is that Justice Stevens will continue to defend it and to extend its reach. But my other hope is that Justice Stevens will join some of the other judges who have voiced their opposition to the peremptory and proposed its elimination. If the jury is to perform its many and varied roles, then the peremptory needs to be eliminated so that discrimination during jury selection can be avoided. The jury has vital functions to perform as fact finder, educator, and buffer. Any practice, no matter how longstanding, that interferes with these roles should be rejected.

Notes & Observations