

## SOLVING BATSON

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### ABSTRACT

*The Supreme Court faced an important ideological choice when it banned the racial use of peremptory challenges in Batson v. Kentucky. The Court could either ground the rule in equality rights designed to protect potential jurors from stereotyping, or it could base the rule on the defendant's Sixth Amendment right to an "impartial jury" drawn from a "fair cross-section of the community." By choosing the equal protection analysis, the Court turned away from the defendant and the fair functioning of the criminal justice system, and instead focused on protecting potential jurors. In doing so, the Court built a fatal error into the Batson rule, a doctrine which has failed to meaningfully reform jury selection.*

*This Article proposes to revisit that fork in the road, and for the first time, to describe how a Sixth Amendment test would function far better in comparison to the present rule. Unlike Batson, a Sixth Amendment test would focus on the impact of jury selection on diversity instead of attempting to divine the subjective intent of lawyers. The test would function as follows: If peremptory challenges skewed the diversity of suspect classifications on the jury, then a lawyer would need to justify his strikes with reference to specific and individualized concerns about each juror's impartiality. The judge would then balance the strength of the proffered reason for the strike against the value of the lost diversity. Although this remains a*

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*subjective test, it would prove much stronger than the Batson rule. Pragmatically, the test would measure the relevance and importance of a proffered reason rather than its sincerity, and would prove far less insulting to enforce. Ideologically, the test would focus on the more important constitutional goals of the diversity and impartiality of the jury. Instead of vainly regulating the color blindness of jury selection, a Sixth Amendment rule would focus on gathering as diverse a jury as possible while rooting out individual bias.*

*This would require reversal of the Court's reasoning in Batson, a decision that would greatly improve equal protection law. Scholars divided between the worlds of constitutional and criminal law rarely place the Batson cases into an equal protection context and thus fail to recognize that those cases prove outliers in their insistence on absolute color blindness. Stranger still, each side of the Court switched positions in the jury cases on the value of diversity, on whether race can predict belief, and on whether racial stereotyping standing alone causes constitutional injury. This Article argues that the Supreme Court's interpretation of the Sixth Amendment as valuing diversity, and indeed requiring a jury drawn from a "fair cross-section of the community," creates a constitutional right for defendants that trumps color blindness. Jury discrimination has plagued our criminal justice system for too long to settle for the Court's current state of denial. As mandated by the Constitution, we should focus on the quest for an impartial jury, not just a color-blind selection process.*

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## INTRODUCTION

Juries embody the best and the worst of human instinct. The word “human,” after all, signifies both compassion and weakness.<sup>1</sup> Juries represent the collective wisdom of the masses, acting with justice and mercy while exerting democratic control over our criminal justice system. But juries also make mistakes—convicting the innocent and acquitting the guilty for the wrong reasons.<sup>2</sup> Worst of all, juries too often act based on racism and sexism endemic in our society.<sup>3</sup> This discrimination is almost impossible to root out after a verdict is rendered, so instead, courts and scholars have tried for more than a century to prevent biased deliberations by regulating the process of jury selection.<sup>4</sup> Judges and lawyers strike potential jurors to keep the worst bigots away, and we attempt to choose a jury drawn from a “fair cross-section of the community.”<sup>5</sup>

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1. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 604 (11th ed. 2003) (defining human as “susceptible to or representative of the sympathies and frailties of human nature”).

2. See generally BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011). Although juries may acquit the guilty for many legitimate reasons, for example when the government has not met its burden of proof, I have argued elsewhere that juries violate the Constitution when they acquit based on race or gender discrimination against the victims of crimes. Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75 (2009) (describing the ongoing history of jury discrimination through devaluing minority victims and punishing victims of gender-based violence).

3. See generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 439-40 (1988); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 13-32 (1990) (outlining the history of “justice” for African Americans); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1017-25 (1988); Tetlow, *supra* note 2, at 82-84 (describing the history of jury discrimination against black victims after the end of the Civil War and during the Civil Rights Era).

4. See generally Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 830-37 (1997); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

5. 28 U.S.C. § 1861 (2012). First, the Court interprets the Sixth Amendment requirement of an “impartial jury” to guarantee a jury venire that represents a fair “cross-section of the community.” *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). The venire can no longer exclude women and minorities, as it once did. *Peters v. Kiff*, 407 U.S. 493, 504 (1972); *Ballard v. United States*, 329 U.S. 187, 195-96 (1946). Next, the trial judge oversees the questioning of potential jurors designed to uncover any potential biases. This is a procedural right, rather than a constitutional one, and the scope of voir dire depends almost entirely on the discretion

The debates on these subjects have been the source of many criminal appeals and a copious number of law review articles, most of which, I argue, have strayed off course. The current debate strangely focuses on the rights of potential jurors to a color-blind process, instead of focusing on the rights of defendants to an impartial jury.<sup>6</sup> It focuses on the public's perception of a fair system rather than an actually fair system.<sup>7</sup> Too often it measures impartiality solely through diversity, instead of recognizing diversity as a tool to obtain impartiality, not a goal unto itself.<sup>8</sup>

The Constitution clearly establishes the goal of an "impartial" jury in the Sixth Amendment.<sup>9</sup> And in the 1986 decision *Batson v. Kentucky*, the Court faced a stark fork in the road of how best to serve that goal once it banned the racial use of peremptory challenges, a practice which had resulted in the elimination of minorities from too many juries.<sup>10</sup> The Court could have based its decision on Sixth Amendment fair cross-section doctrine and regulated jury selection in a way that valued and protected racial diversity. Instead, the Court chose to base its decision on equal protection

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of the judge. Under equal protection doctrine, however, the Supreme Court only guarantees the defendant a right to voir dire about racism if race will clearly be an issue in the trial. *Ristaino v. Ross*, 424 U.S. 589, 597-98 (1976). Based on the information elicited during voir dire, the parties can challenge jurors "for cause," and the judge may dismiss the most obviously biased jurors. Next, the prosecutor and defense exercise peremptory challenges to eliminate the jurors they each perceive to be the least favorable to their side. FED. R. CRIM. P. 24(b).

6. See *infra* Part I.A. This begs the question of my own definition of "impartiality." As described below, the cases divide between a definition of impartiality as an "on/off switch," or as an aspirational and elusive goal, subject to all of the normal partiality born of human experience. See *supra* Part III.A. I believe in the latter definition. To pretend that impartiality is easily determined and fairly common ignores the complexities of human bias. But although impartiality remains psychologically and legally hard to define, it should remain our goal. See discussion *infra* Part I.B.

7. See *infra* Part II.C.

8. See *infra* Part III.A.

9. U.S. CONST. amend. VI. The Supreme Court applied the Sixth Amendment to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Sixth Amendment applies by its terms to criminal trials, not to civil trials, though Congress and the states could impose the requirement statutorily on civil trials.

10. 476 U.S. 79, 100 (1986) (banning racial use of peremptory challenges by prosecutors). The defendant in *Batson* preserved both Sixth Amendment and equal protection grounds on appeal. Brief for Petitioner at 1, *Batson*, 476 U.S. 79 (No. 84-6263). The Supreme Court did not comment on these Sixth Amendment arguments in *Batson*, but considered and rejected them by a narrow majority in *Holland v. Illinois*, 493 U.S. 474, 478 (1990).

reasoning in a way that denied the very relevance of race to jury selection.<sup>11</sup>

The Court attempted to solve the problem of discrimination by *jurors* by changing the subject to discrimination *against jurors*. In the *Batson v. Kentucky* line of cases, the Court forbade the lawyers choosing a jury from considering the race or gender of jurors when exercising peremptory challenges.<sup>12</sup> The rule does not aim to protect jury diversity; indeed, the Supreme Court reasoned that the race and gender of jurors is irrelevant to the jury's decision making.<sup>13</sup> We should not therefore be surprised that the rule does not work particularly well to preserve jury diversity.<sup>14</sup> Nor did the Court make more than a passing attempt to connect such color-blind regulation to the rights of the defendant.<sup>15</sup> Instead, the Court elevated the interests of potential jurors against stereotyping during jury

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11. See Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818-19 (1993). As discussed below in Parts II.B. and II.C, the cases also present a strange flip-flop for both sides of the Court, with the liberals arguing for color blindness and avidly denying the relevance of race or gender to predict belief, and the conservatives arguing the importance of racial and gender diversity to deliberations.

12. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (banning gendered use of peremptory challenges); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (banning racial use of peremptory challenges by defense lawyers); see *Batson*, 476 U.S. at 89 (banning racial use of peremptory challenges by prosecutors).

13. See *infra* Part II.C.

14. See *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring) ("Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem."); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 52-53, 73 n.197 (2001) (describing an empirical study of capital trials in Philadelphia between 1981 and 1997 in which prosecutors disproportionately struck black jurors and defense counsel disproportionately struck white jurors, and race-based uses of prosecutorial peremptories declined by only 2 percent after *Batson*); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 583-89 (concluding that *Batson* challenges are rarely successful); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462-64 (1996) (finding lower rates of success using *Batson* challenges when peremptories were used to strike white potential jurors as opposed to black); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 698-99 (1999) (describing a study in which prosecutors excused 71 percent of black jurors and defense counsel excused 81 percent of white jurors in one North Carolina county).

15. See *infra* Part II.C.

selection above consideration of the defendant's right to a nondiscriminatory verdict.<sup>16</sup> As Susan Herman has argued, the *Batson* line of cases is "a story whose author has become so preoccupied with the fate of peripheral characters that the protagonist has been forgotten."<sup>17</sup> We treat the *Batson* rule as our primary protection against jury discrimination, but it has nothing to do with rooting out bias from juries.<sup>18</sup>

A growing number of reformers would throw their hands up at the jury selection process and end the use of peremptory challenges altogether.<sup>19</sup> If we came closer to a system of random selection, they argue, we would end up with far more racially diverse juries. For them, the benefits of diversity far outweigh the costs of giving up a lawyer's chance to root out bias with peremptory challenges. Some of these scholars make the pragmatic argument that, in our heterogeneous society, diversity serves as the best available protector of impartiality.<sup>20</sup> Lawyers' amateurish attempts to use dueling peremptory challenges and root out bias can never compare to the benefits of a diverse jury, particularly one that is racially diverse. A few scholars, however, go farther and argue that diversity simply trumps impartiality.<sup>21</sup> For them, juries serve a democratic role and should represent the public, and minorities should have rights to proportional representation in the same way that we avoid vote dilution in legislative districts.<sup>22</sup> Under this vision, jury verdicts are

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16. See John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297, 310 (2005) (arguing that *Batson* subordinates the defendant's more important rights to liberty and due process to the equal protection rights of jurors); Herman, *supra* note 11, at 1815 ("This increasing degree of attention to the problem of access would be welcome if the cases did not also reveal a decreasing level of attention to the problem of prejudice.").

17. Herman, *supra* note 11, at 1818-19 (explaining that *Batson* may ensure more black people can serve as jurors, but it ignores the more important issue of whether defendants still face discriminatory juries).

18. I have discussed this topic more fully in an earlier work. See Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713 (2012).

19. See *infra* Part III.A.

20. See *infra* Part III.

21. See *infra* Part III.B.

22. Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999); Francis, *supra* note 16, at 353-57; see, e.g., Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).



neither right nor wrong, but rather expressions of popular sovereignty.

There is a middle ground. We should revisit the fork in the road and choose the Sixth Amendment over equal protection color blindness.<sup>23</sup> In Sixth Amendment cases before *Batson*, the Supreme Court required a jury drawn from a fair cross-section of the community precisely because the Court understood the value of jury diversity.<sup>24</sup> Applying the Sixth Amendment to jury selection would allow us to retain peremptory challenges as a tool of impartiality: to allow lawyers—with expanded voir dire rights—to root out bias as best they can. But we can provide a much better protection of jury diversity from the impact of peremptory challenges by actually valuing jury diversity. A Sixth Amendment approach would allow the judge to make trade-offs between the use of peremptory challenges to root out individualized bias and protecting the fair cross section of the jury.

Sixth Amendment regulation would resemble the *Batson* rule, but function very differently. In step one of the test, after jury selection has finished, a lawyer could challenge the other side's use of peremptory strikes that skewed jury diversity.<sup>25</sup> In step two, the challenged lawyer would have to justify those strikes by articulating specific concerns about those jurors' impartiality. Although the lawyer could not rely on a suspect category as the basis of the strike, the judge would no longer demand to know whether the thought crossed the lawyer's mind that race or gender might predict belief.<sup>26</sup> Instead, with an expanded right to voir dire, judges could require more individualized and particular evidence of bias relevant to the

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23. See *infra* Part II.A.

24. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946); see *Peters v. Kiff*, 407 U.S. 493 (1972); *Ballard v. United States*, 329 U.S. 187 (1946).

25. Although the Sixth Amendment right belongs only to the defendant, it focuses on balance for both sides. *Holland v. Illinois*, 493 U.S. 474, 483 (1990). In Part II.A, I argue that the prosecution would also have rights to enforce this rule in order to achieve a balanced diversity. This proposal would expand its coverage to all of the categories deemed suspect under equal protection law but would go no farther. See *infra* note 32. Although a broader notion of diversity matters enormously, the regulation of jury diversity requires a limiting factor in order to function.

26. See *infra* note 127 (arguing that *Batson* establishes that requirement though noting some division in lower courts regarding the permissibility of “dual motives”). As described below in Part II.A, increasing diversity could not serve as the basis for strikes for the pragmatic reason that it would vitiate the judge's authority to protect diversity if both sides could rely on race alone.

case.<sup>27</sup> Finally, the judge would be tasked with balancing the lawyer's concern about bias against the impact on the jury's overall diversity.<sup>28</sup>

The test represents a compromise between our primary tools in the quest for an impartial jury: peremptory challenges and jury diversity. The test is necessarily subjective because it would give judges a fair amount of leeway in how they balance diversity and impartiality. But this test would clearly better protect jury diversity than the current *Batson* rule, which in practice bans the protection of jury diversity.<sup>29</sup> A Sixth Amendment rule would avoid the legal fiction that race and gender do not matter to jury deliberations and would free judges to actively protect jury diversity.<sup>30</sup> Such a rule would also prove pragmatically easier to enforce because it would allow judges to measure the strength of a proffered reason for a strike rather than its sincerity, an awkward and insulting process.<sup>31</sup>

In this Article, I first describe the ideological trade-offs at stake in order to explain why a creative solution is necessary. The Constitution creates, or at least implies, three values relevant to jury selection: the goal of an impartial jury, the use of jury diversity as a tool to strive for impartiality, and the more recent requirement of color-blind jury selection. Although each of these fills an important role, I argue that the quest for impartiality remains the most important constitutional goal. In Part II, I describe my proposed Sixth Amendment test in detail and explain why it would protect diversity while keeping the focus on impartiality as the ultimate goal.<sup>32</sup> Reliance on the Sixth Amendment has been proposed by a

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27. I attempt to draw these lines with more specificity in Part II.A, but the proffered reason would not need to rise to the level of a for-cause challenge.

28. See *infra* note 32.

29. *United States v. Nelson*, 277 F.3d 164, 207-08 (2d Cir. 2002) (holding that *Batson* forbids district courts from adding and subtracting jurors in order to achieve a racially and religiously diverse jury).

30. See *infra* Part II.A.

31. See *infra* Part II.A.

32. My proposal would regulate only those categories of diversity deemed to be suspect under equal protection law—namely race, gender, alienage, and national origin. See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). I would also include religion, which has an unclear status under equal protection law, but which is included in a federal statute banning discrimination in jury selection. 28 U.S.C. § 1862 (2012). Circuits are split about the application of the *Batson* rule to sexual orientation, but if that is recognized as a suspect category, it should be included in this analysis as well. See *SmithKline Beecham Corp. v.*

few scholars, but this Article represents the first attempt to explain why such a test should replace the equal protection rule and why it would function far better.<sup>33</sup> A Sixth Amendment approach would differentiate between race consciousness and racism in a way that would allow a focus on diversity (currently banned by the *Batson* rule) and better fit within existing equal protection doctrine. In Part III, I address why peremptory challenges are worth salvaging. A more diverse jury does not guarantee an impartial one, and we give away too much by losing the ability to root out the strongest forms of bias.<sup>34</sup> Finally, I address those who prefer random selection in

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Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (holding that equal protection forbids striking a juror on the basis of sexual orientation and relying on *United States v. Windsor* for the application of equal protection); *United States v. Blaylock*, 421 F.3d 758, 769-70 (8th Cir. 2005) (holding that although the Eighth Circuit and Supreme Court had never extended *Batson's* application to sexual orientation, the prosecutor offered sufficiently neutral explanations even if a prima facie case had been made).

33. Toni Massaro made this argument before *Batson* itself was decided. Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 542-60 (1986). Several state courts and two federal circuits have also used Sixth Amendment analysis to ban the racial use of peremptory challenges. *Booker v. Jabe*, 775 F.2d 762, 779 (6th Cir. 1985), *vacated sub nom.* *Michigan v. Booker*, 478 U.S. 1001 (1986); *McCray v. Abrams*, 750 F.2d 1113, 1134-35 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986); *People v. Wheeler*, 583 P.2d 748, 762 (Cal. 1978); *Riley v. State*, 496 A.2d 997, 1008 (Del. 1985); *State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984); *Commonwealth v. Soares*, 387 N.E.2d 499, 518 (Mass. 1979); *State v. Gilmore*, 511 A.2d 1150, 1169-70 (N.J. 1986); *State v. Crespin*, 612 P.2d 716, 718 (N.M. Ct. App. 1980). After *Batson*, but before *Holland v. Illinois*, Michael Kirk argued that the Sixth Amendment should apply alongside equal protection doctrine. Michael Kirk, *Sixth and Fourteenth Amendments: The Swain Song of the Racially Discriminatory Use of Peremptory Challenges*, 77 J. CRIM. L. & CRIMINOLOGY 821, 839 (1986). In a Note published after *Holland*, Jefferson Howeth argued that the Sixth Amendment analysis should apply because it offered more hope for expanding the *Batson* rule to defense attorneys and to civil litigants, though ultimately this results-oriented logic proved moot. Jefferson Edward Howeth, Note, *Holland v. Illinois: The Supreme Court Narrows the Scope of Protection Against Discriminatory Jury Selection Procedures*, 48 WASH. & LEE L. REV. 579, 611, 614 (1991). Susan Herman was the first to criticize the application of equal protection doctrine to require color blindness. Herman, *supra* note 11, at 1813-15. She briefly suggests that a Sixth Amendment approach might have been stronger. *Id.* at 1840. Finally, Eric Muller argued that Sixth Amendment regulation of peremptory challenges would actually connect to the defendant's rights in a way that *Batson* does not, though he would retain equal protection doctrine. Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 137-48 (1996) (criticizing the Court's ruling in *Holland*, and arguing that a Sixth Amendment rationale could coexist with the *Batson* rule). But none of these explain how such a test would work, and even whether the test would coexist with the *Batson* rule.

34. Using Susan Herman's distinction between *weak bias* (the kind of subjectivity we all share) and *strong bias* (the inability to be fair), Herman, *supra* note 11, at 1823, I argue in

order to guarantee a representative jury as part of our democratic system. Equating jury verdicts to elections loses sight of the fundamental role of a jury in our criminal justice system, which is to come up with an accurate and legally correct verdict, not merely the representative one.

We need to refocus our efforts to reform jury selection on the primary goal of seeking justice for the defendant. We need to focus on the quest for impartial juries capable of delivering fair verdicts. The rights of third parties such as jurors matter enormously, but they cannot trump the role of the jury as a mechanism of justice. Nor can the power we give citizens to participate in democracy through juries supersede the functional role that juries play in our criminal justice system. We should replace *Batson* with a test that regulates jury selection in order to seek an impartial jury, without the fundamental distraction of color blindness.

### I. THE DILEMMA OF JURY SELECTION

Discussions of juries too often fail to acknowledge our lack of consensus on their very purpose. Scholars disagree about whether the primary point of the jury system is democracy and popular sovereignty—in which case juries should be diverse and representative of the public—or whether juries function primarily as fact finders and decision makers—in which case juries should be impartial above all.<sup>35</sup> We disagree about whether to prioritize the rights of potential jurors, as the *Batson* rule does, or the rights of defendants.<sup>36</sup> We disagree about whether we should ban lawyers from selecting a jury with any consideration of race or gender, or whether we should monitor the diversity of the jury precisely because race and gender do matter.<sup>37</sup> Worse yet, we often conflate these goals

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Part III that we should not give up on the role of peremptory challenges in seeking out strong biases that range from the racism all too endemic in our system, *see* KENNEDY, *supra* note 3, to the broad array of experiences or ideas that make it difficult for a juror to listen, consider, and deliberate fairly over the evidence.

35. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 122-25 (1994) (describing the Supreme Court's move from consideration of the fair cross-section requirement to promote impartiality to a focus on the political function of the jury).

36. *See* Muller, *supra* note 33, at 118-19.

37. *Id.*

without recognizing that they sometimes overlap and sometimes conflict. Let me begin by describing the constitutional goals of jury selection and making an argument that the Sixth Amendment guarantee of an impartial jury matters most.

*A. Competing Goals: Impartiality, Diversity, and Color Blindness*

Three ideological goals emerge from the analysis of jury selection, each of which has constitutional roots: impartiality, diversity, and color blindness. First, we have the Constitution's explicit textual guarantee of an "impartial jury" in the Sixth Amendment.<sup>38</sup> Second, the Supreme Court has interpreted the Sixth Amendment to encourage a diverse jury, drawn from a fair "cross-section of the community" because diversity improves the quality of deliberations and decreases the risks of bias.<sup>39</sup> Most recently in the *Batson* line of cases, the Supreme Court interpreted the Equal Protection Clause to require color-blind jury selection, banning lawyers from thinking about race or gender while choosing the jury.<sup>40</sup>

Rarely do those who struggle over jury selection acknowledge and articulate these three separate goals, too often conflating them without explanation. A racially diverse jury does not necessarily equate to an impartial jury, for example, though the two concepts are often used interchangeably.<sup>41</sup> Even more rarely do judges and scholars acknowledge that the three goals sometimes conflict. Color-blind jury selection, for example, does not necessarily lead to jury diversity and indeed can stand in its way.<sup>42</sup> Or, to use another example, if we prioritize diversity above all else, we may choose a

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38. U.S. CONST. amend. VI.

39. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946); see *Peters v. Kiff*, 407 U.S. 493, 500 (1972). This is diversity in the broadest sense, though the Court focused on protecting suspect categories like race and gender. *Ballard v. United States*, 329 U.S. 187, 191 (1946).

40. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (banning the gendered use of peremptory challenges); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (banning the racial use of peremptory challenges by defense lawyers); *Batson v. Kentucky*, 476 U.S. 79, 99-100 (1986) (banning the racial use of peremptory challenges by prosecutors).

41. See, e.g., Brand, *supra* note 14 (describing diverse juries as the ultimate goal); Muller, *supra* note 33, at 106-07 (describing the popular perception of racial diversity as a measure of jury impartiality).

42. See Tetlow, *supra* note 18, at 1720-27 (stating that lawyers and judges are not currently allowed to use race-based peremptory challenges, even to increase diversity).

jury that looks fair over a jury that is in fact fair. I begin here by demonstrating the trade-offs among these three goals inherent in our choices about jury selection before describing my own proposal for balancing them.

Let me make a fairly innocuous-sounding point that directly challenges much of the current orthodoxy. I argue that the most important constitutional goal of jury selection is impartiality. We should prioritize the rights of defendants to an impartial jury over the rights of potential jurors to color blindness. And as we prioritize the search for a fair jury, we should not settle for a jury that looks fair because it is diverse. The quest for an impartial jury may prove aspirational, but we cannot forget that it remains our ultimate goal.

The right to an “impartial jury,” after all, is an explicit textual guarantee contained in the Sixth Amendment.<sup>43</sup> The right is designed to protect the basic integrity of the entire criminal justice process.<sup>44</sup> Although we have many important goals for our criminal justice system, including promoting democracy and self-governance, our main concern must remain the trial’s actual fairness.<sup>45</sup> As I argue in more detail below, we should strive for jury verdicts that are legally and factually accurate, not just verdicts that express the public will.<sup>46</sup> Ideally, juries will convict only the guilty and convict only when the government has met its burden of proof.<sup>47</sup> And they will not refuse to convict out of racial or gender animus toward the victim.<sup>48</sup>

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43. U.S. CONST. amend. VI.

44. *Holland v. Illinois*, 493 U.S. 474, 483 (1990) (“The rule we announce today is not only the only plausible reading of the text of the Sixth Amendment, but we think it best furthers the Amendment’s central purpose as well. Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored.”).

45. See *infra* Part III.B.

46. See *infra* Part III.B. There are times when it is legally appropriate to acquit a guilty defendant, because, for example, the government has not met its burden of proof. But there remain clearly incorrect verdicts, such as the conviction of the factually innocent or the refusal to convict a guilty defendant because of bias against the victim.

47. There are also times when applying facts to a subjective area of law allows for a range of “correct” verdicts. See *infra* Part III.B.

48. See Carter, *supra* note 3, at 428 (discussing the failure of jurors to imagine blacks as victims in the context of the Bernard Goetz acquittal and *McCleskey v. Kemp*); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1325 n.25 (1997) (stating that “there is no legal

To accomplish this, we do not seek the mythical “impartial juror” devoid of opinions and untouched by individual experience—a blank slate. Rather, we seek an impartial jury as a whole, a group made up of individuals fair enough to listen to the evidence and to deliberate thoughtfully.<sup>49</sup> We seek a group containing enough variety of life experiences to add to the richness of understanding of the case and to deliberations.<sup>50</sup>

In a series of cases in the mid-twentieth century, the Court began exploring the importance of jury diversity to our notions of fairness. The Court interpreted the explicit right to an “impartial jury” to guarantee a jury drawn from a fair “cross-section of the community.”<sup>51</sup> In the broadest sense, the Court reasoned, diversity of viewpoints helps lead us to correct decisions.<sup>52</sup> Juries are not black boxes

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literature dealing with acquittals”); Tetlow, *supra* note 2, at 79 (arguing that jury discrimination against victims based on race or gender is endemic and unconstitutional). The Second Circuit mentioned the issue in dicta in *United States v. Thomas*, 116 F.3d 606, 608 (2d Cir. 1997) (considering “whether a juror’s intent to convict or acquit regardless of the evidence constitutes a basis for the juror’s removal during the course of deliberations under Rule 23(b)”).

49. See Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1574 (2007) (distinguishing between a “single-viewpoint” argument that asserts the need for a particular perspective in jury deliberations versus a “multiple-viewpoint” perspective that looks for an “array of dissimilar views that enrich the quality of deliberations”).

50. *Id.*

51. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). The Court used the Sixth Amendment to ban the outright exclusion of black people in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879), and women from jury service in *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975), though the Court stopped short of regulating the cross section of the actual trial jury. *Holland v. Illinois*, 493 U.S. 474, 487-88 (1990) (refusing to apply Sixth Amendment analysis to govern the fair cross section of the petit jury). These cases focus on the rights of the *defendant* to such diversity, and do not simply protect the rights of various groups to serve on juries. In both *Taylor*, 419 U.S. at 531-32, and *Duren v. Missouri*, 439 U.S. 357, 370 (1979), for example, the Court struck down jury systems in which female jurors were not excluded but could voluntarily opt out or had to affirmatively opt in to serve. Because women could choose to serve, those cases necessarily focused on the rights of defendants to have women fairly represented. Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1207-08 (1995).

52. See Muller, *supra* note 33, at 144 (“[C]riminal verdicts are not just findings of historical fact, but expressions of an inescapably subjective consensus reached among jurors who bring discrete viewpoints and perspectives to their deliberations. Representation of these discrete viewpoints on the jury enhances the reliability of the criminal verdict, both by guaranteeing that the verdict will reflect a true social consensus, and by convincing the community as a whole that the verdict is worthy of respect.”).

taking in evidence and producing a scientific verdict,<sup>53</sup> but rather rely on the ability of individuals from very different backgrounds to perceive the elusive truth.<sup>54</sup> We value consensus reached from a variety of perspectives, which is why our system often vests important decisions to groups: from juries to panels of appellate judges to legislatures. The very nature of a jury implies a multiplicity of viewpoints.<sup>55</sup> The jury is thus collectively impartial, balancing the inevitable and inherent biases of each individual.<sup>56</sup>

In Sixth Amendment cases, the Court recognized the value of diversity very broadly, but focused on regulating categories subject to heightened equal protection scrutiny. The Court described the particular importance of black people and women to jury diversity without pretending to know how such jurors would vote.<sup>57</sup> The Court argued only that deliberations would be impoverished without those perspectives.<sup>58</sup>

And although the Court stopped short of making specific claims about the value of diversity, empirical evidence shows that racially

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53. *Id.* at 126-32 (arguing that, in the *Batson* cases, the Court implied with its color-blind logic that juries deliberate and make a scientific evaluation of evidence to produce a presumably correct verdict).

54. *See Ballard v. United States*, 329 U.S. 187, 193-94 (1946); *see also Re*, *supra* note 49, at 1574.

55. *See Holland*, 493 U.S. at 493-94 (Marshall, J., dissenting) (stating that the very nature of a jury implies the opportunity for a fair cross section of the community). The Supreme Court has defined a minimum number of jurors to make up a constitutionally acceptable jury as a group “large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.” *Williams v. Florida*, 399 U.S. 78, 100 (1970); *see also Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972) (plurality opinion) (“[A] jury will come to such a [common sense] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate ... on the question of a defendant’s guilt.”).

56. Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 129-34; Howe, *supra* note 51, at 1191; Re, *supra* note 49, at 1574-75 (describing this “multiple-viewpoint” conception of diversity as a “diffused impartiality”).

57. For an in-depth description of the development of the fair cross section rule and how it morphed into later interest group politics, see ABRAMSON, *supra* note 35.

58. *See Ballard*, 329 U.S. at 193-94 (“[I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class.... The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.” (footnotes omitted)).



diverse juries are less likely to engage in discrimination.<sup>59</sup> The presence of a key number of minority jurors seems to help shift the potential bias of white jurors.<sup>60</sup> Gender, though less salient than race, also correlates to different experiences and resulting beliefs. For example, studies have found that female jurors are more likely to convict in a hypothetical rape trial and female jurors have expressed greater certainty about rape convictions in real trials.<sup>61</sup>

Meanwhile, the Court's efforts to ban exclusion of various groups from the jury venire meant little when lawyers could still skew that diversity during the selection of the trial jury.<sup>62</sup> At this point, the Supreme Court faced a crossroads between the Sixth Amendment and the Equal Protection Clause. On one hand, it could apply the Sixth Amendment to govern the diversity of the trial jury, as I now propose.<sup>63</sup> Without creating a quota system, the Court could regulate the use of peremptory challenges to skew the diversity of the petit jury from the diversity of the venire by requiring some level of

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59. See generally Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 427 (1995) (finding that experiential learning is key to perspective and deliberation); Francis, *supra* note 16, at 327-30, 334-35 (conducting empirical research on the importance of diversity to deliberations); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75-107 (1993) (collecting empirical data).

60. See, e.g., Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 683, 692 (2001) (finding different thresholds of minority participation for successful influence on acquittal or conviction).

61. See James H. Davis et al., *Victim Consequences, Sentence Severity, and Decision Processes in Mock Juries*, 18 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 346, 354 (1977); Gloria J. Fischer, *Gender Effects on Individual Verdicts and on Mock Jury Verdicts in a Simulated Acquaintance Rape Trial*, 36 SEX ROLES 491, 496-97 (1997); Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOL. 282, 290 (1976); Michael G. Rumsey & Judith M. Rumsey, *A Case of Rape: Sentencing Judgments of Males and Females*, 41 PSYCHOL. REP. 459, 462 (1977).

62. See *Batson v. Kentucky*, 476 U.S. 79, 91-93 (1986). In *Swain v. Alabama*, 380 U.S. 202, 221-22 (1965), the Court held that although the Equal Protection Clause placed some limits on the government's exercise of peremptory challenges, the defendant must show the state's repeated striking of black jurors across multiple cases. The *Batson* Court recognized this as a "crippling burden" that rendered the prosecution's peremptory challenges immune from constitutional scrutiny. *Batson*, 476 U.S. at 92-93.

63. The Court declined to follow that road in *Batson* without comment, and then explicitly considered and rejected it a few years later in *Holland v. Illinois* 493 U.S. 474 (1990). See discussion *infra* Part II.B.

justification for peremptory challenges.<sup>64</sup> Instead, in *Batson v. Kentucky*, the Court applied the Equal Protection Clause to ban prosecutors from considering race when selecting a jury.<sup>65</sup> *Batson* did not concern itself with the ultimate diversity of the jury; instead, it regulated the intentions of the lawyers choosing the jury.<sup>66</sup> The *Batson* rule required color-blind jury selection to protect potential jurors, and the public as a whole, from racial stereotypes.<sup>67</sup> The Court thus made a remarkable shift away from discrimination *by jurors* to focus on discrimination *against jurors*.<sup>68</sup>

The *Batson* line of cases seemed to ignore, or sometimes even to reject, both of the Court's other constitutional goals.<sup>69</sup> The Court denied its earlier logic that race and gender diversity matter to jury deliberations.<sup>70</sup> Instead, the Court reasoned that the race and gender of a juror can have no impact on deliberations, and to believe otherwise during the exercise of peremptory challenges violates the Constitution.<sup>71</sup> Empirical evidence proving that race and gender in fact predict voting behavior was dismissed as "conjured up."<sup>72</sup> The

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64. This is the test I propose. See *infra* Part II.A.

65. *Batson*, 476 U.S. at 89 (forbidding prosecutors to use peremptory challenges based upon the race of the juror).

66. See Herman, *supra* note 11, at 1824-25.

67. *Batson*, 476 U.S. at 87-88. Although *Batson* claimed also to protect the rights of the defendant, its reasoning was entirely divorced from the rights of the defendant. See Muller, *supra* note 33, at 102-05.

68. See *Batson*, 476 U.S. at 89. In later cases, the Court expanded this ruling to peremptories motivated by gender in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994), and applied the rule to defense counsel in *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). Justice Scalia wrote a dissenting opinion to *J.E.B.*, noting that the majority's reasoning denying the relevance of gender to jury selection contradicted Sixth Amendment jurisprudence. *J.E.B.*, 511 U.S. at 157 (Scalia, J., dissenting); see also Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 55 (1992) (noting the conflict between Sixth Amendment and equal protection jurisprudence on whether gender matters); Muller, *supra* note 33, at 98-100, 103 (noting the striking contrast between the Court's Sixth Amendment jurisprudence, which suggests that difference matters, and *Batson*'s pretending that it does not); Case Comment, *Fair Cross-Section Requirement for Juries—Peremptory Challenges*: Holland v. Illinois, 104 HARV. L. REV. 40, 168-69 (1990) (noting that the Sixth Amendment encourages what the Equal Protection Clause forbids).

69. See the in-depth discussion of color blindness and *Batson* in Part II.B-C below.

70. Muller, *supra* note 33, at 97-107; Tetlow, *supra* note 18, at 1720.

71. See Herman, *supra* note 11, at 1825 ("In the Court's utopian colorblind world, defendants would have no reason to care about the race of jurors because the jurors themselves would be colorblind.").

72. *J.E.B.*, 511 U.S. at 138 n.9.

Court equated race consciousness with racism, and deemed it irrational, unconstitutional, and necessarily deriving from “open hostility or from some hidden and unarticulated fear.”<sup>73</sup> The Court also relied on the rather circular logic that the idea that race and gender matter to jury deliberations is “the very stereotype the law condemns.”<sup>74</sup> The Court does not want race or gender to matter, so it pretends that they do not.

The best demonstration of the difference between the Court’s color-blind logic versus its earlier celebration of diversity lies in the Court’s changing definition of impartiality. In the Sixth Amendment cases, the Court defined impartiality as something aspirational and collective.<sup>75</sup> In the *Batson* line of cases, however, the Court presented impartiality as something knowable, common, and easily determined.<sup>76</sup> Each individual juror either is impartial or is not impartial—an on/off switch.<sup>77</sup> If we define impartiality as merely being “qualified,” then race and gender cannot have anything to do with it.<sup>78</sup>

I would prioritize the vision of impartiality of the Sixth Amendment cases—the elusive goal rather than the on/off switch. Every potential juror brings his or her own subjective bias born of human experience.<sup>79</sup> The reason we value group deliberation and decision making is to balance those perspectives and to increase the likelihood of a better result.<sup>80</sup> The goal of impartiality may prove

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73. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).

74. *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

75. Massaro, *supra* note 33, at 543-45. Race and gender matter, not intrinsically, but as an incredibly salient human experience. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1205-06 (1992); see ABRAMSON, *supra* note 35, at 119-20.

76. See *J.E.B.*, 511 U.S. at 142-44, 146; *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Edmonson*, 500 U.S. at 630-31; *Powers*, 499 U.S. at 410; *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

77. See *Powers*, 499 U.S. at 410 (quoting *Batson*, 476 U.S. at 87); *Muller*, *supra* note 33, at 123.

78. *Batson*, 476 U.S. at 97 (“Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.” (citation omitted)).

79. See *infra* Part III.A for a discussion of this definition of impartiality.

80. See *Rideau v. Louisiana*, 373 U.S. 723, 730-31 (1963) (Clark, J., dissenting); *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961).

aspirational, and its quest difficult, but that does not make the goal any less primary. My proposal to regulate jury selection would make use of diversity to balance the inherent subjectivity of jurors and to strive for a more impartial whole.<sup>81</sup>

Diversity alone, however, is no substitute for impartiality. We cannot merely balance a wide array of perspectives because all juror bias is not created equally. Susan Herman differentiates between weak bias, the innate subjectivity that can never be eliminated, only balanced, versus strong bias, the inability to be fair.<sup>82</sup> To prioritize diversity above all, especially by eliminating peremptory challenges, leaves too much strong bias on the jury.<sup>83</sup> In Part II, I attempt to thread the needle between these two goals to balance the use of diversity to achieve a broad spectrum of human experience with the power for parties to root out strong bias. In Part III, I defend the attempt to preserve peremptory challenges at all.

### *B. Applying Theory to Practice*

Applying the competing constitutional goals I have identified to the actual process of jury selection demonstrates the pragmatic dilemmas we face. Fundamentally, there is no way to simultaneously value each of the three goals. Instead, we have to juggle three balls with two hands.

Jury trials begin with the process of voir dire. We ask a pool of potential jurors questions about themselves, some quite personal, in order to uncover potential bias.<sup>84</sup> The scope of voir dire falls within the broad discretion of the trial judges, who often have very

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81. Again, my proposal would regulate only those categories of diversity deemed to be suspect under equal protection law, namely race, gender, national origin, and religion. *See supra* note 32. This would be further limited by the fact that a party would need to care enough about a particular category of diversity in order to bring a challenge. Some categories will not seem relevant to the parties. *See infra* Part II.A.1.

82. Herman, *supra* note 11, at 1823. There is a difference, for example, between a juror who tends to respect law enforcement versus a juror who believes that cops never lie, or between a juror with a healthy distrust of police born of experience versus a juror who believes that every cop always lies about every subject.

83. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 207 (1989).

84. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150-51 (2010).

different ideas about whether voir dire constitutes a time-consuming and intrusive process not necessary to distinguish among presumably good people, or whether voir dire is the most important part of a jury selection process designed to root out racism and any other factors that might cloud a juror's judgment.<sup>85</sup> Broad voir dire, I argue, makes the quest for impartiality meaningful and deters us from relying merely on the most superficial of information about jurors.<sup>86</sup>

State courts vary enormously, but often give lawyers wide permission to individually question jurors about any issue that seems relevant.<sup>87</sup> In federal court, however, judges themselves usually conduct the entire voir dire and do so in a far more limited way.<sup>88</sup> Questions might be limited to asking jurors' occupations, neighborhoods, relationships to the parties or lawyers, or whether they or close family members have been victims of crimes or charged with crimes.<sup>89</sup> This might then be topped off with perfectly useless group questions such as: "Does anyone think they cannot be fair?"<sup>90</sup>

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85. See *Mu'Min v. Virginia*, 500 U.S. 415, 431-32 (1991) (upholding a defendant's conviction despite the refusal of the trial judge to allow thorough voir dire about the jury's exposure to pretrial publicity); see also Bennett, *supra* note 84, at 158-60; Jay M. Spears, Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1494 (1975).

86. See Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117, 1151-58 (2012) (arguing for a broader right to voir dire).

87. See Bennett, *supra* note 84, at 159 (stating that federal courts generally allow less lawyer involvement than state courts); Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 386 (2010) (noting the number of potential factors under judicial discretion); see also FED. R. CRIM. P. 24(a)(1) ("The court may examine prospective jurors or may permit the attorneys for the parties to do so."); *Ristaino v. Ross*, 424 U.S. 589, 594 (1976) ("*Voir dire* is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895))); Anne M. Payne & Christine Cohoe, *Jury Selection and Voir Dire in Criminal Cases*, 76 AM. JUR. TRIALS 127, § 4 (2000) ("Most states give trial counsel broad discretion in questioning prospective jurors.").

88. See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 674-75 (2002) (arguing that using only basic and limited questions in a "cursory process at best" is likely due to judicial desire for efficiency, but has the negative consequence that very little information is provided in order to root out biased jurors and provide as close to an impartial jury as possible). In other cases, judges (and lawyers) probe deeper into private attitudes and practices. For example, they sometimes ask about religious beliefs, drinking habits, jobs, hobbies, et cetera. See Alschuler, *supra* note 83, at 158-59 (complaining about the unnecessarily intrusive nature of voir dire).

89. See Marder, *supra* note 88, at 674-75.

90. See *Mu'Min*, 500 U.S. at 451 (Kennedy, J., dissenting) ("There is no single way to *voir*

Lawyers frequently know very little about potential jurors and are left with what they can observe: dress, demeanor, and, of course, race and gender.<sup>91</sup>

In many courts, accordingly, this crucial first step to identifying biased jurors is far too limited.<sup>92</sup> Even as to rooting out racism, the bias that has most plagued and poisoned our criminal justice system, lawyers rely on the discretion of trial judges. The Supreme Court has granted defendants a constitutional right to ask jurors questions related to racism, but only when there is a “significant likelihood” that prejudice will likely affect jurors.<sup>93</sup> In *Turner v. Murray*, the Court held that the imposition of the death penalty on a black defendant always raises such issues, yet a mere conviction for murder would not.<sup>94</sup> Some members of the Court found it too divisive as a constitutional matter to presume that race will be an issue in a criminal trial, and instead argued that raising the issue of racism might put it in the heads of jurors.<sup>95</sup> We are thus left with the Alice in Wonderland rule that lawyers may neither presume that the race or gender of a juror matters to the chances that a juror

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*dire* a juror .... [A trial] judge can also evaluate impartiality by explaining the trial processes and asking general questions about the juror’s commitment to follow the law and the trial court’s instructions.”).

91. See Marder, *supra* note 88, at 674-75; see also Ford, *supra* note 87, at 378; Spears, *supra* note 85, at 1507, 1516.

92. See Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)Use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1390 (2012) (noting the often limited opportunity to assess each juror); Spears, *supra* note 85, at 1504-06.

93. *Ristaino v. Ross*, 424 U.S. 589, 596-98 (1976) (holding that the interracial nature of the crime did not require voir dire about racial prejudice because “[t]he circumstances thus did not suggest a significant likelihood that racial prejudice might infect [the defendant’s] trial”); *Ham v. South Carolina*, 409 U.S. 524, 529 (1973) (finding that a known civil rights activist on trial for marijuana possession had a right to voir dire on racial prejudice). To give an example of how unduly limited the right remains for defendants, the Fifth Circuit affirmed a conviction in which white supremacist defendants accused of defacing a synagogue and assaulting nonwhites in a park were not permitted to voir dire jurors about bias because those issues were not clearly relevant to the trial. *United States v. Greer*, 939 F.2d 1076, 1084 (5th Cir. 1991), *aff’d en banc*, 968 F.2d 433 (5th Cir. 1992).

94. 476 U.S. 28, 36-37 (1986). A majority of the Court felt comfortable affirming a murder conviction despite a refusal to allow voir dire about prejudice against a black defendant, though the Court did reverse the resulting death penalty. *Id.* This led to the classic retort from Justice Brennan: “King Solomon did not, in fact, split the baby in two, and had he done so, I suspect that he would be remembered less for his wisdom than for his hardheartedness.” *Id.* at 44 (Brennan, J., concurring in part and dissenting in part).

95. *Id.* at 50 n.8 (Powell, J., dissenting).

will be racist or sexist, nor do lawyers have a right to find out if the juror is actually racist or sexist.

After seeking information about the pool, the lawyers then ask the judge to strike a few jurors “for cause.”<sup>96</sup> Judges generally grant these strikes sparingly.<sup>97</sup> They must meet the rather high standard of “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”<sup>98</sup> Judges tend to treat challenges for cause as a judicial declaration of a citizen’s unfitness for jury service and therefore grant them reluctantly and rarely.<sup>99</sup> Even when faced with an admission of bias by potential jurors, judges often try to rehabilitate them by asking leading questions.<sup>100</sup> For example, a judge may ask a juror, “Do you think you could put aside that opinion and listen to the evidence?”<sup>101</sup>

Our current jury selection system thus relies instead on peremptory challenges as the primary method to honor the constitutional guarantee of an “impartial jury.”<sup>102</sup> Prosecutors and defense lawyers try to root out bias using their own inexact instincts.<sup>103</sup> By being

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96. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

97. See Scott Brooks, Comment, *Guilty by Reason of Insanity: Why a Maligned Defense Demands a Constitutional Right of Inquiry on Voir Dire*, 20 GEO. MASON L. REV. 1183, 1189 (2013); Spears, *supra* note 85, at 1500.

98. *Wainwright*, 469 U.S. at 424.

99. Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 549-50 (1975); see Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 414-15 (2010) (“Commentators have noted judicial reluctance to grant challenges for cause. This may be particularly true in jurisdictions where judges are subject to reelection ... [and] some judges engage in ‘aggressive rehabilitation,’ asking challenged jurors if they could set aside their experiences and feelings and follow the judge’s orders.”); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 519, 556-57 (1992) (noting the limited scope of for-cause challenges).

100. Howe, *supra* note 51, at 1186 (describing the process of rehabilitating a juror).

101. I will discuss the possibility of increasing judicial responsibility over jury selection by making the test more subjective, but doing so hands over the power over jury selection to a single actor, a proposition that comes with its own obvious risks. See *infra* Part III.A.2.

102. See *Batson v. Kentucky*, 476 U.S. 79, 118-21 (1986) (Burger, C.J., dissenting) (delineating the extensive history of dependence on the peremptory challenge and noting the fundamental importance of the peremptory right in the criminal justice system); *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Pointer v. United States*, 151 U.S. 396, 408 (1894); *Lewis v. United States*, 146 U.S. 370, 378 (1892).

103. Babcock, *supra* note 99, at 552 (“Without giving any reason or meeting any legal test, he may dismiss from ‘his’ jury those he fears or hates the most, so that he is left with ‘a good

overinclusive in the number of unbiased jurors excused, peremptory challenges allow the court and lawyers to avoid the hard work of actually determining specific bias with a greater certainty.<sup>104</sup> Many, if not most, peremptory challenges are admittedly used against jurors who would be impartial in the broadest sense, but the hope is that an overinclusive net will prove more likely to catch the most biased jurors still lurking in the pool.<sup>105</sup>

Peremptory challenges function not as an individualized attempt to determine impartiality but rather as an adversarial process that makes use of each side's self-interest.<sup>106</sup> Lawyers often do not seek impartiality so much as partiality towards their own side; they strike the jurors that seem most likely to vote against them.<sup>107</sup> The hope is that these dueling challenges leave us with a jury closest to the middle.<sup>108</sup> Legal scholarship often mocks this approach as somehow unfair or selfish, at least when used by the prosecutor who seeks a conviction.<sup>109</sup> But like much of our adversarial system, the

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opinion of the jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such dislike.”); *see also* Spears, *supra* note 85, at 1507 n.61; *cf.* Alschuler, *supra* note 83, at 203 (“Nevertheless, the available evidence suggests that [trial lawyers] often fall short of their partisan goals. Their folk wisdom, trial experiences, mystic intuitions, and crude group stereotypes do not in fact enable them to predict which jurors will favor their positions.”).

104. *See* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 771 (1992); Spears, *supra* note 85, at 1507.

105. Underwood, *supra* note 104, at 771 (“[T]he purpose of the peremptory challenge is the elimination of bias ... its method is to resolve doubts (up to a specific number) in favor of exclusion. This device has the advantage of saving the time of attorneys, jurors, and the court that would otherwise be spent in probing the true extent, if any, of the bias of potential jurors. It accomplishes this result by permitting the exclusion of a substantial number of unbiased jurors.”).

106. *See* *Batson*, 476 U.S. at 120 (Burger, C.J., dissenting) (“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise.” (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965))); Babcock, *supra* note 99, at 551.

107. *See* Babcock, *supra* note 99, at 551 (“Of course, neither litigant is trying to choose ‘impartial’ jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased *for* him.”); Spears, *supra* note 85, at 1503-04.

108. *See* Babcock, *supra* note 99, at 551.

109. *See, e.g.*, Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1104 (1994) (stating that the use of race or gender as a basis for peremptory challenges would be a “part of effective advocacy were it not entirely repugnant to the values and standards of the



approach is designed to harness the advocacy of each side to allow the system to come to a better result.<sup>110</sup>

Although a majority of peremptory challenges end up striking jurors who merely seem less favorable to the lawyer's cause, peremptories still remain crucial to rooting out jurors truly incapable of being fair. From jurors motivated by discrimination to those with a stake in the outcome of the case, there remains strong bias, which is important to remove from a jury.<sup>111</sup> There are jurors whose racism, sexism, or any other prejudices do not allow them to perceive the truth or do justice, but who will not admit that bias in a way that subjects them to challenge for cause?<sup>112</sup> I do not pretend that these lines are easy to draw, which is why judges find it impossible to police them with for-cause challenges; but that does not mean that they do not exist.<sup>113</sup>

Indeed the difficulty of defining impermissible levels of bias, much less identifying and accusing a particular potential juror of such bias, underlies the need for an overinclusive system of peremptory challenges. Unlike judges, lawyers can strike jurors who do not

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Constitution, values that should and do override the litigant's interest in winning"). Although prosecutors do have a different ethical role—to seek justice rather than to represent a client—prosecutors seeking a conviction do so the vast majority of the time because they sincerely believe in the defendant's guilt, as well as in protecting the victim and deterring future crime. Although we must strictly regulate the prosecutor's obligation to do justice, demonizing the very notion of a prosecutor does not particularly help.

110. See, e.g., Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, 64-65 (1996) (discussing the advantages of the adversarial system).

111. See Herman, *supra* note 11, at 1821-22. Scott Howe attempts to define impermissible bias (as opposed to unavoidable subjectivity) as "persons who establish themselves in advance as likely to be strongly influenced by information gained extrajudicially regarding important factual issues, as likely to decide the case primarily on offensive, personal considerations or as likely to fail to consider relevant, in-court arguments." Howe, *supra* note 51, at 1183.

112. See Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 243-44 (1968) ("Challenges for cause, therefore, do not keep juries free from unconscious prejudice, from prejudice which the venireman through embarrassment or otherwise is unwilling to admit publicly on voir dire, or from prejudice whose impact on his objectivity is greater than he knows." (footnote omitted)).

113. See Howe, *supra* note 51, at 1184 (giving examples of such bias: financial stake in the outcome of the case, relationship with a party, general bias against the race of a party, the punishment to be imposed, or the crime itself). The first two examples would be removable for cause and hopefully obvious enough to root out; the second two examples would not unless a juror was aware of them and willing to admit them out loud. Kuhn, *supra* note 112, at 243-44.

publicly confess to their own biases but still hint at them.<sup>114</sup> Wearing a confederate flag while denying any racist beliefs does not necessarily equate to a predisposition to convict black defendants—certainly not in a way that a judge could comfortably act on with a for-cause challenge—but it would constitute a rational, though admittedly overinclusive, guess on the part of a defense lawyer.<sup>115</sup>

Our jury selection system thus allows a level of stereotyping based on categories such as occupation, neighborhood, and class, which we would find unacceptable elsewhere.<sup>116</sup> We have chosen a process that casts too broad a net precisely because we see the need to root out bias as so crucial.<sup>117</sup> Most importantly, defense attorneys with minority clients (or prosecutors with minority victims in some cases) worry about identifying the racism they know is endemic in our society and thus in our jury pool.<sup>118</sup> And because we have at least reached the point in our history when being accused of racism is offensive, even when racism itself remains common, having a

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114. See Babcock, *supra* note 99, at 554; Howe, *supra* note 51, at 1194; Underwood, *supra* note 104, at 771.

115. Even in choosing this example, I worried about insulting any less obvious category of behavior, such as watching Fox News, because of course there is no absolute correlation between racism and conservatism, and the allegation of racism is insulting. The awkwardness of this overgeneralizing is precisely what makes for-cause challenges so difficult. If the judge were to ask about racial attitudes surrounding the flag, there are plenty of possibly legitimate neutral reasons of southern pride a juror could credibly offer. We give far too much credit to the process of for-cause challenges by assuming that, even when jurors are aware of their own racism, they will publicly articulate it. See Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 161 (2005) (noting that “[s]ubtle forms of bias are automatic, unconscious, and unintentional” and “escape notice, even the notice of those enacting the bias” (quoting Susan T. Fiske, *What's in a Category?: Responsibility, Intent, and the Avoidability of Bias Against Outgroups*, in *THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL* 127, 127-28 (Arthur G. Miller ed., 2004))). Nor do judges want to publicly label jurors as racists by granting such challenges. See Babcock, *supra* note 99, at 553.

116. Albert Alschuler argues that we should eliminate peremptory challenges altogether because such stereotypes, even on the basis of non-suspect categories, are degrading. Alschuler, *supra* note 83, at 209.

117. Babcock, *supra* note 99, at 556 (“Given the importance of the peremptory challenge, then, ‘any system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned.’” (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894))).

118. See Colbert, *supra* note 3, at 13-32 (outlining the history of “justice” for African Americans); Ogletree, *supra* note 109, at 1127-28 (describing the role defense lawyers play in rooting out racist jurors); Tetlow, *supra* note 2, at 76-95 (describing the history of discriminatory acquittals in hate crime cases as well as empirical evidence of jurors’ devaluing of minority victims in murder and rape cases).

method that does not demand public articulation of those traits that correlate to racism matters enormously.<sup>119</sup>

We allow peremptory challenges for a worthy goal, but they come with two significant costs. First, they allow lawyers to engage in the kind of stereotyping that offends us most: that based on race or gender.<sup>120</sup> Second, and more important for most reformers, peremptory challenges allow lawyers to destroy jury diversity.<sup>121</sup> The Supreme Court chose to address the first problem by regulating the intent of lawyers choosing a jury, but it has never addressed the second: the actual resulting diversity of the jury.<sup>122</sup> Indeed, the Court's logic in the *Batson* line of cases calls into question the relevance of jury diversity at all.<sup>123</sup>

The *Batson* test functions as follows: first, one side may challenge the other side's use of peremptories to strike a particular race or

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119. See Babcock, *supra* note 99, at 553 (“The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. It makes unnecessary explicit entertainment of the idea that there are cases that, for example, most middle-aged civil servants would be unable to decide on the evidence or that most blacks would not rule on impartially.”).

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

121. See *Swain v. Alabama*, 380 U.S. 202, 222 (1965).

122. Although *Batson* held that the Equal Protection Clause does not allow lawyers to strike jurors from the jury venire based on race, 476 U.S. at 79, the *Holland* Court decided that a defendant's Sixth Amendment right to a jury composed of a fair cross section of the community is not violated when lawyers use peremptory challenges to strike any remaining minority jurors from the petit jury. *Holland v. Illinois*, 493 U.S. 474, 487 (1990).

123. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148-49 (1994) (O'Connor, J., concurring) (describing the Court's decision to pretend that race and gender do not matter, though empirical evidence proves otherwise, in order to protect equal protection goals); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (“And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.”); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 210 (1995) (“In fact, the two analyses are in a great deal of tension: whereas the Sixth Amendment ‘flavor’ approach values a group's input into the jury process because the group has characteristics that make it *different* from other groups in society, the Court's recent Equal Protection Clause cases deny any relevant differences between the excluded and included groups at all. Use of certain jury selection criteria is invalid under the Equal Protection Clause reasoning because the criteria are themselves irrelevant, and their use reflects nothing more than stereotypical thinking.” (citing *J.E.B.*, 511 U.S. at 133-34); Muller, *supra* note 33, at 122-23 (“[T]he Court in *Batson* and its progeny has continually and stridently rejected the theory of difference .... This means when a black woman is removed from the jury because of her race and gender, and is replaced by a white man, nothing is lost.”).

gender;<sup>124</sup> second, the challenged party must then give a race—or gender-neutral reason for the strike;<sup>125</sup> and third, the judge must decide whether that reason is pretextual, a fancy word for lying.<sup>126</sup> *Batson* thus asks judges to determine whether lawyers thought about race or gender when making jury selection decisions.<sup>127</sup> The judge has to measure not the quality of the proffered reason for a peremptory challenge, or even its plausibility, but rather its sincerity.<sup>128</sup> In order to grant a *Batson* challenge, a judge must make a finding that the lawyer lied to the court, thus committing an ethics violation.<sup>129</sup>

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124. See *Batson*, 476 U.S. at 105 (Marshall, J., concurring) (arguing that litigants remain free to misuse peremptory challenges as long as the strikes fall *below* the prima facie threshold level).

125. Lawyers need only tender a neutral reason, not a “persuasive, or even plausible,” one. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam); see also *id.* at 766 (“[T]he mustaches and the beards look suspicious to me.”).

126. *Batson*, 476 U.S. at 97-98; *id.* at 106 (Marshall, J., concurring) (noting that the unconscious internalization of racial stereotypes may lead litigants more easily to conclude “that a prospective black juror is ‘sullen,’ or ‘distant,’” even though that characterization would not have sprung to mind had the prospective juror been white).

127. *Batson* asks this question by determining whether the race- or gender-neutral reason offered is pretextual, meaning it is not the real reason for the strike, though technically the judge does not ask the lawyers whether they considered race or gender. The Supreme Court has never officially decided whether a dual motive—a permissible motive and an impermissible one—would pass the *Batson* test. In dissent to a denial of certiorari, two Justices suggested that it would not. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari). Some federal circuit courts, however, have applied mixed-motive analysis to allow lawyers who have admitted to consideration of race or gender to persuade a judge that they would have made the same decision without the forbidden reason. See *Gattis v. Snyder*, 278 F.3d 222, 234-35 (3d Cir. 2002); *Wallace v. Morrison*, 87 F.3d 1271, 1274-75 (11th Cir. 1996); *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995); *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995); *Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993). See generally Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 279 (2007) (noting that the Supreme Court has not yet ruled whether mixed-motive analysis, borrowed from Title VII cases, should apply to the *Batson* rule, and arguing that it should not). If the Supreme Court were to hold that mixed-motive analysis could apply to the *Batson* rule, that would render my proposal less controversial, though still different from *Batson* because it would focus on results rather than intent.

128. See *Purkett*, 514 U.S. at 768 (stating that lawyers need only tender a neutral reason, not a “persuasive, or even plausible” reason).

129. The test requires the defendant to “make a liar out of the prosecutor.” *Munson v. State*, 774 S.W.2d 778, 780 (Tex. Crim. App. 1989); see José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 374, 377 (1998) (recognizing that *Batson* “requires the judge to ask an officer of the court whether he has violated his obligation to be candid with the court,” which is

*Batson* requires trial judges to determine whether a lawyer acted on a belief that race or gender can predict belief, something the judge herself may believe given all of the empirical evidence to support this reasoning.<sup>130</sup> Judges tasked with enforcing the rule often resist labeling lawyers as racist just because they have engaged in race consciousness.<sup>131</sup> They understand, for example, that criminal defense lawyers representing minority clients violate the rule almost as an ethical imperative.<sup>132</sup> Some scholars have

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“tantamount to an accusation of dishonesty,” and that trial courts “have little incentive to use it against lawyers who regularly practice before them”); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 531 (noting that it is “asking a lot” of the trial court to “doubt the integrity of an attorney who has, in most cases, been in that trial courtroom before and who is perhaps well-known to the trial judge”); Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 36 (1997); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 787 (1999) (noting that a finding that a prosecutor has intentionally violated a juror’s constitutional rights is “one that no judge wants to reach lightly” and that “trial courts have a hard time finding the prosecutor’s proffered explanation a subterfuge for purposeful discrimination”); William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 HAMLINE L. REV. 235, 268 (2002) (“The trial judge’s task is complicated by the reality that any finding of intentional discrimination may have serious ethical implications for the prosecutor. It might be appropriate for judges to give prosecutors the benefit of the doubt before making any finding that a prosecutor’s stated reason is a pretext and the prosecutor has in fact engaged in impermissible racial discrimination.”); Page, *supra* note 115, at 177-78 (recognizing that a finding of pretext is “likely to color the rest of the trial” as well as “other trials in jurisdictions where lawyers appear frequently before the same judges”); Roberts, *supra* note 92, at 1389.

130. See Tania Tetlow, *How Batson Spawned Shaw—Requiring the Government to Treat Citizens as Individuals When It Cannot*, 49 LOY. L. REV. 133, 165 (2003); see also T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1066 (1991); Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 26-30 (2005) (describing empirical research on the difference that gender makes to jury deliberation); King, *supra* note 59, at 80-99 (discussing studies showing that juror race affects verdicts, and also studies that show the opposite); Page, *supra* note 115, at 190-92.

131. See Robin Charlow, *Batson “Blame” and Its Implications for Equal Protection Analysis*, 97 IOWA L. REV. 1489, 1491-92 (2012); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1087-88 (2009) (noting that some judges may refuse to enforce *Batson* when peremptories are used against blacks and whites equally); Page, *supra* note 115, at 177 (noting that granting a challenge is akin to calling a lawyer a liar, and maybe racist and sexist as well).

132. See Tetlow, *supra* note 18, at 1727; see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O’Connor, J., concurring) (“[By applying the *Batson* rule to gender, we] also increase the possibility that biased jurors will be allowed onto the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic. Similarly, in jurisdictions where law-

urged courts to report lawyers to the bar after granting a *Batson* challenge.<sup>133</sup>

We will consider the harms inherent in gender- or race-consciousness in Part III, but I argue that the more important flaw of peremptory challenges is the second harm: that lawyers have the power to skew the diversity of a jury by eliminating minorities. When groups are evenly matched in the pool, as is usually the case with gender, dueling peremptories give each side equal access to strike the gender they believe (possibly wrongly) will hurt them, and the results might balance out.<sup>134</sup> This also proves true with racial diversity in a jurisdiction, often urban, in which racial groups are evenly matched.<sup>135</sup> But in much of the country, racial minorities are few enough to be eliminated with peremptory challenges.<sup>136</sup> Although we could attempt to adjust the number of peremptory challenges granted to each side to correct this power, we cannot effectively predict in advance the necessary numbers, or even which side's challenges should be reduced.<sup>137</sup> In a hate crime trial, such as *Georgia v. McCollum*, for example, the white defendants sought to eliminate all of the black jurors.<sup>138</sup>

The eternal dilemma of jury selection revolves around whether peremptory challenges can be salvaged and regulated or whether they should be abandoned altogether. Although peremptories allow us to root out bias that is subtle and unstated, they also tend to

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yers exercise their strikes in open court, lawyers may be deterred from using their peremptories, out of the fear that if they are unable to justify the strike the court will seat a juror who knows that the striking party thought him unfit. Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.").

133. See, e.g., Gershowitz, *supra* note 131, at 1065, 1084.

134. See *J.E.B.*, 511 U.S. at 154-55 (Rehnquist, C.J., dissenting) (arguing that the even division of gender in society renders it undeserving of protection under *Batson*); cf. Ford, *supra* note 87, at 413.

135. Cities of over 100,000 people with a slight majority African American population include Washington, D.C., Detroit, Jackson, Miami Gardens, Birmingham, Baltimore, Memphis, New Orleans, Flint, St. Louis, Baton Rouge, Montgomery, Savannah, Wilmington, Atlanta, Newark, and Cleveland. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 9, 15 (2011), available at <http://perma.cc/VLG8-G83J>.

136. See Cavise, *supra* note 129, at 527 (noting that minorities "usually appearing in much smaller numbers, can be completely eliminated" with peremptory challenges).

137. It would depend on the racial makeup of a particular community. Further, sometimes the prosecutor seeks to preserve minority representation in the jury. See *infra* Part III.A.

138. 505 U.S. 42, 44-45 (1992).

skew the jury's diversity and submit potential jurors to the rank stereotyping complained of in *Batson*. That leaves us with four main options: (1) retaining peremptories but regulating them for color blindness (the current *Batson* approach); (2) retaining peremptories but regulating them for diversity (the approach proposed by this Article); (3) getting rid of peremptories altogether for both sides or banning them for just the prosecutor but at a real cost to the quest for impartiality; or (4) creating a color-conscious approach that protects diversity more effectively than does random selection but at an even greater cost to impartiality.

Ultimately, no perfect solution exists to the necessary trade-offs between impartiality, diversity, and color-blind jury selection, but we can better prioritize our goals. We can still regulate jury selection in a way that prioritizes impartiality and simultaneously recognizes diversity as the most important tool in that regard. We can avoid the cynicism of quotas without engaging in the distraction of color blindness.

## II. USING A SIXTH AMENDMENT TEST TO BALANCE IMPARTIALITY AND DIVERSITY

Both peremptory challenges and jury diversity constitute powerful tools in service of an impartial jury. I argue that we can protect them both with a Sixth Amendment approach to regulate peremptory challenges, an approach that would negotiate between the use of strikes to root out bias while protecting a diverse jury. This would chart a course between the failed experiment of regulating peremptories for color blindness and the extreme of ending peremptories altogether.

I join a few others who have proposed reliance on the Sixth Amendment, but this Article is the first to describe how such a test could function differently than the *Batson* test and to make clear that the test should replace *Batson*, not just mirror it. Instead of regulating peremptory challenges with color-blind equal protection analysis, as *Batson* does, I would substitute a rationale that values diversity.<sup>139</sup> We would no longer pretend that race does not matter:

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139. As I describe in more detail below, this would require replacing the reasoning of *Batson* with the road not taken in *Holland v. Illinois*, 493 U.S. 474 (1990). See *infra* Part II.C.1.

we would regulate the diversity of the jury because race does matter.

*A. The Specifics of a Sixth Amendment Test: Three Very Different Steps*

My proposal would resemble the *Batson* three-step rule but would function very differently. In step one, at the end of jury selection, a lawyer could challenge the use of peremptory challenges that alter the diversity of the jury.<sup>140</sup> In step two, the challenged lawyer would need to justify those strikes that skewed diversity with specific concerns about a juror's potential bias without relying merely on the juror's race or gender. In step three, however, the judge then would weigh the importance of those stated reasons about a juror's impartiality against the importance of the diversity sacrificed without that juror. Unlike the *Batson* rule, the judge would no longer measure the veracity of the reason but its merit. And although we would not allow lawyers to specifically rely on race as the basis for their strike, we would no longer ask them to deny that they thought about race.<sup>141</sup> This would constitute a far more objective and reviewable test than asking judges to look a lawyer in the eye to measure whether he is telling the truth when claiming to be properly color blind.

Before we begin to regulate jury selection, however, we first need an expanded right to lawyer-directed voir dire for the information necessary to seek an impartial jury.<sup>142</sup> Without that, lawyers and judges fly blind in identifying those jurors who may have prejudged the case, those jurors who have a strong sympathy towards the victim and antipathy towards the defendant (or the other way around), and those jurors who have personal experience or strong

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140. As described below, this process would need to occur at the end of jury selection in order to determine the final impact of all peremptories on diversity. *See infra* Part II.A.1.

141. This would also apply to the other suspect categories under equal protection law. *See supra* note 32. I focus more on race in this Article, but as I have argued elsewhere, gender discrimination functions similarly to racial discrimination, particularly in trials of gender-based violence. *See Tetlow, supra* note 2, at 81-82.

142. *See Tetlow, supra* note 86, at 1140-58 (arguing for a broader voir dire right and for its application to prosecutors).



opinions about the crime charged.<sup>143</sup> Jurors can be surprisingly honest about admitting those prejudices when asked the right question, but more often, they reveal prejudices only subtly and unwittingly.<sup>144</sup> Although scholars often remain cynical about the possibility of rooting out bias such as racism, indirect questions, such as asking how the juror feels about affirmative action or the Trayvon Martin trial, can demonstrate much about someone's attitudes towards race in all of their complexity.

This is also an area in which the goals of impartiality and color blindness converge. Ironically, the broader voir dire rights that the Supreme Court has rejected would constitute the easiest solution to the kind of stereotyping the Court banned in *Batson*.<sup>145</sup> When lawyers have no other information, race and gender constitute the most

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143. See *id.* at 1147 & n.178 (“[W]e do not allow the possibility of a false answer to serve as an excuse for not asking these questions.”); see also Ford, *supra* note 87, at 390; Spears, *supra* note 85, at 1504, 1507, 1523.

144. Spears, *supra* note 85, at 1506, 1523-24 n.122; see *People v. Williams*, 628 P.2d 869, 877 (Cal. 1981) (holding that counsel should be allowed to ask questions to elicit bias on voir dire), *superseded by statute*, Proposition 115 (June 5, 1990) (codified at CAL. CIV. PROC. § 223 (West 2014)), as recognized in *People v. Noguera*, 842 P.2d 1160 (Cal. 1992). The *Williams* court recognized that

although we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially, further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he reasonably believes he can overcome. And although his protestations of impartiality may immunize him from a challenge for cause, they should not foreclose further reasonable questioning that might expose bias on which prudent counsel would base a peremptory challenge.

*Williams*, 628 P.2d at 873 (internal citations omitted); see also Fowler, *supra* note 130, at 45 (discussing the use of voir dire to eliminate jurors with gender prejudices); Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209, 212 (2011) (stating that “many studies demonstrate a bias of white jurors against black defendants”); Barat S. McClain, Note, *Turner's Acceptance of Limited Voir Dire Renders Batson's Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 306 (1989) (discussing the importance of voir dire to eliminating jury discrimination without violating *Batson's* prohibition on presuming such prejudice according to race); cf. Alschuler, *supra* note 83, at 203 (finding that, for all their mythologies and traditions, lawyers usually fail at voir dire); Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 650-51 (1991) (arguing that voir dire “fails to elicit accurate or honest responses from potential jurors” and is therefore ineffective to root out prejudice).

145. See *United States v. Greer*, 968 F.2d 433, 445 (5th Cir. 1992) (en banc) (Higginbotham, J., writing for the half of the court that would reverse) (describing the importance of allowing broad voir dire on issues of potential prejudice in order to avoid *Batson* error), *aff'g* 939 F.3d 1076 (5th Cir. 1991).

relevant facts available to lawyers during jury selection.<sup>146</sup> Broad voir dire can correct demographic stereotypes in an immediate way that teaches lawyers to be careful in their reliance on them.<sup>147</sup> At the same time, broad voir dire allows us to seek out the prejudice that pollutes jury deliberations or the bias that clouds judgment.<sup>148</sup>

*1. Step One: Establishing a Prima Facie Case of Skewed Diversity*

After voir dire and the exercise of challenges, the proposed Sixth Amendment test would then regulate the results of jury selection. In step one of the test, either side could challenge the use of peremptory challenges to skew the diversity of the jury. This would be a far more results-oriented test than step one of the *Batson* test, which focuses on patterns of strikes as evidence of a lawyer's motives.<sup>149</sup> Instead, this test would measure the extent to which

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146. See *id.*; see also Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 55 n.301 (1988) ("Prosecutorial inquiry into the existence of specific bias, rather than merely striking because of broad assumptions based on race, age, or status, actually promotes the accuracy of peremptory challenges.").

147. The information gathered from individuals will sometimes confirm stereotypes as well, but will certainly remind lawyers that such stereotypes are overbroad guesses. Lawyers allowed to ask questions will often find that appearances are deceiving and that they have entirely misread a particular juror. Lawyers will also be reminded to broaden their understanding of racial experience, and remember, for example, that members of the black community who suffer the most from police misconduct often also suffer the most from violent crime.

148. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994) ("If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.").

149. See *Batson v. Kentucky*, 427 U.S. 79, 95, 97 (1986) (finding that a defendant makes a prima facie case by showing purposeful discrimination in the selection of his venire in his specific case); Tracy M.Y. Choy, Note, *Branding Neutral Explanations Pretextual Under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577, 584 (1997). *Batson* does not purport to care about the impact of strikes on the jury's ultimate diversity; rather, it concerns itself with the far murkier question of whether a pattern of strikes proves racial motive. James R. Gadwood, Note, *The Framework Comes Crumbling Down: Juryquest in a Batson World*, 88 B.U. L. REV. 291, 297-99 (2008); see *Johnson v. California*, 545 U.S. 162, 170 (2005) (modifying the threshold of *Batson's* first step by allowing defendants to make a prima facie case by showing evidence sufficient to establish an "inference that discrimination has occurred," without elaborating on what sufficiently

diversity has in fact been skewed after jury selection is finished.<sup>150</sup> If dueling strikes have no ultimate impact on the diversity of the resulting jury because they cancel each other out, there would be no need to entertain a challenge.<sup>151</sup> Because a jury constitutes such a small sample, any divergence in diversity would suffice to raise a challenge.<sup>152</sup>

I would measure diversity with regard to the categories the Supreme Court has already deemed suspect classes under equal protection analysis. Race and gender, among others, are suspect classes and always worthy of the highest scrutiny; eye color and profession are not.<sup>153</sup> Although I believe in the impact of a much broader diversity than these categories, we need a limiting principle. It makes sense to focus on the factors most associated with a specific divergence in experience.<sup>154</sup> Further, the Court could consider a challenge to the striking of whites, though the Court

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establishes the inference); Francis, *supra* note 16, at 360-61 & n.408 (arguing that *Batson* should apply with reference to the impact of strikes, not just the percentage of strikes used on minorities, and citing cases that hold the opposite).

150. This would require challenges to come at the end of jury selection rather than after individual strikes, and would require jurors to remain available in case they were reseated.

151. Accordingly, there would be no dueling challenges on the subject of race, for example, because there could only be a challenge to the side that ended up underrepresented. In other words, if the defense lawyer struck white jurors and the prosecutor struck black jurors, and the jury ended up disproportionately white, then the defense lawyer would have a right to challenge the prosecutor without having to explain her own strikes. The test is about impact on diversity, not motive. The only dueling challenges would involve different categories of diversity; for example, one side might complain about too few black jurors and the other side might complain about too few women.

152. This would be true even if the difference in percentage were slight because sometimes that means the difference between a little racial diversity or none.

153. This would expand further than *Batson* to other suspect categories like national origin and religion not yet adopted by the Supreme Court for application of the *Batson* rule. See A.C. Johnstone, Comment, *Peremptory Pragmatism: Religion and the Administration of the Batson Rule*, 1998 U. CHI. LEGAL F. 441, 441 (describing the Supreme Court's refusal to address the application of the rule to religion).

154. See Muller, *supra* note 33, at 146 (rebutting the argument that a Sixth Amendment test need apply to all and stating that the Court "has had little trouble limiting community representation to groups it deems 'distinctive' within the community"). Jeffrey Abramson argues that the move towards more interest group politics has diminished our conception of a broader diversity and sends the wrong signal to jurors about the nature of jury deliberations. ABRAMSON, *supra* note 35, at 124-25. I agree, but there is no viable way to enforce diversity in its broadest sense, and the experiences of gender and racial oppression remain among the most relevant to rooting out the problem of race and gender discrimination on juries.

might worry less about protecting the participation of the majority in order to protect diversity.<sup>155</sup>

The test would compare the diversity of suspect categories resulting after jury selection is complete to the diversity available in the venire.<sup>156</sup> Yet I leave the decision of whether to make a challenge to the lawyers rather than the judge because many categories of lost diversity will not seem relevant to the parties.<sup>157</sup>

I would also make the challenge available to both sides, despite the fact that the Sixth Amendment applies by its terms only to the defendant.<sup>158</sup> The guarantee of an impartial jury by definition requires balanced scales, and thus cannot practically operate as a one-sided rule. "Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored."<sup>159</sup> As an instrumental measure, therefore, we must harness the adversarial process to achieve that balance.<sup>160</sup> And although the Sixth Amendment applies only to

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155. To exclude whites from the analysis would (a) make this an even more uphill battle against current equal protection jurisprudence; (b) create a lopsided rule that allowed only whites to be struck as such, thus unbalancing the diversity of the jury; and (c) have odd applications in jurisdictions, including many cities, where whites are in the numerical minority.

156. To compare jury diversity to the diversity of the community would function too much like racial quotas, in ways that raise equal protection issues discussed below. *See infra* Part II.C.1.

157. I imagine that gender and national origin would seem relevant less frequently than might race, and in some cases, none of these categories may seem relevant to the parties. It is also entirely possible that a party might make a challenge to a category for the purpose of gamesmanship even if they do not care about the actual category of diversity, just in the hope of costing the other side a strike that they might deem important without the ability to explain why. I do not see a way around this risk, but I tend to think it would not prove terribly effective. The judge is unlikely to worry as much about protecting diversity of a category that seems irrelevant to the case at hand, nor would a strike that truly cannot be articulated be worthy of as much concern.

158. *See Francis, supra* note 16, at 305 (stating that the Sixth Amendment is limited to the defendant, and thus would preclude application of a *Batson*-type rule to the defendant's use of peremptory challenges); Massaro, *supra* note 33, at 560.

159. *Holland v. Illinois*, 493 U.S. 474, 483 (1990).

160. *See, e.g., Howeth, supra* note 33, at 615. To explain the limits of this principle, the argument would not apply to the defendant's other rights under the Sixth Amendment, for example, the right to a jury trial or the Confrontation Clause guarantee. Kirk, *supra* note 33, at 841-42 (noting that a fair cross-section requirement would prohibit either side from racially skewing the jury). These rights do not require an adversarial balancing to make them operative in the way that an impartial jury does.

criminal trials, Congress and state legislatures could, and should, choose to extend it statutorily to civil cases.<sup>161</sup>

*2. Steps Two and Three: Balancing Specific Concerns About Impartiality Against the Importance of Diversity to an Impartial Jury*

In step two of the test, a lawyer whose strikes resulted in a reduction of diversity would need to articulate a specific and relevant concern about the juror's bias. Merely making an argument that race or gender correlates to a particular belief would not suffice, but unlike in *Batson*, we would no longer ask if the lawyer considered race or gender. For example, if a defense lawyer worries that white jurors are more likely to be racist against a black client, the lawyer must articulate more specific reasons for concern about individual jurors. During an expanded right of voir dire, the lawyer would need to ask questions designed to reveal racial attitudes and distinguish among those white jurors. We would no longer ask the lawyer to solemnly deny on his honor that he considered race, nor would it be a problem if the lawyer admitted that fact. But the lawyer would need to articulate specific evidence of his concern about actual bias.

Unlike *Batson*, however, we would measure the quality of that reason, not just its sincerity. In step three of the test, the judge would decide whether the concerns about the juror's impartiality should trump the resulting impact on the jury's diversity.<sup>162</sup> This is a necessarily subjective balancing test, but one focused on the right priorities measuring the strength of the reason, rather than its sincerity. This test would allow trial judges to overturn strikes based on some of the sillier reasons upheld under *Batson* (from a man wearing a beard to a woman wearing earrings).<sup>163</sup>

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161. See 28 U.S.C. § 1862 (2012); LA. CODE CRIM. PROC. ANN. art. 795 (2008); MINN. STAT. ANN. § 26.02 (West 2014); TEX. CODE CRIM. PROC. ANN. art. 35.261 (West 2013).

162. Jeffrey Abramson proposed a similar test, but labels it as mere enforcement of the *Batson* rule. See Abramson, *supra* note 56. He fails to acknowledge that the *Batson* rule itself forbids regulating peremptories in order to protect diversity, because that violates the color-blind ideal that race does not matter to jury deliberation.

163. See *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam) (upholding a strike based on beards and noting that "the second step of this process does not demand an

Lawyers could defend their strikes by articulating specific reasons sufficient to call the juror's impartiality into question.<sup>164</sup> This would result in a standard higher than the often arbitrary guesswork of unregulated peremptories, but it would protect peremptories from the near certainty now required of for-cause challenges. The entire point of attempting to regulate peremptory challenges is to retain some of the benefit of their overinclusiveness in the battle against strong bias. Let me give examples. Meaningful concerns about impartiality would include a prejudice against or bias towards the defendant, the government, or a key witness. They would include a juror's personal experience with crime, as the victim or the accused. And they would definitely include those jurors who openly confess to concerns about their own impartiality during voir dire, but avoid a for-cause challenge because they then promise to be fair.

The realm of acceptable answers to a Sixth Amendment challenge would not include the preservation of diversity. I propose this restriction for pragmatic rather than ideological reasons. Allowing each litigant to police diversity by countering the other side's strikes would devolve into an endless circle. Instead we would vest that responsibility with the judge, who would marshal the results on diversity of dueling strikes while the lawyers focus on using peremptories for more individualized concerns over bias.

That begs another, more difficult question. I have previously argued that race might be relevant to predicting bias,<sup>165</sup> so how can I prohibit a party from using race alone to explain their concern over a particular juror? This essentially represents a compromise. No longer would we pretend, despite all empirical evidence, that race and gender do not frequently predict belief. But if we allowed strikes

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explanation that is persuasive, or even plausible"); *United States v. Claytor*, No. 7:05 CR 0007, 2005 WL 1745642, at \*3 (W.D. Va. July 26, 2005) (upholding a strike based on reason that juror wore earrings in each ear); see also Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1090-98 (2011) (providing other examples of upholding strikes based on frivolous reasons).

164. See Alschuler, *supra* note 83, at 207 (proposing such a test for for-cause challenges); Underwood, *supra* note 104, at 762-64 (describing some reasons for challenges such as prospective jurors who give, but then retract, grounds for removal for cause, and jurors who are part of a category, like an occupation, that might oppose the litigant).

165. See Tetlow, *supra* note 130, at 142-43; Tetlow, *supra* note 18, at 1720-21; *supra* Part I.A.

based on nothing more than race and gender, we would necessarily frustrate the quest for diversity.<sup>166</sup> It would remove any opportunity for the judge to act as the protector of diversity.

Requiring lawyers to articulate other reasons for their strikes after broad voir dire also has the advantage of testing their assumptions without denying that those assumptions are never true. As I discuss below in this Part, I do not believe that the alleged injury to potential jurors from silent stereotyping creates an equal protection violation worthy of restricting the quest for an impartial jury.<sup>167</sup> Yet such stereotyping is worth avoiding when possible.<sup>168</sup> Given the opportunity in voir dire to be more precise and individualized in our predictions, it is not necessary to rely solely on stereotypes that make us deeply uncomfortable.<sup>169</sup>

Remember that at the moment, we do not allow judges to measure the quality of the reason for a strike, but only its sincerity. This requires judges to gauge the honesty of the men and women who practice before them, a difficult task at best and one almost impossible to measure on appeal.<sup>170</sup> The *Batson* rule also requires personally insulting prosecutors and defense lawyers in a way that judges do not take lightly, calling them liars and implying that they are racist.<sup>171</sup> Technically, as some have argued, lying to the court constitutes an ethics violation that the judge should then report to

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166. See Abramson, *supra* note 56, at 132-33 (describing how allowing strikes based on group stereotypes would necessarily frustrate diversity as a practical matter).

167. See *infra* Part II.C.

168. This would also bring jury selection law in line with the more cautious use of color blindness in the legislative redistricting cases, in which we do not demand that legislators swear that they never considered race as they draw district lines, or in affirmative action in admission cases, in which race can be a plus factor to promote diversity. See *infra* Part II.C.

169. See Colbert, *supra* note 3, at 121 n.584 (“For jury selection to be meaningful, the defense attorney must conduct the voir dire.”); Andrew G. Gordon, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 *FORDHAM L. REV.* 685, 705 (1993); Sheri Lynn Johnson, *The Language and Culture (Not To Say Race) of Peremptory Challenges*, 35 *WM. & MARY L. REV.* 21, 45-46 (1993); Ogletree, *supra* note 109, at 1127-28; McClain, *supra* note 144, at 300; Spears, *supra* note 85, at 1504.

170. See Bellin & Semitsu, *supra* note 163, at 1099-102 (finding that the *Batson* challenges actually granted or reversed on appeal tend to involve attorneys who have in fact admitted to thinking about a forbidden category, who have given a reason that would have applied to a retained juror of a different demographic category, or who have given a patently false reason not supported by the record).

171. See *supra* notes 129-31 and accompanying text.

the bar for disciplinary proceedings.<sup>172</sup> Disconnecting the regulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rule.<sup>173</sup>

Let me illustrate the difference between the two tests. In a hate crime trial of a white defendant, the defense lawyer might attempt to strike black jurors because of concerns that they would favor conviction. The prosecutor in turn might attempt to use all his strikes on white jurors because of concerns about racism against the victim. Everyone in the courtroom, including the judge, would understand that both sides would find it almost impossible not to think about race, particularly while they were being reminded not to think about race.<sup>174</sup>

Under a *Batson* test, both lawyers would need to give neutral reasons for their strikes and swear that they did not consider race.<sup>175</sup> Theoretically, a judge who finds it incredible to believe that neither side considered race should grant all the *Batson* challenges, and report those lawyers to the bar association for discipline.<sup>176</sup> As

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172. See Gordon, *supra* note 169, at 712-17. Charles Ogletree has suggested beefing up *Batson* sanctions to include contempt and suspension. Ogletree, *supra* note 109, at 1122.

173. Many scholars have attempted to work within the *Batson* rule to require that the proffered explanation be more objectively reasonable. See, e.g., Bellin & Semitsu, *supra* note 163, at 1121-25 (arguing for a higher standard of proof to rebut the appearance of discriminatory motive without requiring a finding of pretext); Cavise, *supra* note 129, at 549-50 (suggesting that judges require that a proffered justification “makes sense”); Henning, *supra* note 129, at 794-95 (suggesting that one method of improving *Batson* would be “to lower the standard by which the trial court can remove a juror for cause” by allowing the courts to “combine the prima facie requirement of *Batson* with the challenge for cause, requiring the attorney who appears to be striking jurors in a discriminatory manner to justify the peremptory challenges by something more than just a neutral explanation”); Camille A. Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1703 (2008) (arguing that a *Batson* challenge should be upheld “when the evidence fits a hypothesis of racial discrimination ... better than the race neutral reason offered”); Page, *supra* note 115, at 260-61 (recognizing the benefits of an “objective” standard for *Batson* violations and suggesting that trial courts could find that although an attorney believed she “acted in good faith,” she would not have exercised the peremptory challenge “but for the potential juror’s race or gender” and thus acted unconstitutionally). Each of these proposals struggles to create an end-run to the *Batson* rule, which clearly rests on discriminatory motive, not effect.

174. See Brand, *supra* note 14, at 616-17; Abbe Smith, “Nice Work If You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 565-66 (1998) (arguing that it is unethical for a criminal defense lawyer to ignore insights into the impact of juror race and gender in order to comply with *McCullum*).

175. *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986).

176. See Gordon, *supra* note 169, at 712-17. But see MODEL RULES OF PROF’L RESPONSIBILITY R. 8.4 cmt. 4 (2003) (suggesting that a “trial judge’s finding that peremptory challenges



a practical matter, the judge would probably grant none of the challenges. Even if the lawyers gave quite frivolous sounding reasons for their strikes, the judge could measure only the sincerity of those reasons, not their merit.<sup>177</sup> It is a test weakened by the legal fiction upon which it is based—that race does not matter—which calls into question the whole enterprise. The judge could not, moreover, consider the resulting diversity of the jury because *Batson* makes that unconstitutional.<sup>178</sup>

Under a Sixth Amendment test, in contrast, the judge could wait to see whether dueling strikes actually affected diversity, which would depend on the breakdown of the venire. The judge could acknowledge, without finding a constitutional violation, that the defense lawyer worried about black jurors prejudging his client and that the prosecutor worried that white jurors might discriminate against the black victims of a hate crime. But the judge could require that these lawyers actually show some evidence of bias beyond mere race. If, despite expanded voir dire by the attorneys, a struck juror did not reveal any signals that he would be unable to listen to the evidence and to fairly deliberate the case, the judge should then overrule the strike to protect the diversity of the jury. Conversely, the judge should allow the strike if there was specific evidence of potential bias, perhaps if a juror had himself been the victim of a hate crime or had avidly followed news coverage of the case, yet promised to be fair. And unlike the entirely discretionary lie detector test of the *Batson* rule, this new balancing test could be evaluated on appeal as a question of law.<sup>179</sup>

The test represents a compromise between values, an attempt to prioritize them properly and to balance them. I acknowledge fully that it will prove heavily subjective and will vary by the judge.<sup>180</sup>

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were exercised on a discriminatory basis does not alone establish” conduct in violation of the Model Rules); John William Clark IV, Comment, *Batson v. Kentucky and the ABA Model Rules of Professional Conduct: Is a Violation of Batson also an Ethical Violation?*, 29 J. LEGAL PROF. 205, 211 (2005).

177. See *Purkett v. Elem*, 514 U.S. 765, 766-68 (1995) (per curiam).

178. *Batson*, 476 U.S. at 85-87 & n.6.

179. See Bellin & Semitsu, *supra* note 163, at 1098; Cavise, *supra* note 129, at 529-31.

180. I can make a few predictions about how it would function. Although the test is not race specific, I imagine most judges would work harder to reverse a dilution of minority representation rather than a dilution of majority representation. I imagine judges might worry less about gender than about race because gender is usually evenly divided in the

Yet this test should prove stronger than *Batson* for reasons both pragmatic and ideological. It avoids looking into the character of prosecutors and defense lawyers and provides a far more practical method of enforcement. More to the point, a Sixth Amendment test necessarily would be better for jury diversity than *Batson* because it does not deny the value of diversity. For the first time, we would grant judges the permission and responsibility to actively defend the diversity of the jury. Although judges would vary in how zealously they carried out this task, anything they accomplish would be better than what we have now.

*B. Why Holland v. Illinois Was Wrong: The Sixth Amendment Should Regulate Jury Selection*

The test I propose would require revisiting the fork in the road the Supreme Court faced in regulating peremptory challenges. It would require reversal of the color-blind logic of *Batson*. And it would require reversal of the Court's decision in *Holland v. Illinois* to reject the application of the Sixth Amendment to trial juries. In *Holland*, a narrow majority engaged in exaggerated slippery slope arguments, contending that application of the Sixth Amendment to trial juries would require quotas for every imaginable group and thus gut the Amendment's primary purpose of impartiality.<sup>181</sup> The Court could not imagine how to thread the needle between applying fair cross-section doctrine to jury selection without requiring de facto quotas. I have tried to answer that question here.

In 1986, the defendant in *Batson* relied heavily on both Sixth Amendment fair cross-section doctrine and the Equal Protection Clause in his arguments to the Supreme Court.<sup>182</sup> Indeed, years before, the California Supreme Court had crafted a test banning the racial use of peremptory challenges, relying on the Sixth Amendment to create a rule that functioned very similarly to the one I now propose.<sup>183</sup> Yet the *Batson* Court rejected the Sixth Amendment path

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venire and both sides have equal opportunities to favor one or the other.

181. *Holland v. Illinois*, 493 U.S. 474, 480-84 (1990).

182. The petitioner relied more heavily on Sixth Amendment fair cross-section claims than on equal protection. Brief for Petitioner at 8-18, *Batson*, 476 U.S. 79 (No. 84-6263), 1985 WL 669926, at \*8-18.

183. See *People v. Wheeler*, 583 P.2d 748, 762 (Cal. 1978) (using Sixth Amendment analysis

without comment and relied on the Equal Protection Clause reasoning I contest below.

Four years later in *Holland*, however, the Sixth Amendment question was put squarely before the Court. Daniel Holland, convicted before the ruling in *Batson*, failed to preserve an Equal Protection challenge to his jury's selection and therefore asked the Supreme Court to acknowledge the Sixth Amendment as another constitutional basis for the *Batson* rule.<sup>184</sup> Justice Scalia, writing for a 5-4 majority, claimed that the Court had never before applied the fair cross-section requirement to govern petit juries and rejected the invitation to do so.<sup>185</sup> He argued that, although the Sixth Amendment forbids the government from "stack[ing] the deck" by eliminating certain groups from the venire, once both sides operate on a fair playing field, they can exercise peremptory challenges with impunity.<sup>186</sup>

Of course, the argument that the Sixth Amendment had never applied to petit juries was "rank revisionism."<sup>187</sup> In a heated dissent, Justice Marshall pointed out that the Court had applied the Sixth Amendment repeatedly to define the very nature of the trial jury in order to preserve the possibility of achieving a fair cross section on the jury.<sup>188</sup> The Court held unconstitutional a jury with five members because it left too little opportunity for diversity.<sup>189</sup> The Court

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to ban race-conscious peremptory challenges). *Wheeler* established the rebuttable presumption for the constitutional exercise of peremptory challenges, overcome by showing a "strong likelihood" that challenges are based on group association rather than specific bias. *Id.* at 764. After the court determined a prima facie case had been made, the burden shifted to the opposing party to establish that the challenges were not based on group bias alone, but rather that they were exercised either on specific bias or grounds reasonably relevant to the instant case. *Id.*

184. The defendant in *Holland* failed to anticipate the equal protection basis of the Court's ruling in *Batson*, and preserved only Sixth Amendment objections to the prosecutor's use of peremptory challenges in his trial. *Holland*, 493 U.S. at 476, 487. As a white defendant complaining about the striking of black jurors, Holland apparently worried he would lack standing to make an equal protection argument. See *Arguments Before the Court: Criminal Law and Procedure*, 58 U.S.L.W. 3279, 3280 (1989).

185. *Holland*, 493 U.S. at 482-83.

186. *Id.* at 481. Justice Scalia, who dissented in *Batson*, did acknowledge that prosecutors still operated under its restrictions. *Id.* at 486-87.

187. Muller, *supra* note 33, at 139 ("The Court's decision in *Holland* is hard to fathom.").

188. *Holland*, 493 U.S. at 494-95 (Marshall, J., dissenting).

189. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (holding that the Sixth Amendment requires a jury of at least six in order to offer a proper opportunity to obtain a fair cross

required that juries issue verdicts by at least a three-fourths majority to protect the intended benefit of a fair cross section of jurors.<sup>190</sup> Further, as described above, the Supreme Court in the Sixth Amendment cases recognized diversity as the most important tool in the quest for impartiality, one that should not lightly be cast aside at the moment of jury selection.<sup>191</sup>

The majority in *Holland* recognized the fair cross-section requirement as a tool of impartiality, but then claimed that applying that tool to the trial jury would do too much damage to the role of peremptory challenges in protecting impartiality, creating a nightmarish system of quotas for every imaginable demographic group.<sup>192</sup> Ultimately, as Justice Scalia argued, the “Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does).”<sup>193</sup>

I defend the role of peremptory challenges in Part III because I agree that the instrumental tool of diversity should not swallow the ultimate goal of impartiality. Yet Justice Scalia failed to recognize how much diversity and impartiality overlap before they diverge.<sup>194</sup> He failed to recognize that an even playing field of peremptory challenges still allows for the elimination of minority voices, a practice that has taken a terrible toll on our justice system.<sup>195</sup>

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section of the community).

190. *Johnson v. Louisiana*, 406 U.S. 356, 362-63 (1972) (holding that the Sixth Amendment requires at least a 9-3 vote for conviction). For a fuller description of the constitutional basis for a Sixth Amendment rule, see Muller, *supra* note 33, at 137-48.

191. See *Holland*, 493 U.S. at 503-04 (Marshall, J., dissenting) (“The elimination of racial discrimination in our system of criminal justice is not a constitutional goal that should lightly be set aside.”).

192. *Id.* at 486 (majority opinion) (“His Sixth Amendment claim would be just as strong if the object of the exclusion had been, not blacks, but postmen, or lawyers, or clergymen, or any number of other identifiable groups.”).

193. *Id.* at 480.

194. *Id.* at 493 (Marshall, J., dissenting) (criticizing Justice Scalia’s “false dichotomy” between a fair cross section and impartiality). Justice Scalia, moreover, failed to acknowledge that the damage he warned of had already been done. In the world of *Batson* regulation, it is hard to imagine how the Sixth Amendment could do anything more to restrict peremptory challenges. *Holland* clearly asked for a test that would function exactly as *Batson* did, and ban the purposeful use of peremptory challenges by race. *Id.* at 478 (majority opinion). Because I propose ending the *Batson* test, however, I have more work to do to address Scalia’s criticism.

195. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1656

Perhaps we can have our cake and eat it too. We should apply the Sixth Amendment to regulate peremptories so as to preserve the *opportunity* to achieve a fair cross section on the petit jury. We can accomplish this without protecting postal workers and people with blue eyes. We can, as we already do, focus on suspect classifications.<sup>196</sup> Nor do we need to slide into quotas in order to allow the judge to protect both important tools of impartiality by negotiating between them. We should vest the trial judge with responsibility to balance the use of peremptory challenges to seek the impartial jury guaranteed by the Sixth Amendment without unnecessarily sacrificing the instrumental tool of diversity. Peremptory challenges serve as our primary procedural protection of impartiality, but a jury resembling a fair cross section of the community also serves a crucial role worthy of protection.

*C. Why Batson Was Wrong: Equal Protection Does Not Ban Recognition that Racial Diversity on Juries Matters*

Faced with the fork in the road between regulating jury selection for diversity or color blindness, the Supreme Court chose color blindness.<sup>197</sup> This did not represent a mere divergence between the two paths, but rather a conflict so great that my proposed Sixth Amendment rule would also require reversal of *Batson*. Currently, the *Batson* rule does not allow trial judges to consider and to regulate the diversity of the jury, as I propose, because *Batson* denies the

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(1985). See generally KENNEDY, *supra* note 3, at 3-135 (describing the history of racial overenforcement and underenforcement of the law, including the misconduct of all-white juries).

196. See *Holland*, 493 U.S. at 502 (Marshall, J., dissenting) (“The majority’s exaggerated claim that ‘postmen, or lawyers, or clergymen’ are distinctive groups within the meaning of our fair-cross-section cases will no doubt be quickly inferred if ever a litigant reaches the Supreme Court claiming that such groups are ‘distinctive.’ To date, at least, this Court has found only women and certain racial minorities to have the sorts of characteristics that would make a group ‘distinctive’ for fair-cross-section purposes.” (citations omitted)); Muller, *supra* note 33, at 142-48 (explaining why a Sixth Amendment rationale would not need to create quotas for race or any other category). There exists much jurisprudence already distinguishing between categories worthy of special scrutiny (e.g., race and gender) versus those that are not (e.g., occupation and eye color).

197. This choice was presented in *Batson* itself. The defendant relied more heavily on Sixth Amendment fair cross-section claims than on equal protection. See Brief for Petitioner at 5, 8-10, *Batson v. Kentucky*, 476 U.S. 79 (1986) (No. 84-6263), 1985 WL 669926, at \*4, \*12-17.

very relevance of race.<sup>198</sup> The Supreme Court requires color blindness by everyone in the courtroom, going so far as to forbid trial judges from presuming that racism might impact a verdict because such a presumption would prove “too divisive” as a constitutional matter.<sup>199</sup> Instead judges must model an aspirational color blindness.<sup>200</sup>

The restriction on judges does not represent the only conflict between the two paths. The *Batson* rule also forbids the lawyers exercising peremptory challenges from considering race as they guess about partiality.<sup>201</sup> The Court does so not to protect the defendant’s rights to an impartial jury nor the public’s right to a fair criminal justice system.<sup>202</sup> Instead, the *Batson* rule seeks to protect potential jurors from the then newly created harm of racial stereotyping standing alone.<sup>203</sup> As such, the test does not purport to protect

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198. *United States v. Nelson*, 277 F.3d 164, 207-08 (2d Cir. 2002) (holding that *Batson* forbids district courts from adding and subtracting jurors in order to achieve a racially and religiously diverse jury); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 (1994) (Scalia, J., dissenting) (noting that the majority’s reasoning denying the relevance of gender to jury selection contradicted Sixth Amendment jurisprudence); Forman, *supra* note 68, at 54 (noting the conflict between Sixth Amendment and equal protection jurisprudence on whether gender matters); Gerken, *supra* note 22, at 1113-15 (describing the “doctrinal puzzle”); Muller, *supra* note 33, at 97, 101-02 (noting the striking contrast between the Court’s Sixth Amendment jurisprudence, which suggests that difference matters, and *Batson*’s pretending that it does not).

199. *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976) (limiting defendant’s right to voir dire about racial prejudice to cases in which racism will clearly be an issue in the trial, and forbidding judges from assuming that risk).

200. Tetlow, *supra* note 18, at 1737.

201. Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 946, 965 (1998) (noting that a defendant is “entitled to a jury drawn from a fair cross section,” but “when actually seating a jury ... he may not take those same characteristics into account”); Case Comment, *supra* note 68, at 173 (“[A]fter *Holland* the sixth amendment permits and encourages what the fourteenth amendment prohibits. The inevitable friction between *Holland* and *Batson* will affect the practical articulation of the *Batson* rule. This friction is the result of *Holland*’s misconception of the appropriate content of the impartiality guarantee. Properly understood, the sixth and fourteenth amendments respond in harmony to condemn discriminatory selection procedures.” (footnotes omitted)).

202. The Court in *Batson* listed the defendant’s rights as one of its three concerns, along with the rights of potential jurors and the right of the public to the perception of a fair criminal justice system. *Batson*, 476 U.S. at 86-88. In *Batson*’s progeny, the Court increasingly made clear that the rights of defendants did not factor into the *Batson* rule. See Muller, *supra* note 33, at 122.

203. Francis, *supra* note 16, at 310 (stating that *Batson* subordinates the defendant’s more important rights of liberty and due process to the equal protection rights of jurors); Tetlow, *supra* note 18, at 1718, 1731, 1735; see Herman, *supra* note 11, at 1818-19.

the goal of an impartial jury, and proves willing to impose on impartiality if need be.<sup>204</sup>

Let me explain why this proves such a distraction from the primary goal. The reason, in fact, that most judges and scholars care about regulating peremptory challenges is because they correctly believe that diversity does matter, that race frequently does predict belief, and that we want those beliefs to be represented on the jury to increase the chances of a correct verdict.<sup>205</sup> The reason that *Batson* has so utterly failed to protect diversity and impartiality is because *Batson* has changed the subject entirely. As Eric Muller has pointed out, if *Batson's* logic that race does not matter were true, then the *Batson* error by definition could have no impact on the verdict.<sup>206</sup> We would have no reason to worry about all-white juries committing injustice because the Supreme Court has told us that the race of jurors is irrelevant.<sup>207</sup> To believe otherwise while choosing a jury, the Court held, violates the Constitution.<sup>208</sup>

My proposed test would focus on the rights of defendants and the actual fairness of the criminal justice system. It would grapple with the endemic racial discrimination that mars our system, not through the mandated use of denial, but by protecting the jury diversity necessary to combat that discrimination. Without throwing open the doors to overt use of racial stereotypes, it would carve out a middle ground that more closely resembles the rest of equal protection doctrine. Lawyers could not affirmatively rely on the correlation between race and belief when justifying a strike that skewed diversity, nor would we require lawyers to deny that they

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204. *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991)).

205. Hubert S. Feild, *Juror Background Characteristics and Attitudes Toward Rape: Correlates of Jurors' Decisions in Rape Trials*, 2 *LAW & HUM. BEHAV.* 73, 82-91 (1978) (discussing the predictability of jurors' votes in rape cases); Ford, *supra* note 87, at 390; Fowler, *supra* note 130, at 26-30 (describing empirical research on the difference that gender makes to jury deliberation); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 *OHIO N.U. L. REV.* 229, 244-51 (1990); Johnson, *supra* note 195, at 1636-43; King, *supra* note 59, at 80-99 (discussing studies showing that juror race affects verdicts, and also studies that show the opposite); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 *S. CAL. INTERDISC. L.J.* 1, 9-14 (1997).

206. Muller, *supra* note 33, at 122.

207. *Id.* at 122-23.

208. *Id.* at 122.

considered that correlation during jury selection. We would no longer equate race consciousness with racism, but we would require lawyers, using expanded rights to voir dire, to come up with more specific concerns about impartiality. Most importantly, we would allow judges to regulate jury selection to protect jury diversity.

### 1. *Valuing Diversity in Equal Protection Analysis*

The application of equal protection analysis to jury selection tends to get lost in the scholarly divisions between constitutional law and criminal procedure. Once we resituate *Batson* in the equal protection context, however, the case begins to look like an outlier from the other areas of law in which the Court allows consideration of race in order to promote diversity.<sup>209</sup> Although the Court has banned affirmative action in government hiring and contracting,<sup>210</sup> it has repeatedly allowed consideration of race for instrumental purposes related to diversity and representation.<sup>211</sup> For example, the Court has allowed universities to consider race as a “plus factor” in student admissions, even though that exacts a much higher cost on excluded students than the consideration would on jurors not chosen for a particular jury.<sup>212</sup> More striking yet, even the more conserva-

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209. One of the few scholars to recognize the connection is John Francis. Francis, *supra* note 16, at 345-47, 356 (arguing that *Batson* contradicts other equal protection doctrine); see also Tetlow, *supra* note 130, at 144, 146 (arguing that the *Batson* cases established the notion of color blindness as its own constitutional injury, a doctrine which the more conservative portion of the Court relied upon heavily in the legislative redistricting cases).

210. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510-11 (1989).

211. See *Adarand Constructors*, 515 U.S. at 227 (“It follows from that principle that all governmental action based on race—a *group* classification long recognized as ‘in most circumstances irrelevant and therefore prohibited’—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding ‘benign’ state and federal racial classifications to different standards does not square with them.” (citations omitted)). In contrast, in *Grutter v. Bollinger*, the Court held that race could be used as one factor among many as a means of achieving the compelling purpose of increasing diversity in a student body. 539 U.S. 306, 334 (2003). Similarly, in *Regents of the University of California v. Bakke*, Justice Powell positively cited Harvard’s (and a number of other universities’) “race-plus” program as a means of constitutionally taking account of race in university admissions. 438 U.S. 265, 316-18 (1978).

212. *Grutter*, 539 U.S. at 341 (noting that the University’s race-conscious admissions policies were not unduly harmful to nonminority students).



tive majority of the Court has allowed legislators sorting voters into legislative districts (a process quite similar to jury selection) to assume that race predicts voting behavior so long as they are not too obvious about it.<sup>213</sup> Only the *Batson* Court rejected any consideration of race despite the existence of a countervailing constitutional principle promoting diversity—that of the fair cross section doctrine.

The breakdown of votes in the Supreme Court's *Batson* line of cases also presents a strange ideological reversal of the normal discussions on color blindness versus diversity. Only in the jury cases do the more conservative Justices argue that race consciousness does not equate to racism, and that diversity is necessary to combat the racism inherent in our society and thus in our jury system.<sup>214</sup> Stranger still, only in the jury cases do the more liberal justices deny the salience of race and proclaim the importance of aspirational color blindness as a model to the cynical public.<sup>215</sup> Neither side has ever conceded its inconsistency on these issues.<sup>216</sup>

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213. *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (holding that redistricting establishes an equal protection claim only when a district's shape was so irregular that no other reason besides race could be asserted as a motivation for the particular change); see Tetlow, *supra* note 130, at 135.

214. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O'Connor, J., concurring) ("Nor is the value of the peremptory challenge to the litigant diminished when the peremptory is exercised in a gender-based manner. We know that like race, gender matters."); *id.* at 160 (Scalia, J., dissenting) ("Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case. There is discrimination and dishonor in the former, and not in the latter." (citation omitted)).

215. See Muller, *supra* note 33, at 134-35 (describing how the Justices flip-flop on the subject of whether difference matters). The more liberal justices writing the majority opinions in *Batson* and its progeny embrace the idea that race can never predict belief, even though they argue strongly that it does in other contexts. Tetlow, *supra* note 130, at 149-50. The dissenters in the *Batson* line of cases argue strenuously that race and gender do matter to jury verdicts, citing empirical evidence of that fact, but then return to color-blind ideology in other contexts. *Id.*

216. Only Justice O'Connor acknowledged the inconsistency, in part by claiming that the *Batson* rule "in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." *J.E.B.*, 511 U.S. at 149 (O'Connor, J., concurring) (quoting *Brown v. North Carolina*, 479 U.S. 940, 941-42 (1986) (O'Connor, J., concurring)). And only Justice Kennedy actually remained consistent in advocating for color blindness in both the jury selection cases and in the affirmative action and legislative districting cases. See *Gratz v. Bollinger*, 539 U.S. 244, 247 (2003); *Shaw*, 509 U.S. at 632; *Georgia v. McCollum*, 505 U.S. 42, 43 (1992); *Powers v. Ohio*, 499 U.S. 400, 401 (1991).

In comparison to the *Batson* cases, the Supreme Court has come to different conclusions about the constitutional value of diversity in the cases governing affirmative action in student admission. In *Grutter v. Bollinger*, a narrow majority of the Court allowed the University of Michigan Law School the leeway to consider race as a “plus factor” in order to promote diversity in its student body as an important educational tool.<sup>217</sup> The viewpoint that racial experience matters does not, the Court argued, equate to a belief that minorities always represent a particular viewpoint. It rebuts such stereotypes:

Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a “critical mass” of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.<sup>218</sup>

Diversity, the majority reasoned, increases the likelihood that different viewpoints will be represented during classroom debates and that stereotypes will be broken down.<sup>219</sup>

The dissenters, however, portrayed affirmative action as the denial of university admission to an individual based on his or her race.<sup>220</sup> Diversity amounts, they argued in this case and others, to an unconstitutional determination that race equates to a particular belief structure.<sup>221</sup> It reifies societal beliefs that race does and

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

218. *Id.* at 333.

219. *Id.* at 330 (“These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’” (citations omitted)).

220. *Id.* at 389 (Kennedy, J., dissenting) (“With respect to the remaining 15% to 20% of the seats [those not in the top percent of LSAT scores], race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant’s chance of admission is far smaller if he or she lacks minority status.”).

221. See *id.* at 389 (Kennedy, J., dissenting); *Shaw*, 509 U.S. at 657. *Contra Shaw*, 509 U.S. at 678 (Stevens, J., dissenting).

should matter.<sup>222</sup> And it denies an important benefit to an applicant on the basis of his or her race.<sup>223</sup>

In the jury selection cases, each side of the Court made similar arguments, but on opposite sides of the issue.<sup>224</sup> The more conservative Justices argued in dissent that race predicts belief without guaranteeing it. “It is not merely ‘stereotyping’ to say that these differences [in racial experience] may produce a difference in outlook which is brought to the jury room.”<sup>225</sup> Racial diversity matters to jury deliberations, particularly by guarding against the conscious and unconscious racism of white jurors.<sup>226</sup> The dissenters pointed out that for decades before *Batson*, the Court made clear in the fair cross-section cases that the idea that race and gender *might* matter to jury deliberations stems from the irrational and unconstitutional certainty that it will always matter.<sup>227</sup> The Court managed

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222. See *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part) (“The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.”).

223. *Id.* at 361, 368.

224. Justices Scalia, Thomas, and Rehnquist followed this line of thinking for those cases in which they voted, dissenting or concurring. *J.E.B. v. Alabama ex rel. T.B.* 511 U.S. 127 (1994); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986). They also dissented in *Grutter*. Justices Powell, White, Stevens, Brennan, and Marshall were in the majority in the *Batson* line of cases as they left the Court. Justices Ginsburg, Souter, and Breyer were in the majority in the *Batson* line of cases as they joined the Court, and were in the majority in *Grutter*. Justice O’Connor straddled the middle, dissenting in *McCollum* and concurring in *J.E.B.*, but acknowledging that the *Batson* rule is an aspirational legal fiction more than a fact, because race “matters.” *J.E.B.*, 511 U.S. at 146 (O’Connor, J., concurring); *McCollum*, 505 U.S. at 62 (O’Connor, J., dissenting). As described earlier, Justice Kennedy remained consistent in advocating for color blindness in both the jury selection cases and in the affirmative action and legislative districting cases.

225. *J.E.B.*, 511 U.S. at 156 (Rehnquist, C.J., dissenting).

226. *McCollum*, 505 U.S. at 68 (“It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”); see also *J.E.B.*, 511 U.S. at 148 (citing empirical studies indicating that gender, just like race, matters in juror selection).

227. See *J.E.B.*, 511 U.S. at 157-58 (Scalia, J., dissenting) (“The Court also spends time establishing that the use of sex as a proxy for particular views or sympathies is unwise and perhaps irrational. The opinion stresses the lack of statistical evidence to support the widely held belief that, at least in certain types of cases, a juror’s sex has some statistically significant predictive value as to how the juror will behave. This assertion seems to place the Court in opposition to its earlier Sixth Amendment ‘fair cross-section’ cases.” (citing *Taylor v. Louisiana*, 419 U.S. 522, 532 n.12 (1975))); *Peters v. Kiff*, 207 U.S. 493, 503-04 (1972)

to make this argument while carefully avoiding race or gender essentialism. One does not have to believe in biologically ingrained difference to understand that the experience of race and gender discrimination often impacts ideology.<sup>228</sup>

The more liberal majority in the *Batson* cases, however, argued that the idea that race predicts belief in jury deliberations is irrational, and based upon “open hostility or from some hidden and unarticulated fear.”<sup>229</sup> To make the counterfactual claim that race never predicts belief, the Court engaged in a straw man argument. Instead of addressing whether lawyers exercising peremptories could permissibly guess that race or gender might predict belief, the Court reasoned that lawyers cannot constitutionally *presume* that race or gender will *necessarily* determine belief.<sup>230</sup> *Batson* redefined jury selection as a determination of qualification—a “person’s race simply ‘is unrelated to his *fitness* as a juror.’”<sup>231</sup> Many scholars perpetuate these arguments by equating race consciousness in jury selection to racism.<sup>232</sup>

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(“When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.” (citing *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (“[A] distinct quality is lost if either sex is excluded.”))).

228. See Abramson, *supra* note 56, at 128-29; Johnson, *supra* note 195, at 1706-07; Kuhn, *supra* note 112, at 237-40; Jennie Rhine, Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417, 1429 (1969).

229. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (explaining that the only “rational way” for a lawyer to act is “without the use of classifications based on ancestry or skin color”).

230. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (“[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”); see Muller, *supra* note 33, at 101-02.

231. *Batson*, 476 U.S. at 87 (emphasis added) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

232. Scholars often make this argument while at the same time espousing the value of diversity and failing to acknowledge the hypocrisy of arguing that race matters to jury deliberations, but that lawyers who agree are racist. See, e.g., Brand, *supra* note 14, at 519, 523 (decrying “discriminatory peremptory challenges” and arguing for the inclusion of minority jurors because race matters). Charles Ogletree, for example, admits that race and gender sometimes do matter, and that such strikes can be “in keeping with the litigant’s goals, and would simply be part of effective advocacy were it not entirely repugnant to the values and standards of the Constitution, values that should and do override the litigant’s interest in winning.” Ogletree, *supra* note 109, at 1104. If the current rule banned the dilution of minority voting strength on juries, then such strikes might be considered discriminatory, or

In reality, however, jury selection involves no presumption of certainty. Peremptory challenges guess at juror ideology; they do not declare it to be true.<sup>233</sup> The *Batson* Court in effect banned the empirically proven fact that race and gender sometimes do correlate to belief.<sup>234</sup> Here is another way to describe the strangeness of *Batson's* reasoning: if we define racist jury selection as a lawyer's irrational and inaccurate stereotyping, then this is conduct that comes with its own inherent penalty. Lawyers whose racial use of peremptory challenges has no merit only hurt their own cause.<sup>235</sup> They strike the wrong jurors. Instead, we are really worried about correct stereotypes. Fundamentally, we want to prevent people from wiping out representation of those views on the jury.<sup>236</sup>

Starting with *Shaw v. Reno*, the Supreme Court engaged in a similar debate in the legislative redistricting cases about the permissibility of using race as a predictor of voting behavior.<sup>237</sup> In that case, a conservative majority of the Court relied on *Batson* to ban legislators from drawing legislative districting lines in a way that would seem obviously racially motivated.<sup>238</sup> But even that conservative opinion stopped short of the absolute color blindness of *Batson*: the Court held only that race could not be the predominant factor for the shape of a particular district.<sup>239</sup> And the Justices again

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at least illegal. At the moment, however, the Court bans strikes conducted on the supposedly false notion that race affects belief.

233. See Alschuler, *supra* note 83, at 168-69 (differentiating between the prosecutor's attempt to guess at the most favorable jury from *Batson's* contention that the prosecutor presumes the incapacity of black jurors). The reasons for exercising peremptory challenges have become the stuff of lore and tradition, as well as the basis of careers as expensive jury consultants. See *id.*

234. Ford, *supra* note 87, at 390; Fulero & Penrod, *supra* note 205, at 232-34 (reviewing the "folklore" of jury selection techniques); Muller, *supra* note 33, at 106 ("[R]ace and gender are rational, even if grossly imperfect, proxies for perspective."); Saks, *supra* note 205, at 9-14.

235. Muller, *supra* note 33, at 101-02 (stating that the *Batson* Court's decision implied that a *Batson* error is by definition harmless because of the Court's strange insistence that juror race can never matter); *id.* at 122-23 (arguing that *Batson's* own logic suggests that it creates harmless error: if race and gender do not matter to jury deliberations, as the Court reasons, then there is no injury to the defendant).

236. Muller, *supra* note 33, at 137 ("This, then, is the second, more sensible conclusion that should flow from the *Batson* opponents' commitment to the theory of difference: a reliable verdict becomes the consensus of a jury whose membership incorporates those distinctive perspectives.").

237. 509 U.S. 630 (1993).

238. *Id.* at 649.

239. *Id.* at 646. The Justices in the majority of the *Shaw* line of cases included O'Connor,

revealed a reversal of opinions on the subject of whether race should matter.<sup>240</sup>

The more conservative majority in the *Shaw* cases gleefully relied on the *Batson* cases for the proposition that race is irrelevant to electoral behavior, and the notion that black voters “share the same political interests” is merely an “impermissible racial stereotype[.]”<sup>241</sup> based on the “demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.”<sup>242</sup> They pointed out the hypocrisy of the dissenters who argued so forcefully about the irrelevance of race in the flurry of *Batson* cases leading up to *Shaw* in 1992.<sup>243</sup> And although the conservative Justices did not explain their own flip-flop on these issues, they began to come around more fully to the notion of color blindness in the jury cases.<sup>244</sup>

The more liberal dissenters in the *Shaw* cases expressed outrage at the idea that race could not predict voting behavior. They attempted to distinguish the jury cases by arguing that it is “irrational to assume that a [black] person is not qualified ... to serve as a juror,” although “[i]t is neither irrational, nor invidious, however, to assume that a black resident of a particular community is a Democrat if reliable statistical evidence discloses that 97% of the blacks in that community vote in Democratic primary elections.”<sup>245</sup>

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Scalia, Thomas, and Rehnquist. The dissenters included Justices Stevens, Ginsburg, Breyer, and Souter.

240. *Id.* at 649.

241. *Id.* at 647-48 (citing peremptory challenge cases).

242. *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (citations omitted) (internal quotation marks omitted).

243. *Bush v. Vera*, 517 U.S. 952, 968-69 (1996) (“We cannot agree with the dissenters that racial stereotyping that we have scrutinized closely in the context of jury service can pass without justification in the context of voting. If the promise of the Reconstruction Amendments, that our Nation is to be free of state-sponsored discrimination, is to be upheld, we cannot pick and choose between the basic forms of political participation in our efforts to eliminate unjustified racial stereotyping by government actors.” (citations omitted)).

244. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), for example, Justice Kennedy expressed horror at the idea that group affiliations could matter to jury deliberations: “It is important to recognize that a juror sits not as a representative of a racial or sexual group but as an individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice.” *Id.* at 153-54 (Kennedy, J., concurring).

245. *Bush*, 517 U.S. at 1031 (Stevens, J., dissenting). Justice Souter tried a different tack by arguing that race *should* not play a role in jury deliberations, as compared to elections, because jury deliberations do not represent arguments over social values, but are rather

Of course, peremptory challenges do not determine qualification to serve on a jury any more than legislative districting predicts certainty about voting behavior.

The dissenters in the *Shaw* case also pointed out a countervailing set of values that require legislators to think about race—the Voting Rights Act’s prohibitions on vote dilution.<sup>246</sup> But those Justices ignored the parallel command in the jury selection context. The Sixth Amendment fair cross-section requirement also rests on the idea that racial and gender diversity matter to jury deliberations, creating the odd situation of arguing that the Fourteenth Amendment forbids what the Sixth Amendment requires.<sup>247</sup>

Because the worlds of constitutional law and criminal procedure do not sufficiently communicate, it has gone strangely unnoticed that the *Batson* cases constitute absolute outliers within equal protection law. The *Batson* rule creates the strictest possible prohibition on the consideration of race, even when used to promote jury diversity. It proves far stricter than the cautious allowance of diversity in educational admissions, even though the harm to excluded students seems far greater than the harm to excluded jurors.<sup>248</sup> It proves stricter even than the Court’s requirement that legislatures not make it too obvious that they thought about race in legislative districting.<sup>249</sup>

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“neutral,” “impartial,” and “objective[.]” *Id.* at 1051 n.5 (Souter, J., dissenting). As Eric Muller argues, this notion that juries are black boxes turning out scientific verdicts without need for debate over social values is both demonstrably false and underlies the more conservative refusal to properly review criminal convictions on appeal. Muller, *supra* note 33, at 137 (“The image of the jury as a scientific laboratory is fatally incomplete; in order to fulfill its central mission of producing reliable verdicts, a criminal jury must incorporate and represent the distinctive views of the community.”).

246. *Shaw*, 509 U.S. at 683-84 (Souter, J., dissenting) (pointing out that legislators must consider race in order to avoid violating the Voting Rights Act). Regarding affirmative action in admissions cases, moreover, the majority argued that the First Amendment carves out leeway for universities to make decisions protected by academic freedom. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

247. *See supra* note 201.

248. *Grutter*, 539 U.S. at 334 (2003) (allowing consideration of race as a factor in admissions so long as it acts as one factor among many, or so long as an applicant receives sufficiently individualized review).

249. *Shaw*, 509 U.S. at 642 (holding that a district whose shape was so irregular that no other reason besides race could be asserted as a motivation for the particular redistricting establishes an equal protection claim).

Stranger yet, *Batson* represents the ultimate triumph of color blindness in a series of cases authored by the left of the Court. I have no evidence of why that occurred and can only speculate that, in the tangle of values governing jury selection, it seemed important to create the most absolute restriction on the racial skewing of juries. The problem for the Court was that the reasoning of the rule belied its effectiveness.<sup>250</sup> It rests on an exaggeration of the meritocratic nature of jury selection.<sup>251</sup> Worse yet, it represents a state of denial about the ways that race still matters all too much to our criminal justice system.<sup>252</sup>

The Sixth Amendment test I propose to regulate jury selection should not violate Equal Protection because it is narrowly tailored to serve a compelling governmental interest. Jury diversity serves a clearly constitutional purpose justifying race consciousness, one rooted in protecting the defendant's Sixth Amendment guarantee of an "impartial jury" and the fair functioning of the criminal justice system. The test does not impose racial quotas or allow diversity to trump individualized concerns about bias, and thus does not pretend that racial diversity alone defines impartiality.<sup>253</sup> The test simply recognizes the fair cross-section principle as an important tool to select a fair jury, and prioritizes those categories of diversity previously recognized by the Court as the most important, given our history of discrimination against them.

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250. See, e.g., Brand, *supra* note 14, at 620-21 (noting that *Batson* and its progeny presume the existence of a color-blind society at great cost to the rule's effectiveness); Roberta K. Flowers, *Does It Cost Too Much? A "Difference" Look at J.E.B. v. Alabama*, 64 *FORDHAM L. REV.* 491, 532-33 (1995) (arguing that the Court's claim that gender does not matter to jury deliberations is simply counterfactual); Herman, *supra* note 11, at 1818-19 (stating that the Court's color-blind reasoning values a jurors' rights against being stereotyped over the defendant's rights to a fair trial); Johnson, *supra* note 169, at 69-70; Leipold, *supra* note 201, at 991-92; Muller, *supra* note 33, at 116-21, 131-48 (arguing that the *Batson* rule defines itself as harmless error because its reasoning pretends that jury diversity is irrelevant to a defendant's rights, and proposing a Sixth Amendment analysis as a stronger basis for the rule).

251. See *supra* Part I.B.

252. This state of denial then infects all of the rest of constitutional criminal procedure in ways the left of the Court often complains of. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 321-22 (1987) (Brennan, J., dissenting) (excoriating the Court for its refusal to address the demonstrable racism of juries on average); *Turner v. Murray*, 476 U.S. 28, 39 (1986) (Brennan, J., concurring in part and dissenting in part) (criticizing the Court for its refusal to acknowledge that racism often infects jury deliberations).

253. See *infra* Part III.B on why diversity cannot supplant impartiality as the ultimate constitutional goal.



*2. Prioritizing the Rights of Third Parties Against Stereotyping  
over the Rights of Defendants to an Impartial Jury*

Ultimately, all this purported worry about color blindness in jury selection clearly has nothing to do with the quest for an impartial jury: it focuses instead on the rights of potential jurors.<sup>254</sup> The Court acknowledged this in *McCollum* when applying the *Batson* rule to defendants themselves, holding that “if race stereotypes are the price for acceptance of a jury panel as fair, we reaffirm today that such a price is too high to meet the standard of the Constitution.”<sup>255</sup> The Court has decided that the right against stereotyping of potential jurors, who are third parties in the criminal justice system, essentially trumps the right of defendants to an impartial jury and the right of the public to a fair criminal justice system.<sup>256</sup> Ironically, the Court proves far more solicitous about the rights of jurors than the rights of students, who can be excluded from universities based on their race in the name of diversity, despite the fact that the admissions process purports to be a meritocracy in a way that jury selection does not.

Given the Sixth Amendment imperative to protect the defendant’s right to an impartial jury, the Court’s willingness to go out so far onto an equal protection ledge to protect jurors seems misplaced.

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254. Herman, *supra* note 11, at 1817-18; Tetlow, *supra* note 18, at 1730-31; see Muller, *supra* note 33, at 120-21; Underwood, *supra* note 104, at 726-27, 742-45.

255. Georgia v. McCollum, 505 U.S. 42, 57 (1992) (citations omitted) (internal quotation marks omitted) (relying on *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991)).

256. The Court in the *Batson* line of cases also relied on a more important sounding argument: the right of citizens to be chosen or rejected from a jury without regard to race. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“As long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.” (citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879))). This would present the equal protection issue far more squarely, in a way similar to the claims made by students to an admission decision devoid of consideration of race. The difference, however, is one of standing. Because jurors are third parties to the criminal appeals brought by defendants, they must suffer “injury-in-fact” and demonstrate a nexus between their rights and the interest of the litigant. See Underwood, *supra* note 104, at 756 (describing the test but arguing that third-party standing should belong to jurors). Although citizens have a right to access jury service, they do not have a right to be chosen for any particular trial jury. *Powers v. Ohio*, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting). Indeed, most are not selected, and for entirely superficial reasons. Accordingly, the Court instead created standing based on stereotyping alone—a doctrine excoriated by those same Justices in dissent from the *Shaw* line of cases. See *supra* notes 245-52 and accompanying text.

Though it is worth considering the harm that racial stereotypes cause potential jurors, that harm should not trump the rights of defendants. It is also far from clear that jurors do suffer serious injury from race-conscious peremptory challenges.

There is a difference between the stigma caused by categorical exclusions from the venire, which the Court overturned one hundred years before *Batson*, and the individualized use of peremptory challenges to guess at bias. The Supreme Court struck down the exclusion of blacks from jury service in *Strauder v. West Virginia*, describing the stigmatic injury of such an exclusion to black people as “practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”<sup>257</sup> It is far more difficult to argue, however, that the stereotyping of peremptory challenges, made in the course of jury selection based entirely on guesswork and often done by each side against different races, creates the same kind of stigma as the statutory exclusion of black people or women from jury service.<sup>258</sup>

Unlike university admissions or government hiring, the jury selection process does not purport to be a meritocracy. And although methods of exercising peremptory strikes differ, for the most part, potential jurors experience the exercise of strikes against the majority of the venire for entirely silent reasons.<sup>259</sup> Arguments over *Batson*, or the proposed Sixth Amendment test, should happen at the bench out of earshot. No one is labeled “too stupid or biased to serve on a particular jury.”<sup>260</sup> The vast majority of potential jurors

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257. 100 U.S. 303, 308 (1879).

258. Ultimately the *Batson* cases rely not just on the argument that race *does* not matter, but that it *should* not matter. Justice Kennedy expressed this view most eloquently in his concurrence to *J.E.B. v. Alabama ex rel. T.B.*:

It is important to recognize that a juror sits not as a representative of a racial or sexual group but as an individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice.

511 U.S. 127, 153-54 (1994) (Kennedy, J., concurring). However, it is unclear how this message is communicated.

259. Babcock, *supra* note 99, at 553-54. It would also be easier to convert jury selection to a system in which jurors are not aware of who struck them or why than it would be to end peremptory challenges to avoid that injury.

260. *Holland v. Illinois*, 493 U.S. 474, 497 (1990) (Marshall, J., dissenting) (arguing that

are not chosen for a jury, and most are perfectly thrilled to avoid the economic and emotional cost of serving. Unlike job and college applicants, jurors are not volunteers. They are required by law to give up their time, and thus often to lose wages or face legal consequences.<sup>261</sup> Fundamentally, given the cost of jury service to many citizens, Sheri Johnson observes, “[a] flat assertion that the psychological pain of being excluded on the basis of race always outweighs the benefits seems to me either extremely dogmatic or paternalistic.”<sup>262</sup> Above all, most potential jurors would be surprised at the thought that their rights against certain stereotypes, during a process designed for instrumental reasons to be awash in stereotypes, would trump the quest for an impartial jury.<sup>263</sup>

When minority jurors walk away from the selection of an all-white jury, some will experience injury, but that injury is born of a collective loss of power rather than personal stereotyping. In other words, a minority juror struck from a jury that remains racially diverse for the most part probably does not care whether race factored into the reasons that she was not chosen.<sup>264</sup> A Sixth Amendment test that better regulates jury diversity, even though it would no longer ban race consciousness, would reduce this collective injury.

In this sense, jury selection resembles legislative redistricting more than affirmative action in admissions. Potential jurors are sorted into different trial juries in the way that voters are sorted

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potential jurors are so labeled); *see Johnson, supra* note 169, at 77 (arguing that it is “hard to believe” that a person excluded based on race would experience his exclusion as a “judgment of unfitness for citizenship” (citing Underwood, *supra* note 104, at 746)).

261. *Re, supra* note 49, at 1584 (stating that jury service is mandatory and at the time of the government’s choosing). Punishment for refusal to serve ranges from fines to imprisonment. For example, 28 U.S.C. § 1866(g) (2012) provides that “[a]ny person who fails to show good cause for noncompliance with a [jury] summons may be fined not more than \$1,000, imprisoned not more than three days, ordered to perform community service, or any combination thereof.” *See also* STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 14 (1994). Most Americans sent summonses never appear for a combination of reasons: the summonses were never delivered, they ask to be and are excused, or they ignore the summonses. Two-thirds of the prospective jurors who do appear do not serve because they ask to be and are excused, lawyers challenge them, or they are never sent to a courtroom. *See id.* at 243 n.1.

262. Johnson, *supra* note 169, at 77.

263. *Id.* at 51.

264. *Id.* at 89-90.

into districts.<sup>265</sup> They do not lose their right to serve if they are not chosen for a particular jury. Although they will not vote in that particular case, no one has a right to serve on any particular jury.<sup>266</sup> As several scholars have argued, what matters more to the makeup of juries is the ability of minorities to vote on juries in a proportional way, which is the same goal of remedies for vote dilution.<sup>267</sup> If we could obtain that kind of diversity at the expense of some unspoken race consciousness during jury selection by permitting judges to believe race matters in order to enforce diversity, the price seems well worth paying.

Finally, the *Batson* cases describe most passionately an even more abstract constitutional harm: the expressive harm that racial stereotypes cause to the reputation of the judicial system.<sup>268</sup> “Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there.”<sup>269</sup> This is a different injury than arguing that all-white juries call into question the legitimacy of the system.<sup>270</sup> If the public links legitimacy with diversity, the Court argues that the public is gravely mistaken.<sup>271</sup> Instead, the criminal justice system should teach the public that race does not matter by engaging in that myth itself.<sup>272</sup>

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265. See Gerken, *supra* note 22, at 1139 n.104.

266. *Powers v. Ohio*, 499 U.S. 400, 424 (1991) (Scalia, J. dissenting).

267. See Gerken, *supra* note 22, at 1139 (describing the concept of “second-order diversity,” and arguing that the relevant issue is diversity across the spectrum of juries, rather than “first-order diversity” within each individual jury); *infra* Part III.B. Of course, unlike voters, all of whom receive a district, most potential jurors do not serve on a trial jury, though they may be called again.

268. *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986). The Court also relied on the entirely circular argument that racial use of peremptory challenges projects lawlessness into the system because the litigants are not following the *Batson* rule. Violation of *Batson* “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.” *Powers*, 499 U.S. at 412.

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

270. There is a different, more results-oriented issue of public legitimacy that depends on the actual diversity of the juries. That argument is made by those who promote diversity, and is discussed in Part III.B.

271. Muller, *supra* note 33, at 124 (suggesting that the public’s belief is mistaken); Underwood, *supra* note 104, at 749 (noting that although the stereotypes of the public about the importance of racial makeup of juries “cannot properly serve as the foundation of any legal rule or right, they can nevertheless undermine public confidence in the fairness of verdicts and thus increase the harm resulting from race-based jury selection”).

272. *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976). The two halves of the Court also flip-flopped in their consideration of “expressive harm” in the legislative districting cases.

The Court is in the peculiar situation of worrying that the harm to public confidence in the criminal justice system stems from the public noticing that lawyers believe that race matters when choosing juries.<sup>273</sup> Of course, the reality is that the public entirely agrees that race matters to jury deliberations. As the proponents of diversity often note, the public often measures the legitimacy of juries by their racial makeup.<sup>274</sup> The Court's argument literally prioritizes the desire to persuade a skeptical public of the value of color blindness over the right of the defendant, and indeed, of the public, to actual racial justice.<sup>275</sup>

In *McCullum*, for example, the Court cited riots sparked by the acquittal of police officers charged with racial beating as an example of the importance of preserving public confidence in the criminal justice system.<sup>276</sup> After a change of venue from Los Angeles to

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Considering race during districting, the conservatives argued, would just reify racial bloc voting. See *Shaw v. Reno*, 509 U.S. 630, 647-48 (1993). Justices O'Connor, Rehnquist, Scalia, Kennedy, and Thomas were in the majority in *Shaw*. *Id.* Justices White, Blackmun, Stevens, and Souter dissented. *Id.* In *Miller v. Johnson*, Justice Kennedy joined the conservative majority and Justices Ginsberg and Breyer joined the dissenters. 515 U.S. 900, 902 (1995). Again, although Justice O'Connor at least acknowledged the ideological difficulty of deciding whether race and gender matter in the jury cases, only Justice Kennedy voted consistently in favor of color blindness in both sets of cases. See *supra* note 216.

273. The dissenters in the *Batson* cases (like the liberal dissenters in the *Shaw* cases) derided the elusive concept of expressive harm. See *Powers*, 499 U.S. at 427 (Scalia, J., dissenting) ("Injury in perception" would seem to be the very *antithesis* of "injury in fact."). The dissenters also ridiculed the abstract, unproven nature of the harm. *Id.* at 426 ("The Court must, of course, speak in terms of the *perception* of fairness rather than its reality.").

274. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 704 (1995) ("Few statements are more likely to evoke disturbing images of American criminal justice than this one: 'The defendant was tried by an all-white jury.'"); Forde-Mazrui, *supra* note 22, at 361-64 (citing political legitimacy as one of three bases for a representative jury, along with community consensus and juror rights); Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1186-90 (1994) (surveying empirical evidence for this claim); Massaro, *supra* note 33, at 517-18; Muller, *supra* note 33, at 144 ("[C]riminal verdicts are not just findings of historical fact, but expressions of an inescapably subjective consensus reached among jurors who bring discrete viewpoints and perspectives to their deliberations. Representation of these discrete viewpoints on the jury enhances the reliability of the criminal verdict, both by guaranteeing that the verdict will reflect a true social consensus, and by convincing the community as a whole that the verdict is worthy of respect.").

275. See *Johnson*, *supra* note 169, at 81 (noting that the *Batson* cases' reliance on public perceptions of legitimacy "completely ignores the public interest in racially unbiased results, just as it ignores the defendant's interest in racially unbiased results").

276. *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (citing Alschuler, *supra* note 83, at 195-96).

predominately white Ventura County, the defendant police officers charged with beating Rodney King faced a jury without any black members, which then acquitted.<sup>277</sup> After the resulting riots, a more racially diverse federal jury convicted the defendants of most charges.<sup>278</sup> Because the beatings occurred on videotape, the case involved less a dispute over what happened than what it meant under the law.<sup>279</sup> The riots did not result from outrage that the lawyers choosing a jury might have believed that race mattered. No one seemed persuaded, as the Court would wish, that the race of the jurors had nothing to do with the verdict. It was the very absence of African American jurors that made the verdict seem inevitable.

Let me make a more important point. The outrage and riots occurred because the verdict was so outrageously wrong. If the acquittal of so public an injustice had been handed down by a jury with one or two black members it might have softened the blow, but I doubt by much. And conversely, if the mostly white Ventura County jury had convicted, there would have been no outrage at the lack of proper diversity. Impartiality matters more than color blindness for defendants, for the fair functioning of the criminal justice system, for public perception of the system, and even, I bet, for most jurors subject to potential stereotyping.

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277. See INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 3-17 (1991) (describing the Rodney King incident and the evidence of the defendants' guilt); Robert Reinhold, *Surprised, Police React Slowly as Violence Spreads*, N.Y. TIMES, May 1, 1992, at A1 (describing the resulting riot, which some consider one of the most violent episodes in U.S. history). Los Angeles Mayor Tom Bradley stated that he was "outraged" by the verdicts. Jane Fritsch, *Los Angeles Mayor Criticizes Chief for Slow Action on Riot*, N.Y. TIMES, May 4, 1992, at B9. President George H.W. Bush found it "hard to understand how the verdicts could possibly square with the video." Richard A. Serrano & Jim Newton, *3 King Case Defendants Notified of U.S. Inquiry*, L.A. TIMES, July 31, 1992, at A1.

278. See *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993), *vacated in part on other grounds*, 34 F.3d 1416 (9th Cir. 1994); Linda Deutsch, *Jury's Diversity Proved the Key*, SEATTLE TIMES, Apr. 18, 1993, at A3.

279. *Koon*, 833 F. Supp. at 776-77 ("A meaningful understanding of the events [the videotape] depicts required the explanation of witnesses who are experts in law enforcement. At trial the Government and defendants agreed that much of the officers' conduct was justified and legal, yet vigorously disputed whether and when their behavior became illegal.").

### III. PROTECTING DIVERSITY WITHOUT LOSING FOCUS ON IMPARTIALITY: IN DEFENSE OF THE PEREMPTORY CHALLENGE

Having defended jury diversity to the hilt, I now need to answer the question of why I cling to the preservation of peremptory challenges at all. The obvious solution to the problem of lawyers skewing jury diversity would be to end peremptory challenges altogether, as England did.<sup>280</sup> This would protect diversity far more effectively than any attempt to regulate peremptory challenges possibly could. Having explained why I would change the law, let me address why I would not go further.

I defend the practice of lawyers selecting juries because I still believe that the ultimate goal is an impartial jury, not just a diverse one. Both diversity and peremptory challenges constitute the most important tools in the quest for impartiality. It is true that the tool of peremptories interferes with the tool of diversity, but my proposal attempts to harness both. Sixth Amendment regulation would allow judges to value the instrumental role of a diverse jury to protect impartiality, which allows lawyers to use peremptory challenges to root out individually biased jurors.

The growing number of reformers who propose to end peremptory challenges offer three very different reasons for doing so. First, many scholars and a few Supreme Court Justices would end peremptories in order to end any possibility of *Batson* error.<sup>281</sup> For

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280. Criminal Justice Act, 1988, c. 33 § 118(1) (Eng.); see 2 LAW REFORM COMM., PARLIAMENT OF VICTORIA, JURY SERVICE IN VICTORIA—FINAL REPORT, ch. 5, p. 165 (Dec. 1997) (showing majority support among English barristers for a system without peremptory challenges in 1993 study). England, however, does not require unanimous juries. Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 265 (2008); see also Alschuler, *supra* note 83, at 157 (“Arbitrary exclusions from jury service have no place in a constitutional system grounded on concepts of equality and individual worth.”); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182-83 (1995); Hoffman, *supra* note 4; Ogletree, *supra* note 109, at 1147-48 (proposing ending peremptories only for the state). England has eliminated peremptory challenges. Bray, *supra* note 99, at 522.

281. See *Miller-El v. Dretke*, 544 U.S. 231, 273 (2005) (Breyer, J., concurring) (noting that in light of *Batson*’s ineffectiveness, it is “necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole”); *Batson v. Kentucky*, 476 U.S. 79, 102-07 (1986) (Marshall, J., concurring) (proposing ending peremptories for both sides, and rejecting scholarly argument that peremptories should be ended just for the prosecutor); *Swain v. Alabama*, 380 U.S. 202, 246 (1965) (Goldberg, J., dissenting) (arguing that equal protection

them, the importance of color-blind jury selection far outweighs the use of challenges by both sides to improve the impartiality of the jury.<sup>282</sup> Lawyers would no longer be able to stereotype jurors if they had no opportunity to do so. Of course, this color-blind reasoning mirrors the soft foundations of the *Batson* rule, discussed above, and takes an even greater tax on impartiality.<sup>283</sup> It would be like replacing merit selection of judges with random selection in order to ensure that a judicial candidate's race was never considered.

Most scholars, however, urge ending peremptories in order to protect jury diversity, not color blindness. A system closer to random selection would necessarily result in more jury diversity than a system that allows lawyers the opportunity to eliminate minorities.<sup>284</sup> These reformers would end peremptories because they believe that race does matter, not because they pretend it does not.<sup>285</sup> In the

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might compel the end of peremptory challenges); *see also*, Alschuler, *supra* note 83, at 157 ("Arbitrary exclusions from jury service have no place in a constitutional system grounded on concepts of equality and individual worth."); Amar, *supra* note 280, at 1182-83; Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369 (1992) (authored by the Senior Judge on the U.S. District Court for the Eastern District of Pennsylvania); Hoffman, *supra* note 4 (authored by a Colorado state court judge); Melilli, *supra* note 14, at 502-03; Page, *supra* note 115, at 245-46; Case Comment, *supra* note 68 at 174-75 (noting that peremptory challenges violate the Sixth Amendment by reducing diversity and violate equal protection law by allowing irrational and arbitrary decision making).

282. *See* Alschuler, *supra* note 83, at 170 ("Peremptory challenges ensure the selection of jurors on the basis of insulting stereotypes without substantially advancing the goal of making juries more impartial. The Equal Protection Clause forbids the arbitrary classification of human beings, and peremptory challenges are inherently arbitrary. Even when exercised on grounds other than race, these challenges are unconstitutional."); Amar, *supra* note 280, at 1183; Melilli, *supra* note 14, at 501-03; *see also* *Swain*, 380 U.S. at 244 (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.").

283. Practically speaking, an end to peremptory challenges would almost certainly require a more rigorous voir dire and use of for-cause challenges, so we cannot avoid the problem of guessing at people's beliefs and biases based on superficial information. Ogletree, *supra* note 109, at 1127.

284. *But see* Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POLY REV. 65 (2008).

285. Ironically, many of these reformers argue both that diversity matters, and that lawyers who exercise peremptory challenges in a race conscious way are racist. *See* *Grutter v. Bollinger*, 539 U.S. 306 (2003). That said, avoiding racial stereotyping, regardless of any need to categorically deny its accuracy, would prove another benefit for these reformers.



hierarchy of our three constitutional goals, they agree that diversity trumps color blindness.

These reformers still diverge, however, on the issue of whether impartiality trumps diversity. Some retain a focus on impartiality as the ultimate goal, but make the pragmatic argument that diversity standing alone simply provides the best protection for impartiality. They propose various fixes to the jury system to make up for the end of peremptory challenges.<sup>286</sup> I agree philosophically with these reformers, but ultimately conclude that the benefits of party participation in jury selection outweigh the benefits of more random selection.

Other reformers who would end peremptory challenges make the more provocative argument that diversity simply trumps impartiality. They believe that the role of juries as *representative* matters more than the guarantee of juries that are impartial.<sup>287</sup> Without disputing the importance of juries to our notions of democracy, I disagree with the notion that this role can trump the functional role of the jury in our criminal justice system. The constitutional notion of trial by jury, I argue, prioritizes its fair functioning over its role as a pillar of power sharing and democracy.

#### A. *Why Diversity Is Not Enough*

Having already addressed the reasons why color blindness should not justify ending peremptories, this Section will focus on those reformers who argue that no lawyerly guessing about bias can ever substitute for the kind of jury diversity resulting from random selection. This argument at least maintains the defendant's right to an impartial jury as central and recognizes diversity as instrumental. The correctness of the argument depends on facts that are difficult to measure: the power of diversity to protect impartiality versus the usefulness of peremptory challenges to eliminate bias. Yet the question is not simply empirical. Those who would end peremptories emphasize the subjective and inevitable nature of all

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286. These include retaining challenges for the defendant, beefing up for-cause challenges and/or ending the unanimity requirement for verdicts. *See infra* Part III.A.

287. *Cf. Amar, supra* note 280, at 1182.

human bias, and throw their hands up at the possibility of doing anything other than balancing it.<sup>288</sup>

To start with, ending peremptories does not result in perfectly diverse juries in every community. It is entirely dependent on the venire of that particular jurisdiction.<sup>289</sup> Ending peremptories would result in more diverse juries in Texas than in Utah.<sup>290</sup> And it would work only on average over time, leaving some juries still quite homogenous.<sup>291</sup> Indeed, some reformers would grapple with this problem by requiring diversity through affirmative quotas, systems that would increase the impact of diversity but still suffer from the problems discussed in this Part.<sup>292</sup>

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288. See Alschuler, *supra* note 83, at 168-70; Herman, *supra* note 11, at 1822-23.

289. Alschuler, *supra* note 83, at 170-71, 205 (noting that ending the peremptory will not solve the problem when jurisdictions have very little diversity to start with); Cavise, *supra* note 129, at 527 (noting that minorities “usually appearing in much smaller numbers ... can be completely eliminated” with peremptory challenges).

290. See Re, *supra* note 49, at 1578-79.

291. Gerken, *supra* note 22, at 1112 (explaining that random selection would not create perfectly proportional diversity in each jury trial, but only on average).

292. See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (6th ed. 2008) (proposing legislation guaranteeing a nonwhite defendant a majority of jurors of the same race); Forman, *supra* note 68, at 75-83 (proposing selecting juries from separate pools of men and women to ensure proportional representation of women). These proposals suffer from both pragmatic and ideological problems. In our increasingly diverse society, we would need to decide which racial groups require mandatory representation. Johnson, *supra* note 195, at 1694 (guaranteeing the defendant three “racially similar” jurors out of twelve); Harold McDougall, Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970) (proposing proportional representation); see Howe, *supra* note 51, at 1198-99 (describing costs of proposals to allow parties to immunize jurors from peremptory challenges as requiring long voir dire, a large jury pool, and problems of accuracy); Muller, *supra* note 33, at 141 (arguing that mandating proportional representation on every jury is a “vain and impractical hope”). Unlike the proposals to simply end peremptory challenges, more of the proposals for quotas value racial diversity over all else, thus missing out on a broader fair cross section of traits such as gender. Because these proposals would otherwise limit the cross section of the jury by creating quota systems, they take a tax on other types of diversity. Yet if we did try to mandate inclusion of every relevant category, even just limiting ourselves to those categories included in antidiscrimination statutes, we would need to also consider disability, sexual orientation, religion, gender, and national origin. For a jury of twelve, this becomes an impossible task. Abramson, *supra* note 56, at 158 (“[W]hat if the handicapped [litigant] is Hispanic, do we now have to recruit for a Hispanic American who is also handicapped?”). Many of these proposals would require racial matching between the defendant and jury quotas, thus solving the problem of which categories to concern ourselves with. Johnson, *supra* note 195, at 1698. Yet such a system would be both over- and under-inclusive. It would ignore, for example, the interest that a white defendant might have in seeking a racially diverse jury in order to seek his own legitimate goals. Alschuler, *supra* note 83, at 187-88 (stating that prosecutors tend to strike black jurors from every jury, regardless of the race of the defendant, because of the perception,

Ending peremptory challenges would not result in a system of random selection. Judges would still need to strike the most clearly biased jurors for cause (those related to the defendant, for example, or those who witnessed the crime), disqualify some as incompetent (those unable to perceive or understand the evidence), and excuse others on hardship grounds (for family, medical, and economic reasons).<sup>293</sup> All of these factors can take an unintentional toll on diversity.<sup>294</sup> Thus, for any specific defendant in any particular community, the increase of average jury diversity may not nearly be worth the price of losing all control over jury selection.

Fundamentally, however, ending peremptories would at least increase diversity to some degree, but at what cost to impartiality? Depriving both sides of peremptory challenges would result in juries

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born out by empirical evidence, that black jurors are less likely to convict than white jurors). Matching the defendant's race also ignores the rights of minority victims of crime. It would do nothing to address the endemic racial discrimination against victims. Worse, it would grant defendants rights that would trump the broader opportunity for a jury impartial towards the race or gender of the victim.

The extent to which these proposals would interfere with impartiality varies, but is often left unclear. Many of them, for example, do not explain whether they would also eliminate peremptory challenges, thus abandoning the possibility of exercising strikes on the non-minority members of the venire. This puts the same heavy reliance on minority members of the jury to carry the weight of racial justice. See Herman, *supra* note 11, at 1847 (suggesting that quotas do more to enhance access of minority jurors, but still impose the responsibility to address racism on those jurors). Some proposals would do worse. Deborah Ramirez, for example, proposes a system of "peremptory choices," allowing each side to affirmatively choose jurors rather than to eliminate them. Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial By Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 806 (1994). Each side would inevitably pick a pool of the most partial jurors, and the jury would then be selected from that most biased pool. This would create a far more partial jury than even a system of random selection.

293. See Howe, *supra* note 51, at 1193-97 (describing the array of reasons that jury selection cannot be entirely random).

294. Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 703 (1998); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 714-17 & n.27 (1993) (noting the disproportionate impact that issues like proficiency in English, conviction or charge of a felony, and financial hardships including transportation difficulties, inability to afford unreimbursed costs of jury services, and loss of income can have on prospective minority venire members); Joanna Sobol, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community,"* 69 S. CAL. L. REV. 155, 175-76 (1995); Gender Bias in the Courts Task Force, *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 786-87 (2001) (describing the disproportionate effect the lack of childcare accommodations has on women in court at the state level).

that include both more minority jurors and more biased jurors.<sup>295</sup> It is an enormous gamble to throw out the primary procedural method to root out bias in the hope that diversity will increase. As Charles Ogletree worries, at least as to defendants, “It is by no means clear, either as a policy matter or under the Sixth Amendment, that the benefits of such a shift would outweigh the risks.”<sup>296</sup> Removing peremptory challenges might make the jury look fair as measured by demographics, but potentially at a significant cost to actual fairness.

On the specific subject of jury racism, the magic question is whether it matters more to distinguish among the many white people who will end up on the jury in the hope of rooting out bias, or instead to accept the luck of the draw in the hopes of having a greater proportion of minorities on the jury who might change the conversation. Doing so would put a terrible amount of pressure on the frequently few minority members of a jury to make up for the unexamined bias of the majority.<sup>297</sup> Moreover, trading away input into jury selection for a greater share of minority jurors presumes that those minority jurors will necessarily be motivated to root out racism, something that is not always true.<sup>298</sup>

These reformers worry less about the impact on impartiality in part because they hold a very different idea of the nature of impartiality from *Batson*’s idea of easily discernable “fitness.”<sup>299</sup> Instead, every juror is inherently partial—subject to the natural human bias

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295. Ogletree, *supra* note 109, at 1145.

296. *Id.* Professor Ogletree would solve this problem by imposing the end of peremptories only on the prosecutor. *Id.* at 1147-48. I address the problem with this approach immediately below. See also Colbert, *supra* note 3, at 122 (suggesting that for-cause challenges are an inadequate replacement for a defendant’s use of peremptories).

297. Herman, *supra* note 11, at 1845 (“The courts cannot realistically expect that adding a few more minority jurors will solve the problem of racism. A represented minority is still a minority.”). See generally Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000) (describing difficulties for minority jurors to influence verdicts).

298. Particularly when the alleged victim of a crime is also African American, studies show that African American jurors sometimes prove far less sympathetic than whites. See Johnson, *supra* note 195, at 1634-35. Some minorities, and especially some women, internalize the prejudices against them and avidly enforce the existing rules, thus making worse jurors than some of the white and male alternatives. Herman, *supra* note 11, at 1838 (describing how black jurors may harbor prejudices against black defendants); see Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 595-97 (1987) (noting female jury member conformity to traditional gender roles while serving on juries).

299. Muller, *supra* note 33, at 123.

born of differing life experiences.<sup>300</sup> Neutrality is impossible because every juror necessarily possesses what Susan Herman describes as “bias in its weak sense,” or subconscious beliefs that will affect deliberations, although remaining “comfortably within the range of fairness.”<sup>301</sup> This mirrors the vision of impartiality in the Supreme Court’s fair cross section cases, in which impartiality is an aspiration, perhaps never fully attainable.<sup>302</sup> The best we can possibly do to counter weak bias is to balance it.<sup>303</sup> It then makes sense to end peremptories because random selection provides our best hope for this pluralist vision of jury deliberations.<sup>304</sup>

Dueling peremptory challenges clearly interrupt this balancing act, and do so by design. Beyond mere demographic diversity, peremptories interfere with representation of the full array of public viewpoints by eliminating the extremes and moving towards the middle.<sup>305</sup> In a typical criminal trial, the defense would try to strike the most conservative jurors or those who had been a victim of the same crime. The prosecutor would try to strike those most likely to acquit, from the very liberal to the very sympathetic. The question is whether juries chosen without peremptories would benefit or suffer from having the Fox News-watching National Rifle Association member debate the heavily tattooed guy who wants to legalize marijuana. This might inform and expand juries’ discussions, or it might destroy the kind of careful and productive deliberations we desire, resulting in more hung juries at a cost to efficiency.<sup>306</sup>

The failure of juries to agree on a verdict is not the only problem with random selection. Empirical evidence demonstrates the diffi-

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300. Herman, *supra* note 11, at 1822.

301. *Id.* at 1822-23 (“Jury selection cannot hope to eliminate everyone who is biased if by bias we refer to subjective viewpoints—group identifications, beliefs, and experiences—that may consciously or unconsciously affect our judgments.”); *see also* Minow, *supra* note 75, at 1207-09.

302. Herman, *supra* note 11, at 1822; Minow, *supra* note 75, at 1205-06.

303. *See* Herman, *supra* note 11, at 1822; *see also* Massaro, *supra* note 33, at 545 (distinguishing between an “impartial” jury and a diverse, and therefore “fair” jury).

304. *See* Massaro, *supra* note 33, at 545-47.

305. Howe, *supra* note 51, at 1215.

306. Retrials often favor the defendant, but also come at a cost to already stretched defense counsel. And helping a defendant reach ultimate acquittal through delayed retrials and staler evidence does not necessarily serve the public good. *See* KENNEDY, *supra* note 3; Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 171-72 (2008).

culty individuals have in sticking to their beliefs in the context of group dynamics, particularly in smaller groups the size of juries.<sup>307</sup> Some jurors will tend to dominate deliberations and get their way.<sup>308</sup> One of the most important tasks lawyers undertake during jury selection is to eliminate the strong jurors—the ones on either side of the debate who will dominate deliberations and skew a verdict their way.<sup>309</sup> Leaving these jurors on the jury constitutes an underappreciated cost of ending peremptory challenges.

Further, even if we accept that impartiality is not absolute, it goes too far to claim it means nothing. There still exists strong bias, or the inability to be fair.<sup>310</sup> Scott Howe attempts to define impermissible bias (as opposed to unavoidable subjectivity) as “persons who establish themselves in advance as likely to be strongly influenced by information gained extrajudicially regarding important factual issues, as likely to decide the case primarily on offensive, personal considerations or as likely to fail to consider relevant, in-court arguments.”<sup>311</sup> There are jurors whose prejudices and discrimination do not allow them to perceive the truth or to do justice, but who will not state that fact openly in a way that will get them

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307. See generally *Ballew v. Georgia*, 435 U.S. 223, 232-38 (1978) (noting the difficulty of maintaining a minority viewpoint as jury size decreases); S. E. ASCH, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP AND MEN* 177, 183-85 (Harold Guetzkow ed., 1963).

308. See Alex Bavelas et al., *Experiments on the Alteration of Group Structure*, 1 J. EXPERIMENTAL SOC. PSYCHOL. 55, 59 (1965) (describing how group members perceived those who spoke most often to offer the best ideas and guidance); L. Richard Hoffman, *Group Problem Solving*, in *GROUP PROCESSES* 73 (Leonard Berkowitz ed., 1978) (“[H]e who talks the most is likely to promote his solution to the group successfully.”); Rita M. James, *Status and Competence of Jurors*, 64 AM. J. SOC. 563, 564 (1959) (noting that jurors with highest participation rate or highest level of education were seen as most persuasive); Marder, *supra* note 298, at 593, 595-96, 598-600 (“One obvious way to maintain power in a group is to monopolize and control discussion. Those who have power can do the talking; those who lack power must do the listening.”).

309. See Cathy E. Bennett et al., *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMU L. REV. 659, 679 (1992); Melilli, *supra* note 14, at 488; see also Thomas D. Rowe, Jr., *The Twelve-Person Federal Civil Jury in Exile*, 46 U. MICH. J.L. REFORM 691, 693 (2013). As a prosecutor, I struck a law professor who focused on corporations on that ground, though I had no idea of her ideology.

310. Herman, *supra* note 11, at 1823. Alschuler calls these “three dollar bill jurors” and recommends relaxing unanimity requirements so that they can simply be outvoted. Alschuler, *supra* note 83, at 207; see *infra* Part III.A.2.

311. Howe, *supra* note 51, at 1183.

struck for cause.<sup>312</sup> Examples might include jurors who are prejudiced against the defendant because they have strong feelings about that individual or the crime charged, those with a strong sympathetic connection to the victim (for example, a juror who works with abuse victims in a trial charging abuse), jurors who are racist or sexist, or jurors who have been victims of the charged crime and struggle with their ability to be fair (though willing to promise to try and thus avoid a for-cause strike). Jurors prejudiced against the prosecution might include those who generally hate the government (for example, tax protestors or militia members), those with family members who have been convicted of the crime charged who admit in voir dire that they struggle to be fair, those who do not simply distrust police but rather refuse to believe any of them, those who watch CSI: Crime Scene Investigation obsessively and prove unwilling to convict in the absence of DNA evidence,<sup>313</sup> those with a strong prejudice against the victim, and those who do not believe in certain kinds of crimes (such as domestic violence or marital rape).<sup>314</sup> When we allow that kind of bias onto the jury, we seriously diminish the chances of a fair verdict. Except for the rare juror who insists on such bias (usually in an attempt to avoid selection) none of this bias is easy to remove with for-cause challenges.

Focusing on diversity alone threatens to distract us from the need to eliminate strong bias, especially racism. Diversity may *predict* impartiality, but it is an incredibly rough proxy. Mere racial diversity provides an even rougher proxy.<sup>315</sup> Although empirical evidence

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312. I do not pretend that these lines are easy to draw, which is precisely why it is too difficult to rely solely on for-cause challenges. *See id.* at 1183-85 (giving examples of such bias: financial stake in the outcome of the case, relationship with a party, or general bias against the race of a party, the punishment to be imposed, or the crime itself).

313. In my own experience as a prosecutor, these proved to be the jurors who hung juries despite the impossibility in those trials of the kind of forensic evidence they craved based on television. The state can always call an expert to explain why such evidence is not possible given the facts of the case, but that proves an expensive endeavor, and one that requires anticipating the possible CSI-type evidence that jurors might expect.

314. Although there is much controversy over the permissibility of jury nullification, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701-05 (1995), I find no court or scholar who argues that nullification is constitutionally permissible when based on discrimination against certain kinds of victims.

315. *See Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (relying on social science evidence to observe that some members of a minority group may themselves engage in discrimination “to disassociate themselves from the group, even to the point of adopting the majority’s negative attitudes towards the minority”).

shows the relative value of diversity, it also proves that a diverse jury does not guarantee an impartial one.<sup>316</sup> Diversity and impartiality intertwine before they diverge, but they do diverge.

Those who would gamble with random selection express both great optimism in the power of diversity, and also great cynicism in the possibility of rooting out racism from the majority through peremptory challenges.<sup>317</sup> The value of peremptories depends substantially on the forthrightness of potential jurors during voir dire, as well as the ability of lawyers to make the right choices.<sup>318</sup> Peremptory challenges allow lawyers to strike jurors who do not articulate their own biases, but hint at them.<sup>319</sup> But we do not train law students in the social science relevant to jury selection, nor do lawyers ever receive meaningful feedback on their choices.<sup>320</sup> Even the most experienced litigator learns only the resulting verdict of a trial, nothing about the deliberations themselves, nor the viewpoints of those they chose to strike.<sup>321</sup>

The value of peremptories is difficult to measure and has not been the subject of significant empirical work.<sup>322</sup> One of the most famous

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316. See King, *supra* note 59, at 126-28 (suggesting that diversity does not guarantee impartiality, and that lack of diversity does not necessarily thwart a correct verdict).

317. See Herman, *supra* note 11, at 1838 (arguing that even a perfect cross section of the community would leave minority juries with a heavily majority white jury and serious questions of bias).

318. See Johnson, *supra* note 195, at 1675.

319. See Howe, *supra* note 51, at 1194; Underwood, *supra* note 104, at 771. As Babcock argued powerfully in her famous article defending peremptories, by being overinclusive, peremptories allow judges to do the hard and possibly offensive work of determining bias with greater specificity. Babcock, *supra* note 99, at 554-55.

320. See generally William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 227 (1996) (noting the need for social science inclusion and practical skills training, such as selecting juries, in professional legal education).

321. United States v. Olano, 507 U.S. 725, 737 (1993) (noting “the cardinal principle that the deliberations of the jury shall remain private and secret”); Tetlow, *supra* note 2, at 103 (noting the harm the Supreme Court imposes on defendants unable to determine whether their convictions were discriminatory due to the “black box” of jury deliberations). After the Chicago Jury Project taped several deliberations in 1954 in its effort to gather information about jury decision making, state legislatures responded to the “bugging” of juries by prohibiting the recording of deliberations; since then, actual deliberations have been taped only once. Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323, 324-26 (1991); see also Marilyn Chandler Ford, *The Role of Extralegal Factors in Jury Verdicts*, 11 JUST. SYS. J. 16, 33 (1986) (stating that nearly all states prohibit observation of jury deliberations).

322. See Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the*



studies, now almost forty years old, compared jury verdicts with the opinions of those struck by peremptories and asked to remain as “shadow juries” to observe the trial.<sup>323</sup> The study showed mixed results. It found that most of the jurors struck with peremptories would have voted the same way as the selected jurors, making peremptories unnecessary, but also harmless.<sup>324</sup> Scholars often point to this aspect of the study as proof that peremptories are unimportant to seeking impartiality without noting that peremptories also seem to do no damage.<sup>325</sup> But Charles Ogletree points out a less cited result of the Zeisel and Diamond study.<sup>326</sup> In a few cases, defense lawyers successfully used peremptory challenges in a way that changed the verdict, resulting in acquittals.<sup>327</sup> Peremptory challenges most often do neither good nor harm, but sometimes actually make all the difference in a case.

Would we be better off with random jury selection, policed only by the trial judge for the most obvious examples of bias? It is incredibly difficult to measure, but doing so puts all of our eggs in one basket. I worry that we focus on diversity more because it satisfies our desire to have an impartial-looking jury than because we actually believe there exists no better way to root out bias. Diversity provides a placebo that still fails to grapple with the discrimination of the majority by tasking a few minority jurors with the role of

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*Jury*, 73 TEX. L. REV. 1041, 1113 n.293 (1995) (noting the paucity of empirical studies focusing on the effectiveness of peremptory strikes); see, e.g., Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409 (1990); Paul V. Olczak et al., *Attorneys' Lay Psychology and Its Effectiveness in Selecting Jurors: Three Empirical Studies*, 6 J. SOC. BEHAV. & PERSONALITY 431 (1991); Glenn F. Ross, *The Selection of Jurors in the Higher Courts of Queensland*, 15 AUSTL. PSYCHOLOGIST 351, 357 (1980); 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, 498-99 (1978).

323. Zeisel & Diamond, *supra* note 322, at 492-500.

324. *Id.* at 507.

325. See, e.g., Alschuler, *supra* note 83, at 203-04 (discussing that study as proof that peremptories are not worth keeping, but not explaining why peremptories therefore cause any harm); Paul H. Schwartz, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. REV. 1533, 1577 (1991); Joshua E. Swift, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 344 n.63 (1993).

326. Ogletree, *supra* note 109, at 1146.

327. Zeisel & Diamond, *supra* note 322, at 519 (“[C]ases in which peremptory challenges have an important effect on the verdict occur with some frequency.”). These acquittals were some of the few verdicts with which the trial judge disagreed. Ogletree, *supra* note 109, at 1146.

persuading the majority out of their deeply held bias. And, in general, it invites a greater extremism into jury deliberations which we value for the ability of reasonable people to persuade each other.

Most of those who seek to end peremptory challenges recognize the potential cost to impartiality and offer some substitute tools. Many would end peremptories only for the state and preserve them for the defendant.<sup>328</sup> Others would increase the power of judges over jury selection by expanding the for-cause challenge.<sup>329</sup> And a few have proposed releasing the jury's unanimity requirement as a way to work around the clearly biased jurors who will be more likely to serve.<sup>330</sup> Each of these proposals, however, comes with significant costs.

*1. Denying Peremptory Challenges Only to the State Ignores  
Endemic Jury Discrimination Against Minority Victims*

Some of the reformers most troubled by the trade-off between impartiality and diversity would solve the problem by imposing that cost only on the state.<sup>331</sup> They argue that allowing defendants, but not prosecutors, to exercise peremptory challenges would promote diversity, maintain the defendant's rights to strive for impartiality, and come at an acceptable cost to the state. "[F]alse convictions are worse than false acquittals."<sup>332</sup> Unlike the defendant, the State will

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328. See *infra* Part III.A.1.

329. See *infra* Part III.A.2.

330. See *infra* Part III.A.3.

331. See Ogletree, *supra* note 109, at 1138-41; Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1014 (1989) (arguing that due process prohibits prosecutors from striking jurors for any reasons other than the type that would rise to a for-cause challenge, and thus prosecutors should have no peremptory challenges); cf. Massaro, *supra* note 33, at 560 (proposing to end peremptories only for the state despite the problem of the "all-white jury [that] acquits a white defendant of a crime against a black victim").

332. Ogletree, *supra* note 109, at 1142. Professor Ogletree also makes the argument that the issue must not be terribly compelling because it took the Supreme Court six years after *Batson* to consider it. *Id.* at 1150. This ignores the fact that prosecutors cannot appeal acquittals, and could only raise the issue by raising a rare and difficult interlocutory appeal. *Georgia v. McCollum*, 505 U.S. 42, 50-52 (1992); see also J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015, 1021-23 (1990) (describing the enormous difficulty in raising the issue of the defendant's use of peremptory challenges on appeal).

not go to jail if it loses.<sup>333</sup> Reformers argue that the State will have many opportunities to catch the same guilty defendant or to enforce other examples of a particular crime.<sup>334</sup>

One practical problem with the proposal is that ending peremptories for only one side would eliminate the benefits of random selection and the resulting fair cross section. The proposal would no longer accomplish a jury more representative of the venire from which it came. Instead, in the interest of protecting the defendant's right to root out bias against himself, he alone would have the right to choose.

The bigger problem, however, is that reformers assume that defendants would exercise peremptories to add minority representation.<sup>335</sup> To an astonishing extent, they assert hypothetical defendants who are almost always black, despite the fact that a majority, at least of federal criminal defendants, are white.<sup>336</sup> With very rare exception, reformers never grapple with the possibility of a white defendant who might use his newfound privileges to strike black jurors.<sup>337</sup> Nor do they mention the existence of crime victims, who are disproportionately black, nor the endemic problem of racial discrimination against victims.<sup>338</sup>

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333. Massaro, *supra* note 33, at 561.

334. *Id.* (arguing for eliminating only prosecutorial peremptories because “the state has repeated opportunities to enforce the penal code and hence to protect society”).

335. See Francis, *supra* note 16, at 325-26 (noting the existence of nonminority defendants, but strangely presuming that they would use peremptory challenges in a random or neutral way).

336. As of March 2015, the Federal Bureau of Prisons lists 59.1 percent of federal prisoners as white. *Statistics: Inmate Race*, FED. BUREAU OF PRISONS (Aug. 29, 2014), [http://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](http://www.bop.gov/about/statistics/statistics_inmate_race.jsp) [<http://perma.cc/AGQ4-TN2K>]. Given racial sentencing disparities, white defendants are presumably far more numerous than prison statistics indicate because they serve shorter sentences on average.

337. Toni Massaro is one of the rare few to actually acknowledge the problem, but she dismisses it as a necessary cost, and offensive more to the mere appearance of fairness. She argues that any solution should focus on increasing the number of minorities in the venire (without explaining how that would work to protect against racial skewing by the defendant, though insufficient to protect against racial skewing by the state). Massaro, *supra* note 33, at 560-61. Douglas Colbert attempted to grapple with the same problem by proposing a provocatively creative solution. He makes a Thirteenth Amendment argument to withhold peremptories from the defendant charged with a crime against a black victim. Colbert, *supra* note 3, at 118. The problem, of course, is that the Court would never allow such a race-specific solution.

338. Bureau of Justice statistics show that blacks are disproportionately the victims of crime. JENNIFER TRUMAN ET AL., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2012, at 7

These proposals simply ignore, or gloss over, the fact that defendants also sometimes have motives to strike all minorities from juries.<sup>339</sup> This oversight is all the more startling because the Supreme Court case applying the *Batson* rule to defendants, *Georgia v. McCollum*, involved white defendants who sought to strike all of the black jurors while on trial for a hate crime against black victims.<sup>340</sup> Those who would apply the *Batson* rule only to regulate the state often cite Justice Marshall's concurrence to *Batson*, suggesting the need to end peremptory challenges, but they ignore his warning that the prohibition should apply to both sides precisely because the defendant could make use of peremptories to strike minority jurors as well.<sup>341</sup>

As I have described at greater length elsewhere, discriminatory acquittal, the flip side of the coin of discriminatory conviction, constitutes a massive constitutional problem.<sup>342</sup> Empirical research has consistently shown that juries racially discriminate more against the *victims* of crime than against defendants.<sup>343</sup> Indeed, the quintessential modern example of racist jury deliberations in our popular discussion, and in many of these articles, is the Rodney King trial.<sup>344</sup> Yet no one seems to note the irony of allowing only the police officers who beat Rodney King the ability to exercise peremptory challenges.<sup>345</sup> We must create a rule that functions fairly, whether the target of jury discrimination is the defendant or the alleged victim.

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(2013). See generally Tetlow, *supra* note 2 (describing the long history of discriminatory acquittal, from the trials of hate crimes to death penalty and rape conviction disparities based on the race of the victim and noting lack of scholarly interest in the subject).

339. See Johnson, *supra* note 195, at 1616-17.

340. 505 U.S. 42, 44-45 (1992).

341. *Batson v. Kentucky*, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring). Justice Marshall retired from the Court before it decided *McCollum*.

342. See Tetlow, *supra* note 2, at 103.

343. See Baldus et al., *supra* note 14, at 56; Johnson, *supra* note 169, at 71-72 (noting that defendants sometimes seek to strike minority jurors); Tetlow, *supra* note 2, at 85-86.

344. See Baldus et al., *supra* note 14, at 21 n.40; Brand, *supra* note 14, at 514-16; Herman, *supra* note 11, at 1810; Johnson, *supra* note 169, at 22; King, *supra* note 294, at 709; Marder, *supra* note 88, at 1059; Muller, *supra* note 33, at 106; Ramirez, *supra* note 292, at 780; Taylor-Thompson, *supra* note 297, at 1315 n.317.

345. It is unclear in these articles whether the defendants who would retain peremptories would also be bound by *Batson* and *McCollum*. Presumably not, because *McCollum* would prohibit the use of peremptories for the purpose of protecting diversity.

2. *Strengthening For-Cause Challenges Gives the Power of Jury Selection to the Judge*

Most scholars who would end peremptories recognize and worry about the resulting trade-off between protecting diversity and striving for impartiality. They worry about how to eliminate, or work around, the clearly biased juror who can no longer be struck with a peremptory challenge. Most propose strengthening the judge's role in striking biased jurors for cause.

Increasing the power of the trial judge to exercise for-cause strikes might help eliminate the most obviously biased jurors.<sup>346</sup> The current standard for such strikes is quite high: "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."<sup>347</sup> Judges grant such causes reluctantly and rarely, after making every effort to cure the expressed bias.<sup>348</sup>

Without peremptory challenges as a backstop, in theory judges should rise to the challenge and understand the need to take on increased responsibility for protecting the impartiality of the jury.<sup>349</sup> Yet judges too often see the question of bias as an unequivocal determination of impartiality. They hesitate to strike jurors because it seems overly demeaning, a judicial declaration of unfitness.<sup>350</sup>

To solve this problem, some reformers would attempt to lower the for-cause standard in order to make it meaningful. Charles Ogletree proposes "any basis that would cause a reasonable attorney to be confident that the challenged juror will be unable to render an impartial verdict," though that basis could not be based on "pure hunch."<sup>351</sup> Albert Alschuler would reduce the standard further to encompass "any juror whose ability or fairness appeared open to

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346. See, e.g., Alschuler, *supra* note 83, at 207; Ogletree, *supra* note 109, at 1134-40.

347. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotation marks omitted).

348. See Howard, *supra* note 99, at 414-15 & n.230 ("Commentators have noted judicial reluctance to grant challenges for cause. This may be particularly true in jurisdictions where judges are subject to reelection ... [and] some judges engage in 'aggressive rehabilitation,' asking challenged jurors if they could set aside their experiences and feelings and follow the judge's orders.")

349. Ogletree, *supra* note 109, at 1134.

350. See *id.*

351. *Id.*

doubt.”<sup>352</sup> He would specifically reassure judges that this would not require a finding of partiality.<sup>353</sup> This would certainly help. It would replace an overly strangled definition of bias with a very broad, albeit intensely subjective, one.

Herein lies the problem. Broadening for-cause challenges to make them into a meaningful guard against juror bias also then gives judges great power to select juries.<sup>354</sup> Any individual’s perception of whether a juror’s fairness appears “open to doubt” constitutes a highly discretionary and overly powerful inquiry.<sup>355</sup> It would impose the judge’s own (often subconscious) bias onto jury selection.<sup>356</sup> Not only would the parties face the judge’s ideological bent in the refereeing of the trial, but also in the composition of the jury.

In some ways, my Sixth Amendment test resembles a more stringent for-cause standard. I would, after all, task judges with weighing lawyers’ arguments about impartiality with a test similar to that proposed by Ogletree and Alschuler for an easier for-cause standard. Both systems would vest tremendous power in the judge to make subjective calls. And of course actually ending peremptories would have a far stronger impact on diversity, while still allowing judges to police impartiality.

There is a big difference, however, in asking historically reluctant judges to grant a strike (as in an expanded for cause challenge) versus asking judges to veto a strike made by a party based on a legal balancing test (as in my proposal). My proposed test puts the power of inertia behind allowing strikes of potentially biased jurors.

There is also a difference between allowing both sides to participate in jury selection, with only the occasional obligation to explain themselves when they have skewed diversity versus eliminating peremptories altogether. In my proposed test, the parties will still exercise their dueling slate of challenges and would have to explain only the challenges that impact diversity. We would still harness each side’s self-interest to root out bias through active participation

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352. Alschuler, *supra* note 83, at 207.

353. *Id.*

354. *Id.* at 209 (acknowledging that judges would have increased power over jury selection but that “[t]he danger of unconstitutional abuse posed by the exercise of peremptory challenges by partisan advocates is probably greater”).

355. *Id.* at 208 (citing examples of difficult calls to make).

356. *Id.*

in jury selection rather than relying entirely on the judge's personal and often cautious willingness to do so.

*3. Relaxing Unanimity Disempowers the Biased Juror, but Also Dilutes the Impact of Diversity*

If ending peremptory challenges allows more biased jurors to be seated, then perhaps we could solve the problem by allowing those jurors to be outvoted. Indeed, although many note that England has ended peremptory challenges, few notice that it relaxed the unanimity requirement at the same time.<sup>357</sup> Albert Alschuler half-heartedly proposes the possibility of relaxing the requirement of unanimous verdicts to the constitutionally permissible limit of a two-thirds vote.<sup>358</sup> This would diminish the damage done by the occasional "three dollar bill juror" (one who simply cannot be fair) who makes his way onto a jury chosen without peremptory challenges.<sup>359</sup> Akil Amar would go even farther. He would eliminate almost all pretenses at voir dire and for-cause challenges, and then have juries rule by simple majority vote.<sup>360</sup> Indeed, grand juries function this way. They are large and inclusive, but govern by majority rule.<sup>361</sup>

Nonunanimous verdicts would help to split the difference between the benefits of diversity and the costs of impartiality. By ending peremptories, we could make use of diversity to provide a fair cross section on the petit jury, thus using diversity as a powerful tool to optimize impartiality. Nonunanimous verdicts would then reduce the power of jurors with strong bias, those who actively cannot be fair.<sup>362</sup>

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357. Bove, *supra* note 280, at 265.

358. Alschuler, *supra* note 83, at 207 & n.189 (making this proposal, but then admitting in a footnote that he would not actually view such a change as progress).

359. *Id.* (suggesting the adoption of nonunanimous verdicts to make up for possibility of a crazed "three dollar bill juror").

360. Amar, *supra* note 280, at 1189-91.

361. See Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1781 (2011) (stating that grand juries typically function by majority rule). Federal grand juries require twelve out of sixteen to twenty-three members to return an indictment. FED. R. CRIM. P. 6(a), (f). Of course grand juries only indict, not convict, so the stakes are lower.

362. See Herman, *supra* note 11, at 1823 (defining strong and weak bias). There is no easy way to measure the effectiveness of this fix because each jury pool will have a different number of "three dollar bill jurors" who make their way onto the jury, but it would certainly help.

The problem is that this approach also would come at a significant cost both to our ideal of jury deliberations and to the actual power of diversity.<sup>363</sup> It would succeed in making partial jurors less powerful, but it also would make minority jurors less powerful.<sup>364</sup> In effect, it might cancel out the impact of increased diversity. Minority jurors could no longer simply act as holdouts against bias; in order to hang a jury, they would need to persuade the rest of the group.<sup>365</sup>

Ultimately, each of the proposed reforms to radically reshape jury selection comes at a significant cost. We could eliminate peremptories to protect diversity, but at an unknowable cost to an impartial jury for the defendant. We could impose that cost only on the State and put the power of jury selection in the hands of the defendant alone, but this would sacrifice equal protection of the law for minority victims. We could improve impartiality by giving judges greater power to exercise for-cause challenges, but at a cost to the nature of a jury independent of the court and to whatever side did not share the judge's leanings. We could perhaps reduce the need for a unanimous verdict as a way around the new percentage of biased jurors who slip through, but at a risk to our ideals of a deliberative process and to the power of the very diversity we tried to promote. In the quest for an impartial jury, none of these trade-offs seems worth making.

### *B. The Defendant's Right to an Impartial Jury Matters More than the Democratic Role of Juries*

The final argument for ending peremptory challenges contends that diversity simply trumps impartiality as a constitutional value.

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363. See ABRAMSON, *supra* note 35, at 179-205 (arguing that relaxing the unanimity requirement guts the power of diversity and also our idea of jury deliberations); ALSCHULER, *supra* note 83, at 207 n.189 ("Jury unanimity reinforces the sense that criminal convictions manifest a high degree of certainty of guilt, a sense that furthers the criminal law's ability to fulfill its distinctive mission." (citing Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 402-06 (1958))).

364. See *Johnson v. Louisiana*, 406 U.S. 356, 396 (1972) (Brennan, J., dissenting) (noting that under a majority rule regime "consideration of minority views may become nothing more than a matter of majority grace"); ABRAMSON, *supra* note 35, at 179-205 (arguing that relaxing the unanimity requirement guts the power of diversity and also our idea of jury deliberations). See generally Taylor-Thompson, *supra* note 297, at 1274 (describing the impact of the growing trend of nonunanimous verdicts on minority jury power).

365. Taylor-Thompson, *supra* note 297, at 1310.



A system of random selection better protects the basic democratic principle of citizen participation in juries without interference from a process designed to weed out bias.<sup>366</sup> For these reformers, diverse juries are representative juries, capable of expressing popular will and community consensus.<sup>367</sup> Although I agree that the democratic role of juries matters enormously, it cannot trump the defendant's right to an impartial jury. When jury verdicts become an exercise in popular sovereignty, we lose sight of whether the verdicts are correct. We celebrate the process without focusing on the results.

The Supreme Court has often described the jury system as self-governance.<sup>368</sup> Citizens have a right of access to jury service similar to their right to vote for the other branches.<sup>369</sup> “Just as suffrage ensures the people's ultimate control in the legislative and executive branches, [the] jury trial is meant to ensure their control in the judiciary.”<sup>370</sup> By fulfilling the “civic responsibility” of jury service, citizens fill a particularly important role of guarding against the “arbitrary power” of government.<sup>371</sup> Juries create a buffer against zealous prosecution by the executive branch or bad decision making by the judiciary.<sup>372</sup>

In the Sixth Amendment cases, the Court described this principle not just in terms of governance and individual participation, but also in terms of accurate representation of the public. Juries should be chosen from a fair cross section of the community to protect “our basic concepts of a democratic society and a representative

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366. See Amar, *supra* note 280, at 1182; see also Alschuler, *supra* note 83, at 156-57 (arguing that peremptory challenges are undemocratic).

367. Amar, *supra* note 280, at 1182; see Forde-Mazrui, *supra* note 22, at 362.

368. See Powers v. Ohio, 499 U.S. 400, 407 (1991) (“Jury service preserves the democratic element of law.”).

369. Amar, *supra* note 123, at 204; Amar, *supra* note 280, at 1169.

370. Blakely v. Washington, 542 U.S. 296, 306 (2004).

371. See Holland v. Illinois, 493 U.S. 474, 495 (1990) (Marshall, J., dissenting). These purposes include: “(1) ‘guard[ing] against the exercise of arbitrary power,’ ... (2) preserving ‘public confidence in the fairness of the criminal justice system,’ and (3) implementing our belief that ‘sharing in the administration of justice is a phase of civic responsibility.’” *Id.* (quoting Lockhart v. McCree, 476 U.S. 162, 174-75 (1986)).

372. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”).

government.”<sup>373</sup> The Court did not focus on interest group politics so much as creating a representative cross section of the public will.<sup>374</sup>

Ending peremptories, some reformers argue, would accomplish this kind of representativeness on the trial jury, and not just in the venire. More random selection would create juries that represent the public, and thus express the popular will.<sup>375</sup> This vision of diversity focuses not just on suspect categories or interest group voting, but also on representing the public in general.<sup>376</sup>

Some of those who would restructure juries make a bolder claim about the nature of juries and democracy. They compare jury selection to legislative districting, in which racial minorities have rights against vote dilution.<sup>377</sup> If African Americans do not get the chance to serve on juries in proportion to their percentage in the population, they argue, their power of self-governance through juries is correspondingly diminished.<sup>378</sup> Jury reform must recognize the collective, rather than individual, rights of racial minorities to prevent dilution of political power.<sup>379</sup>

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373. *Smith v. Texas*, 311 U.S. 128, 130 (1940) (“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”). To exclude racial groups from jury service was said to be “at war with our basic concepts of a democratic society and a representative government.” *Id.*

374. Jeffrey Abramson argues that this shifted with *Taylor v. Louisiana* to a more interest group vision of diversity. ABRAMSON, *supra* note 35, at 122-27.

375. *See, e.g.*, Abramson, *supra* note 56, at 128 (explaining that a jury representative of the views of society can fulfill its democratic role); Muller, *supra* note 33, at 137-48 (promoting the vision of a representative jury without proposing an end to peremptory challenges).

376. *See* ABRAMSON, *supra* note 35, at 99-141 (describing the move from a general vision of diversity, which he argues better promotes meaningful deliberations, to an interest group vision of diversity).

377. *See* Forde-Mazrui, *supra* note 22, at 369-71; Francis, *supra* note 16, at 353-56 (arguing that because the Supreme Court allows race consciousness in legislative districting to prevent vote dilution, the Court should allow efforts against racial vote dilution on juries).

378. *See, e.g.*, Gerken, *supra* note 22, at 1112-17. Gerken argues that diversity violations interfere with the opportunity for minorities to serve on juries in proportion to their population. *Id.*

379. *See* Herman, *supra* note 11, at 1843. This would move far beyond current precedent. The Court has not applied the Sixth Amendment to jury selection. *Holland v. Illinois*, 493 U.S. 474, 487-88 (1990). *Batson* relied in part on the idea that jurors should be chosen or not without regard to race, holding that jurors have a right against racial stereotyping even in a process built on stereotyping in general. *Batson v. Kentucky*, 476 U.S. 79 (1986). Yet this individualized right—not to serve on a jury but to avoid not serving on a jury because of race—does not express the collective nature of the injury. Indeed, *Batson's* logic that race should prove irrelevant to jury service would seem to preclude as unconstitutional any claims of proportional representation.

My worry is that the representative-jury argument elevates the diversity of citizen participation over the constitutional guarantee of impartiality.<sup>380</sup> Although there are many similarities between voting and jury service, they serve different purposes. We do not strive to create an impartial electorate, but a representative one.<sup>381</sup> When citizens vote in elections, we may disagree with the results, but we do not deem them inaccurate in some abstract way.<sup>382</sup> We protect the process by which citizens get to vote, rather than police the results of their voting.<sup>383</sup>

We are constitutionally required, however, to strive for an impartial jury that will come to the right answer.<sup>384</sup> Equating juries to elections projects a vision of the jury not as a functional group of individuals carefully chosen for their ability to be fair, but as a group chosen merely to express public opinion.<sup>385</sup> Verdicts become mere exercises of voter power rather than the best available mechanism to achieve correct verdicts in the criminal justice system.<sup>386</sup>

Here is another problem: juries are simply too small to be properly representative of the public will.<sup>387</sup> You would never trust a political poll with a sample of twelve. Now imagine a system in which we replaced elections with a randomly selected sample of

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380. Gerken, *supra* note 22, at 1166 (arguing that the ideal of impartiality runs counter to the goal of racially proportionate representation on juries).

381. See Abramson, *supra* note 56, at 127.

382. *Id.*

383. This is a distinction perhaps akin to the philosophical distinction between those who would choose judges by electing them (for the sake of democracy) versus those who would agonize over appointing qualified judges.

384. U.S. CONST. amend. VI. See generally David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 270-96 (2008).

385. See, e.g., Amar, *supra* note 123, at 204-06; John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585 (2002) (demonstrating that jurors who reached a verdict in criminal cases were more likely to vote in subsequent elections than deadlocked, dismissed, or alternate jurors); Muller, *supra* note 33, at 148 (“[J]uries, like legislatures, are a meeting place for the various experiences and, in Justice Souter’s words, ‘sets of social values,’ of distinctive groups in the community.”).

386. Some acknowledge the potential conflict between representativeness and impartiality and propose a middle ground. Eric Muller argues that judges must balance between the conflicting claims, and perhaps as a result, does not propose ending peremptory challenges. Muller, *supra* note 33, at 144.

387. See JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 18-20 (2009); Gerken, *supra* note 22, at 1112-13 (showing that random assignment produces only a normal distribution curve, not individually diverse juries).

twelve voters and trusted the results as representative. In recognition of this sampling problem, Heather Gerken proposes the idea of “second-order diversity,” arguing that what matters is the diversity of juries as a whole, on average, over time.<sup>388</sup> She thus acknowledges “the fact that different juries will render different verdicts in similar cases,” but celebrates that as expressions of the people’s will.<sup>389</sup>

We worry about different juries rendering different verdicts because we fear it is a sign that one of the juries was partial—in the sense of biased. The notion of second-order diversity recasts jury verdicts as partial in a different sense—as a fraction of the whole. It suggests that a verdict is best understood as one data point in figuring out what the “law” is or ought to be. And that notion may be difficult to reconcile with our normative vision of the role the jury ought to play.<sup>390</sup>

Gerken acknowledges the unfortunate toll this might take on individual defendants or civil litigants, but hopes that some of the sting can be removed by appellate review.<sup>391</sup>

Of course, appellate review of criminal appeals proves far from meaningful.<sup>392</sup> “Justice on average” will not suffice for the innocent men and women who are convicted and spend years in prison, and no appeal of inaccurate acquittals exists for the victims whose perpetrators go free because a biased jury has devalued them as black or female.<sup>393</sup>

The logic of “justice on average” rests in part on the notion that juries are not mere truth seekers, but exercise discretion, judgment, and power. Those who argue for diversity as representation characterize jury verdicts as a function of political compromise: “the

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388. Gerken, *supra* note 22, at 1175.

389. *Id.* at 1165 (explaining that there is always a certain variation among jury verdicts); *id.* at 1161-64 (discussing positive aspects of that variation).

390. *Id.* at 1166.

391. *See id.* at 1165 (“[C]onsistency matters, particularly to those most affected by the decisions.”).

392. *See, e.g.,* GARRETT, *supra* note 2, at 1-13 (describing the reasons the innocent are convicted and rarely exonerated).

393. Tetlow, *supra* note 2, at 91-95 (describing the history of acquittals of those who committed racially oriented violence against black victims, the current empirical evidence that juries tend to devalue black victims, and the evidence that juries put female victims of gender-based violence on trial).

products of life experience, subjective viewpoint, and value judgment.”<sup>394</sup> If we believe that the potential verdicts in most trials could be justified by mere philosophy, then we worry less about variation. Verdicts requiring only policy judgments should function more like elections. It is certainly true that jurors apply law to facts and thus have a role in defining nebulous concepts such as “reasonableness,” “imminent danger,” “causation,” and “state of mind.”<sup>395</sup> Without delving into the permissibility of jury nullification, juries can come to a variety of conclusions within the law that are still legally correct.<sup>396</sup>

Yet is there really such a large proportion of closely divided cases in which either verdict is within the realm of justice? Many, if not most, trials involve purely factual determinations of whether the defendant or someone else committed a particular crime. Verdicts that require the solving of a mystery should not function merely as plebiscites. If the defendant is factually innocent, it is not within the acceptable range of jury power to convict him. If the defendant is guilty, an acquittal—particularly one based on race or gender discrimination against the victim—can also cause serious harm.<sup>397</sup> The decision of whether to send a person to jail or to release him into the community cannot merely be an exercise in discretionary power that we hope is generally correct over time.

Further, even the subjective application of law to facts holds the possibility of deciding badly. Self-defense cases, for example, involve the application of a subjective legal standard to facts.<sup>398</sup> Yet too often, they turn on a racialized determination of the risk posed by the victims, be it an unarmed black teenager with a bag of Skittles or four teenagers playing loud music.<sup>399</sup> Similarly, a significant

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394. See Muller, *supra* note 33, at 136 (comparing scientific verdicts with social verdicts).

395. See Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1201-02 (1998).

396. See Howe, *supra* note 51, at 1182.

397. See Tetlow, *supra* note 2, at 81-95 (describing the long history of discriminatory acquittals and arguing that they violate the Constitution).

398. Caroline Forell, *What's Reasonable? Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1403-05 (2010) (describing the range of subjectivity throughout jurisdictions); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 318-20 (2012) (describing the debate on the reasonableness standard and its subjectivity).

399. See, e.g., Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 369 n.2 (1996) (defining stereotypes as “well-internalized associations regarding groups of people that result in habitually automatic, gut-

number of women incarcerated for murder failed in their self-defense claims after killing men who beat them and threatened to kill them.<sup>400</sup> Juries famously judge these women through a prism of gender discrimination.<sup>401</sup> Even verdicts that represent policy judgments should not merely reflect popular opinion, but represent the thoughtful, nondiscriminatory application of the law.

When jurors deliberate and come to a verdict, it matters whether the results are correct.<sup>402</sup> It is not enough to point to the power exercised by a cross section of society to stand as a bulwark against the government. It actually does matter, both to the defendant and to the public, whether the jury comes to the correct result.<sup>403</sup> Juries

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level responses" (emphasis omitted)); Richardson & Goff, *supra* note 398 (analyzing the way that subconscious biases influence mistaken judgments of criminality). For information on the Trayvon Martin trial, see Charles M. Blow, Op-Ed., *The Curious Case of Trayvon Martin*, N.Y. TIMES, Mar. 16, 2012, at A21; Ashley Hayes, *Witnesses Tell FBI that George Zimmerman Is No Racist*, CNN (July 13, 2012, 7:44 AM), <http://www.cnn.com/2012/07/12/justice/florida-teen-shooting/index.html> [<http://perma.cc/54TR-GREA>]; Karen McVeigh, *Trayvon Martin's Death: The Story So Far*, GUARDIAN (Mar. 20, 2012, 5:53 PM), <http://www.guardian.co.uk/world/2012/mar/20/trayvon-martin-death-story-so-far> [<http://perma.cc/MP47-VTDP>]; and *Trayvon Martin Case (George Zimmerman)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/m/trayvon\\_martin/index.html](http://topics.nytimes.com/top/reference/timestopics/people/m/trayvon_martin/index.html) [<http://perma.cc/JU8W-KB4N>] (last visited Apr. 6, 2015).

400. See CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* 41-50 (1987); ELIZABETH DERMODY LEONARD, *CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL* 103-14 (2002). See generally Mira Mihajlovich, Comment, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1257-59 (1987) (describing development of the battered woman syndrome).

401. See generally ROBBIN S. OGLE & SUSAN JACOBS, *SELF-DEFENSE AND BATTERED WOMEN WHO KILL: A NEW FRAMEWORK* 1-7 (2002); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 14 WOMEN'S RTS. L. REP. 213 (1992); Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 477-78 (1996); Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 269-72 (2008).

402. Justice Souter made this point in dissent to a legislative districting case when distinguishing the application of *Batson*, though he overstates the objective neutrality of all verdicts. *Bush v. Vera*, 517 U.S. 952, 1051 n.5 (1996) (Souter, J., dissenting) ("Politics includes choices between different sets of social values, choices that may ultimately turn on the ability of a particular group to enforce its demands through the ballot box. Jury decision making is defined as a neutral process, the impartial application of law to a set of objectively discovered facts. To require racial balance in jury selection would risk redefining the jury's role.").

403. Re, *supra* note 49, at 1579 ("The jury is unique among governmental institutions in that its legitimacy hinges almost exclusively on impartiality as opposed to accountability."). Given that we do not have real standards for juror competence, nor do we record or review jury deliberations, it matters enormously to protect juror impartiality. *Id.*

do fulfill an important part of democracy, but they fulfill an even more important functional role within the criminal justice system.

Instead of correct verdicts, the jury-as-democracy proponents focus on legitimate verdicts, made so by juries that represent the public. Diverse juries better protect public confidence in the jury system and the acceptance of verdicts as legitimate.<sup>404</sup> And it is certainly true that jury diversity has become a measure of fairness in the popular imagination: the more diverse the jury, the more likely a controversial verdict is to be accepted.<sup>405</sup>

Arguments about public legitimacy matter when they correspond to justice, but they cannot trump it. When a diverse jury comes to a defensible verdict in a tough case, diversity may add to the legitimacy of that verdict. When a diverse jury comes to an indefensible verdict, however, the public will still complain. We cannot supplant the ultimate goal of selecting an impartial jury with a goal of choosing a jury that looks impartial because it is diverse.<sup>406</sup> We cannot elevate the appearance of propriety over actual propriety.

#### IV. CONCLUSION

Juries made up of mere mortals will continue to amaze us with their courage and independence, and then disappoint us with their bias and discrimination. We value juries, but we distrust them with good reason. We struggle to make use of the wisdom of citizens without importing the prejudice endemic in our culture, the racism and sexism that has poisoned centuries of verdicts, or even just the simple human bias that distorts our judgment.

The test I propose, like many legal standards, would be subjective and messy. It represents a compromise and thus would never fully satisfy anyone. It would vary in its results because judges would differ in how actively they policed jury diversity and how carefully they protected lawyers' concerns about individual impartiality. But it would at least focus on the right goals.

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404. See Amar, *supra* note 280, at 1182; Forde-Mazrui, *supra* note 22, at 362.

405. King, *supra* note 274, at 1186-90 (surveying empirical evidence for this claim).

406. Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 485 (1998) ("I think it intuitively obvious that in the context of a criminal trial, fairness to the defendant is more morally compelling than is creating an appearance of neutrality among jurors.").

The current *Batson* rule constitutes a placebo that purports to solve the problem of discrimination by juries but really focuses only on purported discrimination against jurors. Not only does it fail to address the real issues, it also actively distracts from them. The *Batson* rule represents the culmination of the Supreme Court's desire to solve the intractable and unconscionable problem of racism in our criminal justice system by ordering everyone in the courtroom to ignore it.

We need to turn our focus back to discrimination *by* jurors rather than discrimination *against* them. We need to strive for jurors who are impartial, not because they lack any human subjectivity or bias, but because they are willing to listen, deliberate, and try hard to be fair. We need to harness the tool of diversity to enrich deliberations and to do battle with racism. In our quest for a jury that is in fact fair, however, we cannot settle for a jury that looks fair only because it is diverse. We need to focus on the importance of just verdicts and not be distracted by public perceptions. Nor can we be distracted by the democratic role of juries in merely reflecting the will of the people, no matter how flawed. We cannot settle for justice on average.