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## A Jury of Whose Peers?: Eliminating Racial Discrimination in Jury Selection Procedures

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# A JURY OF WHOSE PEERS?: ELIMINATING RACIAL DISCRIMINATION IN JURY SELECTION PROCEDURES

HILARY WEDDELL\*

**Abstract:** The jury system is intended to instill fairness and increase confidence in the American legal system as a whole. Despite this goal, widespread discrimination remains in jury selection procedures. In order to adequately protect both a defendant's right to be tried by a jury of his peers and every citizen's right to participate in the legal system, representativeness should be improved at each of three levels where juror exclusion takes place: (1) the assembly of the jury pool; (2) the issuance of exemptions and excusals from jury service; and (3) the use of peremptory challenges in empanelling the petit jury. States should institute a system like the one used in Massachusetts, which limits service to one day or one trial and eliminates all exemptions from jury service. In addition, the Supreme Court should reevaluate the current unfettered use of peremptory challenges.

## INTRODUCTION

It was an unfortunate case of being in the wrong place at the wrong time for the “Scottsboro Boys” on a chilly Spring morning in 1931.<sup>1</sup> Nine young African American boys were “hoboing” their way across rural Alabama on a freight train when a group of boys confronted them exclaiming “[t]his is a white man’s train. All you Nigger bastards unload.”<sup>2</sup> The ensuing brawl between the two groups was reported to the local Sheriff, who ordered the immediate deputization of all available gun-owning men to “capture every negro on the train and bring them to Scottsboro.”<sup>3</sup> When the train stopped at Paint Rock sta-

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\* Editor in Chief, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE (2012–2013). I would like to thank my parents and my husband for their love, support, and encouragement.

<sup>1</sup> See Stephan Landsman, *History’s Stories: Stories of Scottsboro*, 93 MICH. L. REV. 1739, 1739 (1995).

<sup>2</sup> *Powell v. Alabama*, 287 U.S. 45, 50 (1932); SCOTTSBORO: AN AMERICAN TRAGEDY (PBS 2001). The Scottsboro Boys’ ages ranged from thirteen to twenty. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1334 (2004). Before this unfortunate day that would forever change their lives, many of the boys had never met. *See id.*

<sup>3</sup> *Powell*, 287 U.S. at 50–51; DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 5 (2007); Landsman, *supra* note 1, at 1739; Douglas O. Linder, *Without Fear or*

tion later that afternoon, a posse of armed men rushed onboard and captured the young Scottsboro Boys within minutes.<sup>4</sup> What the posse did not expect to find, however, were two young white girls who had also been free riding on the open carts of the freight train.<sup>5</sup>

Not until twenty minutes later, when the girls were being taken into custody for their free riding and were directly asked whether they were bothered by the Scottsboro Boys, did Ruby Bates claim that she and her friend, Victoria Price, had been raped.<sup>6</sup> The girls claimed that they were held down at knifepoint while the nine Scottsboro Boys took turns raping them.<sup>7</sup> All nine of the boys were immediately taken to Scottsboro where an angry mob was eagerly awaiting their arrival, already convinced of the boys' guilt.<sup>8</sup> Six days later the boys were arraigned for the alleged rapes, and each of them plead not guilty.<sup>9</sup> The boys were never given an opportunity to communicate with their families or obtain competent legal counsel of their own choice.<sup>10</sup>

*Favor: Judge James Edwin Horton and the Trial of the "Scottsboro Boys,"* 68 UMKC L. REV. 549, 550 (2000); SCOTTSBORO: AN AMERICAN TRAGEDY, *supra* note 2.

<sup>4</sup> CARTER, *supra* note 3, at 5; Linder, *supra* note 3, at 550; see Landsman, *supra* note 1, at 1739.

<sup>5</sup> CARTER, *supra* note 3, at 5; see Landsman, *supra* note 1, at 1739. Ruby Bates was seventeen years old. HOLLACE RANDELL, AMERICAN CIVIL LIBERTIES UNION, REPORT ON THE SCOTTSBORO, ALA. CASE 2 (1931), available at <http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/Scottsbororeport.pdf> (last visited May 16, 2013). Victoria Price's age at the time of the alleged incident is unclear although townspeople reported her age as between nineteen and twenty-one. *Id.* at 16.

<sup>6</sup> See Linder, *supra* note 3, at 550–51.

<sup>7</sup> JAMES R. ACKER, SCOTTSBORO AND ITS LEGACY: THE CASES THAT CHALLENGED AMERICAN LEGAL AND SOCIAL JUSTICE 8 (2008); CARTER, *supra* note 3, at 14.

<sup>8</sup> *Powell*, 287 U.S. at 51 (stating the "attitude of the community was one of great hostility"); CARTER, *supra* note 3, at 8; Linder, *supra* note 3, at 551; see Duru, *supra* note 2, at 1335.

<sup>9</sup> *Powell*, 287 U.S. at 49, 52; ACKER, *supra* note 7, at 5; Landsman, *supra* note 1, at 1739; *Scottsboro Timeline*, PBS, <http://www.pbs.org/wgbh/amex/scottsboro/timeline/index.html> (last visited May 16, 2013) [hereinafter *Scottsboro Timeline*]. The girls' identification of the Scottsboro Boys as their attackers at the jailhouse line-up was highly suspect. See Linder, *supra* note 3, at 551. The attention seeking, quick witted Price identified six of the Scottsboro Boys who had allegedly raped her, while Bates just stood silently. *Id.* The guard assumed that "[i]f those six had Miss Price, it stands to reason that the others had Miss Bates." *Id.*

<sup>10</sup> See *Powell*, 287 U.S. at 52–53. Defense counsel was not appointed until the morning of the first trial and had no knowledge of the case or of procedure in Alabama. *Id.* at 57–58. Throughout the trials, Price, the prosecution's star witness, played to the sentiment of the courtroom, giving what was expected of her: a convincing story without hesitations that might "slow up the death sentences." See RANDELL, *supra* note 5, at 5, 16. Because Price gave exactly the story she knew most white southerners expected to hear, few noticed that her testimony was riddled with inconsistencies. See RANDELL, *supra* note 5, at 11 (explaining that Price and Bates's testimony "fitted together so badly as to indicate that they were deliberately giving untruthful evidence"); Duru, *supra* note 2, at 1337. In contrast,

In the span of four days, the boys were tried in four separate cases.<sup>11</sup> By April 9, 1931, just two weeks after that fateful train ride across rural Alabama, eight of the nine Scottsboro Boys were sentenced to death by all-white juries.<sup>12</sup> The ninth boy, thirteen year-old Roy Wright, narrowly escaped the death penalty when the jury could not agree whether to impose death or life imprisonment, resulting in a hung jury.<sup>13</sup> The nine young boys, many of whom met for the first time on the train, would spend the rest of their lives fighting for their freedom.<sup>14</sup>

In the days after the pronouncement of the Scottsboro Boys' death sentences, word of the "legal lynching" suffered by these boys spread across the country.<sup>15</sup> Despite the resulting public outcry for justice, on March 24, 1932, just one day shy of the one year mark of the train ride that forever changed their lives, the Supreme Court of Alabama affirmed the convictions of all but one of the Scottsboro Boys.<sup>16</sup> Only Eugene Williams was granted a new trial because he was thirteen years old and thus subject to the juvenile court's jurisdiction.<sup>17</sup>

Continuing their fight for freedom, the Scottsboro Boys appealed once again, this time to the United States Supreme Court.<sup>18</sup> On November 7, 1932, the Court overturned the boys' convictions in a seven-to-two decision, finding that the boys were denied due process under the Fourteenth Amendment because they were not adequately represented at trial.<sup>19</sup> The Scottsboro Boys were all granted new trials in the Alabama state courts.<sup>20</sup>

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Bates, the other alleged victim, was dubbed by many as "slow and stupid" because she was unable to make her testimony fit with the testimony given by Price on the stand and could not positively identify her alleged attackers. RANDELL, *supra* note 5, at 6, 16.

<sup>11</sup> RANDELL, *supra* note 5, at 5; *Scottsboro Timeline*, *supra* note 9.

<sup>12</sup> SCOTTSBORO: AN AMERICAN TRAGEDY, *supra* note 2. As the judge read the first guilty verdict sentencing Clarence Norris to death by electrocution, the courtroom erupted in cheers. RANDELL, *supra* note 5, at 5, 7–8.

<sup>13</sup> Landsman, *supra* note 1, at 1740; Linder, *supra* note 3, at 552–53. Notwithstanding the prosecution's request for life imprisonment because of the child's "tender age," eleven of the twelve jurors held out for the death sentence. Landsman, *supra* note 1, at 1740; Linder, *supra* note 3, at 552–53. Roy Wright spent the following six years in jail awaiting retrial before the charges against him were dropped in 1937. Douglas O. Linder, *Biographies of Key Figures in "The Scottsboro Boys" Trials*, UMKC SCH. L., [http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB\\_biog.html](http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB_biog.html) (last visited May 16, 2013).

<sup>14</sup> See Duru, *supra* note 2, at 1334.

<sup>15</sup> See ACKER, *supra* note 7, at 35–36; RANDELL, *supra* note 5, at 8.

<sup>16</sup> See CARTER, *supra* note 3, at 158; RANDELL, *supra* note 5, at 9.

<sup>17</sup> CARTER, *supra* note 3, at 158.

<sup>18</sup> *Powell*, 287 U.S. at 49–50.

<sup>19</sup> *Id.* at 45, 71, 73, 77. This was the first time that the Supreme Court recognized that the Due Process Clause of the Fourteenth Amendment applied to poor criminal defen-

Following a change of venue, the second round of trials for the Scottsboro Boys took place in Decatur, Alabama.<sup>21</sup> Despite what appeared to be powerful exculpatory testimony—including Bates’s testimony for the defense that she and Price lied about the alleged rapes—three of the Scottsboro Boys were again found guilty and sentenced to death by all-white juries.<sup>22</sup>

The defendants again appealed to the Supreme Court, this time claiming that they were denied equal protection of the laws under the Fourteenth Amendment due to the “long-continued, systematic, and arbitrary exclusion of qualified negro citizens from service on juries, solely because of their race and color . . . .”<sup>23</sup> In a unanimous decision, the Supreme Court agreed with the defense and again saved the Scottsboro Boys from the electric chair.<sup>24</sup> The Supreme Court noted that although there was evidence of a substantial number of African American citizens who were eligible for jury service in the county where the trials were held, no African American had ever served.<sup>25</sup> The Supreme Court’s 1934 ruling in *Norris v. Alabama* did not just impact

dants in state courts, guaranteeing them competent counsel appointed on their behalf. *See id.*

<sup>20</sup> *Id.* at 73.

<sup>21</sup> Landsman, *supra* note 1, at 1740.

<sup>22</sup> CARTER, *supra* note 3, at 239; JAMES GOODMAN, STORIES OF SCOTTSBORO 134 (1994); Landsman, *supra* note 1, at 1741; SCOTTSBORO: AN AMERICAN TRAGEDY, *supra* note 2. Bates, who was missing in the weeks leading up to the trial, appeared at the close of trial, confessing that her conscience had gotten the best of her. CARTER, *supra* note 3, at 231–33; GOODMAN, *supra*, at 131–32; SCOTTSBORO: AN AMERICAN TRAGEDY, *supra* note 2. She testified that both she and Price had lied about the alleged rapes. *See* GOODMAN, *supra*, at 132.

<sup>23</sup> *Norris v. Alabama*, 294 U.S. 587, 588 (1934).

<sup>24</sup> *Id.* at 599.

<sup>25</sup> *Id.* at 591–92. The State of Alabama set forth the following eligibility requirements for jurors:

The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

*Id.* at 590–91 (quoting 1931 Ala. Acts, 59).

the hotly contested Scottsboro trials; it served as a basis for the integration of many Southern courtrooms for decades to come.<sup>26</sup>

Amid national scrutiny, the Scottsboro Boys were once again tried before Judge Callahan in Decatur.<sup>27</sup> Haywood Patterson, now being tried for the fourth time, was again convicted, this time receiving a sentence of seventy-five years imprisonment.<sup>28</sup> Three more of the Scottsboro Boys were tried and again convicted.<sup>29</sup> Then, on July 24, 1937, in a shocking turn of events, the State of Alabama dropped the charges against the other four defendants, who had already spent six years in jail.<sup>30</sup> The State explained that they were releasing these boys because at the time of the incident one of the boys was practically blind and another one suffered from a serious venereal disease that would have made it excruciatingly painful to commit the crime.<sup>31</sup> The other two defendants were said to be released because at the time of the crime they were only twelve and thirteen years old, and after six and a half years in jail, the “ends of justice” would not be met by further prosecution.<sup>32</sup>

Not until 1950, almost twenty years after that fateful train ride, was the last of the Scottsboro Boys released on parole by the State of Alabama.<sup>33</sup> After eleven jury trials and two favorable decisions by the United States Supreme Court, the Scottsboro Boys spent a combined total of 104 years in prison for a crime they did not commit.<sup>34</sup>

The plight of the Scottsboro Boys is nothing short of a legal travesty.<sup>35</sup> The boys’ trials were a guise; the citizens of Alabama had condemned them to death upon hearing the accusations against them.<sup>36</sup> Racial prejudices were rampant in the courtroom, where many of the judges clearly favored the prosecution and disparaged the defense

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<sup>26</sup> *Id.* at 599; see SCOTTSBORO: AN AMERICAN TRAGEDY, *supra* note 2.

<sup>27</sup> Landsman, *supra* note 1, at 1742.

<sup>28</sup> *Id.*; *Scottsboro Timeline*, *supra* note 9.

<sup>29</sup> Landsman, *supra* note 1, at 1742; SCOTTSBORO: AN AMERICAN TRAGEDY, *supra* note 2. Clarence Norris was again convicted and sentenced to death. CARTER, *supra* note 3, at 369–70. Andy Wright was again convicted and sentenced to ninety-nine years imprisonment. *Id.* at 372–73. Charlie Weems was again convicted and sentenced to seventy-five years imprisonment. *Id.* at 375.

<sup>30</sup> Landsman, *supra* note 1, at 1742; SCOTTSBORO: AN AMERICAN TRAGEDY, *supra* note 2; *Scottsboro Timeline*, *supra* note 9.

<sup>31</sup> Associated Press, *Prosecutors’ Statement: The Explanation of the Freeing of Four Defendants*, N.Y. TIMES, July 24, 1937, at 4.

<sup>32</sup> *Id.*

<sup>33</sup> Duru, *supra* note 2, at 1337; Landsman, *supra* note 1, at 1742.

<sup>34</sup> Duru, *supra* note 2, at 1337; Landsman, *supra* note 1, at 1742.

<sup>35</sup> Duru, *supra* note 2, at 1337.

<sup>36</sup> RANSELL, *supra* note 5, at 18.

counsel in front of the jury.<sup>37</sup> Jury selection procedures in the case were also a sham as the courts continually excluded African Americans from the panel, but included whites who openly admitted that they regarded African Americans as an “inferior race.”<sup>38</sup>

The Scottsboro Boys’ story highlights the struggle of African Americans to secure the basic rights afforded to all by the Constitution; a struggle that continues today.<sup>39</sup> Now, more than eighty years later, we pride ourselves on the progress we have made, yet often forget that much remains to be done.<sup>40</sup>

Some of the most shocking evidence of racial discrimination in the twenty-first century can be seen in the jury selection process.<sup>41</sup> Efforts have been made to increase jury representativeness, however, that goal has yet to be fully realized.<sup>42</sup> For example, in a series of decisions in the 1970s, the Supreme Court mandated that jury venires—the pool of prospective jurors from which jurors are selected—represent a “fair cross section of the community.”<sup>43</sup> Although more African Americans appeared in jury venires following these decisions, this achievement was quickly undercut through the proliferation of discriminatory peremptory challenges.<sup>44</sup>

In a June 2010 report, the Equal Justice Initiative (EJI) studied jury selection procedures in eight southern states and uncovered widespread discrimination that posed a serious threat to the “credibility and reliability of the criminal justice system.”<sup>45</sup> The EJI study found that prosecutors in Houston County, Alabama, have used peremptory challenges to remove from jury service eighty percent of qualified African

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<sup>37</sup> Duru, *supra* note 2, at 1337–38.

<sup>38</sup> *Id.*

<sup>39</sup> See Landsman, *supra* note 1, at 1743.

<sup>40</sup> See EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 11–14 (2010) [hereinafter EJI REPORT].

<sup>41</sup> See *id.* at 4.

<sup>42</sup> See *id.* at 11–14.

<sup>43</sup> See *Duren v. Missouri*, 439 U.S. 357, 370 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 537–38 (1975) (finding Louisiana’s jury selection procedures, which excluded women from service unless they had previously filed a declaration opting in, violated the Sixth Amendment’s guarantee of a jury drawn from a pool representative of the community); see also *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1879) (finding exclusions from jury service based on race violate the Equal Protection Clause of the Fourteenth Amendment), *abrogated on other grounds by*, *Taylor v. Louisiana*, 419 U.S. 522 (1975).

<sup>44</sup> See EJI REPORT, *supra* note 40, at 11–14.

<sup>45</sup> *Id.* at 2, 4. The following eight states’ jury selection procedures were examined by the Equal Justice Initiative: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. *Id.* at 4.

Americans.<sup>46</sup> The study likewise found that in felony cases in Jefferson Parish, Louisiana, prosecutors are three times more likely to strike African American jurors than white jurors.<sup>47</sup>

Although procedures are in place whereby one can object to the discriminatory removal of minorities from the jury pool, these procedures have proven ineffective.<sup>48</sup> After a defendant raises a claim that the prosecutor has used peremptory challenges discriminatorily, the prosecutor is given an opportunity to offer a “race-neutral” explanation for the strike.<sup>49</sup> The Supreme Court has articulated that this is a low burden and that the reason offered “need not be plausible, let alone persuasive.”<sup>50</sup> As a result, courts have accepted “race-neutral” dismissals of African American potential jurors for reasons such as: alleged lack of intelligence or low education; living in an area with a high crime rate; “look[ing] like a drug dealer;” chewing gum; wearing sunglasses in court; or having a child out of wedlock.<sup>51</sup> Because almost any proffered explanation is accepted, the procedure does little to eliminate racial discrimination from jury selection procedures; consequently, minorities continue to be denied their constitutional right to sit on juries at alarmingly high rates.<sup>52</sup>

This Note will examine the concept of a trial by a “jury of one’s peers” throughout American history. Part I examines the development of the jury trial and shows how the interpretation of “peers” has evolved from its original appearance in the Magna Carta to the Supreme Court’s interpretation today of a “fair cross-section of the community.” Part II examines how the fair cross-section guarantee applies to selection procedures for the initial jury pool. Part II also examines the impact of excusals and exemptions from jury service on the representativeness of the jury. Part III studies the selection of the petit jury and the use of discriminatory peremptory challenges. Finally, Part IV argues that the procedures utilized to seat a jury seriously diminish the Supreme Court’s guarantee of an impartial jury representing a “fair cross-section of the community.” In response to this problem, Part IV articulates ways that representativeness can be improved at each of three levels where juror exclusion takes place: (1) the initial drawing of the jury pool; (2) ex-

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<sup>46</sup> *See id.* at 14.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 14–16.

<sup>49</sup> *Id.* at 15.

<sup>50</sup> EJI REPORT, *supra* note 40, at 15.

<sup>51</sup> *Id.* at 17–18.

<sup>52</sup> *Id.* at 14, 17–18.



emptions and excusals from jury service; and (3) the use of peremptory challenges in empanelling the petit jury. This Note will focus both on a defendant's right to be tried by a fair cross-section of the community and on every citizen's right to participate in the legal system.

### I. WHAT IS A "JURY OF ONE'S PEERS"?

The common law principle of a jury of one's peers has existed for centuries and even appears in Article 39 of the Magna Carta, which states that "[n]o freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land."<sup>53</sup> Although the word "peer" does not appear in the United States Constitution, the Sixth Amendment's mandate of trial by "an impartial jury" has been interpreted by the Supreme Court to require a trial by a jury drawn from a fair cross-section of the community.<sup>54</sup>

The right to a trial by jury is of great import in the American legal system.<sup>55</sup> Its participatory nature is rooted in the concept of democracy, and as such it aspires to protect individual liberty.<sup>56</sup> The jury trial has been praised as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."<sup>57</sup> It is a symbol of both democracy at its best and democracy at its worst.<sup>58</sup>

<sup>53</sup> DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS* 85, 160–62 (2d ed. 2004).

<sup>54</sup> U.S. CONST. amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 537–38 (1975); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 49 (2001).

<sup>55</sup> See HANS & VIDMAR, *supra* note 54, at 31; 1 AMERICAN BAR ASSOCIATION DIVISION FOR PUBLIC EDUCATION, *Part I: The History of Trial by Jury*, in *DIALOGUE ON THE AMERICAN JURY: WE THE PEOPLE IN ACTION* 1, 1 (2005), available at <http://www.americanbar.org/content/dam/aba/migrated/jury/moreinfo/dialoguepart1.authcheckdam.pdf> [hereinafter *ABA Jury History*]. Outside the United States, the civil jury trial is rarely used. HANS & VIDMAR, *supra* note 54, at 31. In fact, the United States accounts for around eighty percent of all jury trials worldwide. *Id.*

<sup>56</sup> See HANS & VIDMAR, *supra* note 54, at 36; *ABA Jury History*, *supra* note 55, at 1. The importance of a trial by jury was expressed by Thomas Jefferson when he wrote: "[w]ere I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them." HANS & VIDMAR, *supra* note 54, at 36.

<sup>57</sup> *ABA Jury History*, *supra* note 55, at 1.

<sup>58</sup> JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1 (1994); Kenneth W. Starr, *Juries and Justice*, in 9 *THE GAUER DISTINGUISHED LECTURE IN LAW AND PUBLIC POLICY* 9, 9 (2000).

### A. Historical Evolution of Trial by Jury

The concept of a trial by jury stems from English common law and dates back as far as King Henry II's "self-informing juries" of the twelfth century.<sup>59</sup> A "self-informing jury" is one that is formed from members of the community who are familiar with the parties and have personal knowledge of the dispute.<sup>60</sup> The "self-informing jury" therefore makes its decision without the presentation of evidence.<sup>61</sup>

Brought to America by the English colonists, the right to a jury trial was present in every colony as a symbol of freedom and a protection against oppression.<sup>62</sup> The colonies used juries to resist England's unpopular laws.<sup>63</sup> In the eighteenth century juries were comprised of members of the defendant's community because local residents were presumed to have the most thorough knowledge of the neighborhood, social norms, the parties themselves, and the facts surrounding the dispute.<sup>64</sup> Whereas in the eighteenth century jurors who knew the parties and the dispute were sought out, in the twenty-first century informed jurors are kept off juries because of a belief that they may be unfairly biased.<sup>65</sup> This belief stems from the notion that jurors have a tendency to interpret evidence based on their underlying values and opinions; as humans, they tend to "see what [they] want to see."<sup>66</sup>

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<sup>59</sup> LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE* 11–13 (1999); JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* 115 (2006); STARR, *supra* note 58, at 18; ABA *Jury History*, *supra* note 55, at 1.

<sup>60</sup> RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 107 (2003); OLDHAM, *supra* note 59, at 115.

<sup>61</sup> JONAKAIT, *supra* note 60, at 107; OLDHAM, *supra* note 59, at 115.

<sup>62</sup> See JONAKAIT, *supra* note 60, at 21; STARR, *supra* note 58, at 16, 31. Prior to the enactment of the United States Constitution, the jury trial was the only right common in all twelve state Constitutions. JONAKAIT, *supra* note 60, at 21; LEVY, *supra* note 59, at 85; *Rights of the People: Individual Freedom and the Bill of Rights*, U.S. DEPARTMENT OF STATE INT'L INFO. PROGRAM, <http://www.4uth.gov.ua/usa/english/society/rightsof/jury.htm> (last visited May 16, 2013) [hereinafter *Rights of the People*].

<sup>63</sup> ABA *Jury History*, *supra* note 55, at 4.

<sup>64</sup> See JONAKAIT, *supra* note 60, at 107; STARR, *supra* note 58, at 18; *Rights of the People*, *supra* note 62.

<sup>65</sup> Compare JUDGE NANCY GERTNER & JUDITH H. MIZNER, *THE LAW OF JURIES* 66 (6th ed. 2012) (noting that a party may exercise a for cause challenge against jurors who have connections to the case or the parties), with JONAKAIT, *supra* note 60, at 107 (noting that early jurors were chosen because of their knowledge of the parties or the dispute, and were asked to deliver a verdict on the basis of this knowledge alone).

<sup>66</sup> See JONAKAIT, *supra* note 60, at 261–62. Jonakait offers the illustrative example of watching a football game with friends who are cheering for opposing teams. *Id.* If there is a close call, say a receiver catches the ball very near the sideline, the friends will likely disagree on whether or not the ball was caught in-bounds. *Id.* It is only natural to interpret the play in a way that will most benefit one's team. *Id.*

The American concept of a defendant's right to a trial by jury is embodied in Article III of the United States Constitution, which provides that "[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . ."<sup>67</sup> Silencing the Anti-Federalists who were not convinced that the Constitution should be read to extend the right to a jury trial to all citizens, the Sixth and Seventh Amendments were ratified in the Bill of Rights in 1791.<sup>68</sup> The Sixth Amendment grants defendants local trials by an impartial jury "in all criminal prosecutions," while the Seventh Amendment assures the right to have juries in common-law civil cases.<sup>69</sup>

### B. *The Impartiality Doctrine & the Cross-Sectional Requirement*

The Sixth Amendment's requirement of trials by an "impartial jury" aspires to ensure that a defendant will not be tried by a jury who harbors biases against him or her.<sup>70</sup> Though the Constitution does not set forth any guidelines for impartiality, the Supreme Court has interpreted an "impartial" juror as one who is "indifferent" to the case at hand.<sup>71</sup> For this reason, the parties are allowed to question potential

<sup>67</sup> U.S. CONST. art. III, § 2, cl. 3; GERTNER & MIZNER, *supra* note 65, at 2–3; LEVY, *supra* note 59, at 14–15. Many states have also provided the right for both criminal defendants and civil litigants to be tried by jury in their state Constitutions. GERTNER & MIZNER, *supra* note 65, at 2.

<sup>68</sup> See LEVY, *supra* note 59, at 14–15; Starr, *supra* note 58, at 14–15; ABA Jury History, *supra* note 55, at 4. The Anti-Federalists argued that Article III's jury provision was not specific enough to safeguard a defendant's rights. Starr, *supra* note 58, at 14. They argued for jury trials to be conducted in the county where the crime was committed, rather than the state. *Id.* In addition, they did not believe that the right to a jury was conferred for civil cases. *Id.* at 14–15.

<sup>69</sup> U.S. CONST. amends. VI–VII; Starr, *supra* note 58, at 15. The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI. The Supreme Court has interpreted the Sixth Amendment to guarantee the right to a jury in all criminal cases, except those for "petty offenses." *District of Columbia v. Clawans*, 300 U.S. 617, 624–25 (1937); *Callan v. Wilson*, 127 U.S. 540, 548–52 (1888). The Seventh Amendment provides "[i]n Suits at common law . . . the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII. The Seventh Amendment right to a jury trial in civil cases extends to private torts, contracts, and property cases where legal, rather than equitable, rights are at issue. GERTNER & MIZNER, *supra* note 65, at 6–7.

<sup>70</sup> *Swain v. Alabama*, 380 U.S. 202, 219–20 (1965), *overruled in part by Batson v. Kentucky*, 476 U.S. 79 (1986); Donna J. Meyer, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE W. RES. L. REV. 251, 259–60 (1994).

<sup>71</sup> *Irvin v. Dowd*, 366 U.S. 717, 722–23 (1961) (stating that the Sixth Amendment guarantees defendants the right to be tried by "a panel of impartial, 'indifferent' jurors . . . [whose] verdict must be based upon the evidence developed at the trial"), *superseded by statute as recognized in Casey v. Moore*, 386 F.3d 896 (9th Cir. 2004); GERTNER & MIZNER,

jurors in a process known as voir dire in an attempt to reveal prejudices that might affect a juror's ability to impartially consider the evidence and ultimately decide a defendant's guilt or innocence.<sup>72</sup> Parties are then given the opportunity to remove jurors using challenges, either with or without cause.<sup>73</sup>

Although the Sixth Amendment requires an impartial jury, not every member of the community was immediately allowed to serve on juries.<sup>74</sup> Early in America's history, most states only permitted jury service by white men who owned property and paid taxes.<sup>75</sup> By the late nineteenth century, jury qualifications were loosened in some states, but the issue was not fully addressed until after the enactment of the Fourteenth Amendment in 1868.<sup>76</sup>

## 1. The Fourteenth Amendment

The Fourteenth Amendment guarantees all citizens equal protection under the laws and has been used to make many of the rights guaranteed in the Bill of Rights applicable to the states.<sup>77</sup> The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ... nor deny to any person within its jurisdiction the equal protection of the laws."<sup>78</sup> The Amendment guaranteed citizenship to

*supra* note 65, at 62; see Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 544 (1986); Meyer, *supra* note 70, at 259–60. An impartial juror does not have to be completely ignorant of the circumstances surrounding the case so long as they feel they can put their opinions aside and make a decision based on the evidence presented at trial. *Irvin*, 366 U.S. at 722–23.

<sup>72</sup> GERTNER & MIZNER, *supra* note 65, at 58–59; HANS & VIDMAR, *supra* note 54, at 67; 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, 11–12 (2001); Meyer, *supra* note 70, at 263.

<sup>73</sup> Baldus et al., *supra* note 72, at 11–12; Meyer, *supra* note 70, at 264–65; see also *infra* notes 140–187 and accompanying text.

<sup>74</sup> See JONAKAIT, *supra* note 60, at 114; ABA Jury History, *supra* note 55, at 4.

<sup>75</sup> GERTNER & MIZNER, *supra* note 65, at 36 n.8; JONAKAIT, *supra* note 60, at 114; ABA Jury History, *supra* note 55, at 4. The first African Americans to serve on a jury in the United States were Francis U. Clough and William H. Jenkins who served in 1860, in Worcester, Massachusetts. EJI REPORT, *supra* note 40, at 9; *Long Road to Justice: The African American Experience in the Massachusetts Courts*, MASS. HIST. SOC'Y, <http://www.masshist.org/longroad/03participation/jury.htm#> (last visited May 16, 2013).

<sup>76</sup> See JONAKAIT, *supra* note 60, at 115.

<sup>77</sup> U.S. CONST. amend. XIV, § 1; *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968) (incorporating the Sixth Amendment's right to a jury trial to the states); Rachel Hartje, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 CAL. W. L. REV. 479, 487 (2005).

<sup>78</sup> U.S. CONST. amend. XIV, § 1.

recently emancipated African Americans and gave Congress the power to enforce these provisions against states that refused to provide all races equal protection of the laws.<sup>79</sup> The Amendment has been interpreted by the Supreme Court to bestow various rights to both litigants and jurors, ensuring citizens of all races the right to serve on juries.<sup>80</sup>

## 2. *Strauder v. West Virginia*: The Right to a Jury of One's Peers

In 1897, the Supreme Court issued its first ruling on racial discrimination in jury service.<sup>81</sup> In *Strauder v. West Virginia*, the Court held that West Virginia's law banning African Americans from serving as jurors was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>82</sup> *Strauder*, an African American male, was convicted of murder by an all-white jury.<sup>83</sup> Reversing *Strauder's* conviction, the Supreme Court held that West Virginia could not prohibit African Americans from participating in jury service because the Fourteenth Amendment declared that the laws in the United States must be applied equally without regard to race.<sup>84</sup>

The *Strauder* Court articulated the right to a jury of one's peers, noting that the "very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine . . . ."<sup>85</sup> A defendant's right to a jury by his "peers" does not mean he is tried by friends, but rather by people with whom he shares important characteristics.<sup>86</sup> Commonalities such as race, gender, occupation, and socio-economic status ensure that jurors can empa-

<sup>79</sup> *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1879), *abrogated on other grounds by*, *Taylor v. Louisiana*, 419 U.S. 522 (1975).

<sup>80</sup> U.S. CONST. amend. XIV, § 1; Hartje, *supra* note 77, at 488.

<sup>81</sup> *Strauder*, 100 U.S. at 304, 310; JONAKAIT, *supra* note 60, at 115; SEAN G. OVERLAND, *THE JUROR FACTOR: RACE AND GENDER IN AMERICA'S CIVIL COURTS* 85–86 (Melvin I. Urofsky ed., 2009).

<sup>82</sup> *Strauder*, 100 U.S. at 304, 310; JONAKAIT, *supra* note 60, at 115; OVERLAND, *supra* note 81, at 85–86. The statute provided "[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except [state officials]." *Strauder*, 100 U.S. at 305.

<sup>83</sup> *Id.* at 304–05.

<sup>84</sup> *Id.* at 308, 310; Debra L. Dippel, *Holland v. Illinois: Sixth Amendment Fair Cross-Section Requirement Does not Preclude Racially-Based Peremptory Challenges*, 24 AKRON L. REV. 177, 179 (1990). The Court in *Strauder* pronounced that African Americans have "the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Strauder*, 100 U.S. at 307–08.

<sup>85</sup> *Strauder*, 100 U.S. at 308.

<sup>86</sup> Massaro, *supra* note 71, at 552; Meyer, *supra* note 70, at 261.

thize with the defendant and take into account common experiences that may be helpful in determining witness credibility, deciding guilt or innocence, and in making sentencing decisions.<sup>87</sup> Clarifying its decision, the Court stated that a denial of equal protection would only be found where members of a defendant's race were *purposefully excluded* from the panel of prospective jurors, often called the "jury venire."<sup>88</sup> The *Strauder* Court specifically pronounced that it was not guaranteeing defendants the right to a petit jury comprised in whole or in part of members of his or her race.<sup>89</sup>

While holding that a state could not legally exclude a juror based on race, the Court recognized the state's power to set "the qualifications of its jurors, and in so doing make discriminations."<sup>90</sup> The Court acknowledged that requirements limiting jurors to men, freeholders, citizens, persons within a specific age range, or those who met certain educational qualifications would not violate the Equal Protection Clause.<sup>91</sup>

Despite the fact that the Supreme Court's decision in *Strauder* professed to eliminate discriminatory intent in jury selection procedures, it was easily circumvented through the use of facially neutral eligibility requirements.<sup>92</sup> Southern states quickly realized that because voting requirements were an issue of state law, they could keep African Americans from sitting on juries by keeping them off voting lists.<sup>93</sup> For example, education and property ownership were common, facially neutral voting requirements that were used to exclude African Americans from juries.<sup>94</sup>

The Court has since elaborated and expanded the principles articulated in *Strauder*.<sup>95</sup> Over the next seventy years, the Supreme Court declared state laws unconstitutional when the effective result of a facially neutral eligibility requirement was a racially discriminatory jury selection process.<sup>96</sup> Though the Court granted all races the equal right to

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<sup>87</sup> Massaro, *supra* note 71, at 552; Meyer, *supra* note 70, at 261–62.

<sup>88</sup> *Strauder*, 100 U.S. at 305; Meyer, *supra* note 70, at 263; Jennifer Lee Urbanski, Georgia v. McCollum: *Protecting Jurors from Race-Based Peremptory Challenges but Forcing Criminal Defendants to Risk Biased Juries*, 24 PAC. L. J. 1887, 1930 (1993).

<sup>89</sup> *Strauder*, 100 U.S. at 305.

<sup>90</sup> *Id.* at 305, 310.

<sup>91</sup> *Id.* at 310.

<sup>92</sup> See *id.*; JONAKAIT, *supra* note 60, at 115; *Rights of the People*, *supra* note 62.

<sup>93</sup> See JONAKAIT, *supra* note 60, at 115; *Rights of the People*, *supra* note 62.

<sup>94</sup> Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 382 (1992).

<sup>95</sup> Hartje, *supra* note 77, at 489.

<sup>96</sup> *Sims v. Georgia*, 389 U.S. 404, 407–08 (1967) (striking down the use of juror lists based on segregated tax returns); *Whitus v. Georgia*, 385 U.S. 545, 548–49, 551–52 (1967)

serve on juries, it nevertheless refused to expand this right to mean that a defendant had a right to a jury that matched his or her own race.<sup>97</sup>

### 3. The Jury Selection and Service Act: Fair Cross Section Requirement in Federal Courts

In an effort to afford all citizens an equal opportunity to serve on juries, Congress enacted the Jury Selection and Service Act (JSSA) in 1968.<sup>98</sup> The Act declares that “all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”<sup>99</sup> The Act prescribes specific procedures for randomly drawing the names of qualified citizens who are not excused or exempt from service.<sup>100</sup> The JSSA mandates that voter registration lists be used as the primary source for compiling federal juror lists.<sup>101</sup>

The JSSA’s random selection procedures were enacted to put an end to the “blue ribbon juries,” which at that time were utilized by almost sixty percent of the federal courts.<sup>102</sup> Under the “blue ribbon” system, the jury commissioner chose jurors who had an above average level of education or experience in the matter and thus were deemed “specially able” to decide the case.<sup>103</sup> At that time, many thought that jurors should possess “above average levels of intelligence, morality, and integrity” in order to serve justice.<sup>104</sup>

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(striking down the use of color-coded tax returns that designated taxpayer’s race to compile juror lists); *Avery v. Georgia*, 345 U.S. 559, 560, 562 (1953) (striking down the use of colored tickets to “randomly” select names for jury duty).

<sup>97</sup> See *Thomas v. Texas*, 212 U.S. 278, 282 (1909); *Virginia v. Rives*, 100 U.S. 313, 322–23 (1879); OVERLAND, *supra* note 81, at 87–88.

<sup>98</sup> 28 U.S.C. § 1861 (2006); HANS & VIDMAR, *supra* note 54, at 53.

<sup>99</sup> § 1861.

<sup>100</sup> § 1866. The JSSA states that randomly selected citizens should be deemed qualified to serve on a jury if they are a U.S. citizen over the age of eighteen who has lived in the judicial district for at least one year and can speak and understand English. § 1865. A person who meets the above qualifications, however, will not be allowed to serve if they have a mental or physical illness that would interfere with their ability to serve, or if they have been charged with or convicted of an offense punishable by imprisonment of one year or more. *Id.*

<sup>101</sup> § 1863.

<sup>102</sup> See ABRAMSON, *supra* note 58, at 99.

<sup>103</sup> *Id.*; JONAKAIT, *supra* note 60, at 123.

<sup>104</sup> ABRAMSON, *supra* note 58, at 99.

#### 4. Extension of the Cross-Sectional Obligation to State Courts in *Taylor v. Louisiana*

In the 1975 landmark decision *Taylor v. Louisiana*, the Supreme Court extended the cross-sectional obligation to state courts.<sup>105</sup> Taylor, a male, appealed his conviction alleging that he was deprived of his right to be tried by a jury that was representative of the community because women were systematically excluded from the jury pool.<sup>106</sup> The Supreme Court found that though Taylor was male, he had standing to challenge the constitutionality of Louisiana's jury-selection procedure, which required women to file a declaration for inclusion in jury service.<sup>107</sup> Although women who wished to serve were included, the procedure had the effect of greatly reducing the number of women in the venire, thereby excluding from jury service an identifiable class of citizens in the community.<sup>108</sup> Declaring representative juries as "fundamental to the jury trial guaranteed by the Sixth Amendment," the Court deemed the procedure unconstitutional.<sup>109</sup>

Acknowledging that states would need leeway in application of the cross-sectional mandate, the Court specified that states could fashion their own process for selection of the jury venire.<sup>110</sup> The Court clarified that though juries must be chosen from a group that is "fairly representative" of the community, the jury empanelled in a case does not have to accurately depict the demographics of the community.<sup>111</sup> Therefore, the Court held that it was constitutional for states to use reasonable exemptions or challenges in the selection process.<sup>112</sup>

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<sup>105</sup> 419 U.S. 522, 530, 538 (1975); ABRAMSON, *supra* note 58, at 100. The State of Louisiana required women to file a declaration stating their desire to be included in the jury venire. *Taylor*, 419 U.S. at 523–24. As a result, only ten percent of the eligible jury pool was comprised of women in a district where fifty-three percent of the residents were women otherwise qualified for service. *Id.* at 524.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 523, 526. In 1898, Utah was the first state to give women the right to sit on juries. HANS & VIDMAR, *supra* note 54, at 51. The right became more prominent after the enactment of the Nineteenth Amendment in 1920 which gave women the right to vote because many states used voting rights as a requirement for jury service. *See id.* at 51–52. It was not until 1972 that women were allowed to sit on juries in all state and federal jurisdictions. *Id.* at 52. Alabama, Mississippi, and South Carolina were the last states to grant women the right to sit on juries. *Id.*

<sup>108</sup> *Taylor*, 419 U.S. at 525–26.

<sup>109</sup> *Id.* at 525, 530.

<sup>110</sup> *Id.* at 537–38.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 538. The Court elaborated that States can "grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular



## II. DISCRIMINATION IN COMPOSITION OF THE JURY POOL

Both the impartiality requirement in the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment provide protection against discriminatory jury selection procedures, albeit in slightly different ways.<sup>113</sup> The Fourteenth Amendment forbids intentional discrimination against protected groups, while the Sixth Amendment's focus is not just on eradicating discrimination, but also on the broader goal of ensuring a body that is representative of the community.<sup>114</sup> In addition, to claim an Equal Protection violation, the defendant is usually required to be part of the same group as the excluded juror.<sup>115</sup> Conversely, a Sixth Amendment representativeness challenge can be claimed by any defendant, regardless of whether they are a member of the excluded juror's group.<sup>116</sup>

### A. *The Sixth Amendment's Representativeness Requirement*

Despite the Supreme Court's mandate that jurors be selected from a pool that is fairly representative of the community, many groups are still underrepresented on jury venires.<sup>117</sup> The Supreme Court formulated a three-prong test for determining whether the fair-cross section requirement has been violated in choosing a jury venire.<sup>118</sup> A petitioner must prove: (1) that the allegedly excluded group is a distinctive group in the community; (2) that this group's representation in jury venires is not fair and reasonable in relation to its composition in the community; and (3) that this group's underrepresentation is due to the systematic exclusion of it in the jury selection process.<sup>119</sup> According to the Supreme Court, a group with identifiable commonalities does not constitute a distinctive group; rather, the group must share "some immuta-

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occupations the uninterrupted performance of which is critical to the community's welfare." *Id.* at 534.

<sup>113</sup> GERTNER & MIZNER, *supra* note 65, at 34–37. The overlapping protections might be due to the fact that the Sixth Amendment was not incorporated to the states until 1968, so early claims of state's discriminatory procedures had to be brought under the Fourteenth Amendment's Equal Protection Clause. GERTNER & MIZNER, *supra* note 65, at 37 n.9.

<sup>114</sup> GERTNER & MIZNER, *supra* note 65, at 35–37; HANS & VIDMAR, *supra* note 54, at 49.

<sup>115</sup> GERTNER & MIZNER, *supra* note 65, at 34–35.

<sup>116</sup> *Id.* at 35.

<sup>117</sup> *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); HANS & VIDMAR, *supra* note 54, at 49, 54–55; JONAKAIT, *supra* note 60, at 125.

<sup>118</sup> *Duren v. Missouri*, 439 U.S. 357, 359–60, 364 (1979) (reinforcing its decision in *Taylor v. Louisiana* that the systematic exclusion of women from jury venires denies a defendant his right to a jury selected from a fair cross-section of the community).

<sup>119</sup> *Id.* at 364.

ble characteristic such as race, gender or ethnic background . . . .”<sup>120</sup> For example, African Americans, Mexican Americans, and women have all been recognized by the Supreme Court as distinctive groups.<sup>121</sup> Conversely, attempts to classify groups not sharing an immutable characteristic, such as groups based on age, occupation or education level, as distinctive groups have failed.<sup>122</sup>

The cross-sectional requirement serves three important purposes: First, when the racial composition of the jury generally reflects that of the community, the jury’s verdict is likely to be viewed as a legitimate expression of the community.<sup>123</sup> Second, broad community participation on juries educates the public on the mechanisms of the criminal justice system, and allows them to exercise some control over the process, thereby increasing public confidence and respect for the government.<sup>124</sup> Third, a jury that is drawn from a fair cross-section of the community protects defendants’ rights because when jurors that span racial, gender, and class lines are brought together, the result is a “diffused impartiality.”<sup>125</sup> The emphasis on diffused impartiality is a recognition that “in a heterogeneous society, no person[] is truly impartial, unbiased, or unprejudiced.”<sup>126</sup> Therefore, the focus is shifted from the

<sup>120</sup> *Lockhart v. McCree*, 476 U.S. 162, 175 (1986); GERTNER & MIZNER, *supra* note 65, at 38; Meiring de Villiers, *The Impartiality Doctrine: Constitutional Meaning and Judicial Impact*, 34 AM. J. TRIAL ADVOC. 71, 76–77 (2010).

<sup>121</sup> *Duren*, 439 U.S. at 364 (recognizing women as a distinctive group); *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (recognizing Mexican Americans as a distinctive group); *Peters v. Kiff*, 407 U.S. 493, 505 (1972) (recognizing African Americans as a distinctive group); *United States v. Cannady*, 54 F.3d 544, 547 (9th Cir. 1995) (recognizing Asian Americans as a “distinctive group”); de Villiers, *supra* note 120, at 77.

<sup>122</sup> *United States v. Fletcher*, 965 F.2d 781, 782 (9th Cir. 1992) (noting that “college students” are not a distinctive group); *Anaya v. Hansen*, 781 F.2d 1, 6–8 (1st Cir. 1986) (noting that neither “blue collar workers” nor “less educated individuals” are a distinctive group); *Barber v. Ponte*, 772 F.2d 982, 999–1000 (1st Cir. 1985) (holding that young adults between the ages of eighteen and thirty-four are not a distinctive group because there is no “common characteristic”); *see also* GERTNER & MIZNER, *supra* note 65, at 37, 38 & n.8 (discussing groups that have been recognized by the Supreme Court as “distinctive” for Sixth Amendment purposes).

<sup>123</sup> HIROSHI FUKURAI & RICHARD KROOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION* 133 (Austin T. Turk ed., 2003) (noting that jury diversity should be valued because if all of the jurors, regardless of how varied the viewpoints are to begin with, can come to an agreement, it increases the verdict’s legitimacy).

<sup>124</sup> *See* FUKURAI & KROOTH, *supra* note 123, at 131, 133; *see also* *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127, 140 (1994) (noting that “state-sanctioned discrimination in the courtroom” diminishes the public’s confidence in the justice system).

<sup>125</sup> ABRAMSON, *supra* note 58, at 101; FUKURAI & KROOTH, *supra* note 123, at 133; Meyer, *supra* note 70, at 260.

<sup>126</sup> FUKURAI & KROOTH, *supra* note 123, at 129; Meyer, *supra* note 70, at 260.

impartiality of any one juror to that of the jury as a whole.<sup>127</sup> A diverse jury is more likely to be impartial because the biases of any one member are balanced against those of the rest of the group.<sup>128</sup>

### B. *State Qualifications, Exemptions, and Excusals from Jury Service*

States are free to prescribe the qualifications for their jurors.<sup>129</sup> Most states require that prospective jurors be United States citizens, be over 18 years of age, have no previous felony convictions, and can understand English.<sup>130</sup> Some states, such as Texas, mandate that jurors be “of sound mind and good moral character,” a requirement that has historically been used to impermissibly exclude otherwise qualified citizens.<sup>131</sup>

In addition to minimum qualifications for jury service that limit the jury pool, many state legislatures provide outright exemptions or excusals to certain groups of citizens.<sup>132</sup> Exemptions and excusals serve the same broad purpose, but exemptions are typically automatic dismissals from jury service, whereas excusals are granted on a case-by-case basis.<sup>133</sup> The granting of either an exemption or an excusal recognizes that jury service would pose a hardship on the prospective juror.<sup>134</sup>

The spectrum of state-created exemptions is vast, but the trend is towards eliminating outright exemptions—especially those based on occupation, which have long served to undermine diversity on juries—and instead focusing on excusals that must be approved by the court.<sup>135</sup> At one extreme of the spectrum are states such as Massachusetts that do not grant any automatic exemptions; at the other extreme are states such as Hawaii, which grants numerous automatic occupational exemp-

<sup>127</sup> FUKURAI & KROOTH, *supra* note 123, at 128–29; *see* Meyer, *supra* note 70, at 260.

<sup>128</sup> ABRAMSON, *supra* note 58, at 101; FUKURAI & KROOTH, *supra* note 123, at 128; Meyer, *supra* note 70, at 260.

<sup>129</sup> *Taylor*, 419 U.S. at 538.

<sup>130</sup> HANS & VIDMAR, *supra* note 54, at 54; EJI REPORT, *supra* note 40, at 37; GREGORY E. MIZE ET AL., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 21 (2007), [http://www.ncsconline.org/D\\_Research/cjs/pdf/SOSCompendiumFinal.pdf](http://www.ncsconline.org/D_Research/cjs/pdf/SOSCompendiumFinal.pdf) [hereinafter STATE-OF-THE-STATES SURVEY]. Qualifications for jury service are easily met by the majority of citizens. OVERLAND, *supra* note 81, at 2.

<sup>131</sup> TEX. GOV'T CODE ANN. § 62.102(4) (West 2005); EJI REPORT, *supra* note 40, at 10.

<sup>132</sup> HANS & VIDMAR, *supra* note 54, at 54.

<sup>133</sup> Anne Skove, *Jury Management: Exemptions from Jury Duty*, NAT'L CENTER FOR STATE CTS., [http://www.ncsconline.org/WC/Publications/Memos/JurManExemptions\\_Memo.htm](http://www.ncsconline.org/WC/Publications/Memos/JurManExemptions_Memo.htm) (last visited May 16, 2013).

<sup>134</sup> *See* EJI REPORT, *supra* note 40, at 37.

<sup>135</sup> *See id.* at 14; STATE-OF-THE-STATES SURVEY, *supra* note 130, at 15; Pamela J. Wood, *Massachusetts' Leadership Role in the American Jury System*, 55 Bos. B.J. 13, 15 (2011).

tions.<sup>136</sup> Most states fall somewhere in the middle with few or no outright exemptions, but give local courts to excuse jurors on an individual basis.<sup>137</sup> Excusals are only granted where jury service would pose undue hardship or extreme inconvenience.<sup>138</sup> For example, excusals are commonly granted for jurors who are in financial straits and cannot afford to miss a day of work, mothers who are nursing young children, and jurors who live a great distance from the courthouse.<sup>139</sup>

### III. DISCRIMINATION IN PETIT JURY SELECTION: THE PEREMPTORY CHALLENGE

Once the jury venire is established, potential jurors are questioned, either by the judge or counsel, during a voir dire examination.<sup>140</sup> If the judge feels that any of the potential jurors harbors biases against either party or has knowledge of the facts of the case that might cloud the juror's judgment, the juror may be dismissed for cause.<sup>141</sup> Challenges for cause are unlimited in number and are used only when the juror does not meet the qualifications for service or where there is an articulable reason to doubt the juror's impartiality.<sup>142</sup> Commonly recognized challenges for cause are: disabilities that would interfere with the potential juror's ability to serve; connections to the case or the parties; biases against a party on account of race, religion, or other status; and objections to issues presented by the case such as the death penalty or insanity defense.<sup>143</sup>

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<sup>136</sup> Compare HAW. REV. STAT. § 612-6 (2010) (exempting the following occupations from juror service: elected officials, judges, doctors, dentists, active members of the armed forces, policemen, firemen, and emergency medical service personnel), with MASS. GEN. LAWS ch. 234A, § 3 (2011) (stating "[n]o person shall be exempted or excluded from serving as a grand or trial juror because of race, color, religion, sex, national origin, economic status, or occupation"). Massachusetts does, however, have statutory qualifications for jury service). See MASS. GEN. LAWS ch. 234A, § 4.

<sup>137</sup> See STATE-OF-THE-STATES SURVEY, *supra* note 130, at 14–15.

<sup>138</sup> EJI REPORT, *supra* note 40, at 37.

<sup>139</sup> *Id.*

<sup>140</sup> HANS & VIDMAR, *supra* note 54, at 67.

<sup>141</sup> GERTNER & MIZNER, *supra* note 65, at 66–68; HANS & VIDMAR, *supra* note 54, at 67. In Canada, it is assumed that jurors will take the oath, set aside any preconceived notions or biases and decide a case exclusively on the evidence presented at trial. HANS & VIDMAR, *supra* note 54, at 63. In the United States, however, prospective jurors are questioned at length during voir dire in an attempt to expose general biases that may color the way they view the evidence presented at trial. *Id.* at 63–64.

<sup>142</sup> HANS & VIDMAR, *supra* note 54, at 67; Patricia Henley, *Improving the Jury System: Peremptory Challenges*, PUB. L. RES. INST., <http://www.uchastings.edu/public-law/plri/spr96tex/juryper.html> (last visited May 16, 2013).

<sup>143</sup> GERTNER & MIZNER, *supra* note 65, at 66–68.

Conversely, a peremptory challenge gives litigants the ability to remove potential jurors from the panel without providing an explanation.<sup>144</sup> Peremptory challenges date back to Roman times, and have always existed in the United States.<sup>145</sup> Although the Constitution does not explicitly provide for peremptory challenges, the Supreme Court has recognized their importance in achieving an impartial jury under the Sixth Amendment.<sup>146</sup>

### A. *Discriminatory Use of Peremptory Challenges*

Peremptory challenges are limited in number and give parties the flexibility to remove jurors who they believe are biased when there is not enough evidence to remove them for cause.<sup>147</sup> The number of peremptory challenges each side is entitled to exercise varies with the jurisdiction and type of case being tried, but they exist for all trials, both civil and criminal.<sup>148</sup> Peremptory challenges are said to preserve fairness and assure litigants that the verdict will be based solely on the evidence placed before them at trial.<sup>149</sup> In 1986, the Supreme Court addressed the use of discriminatory peremptory challenges in *Batson v. Kentucky*.<sup>150</sup>

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<sup>144</sup> GERTNER & MIZNER, *supra* note 65, at 118; HANS & VIDMAR, *supra* note 54, at 54; OVERLAND, *supra* note 81, at 83.

<sup>145</sup> Henley, *supra* note 142. Lex Servilia, a Roman statute enacted in 104 B.C., allowed the prosecution and defense to each remove fifty jurors from a pool of two hundred. *Batson v. Kentucky*, 476 U.S. 79, 119 (1986) (Burger, J., dissenting); Urbanski, *supra* note 88, at 1898.

<sup>146</sup> *Swain v. Alabama*, 380 U.S. 202, 212 (1965), *overruled in part by* *Batson v. Kentucky*, 476 U.S. 79 (1986) (finding that the use of peremptory challenges is necessary to secure juries “which in fact and in the opinion of the parties are fair and impartial”); *Hayes v. Missouri*, 120 U.S. 68, 71–72 (1887) (stating that more peremptory challenges may be needed in larger cities in order to ensure an impartial jury); GERTNER & MIZNER, *supra* note 65, at 122; Henley, *supra* note 142.

<sup>147</sup> Urbanski, *supra* note 88, at 1888; Henley, *supra* note 142.

<sup>148</sup> GERTNER & MIZNER, *supra* note 65, at 124. In federal cases, the number of peremptory challenges each party may exercise fluctuates depending on the type of case. *Id.* at 122–24. For cases where the punishment is imprisonment for less than a year, each side may exercise three peremptory challenges. *Id.* at 123. In cases where the punishment is imprisonment for more than a year, the government gets six challenges and the defendant receives ten. *Id.* at 122–23. In death penalty cases, each side may exercise up to twenty peremptory challenges. *Id.* at 122.

<sup>149</sup> *Swain*, 380 U.S. at 219; Henley, *supra* note 141.

<sup>150</sup> *Batson*, 476 U.S. at 84.

## 1. Proving an Equal Protection Violation: The *Batson* Challenge

In *Batson*, an African American man appealed his conviction in the State of Kentucky, claiming that the prosecutor's discriminatory use of peremptory challenges denied him equal protection of the laws.<sup>151</sup> The prosecutor used peremptory challenges to excuse the only four African American jurors, thus leaving an all white jury.<sup>152</sup> The Supreme Court, reaffirming the proposition that racially based peremptory challenges violate the Equal Protection Clause, established a framework for proving purposeful discrimination.<sup>153</sup> As with all Equal Protection claims, the defendant carries the burden of proving a *Batson* violation.<sup>154</sup> There are three components to a *Batson* challenge.<sup>155</sup>

First, the defendant must prove a prima facie case of discrimination in the prosecutor's use of peremptory challenges.<sup>156</sup> This includes proving that the defendant is a member of a cognizable racial group and that there is a pattern of excluding members of this racial group through the use of peremptory challenges.<sup>157</sup> Expressing a necessity for future courts to consider all relevant circumstances that may guide the inquiry, the Supreme Court stated that a prosecutor's questioning during voir dire may give rise to an inference of discrimination.<sup>158</sup>

After the defendant has proven a prima facie case of discrimination, the burden shifts to the prosecutor to offer a race-neutral explanation for the dismissals.<sup>159</sup> Providing guidance for future courts, the Supreme Court noted that this justification does not need to rise to the level of a challenge for cause, but a prosecutor cannot merely state that he believed the excused juror would be partial to the defendant because the juror and the defendant are of the same race.<sup>160</sup> In this second step, courts should not assess the persuasiveness or plausibility of the proffered explanation.<sup>161</sup> It is in the third step of the *Batson* analysis that the judge must determine whether to find purposeful discrimina-

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<sup>151</sup> *Id.* at 82–83.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 84, 96–98.

<sup>154</sup> *Id.* at 93.

<sup>155</sup> *Id.* at 96–98.

<sup>156</sup> *Batson*, 476 U.S. at 96.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 97.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam); JONAKAIT, *supra* note 60, at 144.

tion or accept the race neutral reason for the dismissal, thereby rejecting the *Batson* challenge.<sup>162</sup>

## 2. Extension of *Batson*

The *Batson* framework has been extended and clarified multiple times since the Supreme Court's decision more than twenty-five years ago.<sup>163</sup> In 1991, just six years after *Batson* was decided, the Supreme Court decided two cases in which it extended the prohibition on racially based peremptory challenges.<sup>164</sup> First, in *Powers v. Ohio*, the Court considered whether Powers, a white male, had standing to object to the prosecutor's use of peremptory challenges to dismiss seven African American potential jurors.<sup>165</sup> Affirming the notion that every defendant has a Constitutional right to be tried by a jury whose members are selected using nondiscriminatory criteria, the Court held that any defendant, regardless of his or her race, may make a *Batson* objection.<sup>166</sup> In the second case that year, *Edmonson v. Leesville Concrete Company*, the Supreme Court extended the *Batson* framework to peremptory challenges exercised in civil trials.<sup>167</sup>

Just one year later, the Supreme Court again took up the issue of race-based peremptory challenges.<sup>168</sup> In *Georgia v. McCollum*, Caucasian defendants were charged with assaulting an African American couple.<sup>169</sup> After counsel for the defense admitted that he planned to use peremptory challenges to remove all African American prospective jurors from the panel, the prosecution objected, citing *Batson*.<sup>170</sup> The Supreme Court found that the Constitution prohibited such racial discrimination, thereby extending the *Batson* framework to strikes made by criminal defendants.<sup>171</sup>

In 1994, in *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court's most recent extension of the *Batson* framework, the Court considered whether gender-based peremptory challenges could be contested under

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<sup>162</sup> *Batson*, 476 U.S. at 98.

<sup>163</sup> OVERLAND, *supra* note 81, at 92–94.

<sup>164</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991); *Powers v. Ohio*, 499 U.S. 400, 402–03 (1991).

<sup>165</sup> *Powers*, 499 U.S. at 402–04.

<sup>166</sup> *Id.* at 404, 415–16.

<sup>167</sup> *Edmonson*, 500 U.S. at 631.

<sup>168</sup> *Georgia v. McCollum*, 505 U.S. 42, 44 (1992).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 44–45.

<sup>171</sup> *Id.* at 45–46, 59.

*Batson*.<sup>172</sup> Petitioner, the alleged father in a paternity suit, challenged the State's use of nine of its ten peremptory challenges to dismiss men, resulting in an all female jury.<sup>173</sup> The Court found gender-based dismissals violate the Equal Protection Clause and only "serv[ed] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."<sup>174</sup> Stating that gender is a category which is subject to heightened scrutiny, the Court held that peremptory challenges can be used only to strike jurors based on classifications that would survive rational basis review.<sup>175</sup> For example, strikes can be used to dismiss prospective jurors based on occupation, but they can never be used to strike prospective jurors based on gender or race.<sup>176</sup>

### 3. *Batson* in Action

In an attempt to preserve the historical use of peremptory challenges as an unexplained dismissal of potential jurors, courts have continually extended the acceptable range of race-neutral explanations.<sup>177</sup> Commonly accepted race-neutral explanations are the juror's age, marital status, occupation, socio-economic status, demeanor, education, religion, and prior experience with the criminal justice system.<sup>178</sup> The Supreme Court has upheld the right to exercise a peremptory challenge on the basis of a "silly or superstitious" theory, accepting as race-neutral the dismissal of an African American juror due to his "long, unkempt hair, a mustache and a beard."<sup>179</sup> Furthermore, excluding a

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<sup>172</sup> *J.E.B. v. Alabama, ex rel. T.B.*, 511 U.S. 127, 128–129 (1994).

<sup>173</sup> *Id.* at 129. Of the original thirty-six member juror panel, twelve were males and twenty-four were female. *Id.* Three jurors, two of which were male, were dismissed by the court for cause, leaving only ten prospective male jurors. *Id.* The State then dismissed nine of the male jurors using peremptory challenges and plaintiff dismissed one. *Id.*

<sup>174</sup> *Id.* at 130–31.

<sup>175</sup> *Id.* at 143, 146; GERTNER & MIZNER, *supra* note 65, at 129–30.

<sup>176</sup> *See J.E.B.*, 511 U.S. at 143, 146; GERTNER & MIZNER, *supra* note 65, at 129–30.

<sup>177</sup> *See OVERLAND, supra* note 81, at 96–97.

<sup>178</sup> OVERLAND, *supra* note 81, at 97.

<sup>179</sup> *Purkett*, 514 U.S. at 768–69; *id.* at 775 (Stevens, J., dissenting); OVERLAND, *supra* note 81, at 97–100. The prosecutor's accepted "race-neutral" reason in *Purkett v. Elem* now serves as an infamous example highlighting the deficiencies in the *Batson* framework. *Purkett*, 514 U.S. at 768–69; OVERLAND, *supra* note 81, at 97–100. The full explanation proffered was:

I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a moustache and a goatee type beard. And juror number twenty-four also has a moustache and goatee type beard. Those are the only two people on the jury . . . with the facial



potential juror because he or she is bilingual has been found acceptable by the Supreme Court.<sup>180</sup> If non-English speaking witnesses are expected to testify and the lawyer believes a potential juror may substitute their own translation for that of the interpreter, the challenge is not considered one that is prohibited as racially based.<sup>181</sup> This decision essentially allows lawyers to frame their prohibited race based challenges as permissible language based challenges.<sup>182</sup>

Additionally, while the Supreme Court in *Batson* cited two possible remedies for a *Batson* violation, it failed to endorse either of them as preferable.<sup>183</sup> One of these remedies requires replacing the entire jury venire with new prospective jurors and repeating the exercise of dismissal using peremptory challenges.<sup>184</sup> Critics argue that the use of this remedy might give lawyers an incentive to discriminate based on race in the hopes that the jury venire will be replaced with prospective jurors who are more favorable to their case.<sup>185</sup> The second suggested remedy, reinstatement of the struck juror, is also problematic because the reinstated juror might have difficulty being impartial after his or her discriminatory dismissal.<sup>186</sup> Because the Supreme Court did not articulate the appropriate remedy for a *Batson* violation, lower courts have fashioned their own remedies, which in turn has produced inconsistencies among the States.<sup>187</sup>

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hair . . . And I don't like the way they looked . . . And the moustaches and the beards look suspicious to me.

*Purkett*, 514 U.S. at 766.

<sup>180</sup> *Hernandez v. New York*, 500 U.S. 352, 356, 360–61 (1991) (accepting prosecutor's race-neutral explanation that dismissal of two Hispanic jurors was due to a concern for their ability to defer to the translator's official translation).

<sup>181</sup> *Id.* at 360–61.

<sup>182</sup> *Id.*; ABRAMSON, *supra* note 58, at xxvii.

<sup>183</sup> *Batson*, 476 U.S. at 99–100 n.24; OVERLAND, *supra* note 81, at 95–96.

<sup>184</sup> *Batson*, 476 U.S. at 99–100 n.24; OVERLAND, *supra* note 81, at 95.

<sup>185</sup> See OVERLAND, *supra* note 81, at 95.

<sup>186</sup> See *Batson*, 476 U.S. at 99 & n.24, 100; OVERLAND, *supra* note 81, at 95–96.

<sup>187</sup> *Batson*, 476 U.S. at 99; GERTNER & MIZNER, *supra* note 65, at 148–52; OVERLAND, *supra* note 81, at 96; Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 471–72 (1996). A study performed by Melilli found that lower courts utilized at least eight different standards for determining whether a prima facie case of discrimination was proven under *Batson's* first prong. Melilli, *supra* at 471–72.

B. *Defendants' Right to an Impartial Jury vs. Jurors' Rights to Be Free from Discrimination*

In the peremptory challenge context, there is a considerable amount of tension between the Sixth Amendment's guarantee to an impartial jury comprised of a cross-section of the defendant's community, and the Fourteenth Amendment's prohibition of discrimination.<sup>188</sup> The Sixth Amendment's impartiality doctrine seeks to compile a diverse jury that, in the aggregate, is free of biases or prejudices that may affect its ability to impartially consider the evidence.<sup>189</sup> The doctrine is premised on the assumption that each potential juror has views and interests based on his or her race, gender, religion, and ethnic background that subconsciously affect his or her perspective in a given case.<sup>190</sup> Therefore, the impartiality doctrine holds that it is necessary that the parties have the ability to strike jurors that they believe might harbor biases or are otherwise unable to consider evidence impartially.<sup>191</sup>

In contrast, the Fourteenth Amendment's Equal Protection Clause necessitates colorblindness in the selection of jurors.<sup>192</sup> The Supreme Court has rejected the argument that commonalities between jurors and defendants such as race and gender are indicative of bias, and has found instead that demographics do not necessarily shape a juror's views.<sup>193</sup> Emphasizing the necessity of colorblindness in the courtroom during jury selection, the Court stated:

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. Defense counsel is limited to legitimate, lawful conduct. It is an affront to justice to argue

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<sup>188</sup> See *infra* notes 189–199 and accompanying text.

<sup>189</sup> GERTNER & MIZNER, *supra* note 65, at 58–59; HANS & VIDMAR, *supra* note 54, at 67; Baldus et al., *supra* note 72, at 11–12; Meyer, *supra* note 70, at 263.

<sup>190</sup> ABRAMSON, *supra* note 58, at 100–01.

<sup>191</sup> FUKURAI & KROOTH, *supra* note 123, at 126–27.

<sup>192</sup> *McCullum*, 505 U.S. at 57; *Powers*, 499 U.S. at 410.

<sup>193</sup> See *J.E.B.*, 511 U.S. at 139 n.11 (“[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.”); *McCullum*, 505 U.S. at 59; *Powers*, 499 U.S. at 410; *Batson*, 476 U.S. at 137–38; OVERLAND, *supra* note 81, at 53, 78 (noting that the empirical results show that juror demographics such as “race in particular, but also gender, education and income” do influence a juror’s perception of the case).

that a fair trial includes the right to discriminate against a group of citizens based upon their race.<sup>194</sup>

Thus, the Court has firmly stated that race cannot be used as a proxy for determining juror bias; however, despite this mandate, peremptory challenges continue to be used seemingly on race alone, and the current construction of the *Batson* challenge does little to curb this use.<sup>195</sup> The peremptory challenge procedure as a whole is at odds with the notion that a jury should be comprised of a fair cross-section of the community.<sup>196</sup> Attorneys do not seek a fair and impartial jury; in fact, they seek the exact opposite—a jury that is favorable to their position.<sup>197</sup> Peremptory challenges are premised on the theory that they are necessary to ensure that those with biases will not be impaneled; but in reality, they allow attorneys to dismiss jurors based on arbitrary characteristics such as race, gender, age, occupation, education, and socio-economic status.<sup>198</sup>

#### IV. IMPROVING REPRESENTATIVENESS ON JURIES

Although the jury system is deeply embedded in America's legal system, its fairness is frequently questioned.<sup>199</sup> The jury system is said to create unnecessary delays in litigation, impose unfair social costs on jurors, and be overly expensive for courts and litigants alike.<sup>200</sup> It is also criticized because it leaves a defendant's fate in the hands of a randomly chosen group of citizens with no special legal training.<sup>201</sup> Critics of the jury system discredit jurors' capability to understand the complexities of the justice system, stating that juries are "at best, twelve people of average ignorance."<sup>202</sup> This group of average citizens then deliberates in secret and presents its verdict with no explanation what-

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<sup>194</sup> *McCullum*, 505 U.S. at 57 (internal quotations and citations omitted).

<sup>195</sup> See, e.g., *Powers*, 499 U.S. at 410 ("Race cannot be a proxy for determining juror bias or competence."); FUKURAI & KROOTH, *supra* note 123, at 170.

<sup>196</sup> ABRAMSON, *supra* note 58, at xxiv; see OLDHAM, *supra* note 59, at 205–06.

<sup>197</sup> GERTNER & MIZNER, *supra* note 65, at 119 n.5; HANS & VIDMAR, *supra* note 54, at 74.

<sup>198</sup> ABRAMSON, *supra* note 58, at xxv; see HANS & VIDMAR, *supra* note 54, at 72–74.

<sup>199</sup> HANS & VIDMAR, *supra* note 54, at 31; OVERLAND, *supra* note 81, at 1.

<sup>200</sup> Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 62–63 (1994).

<sup>201</sup> HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 3–4 (1966); OVERLAND, *supra* note 81, at 1.

<sup>202</sup> HANS & VIDMAR, *supra* note 54, at 19. Kalven & Zeisel argue that although jurors are not always highly educated, "twelve heads are inevitably better than one." KALVEN & ZEISEL, *supra* note 201, at 8. Where the individual jurors may be lacking in experience, they more than make up for it with their common sense and personal experiences. *Id.*

soever.<sup>203</sup> Furthermore, jury verdicts are difficult to overturn because the jury's role is to determine the facts.<sup>204</sup>

Abandonment of the current jury system, however, is unlikely because it is deeply ingrained in America's history, character, and Constitutional underpinnings.<sup>205</sup> Juries make decisions based primarily upon their own sense of values and equities and therefore the "jury verdict is more than a statement of fact; it is also an expression of the popular will."<sup>206</sup> Diverse juries inject a sense of fairness into the judicial process and therefore bolster confidence in the system as a whole.<sup>207</sup>

Conversely, racially disproportionate juries reinforce the perception that our justice system is unfair to minorities.<sup>208</sup> Great strides have been taken to make juries more representative of the community, but there is still work to be done.<sup>209</sup> In order to adequately protect both the right of defendants to be tried by a jury representative of a cross-section of the community and the right of citizens to participate in the legal system, representativeness should be improved at each of the three levels at which juror exclusion takes place: (1) the initial drawing of the jury pool, (2) exemptions and excusals from jury service, and (3) and the use of peremptory challenges when empanelling the petit jury.<sup>210</sup> States should follow Massachusetts' lead in increasing diversity and rep-

<sup>203</sup> JONAKAIT, *supra* note 60, at 250; KALVEN & ZEISEL, *supra* note 201, at 3; OVERLAND, *supra* note 81, at 1. Some claim that since juries do not usually provide the reasoning behind their verdict, they have more flexibility than judges to "bend the law" in order to reach a verdict that is just. HANS & VIDMAR, *supra* note 54, at 155; JONAKAIT, *supra* note 60, at 250.

<sup>204</sup> JONAKAIT, *supra* note 60, at 41, 265; OLDHAM, *supra* note 59, at 59. On appeal, a judge can overturn a jury verdict if it is found that the verdict was unsupported by the evidence. OLDHAM, *supra* note 59, at 59.

<sup>205</sup> See Starr, *supra* note 58, at 12.

<sup>206</sup> See KALVEN & ZEISEL, *supra* note 201, at 495; OVERLAND, *supra* note 81, at 5. Judges usually agree with the verdict rendered by the jury. See KALVEN & ZEISEL, *supra* note 201, at 494–95. When the jury's decision differs from what the judge would have found based on the same evidence, it is often not because the jury erred or was careless, but because the jury recognized values or gave weight to values outside the letter of the law. *Id.* at 495.

<sup>207</sup> HANS & VIDMAR, *supra* note 54, at 19, 51; 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, 1182 (1994).

<sup>208</sup> *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); see Michael Higgins, *Jury Makeup: Few Are Chosen*, AM. B. ASS'N J., Feb. 1999, at 50, 51. In *Batson*, the Supreme Court articulated "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

<sup>209</sup> See EJI REPORT, *supra* note 40, at 11–14.

<sup>210</sup> See *id.* at 7–8.

representativeness, for example by enacting an annual municipal census, increasing the daily rate paid to jurors, and adopting the one day or one trial approach.<sup>211</sup> Furthermore, it is time for the Supreme Court to reevaluate the use of peremptory challenges and the *Batson* framework to eradicate discrimination in the jury selection process.<sup>212</sup>

#### A. Increasing Representativeness of the Jury Venire

Although many states and municipalities randomly select potential jurors from voter registration records, cognizable groups within the community often are excluded.<sup>213</sup> Many groups are underrepresented due to the way jury venires are compiled because the disqualifying characteristics have a higher probability of exempting them from service.<sup>214</sup> For example, minorities, young people, those who move residences often, and those who are less affluent are typically less likely to be registered voters.<sup>215</sup> In order to improve representativeness at the initial drawing of the jury venire, states and local municipalities should be required to draw from official records that represent a broader range of citizens, not just those who are registered to vote.<sup>216</sup>

Indeed, in an attempt to combat the lack of minority representation on jury venires, many states and municipal government agencies have started using other means to supplement the voter registration records.<sup>217</sup> These sources include drivers' license records, lists of state issued identification cards, welfare rolls, state unemployment recipients, and even telephone books or city directories.<sup>218</sup> Others municipalities are considering measures such as allowing defendants to request the more diverse "city-only" jury instead of one composed of members from the larger community, which typically include more affluent suburbs.<sup>219</sup> One courthouse in the Detroit area even went as far as subtracting ran-

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<sup>211</sup> See Wood, *supra* note 135, at 14–15; *infra* notes 222–226, 244–248 and accompanying text.

<sup>212</sup> See *infra* notes 249–267 and accompanying text.

<sup>213</sup> See EJI REPORT, *supra* note 40, at 54; JONAKAIT, *supra* note 60, at 124–25.

<sup>214</sup> See HANS & VIDMAR, *supra* note 54, at 54; JONAKAIT, *supra* note 60, at 124–25; Higgins, *supra* note 208, at 51.

<sup>215</sup> HANS & VIDMAR, *supra* note 54, at 54; JONAKAIT, *supra* note 60, at 125; Higgins, *supra* note 208, at 51.

<sup>216</sup> See HANS & VIDMAR, *supra* note 54, at 54; JONAKAIT, *supra* note 60, at 125; Joan Biskupic, *The Push Is on for More Diverse Juries: Minorities Sue to Change Systems of Choosing Pool*, USA TODAY, Aug. 28, 2001 at 1A.

<sup>217</sup> Higgins, *supra* note 208, at 51; Biskupic, *supra* note 216.

<sup>218</sup> HANS & VIDMAR, *supra* note 54, at 54; JONAKAIT, *supra* note 60, at 125; Biskupic, *supra* note 217.

<sup>219</sup> Biskupic, *supra* note 217.

domly selected non-minorities from the jury venire in an effort to construct a jury pool that mirrored the demographics of the community.<sup>220</sup> Six years later, however, that practice was struck down by the U.S. Court of Appeals for the Sixth Circuit for unconstitutionally discriminating against nonminority jurors.<sup>221</sup>

Massachusetts has been particularly successful in compiling comprehensive, up-to-date lists.<sup>222</sup> It is unique in that it sends out a statutorily-mandated yearly census that is used to create the master juror list from which jurors are randomly summonsed.<sup>223</sup> As a result, Massachusetts has one of the highest “juror yield” rates—the percentage of summoned potential jurors that show up at the courthouse—in the country.<sup>224</sup> Other states should follow Massachusetts’s lead and enact a yearly census from which they can compile an accurate and up-to-date juror list.<sup>225</sup> Though there is a cost associated with collecting census data, it is largely offset by the time saved in compiling a juror list from multiple sources, and the reduction in expenses incurred for printing, mailing, and processing undeliverable summonses.<sup>226</sup>

### B. Increasing Representativeness Through Elimination of Exceptions

Exemptions and excusals further destroy jury representativeness.<sup>227</sup> For example, occupational exemptions, which were once very common, grant automatic exemptions to persons in specific fields.<sup>228</sup> Thus, these exemptions eliminate large sections of the population based on generalizations that these citizens are so indispensable in their fields that they cannot miss time to serve on a jury.<sup>229</sup> All citizens

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<sup>220</sup> *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998); Higgins, *supra* note 208, at 51.

<sup>221</sup> *Ovalle*, 136 F.3d at 1100; Higgins, *supra* note 208, at 51.

<sup>222</sup> See Wood, *supra* note 135, at 13–14. Massachusetts’s success in compiling an up-to-date juror list is evidenced by the fact that the U.S. District Court for the District of Massachusetts obtained permission to use the State’s annually-updated list, as opposed to the more limited voter registration lists utilized by federal courts, for its random selection of jurors. *Id.*

<sup>223</sup> *Id.* at 14; see also MASS. GEN. LAWS CH. 51, § 4 (2011) (requiring the registrars of each city and town to compile a list of each person residing there above the age of three).

<sup>224</sup> Wood, *supra* note 135, at 14.

<sup>225</sup> See *id.*

<sup>226</sup> See *id.*

<sup>227</sup> See EJI REPORT, *supra* note 40, at 37; HANS & VIDMAR, *supra* note 54, at 54; see also *supra* notes 128–139 and accompanying text.

<sup>228</sup> See Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL’Y REV. 239, 246 (2007).

<sup>229</sup> See *id.*

should have an obligation to serve on juries and no one class should be seen as too important or too busy to serve.<sup>230</sup> Occupational exemptions should be completely abolished and instead excusals should be made on a case-by-case basis only when it can be shown that jury service would be a burden.<sup>231</sup>

Hardship excusals can also dramatically affect the representativeness of a jury pool.<sup>232</sup> Excusals based on hardship are given to those who care full-time for another—such as small children or the elderly—or those for whom missing time at work to serve on a jury would cause severe financial hardship.<sup>233</sup> Granting excusals based on financial hardship disproportionately excludes those of a lower socioeconomic status.<sup>234</sup>

In addition, requests for hardship excusals are not equally distributed across demographic lines in extended trials.<sup>235</sup> In a trial lasting a few weeks or more, financial-hardship excuses are routinely granted to the self-employed or other workers whose employers will not compensate them for time spent away from work performing jury service.<sup>236</sup> Consequently, white males who tend to be privately employed are disproportionately excused from service in prolonged trials.<sup>237</sup> Jurors on prolonged trials are therefore “more likely to be unemployed or retired, female, without a college education, and unmarried than are jurors who serve on shorter trials.”<sup>238</sup> Thus, the burden of serving on an extended trial is unfairly placed on those who are of a lower socio-economic status.<sup>239</sup>

Some states and local governments are instituting a “one day, one trial” policy that works to reduce hardships that typically exempt minority jurors from service.<sup>240</sup> Under the “one day, one trial” system, jurors are only required to serve for one day or, if impaneled, for the length of one trial.<sup>241</sup> In fact, in Massachusetts, which utilizes the system, ap-

<sup>230</sup> See *id.* at 246, 270.

<sup>231</sup> See *id.* at 270.

<sup>232</sup> See EJI REPORT, *supra* note 40, at 37, 49.

<sup>233</sup> *Id.*

<sup>234</sup> See *id.*

<sup>235</sup> JONAKAIT, *supra* note 60, at 241.

<sup>236</sup> ABRAMSON, *supra* note 58, at XII.

<sup>237</sup> *Id.*

<sup>238</sup> JONAKAIT, *supra* note 60, at 134.

<sup>239</sup> See ABRAMSON, *supra* note 58, at XII; JONAKAIT, *supra* note 60, at 134.

<sup>240</sup> See, e.g., Wood, *supra* note 135, at 15; *Jury Service System*, DALLAS COUNTY, [http://www.dallascounty.org/departments/jury-services/jury-serv\\_system.php](http://www.dallascounty.org/departments/jury-services/jury-serv_system.php) (last visited May 16, 2013).

<sup>241</sup> Wood, *supra* note 135, at 15; Office of the Jury Commissioner for the Commonwealth, *Introduction*, MASS. JURY SYS., <http://www.mass.gov/courts/jury/introduc.htm> (last visited May 16, 2013) [hereinafter MA JURY SYSTEM].

proximately ninety percent of those who report for service are done in one day, and ninety-five percent finish in three days or less.<sup>242</sup> This relatively short commitment lessens the burden on each person called for jury duty and significantly reduces the need for exemptions or excusals from jury service.<sup>243</sup>

Further alleviating the burden of service, the Massachusetts system allows summonsed jurors to reschedule their service to a date of their choosing so long as service is completed within a year from the date on which they were originally scheduled to appear.<sup>244</sup> Jurors who complete their service are disqualified from serving for a period of three years as an attempt to spread the burden of service equally among the community.<sup>245</sup> In an effort to relieve some of the financial burden of missing work, even if only for a few days, Massachusetts requires that employers pay for the first three days of jury service, after which the state pays a per diem rate of fifty dollars per day.<sup>246</sup>

States should emulate the approach used in Massachusetts, where comprehensive juror lists are created using a statutorily-mandated census, nearly everyone is considered eligible to serve, and the number of hardship claims is reduced because of the ability to select a service date, short service periods, and increased juror compensation rate.<sup>247</sup> These features make Massachusetts's system an admirable one that "produce[s] jury pools that are diverse and representative, the cornerstone of 'a jury of one's peers.'"<sup>248</sup>

### C. *Increasing Representativeness by Limiting or Abolishing Peremptory Challenges*

Supreme Court rulings that prohibit discrimination against protected groups in the initial jury venire are ineffective in part because of the great discretion afforded in the exercise of peremptory challenges.<sup>249</sup> Some describe the Supreme Court's *Batson* line of cases as allowing the Court to "have its cake and eat it, too."<sup>250</sup> The decisions allow the Court to appear as if it is enumerating procedures to end invidious

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<sup>242</sup> Wood, *supra* note 135, at 15.

<sup>243</sup> Wood, *supra* note 135, at 14–16; see MA JURY SYSTEM, *supra* note 241.

<sup>244</sup> Wood, *supra* note 135, at 15.

<sup>245</sup> Wood, *supra* note 135, at 14–16; see MA JURY SYSTEM, *supra* note 241.

<sup>246</sup> Wood, *supra* note 135, at 15.

<sup>247</sup> See *id.* at 14–16; see also *supra* notes 213–246.

<sup>248</sup> See Wood, *supra* note 135, at 14.

<sup>249</sup> See OLDHAM, *supra* note 59, at 205–06; OVERLAND, *supra* note 81, at 99–100.

<sup>250</sup> OVERLAND, *supra* note 81, at 116.



discrimination, while at the same time not interfering with the day-to-day use of the peremptory challenge.<sup>251</sup>

Just as Justice Marshall predicted in his concurring opinion in *Batson v. Kentucky*, the *Batson* framework has proved ineffective in abolishing discriminatory uses of the peremptory challenge.<sup>252</sup> A *Batson* violation is difficult to prove; thus, challenges are rarely successful.<sup>253</sup> One study showed that only seventeen percent of *Batson* challenges were successful, and that successful challenges were usually the result of an attorney admitting discriminatory intent or offering no explanation at all.<sup>254</sup> Surprisingly however, *Batson* challenges are successful fifty-three percent of the time when an attorney claims discrimination based on the complete removal of white jurors.<sup>255</sup> In fact, in Tennessee and North Carolina, there has never been a successful reversal based on *Batson*.<sup>256</sup>

This lack of success in *Batson* challenges is due in large part to the fact that courts generally accept the race-neutral reasons offered by attorneys, even when the attorney admits that race was one factor in seeking dismissal.<sup>257</sup> Justice Marshall highlighted the dilemma that trial judges face when they have to enforce an ethical rule that frequently requires them to accuse lawyers of lying when they offer race-neutral reasons for peremptory challenges.<sup>258</sup> Because courts frequently accept almost any race neutral explanation, a prosecutor can easily conceal discriminatory intent.<sup>259</sup>

The Supreme Court must reevaluate the use of peremptory challenges, and at a minimum, should adhere to the framework it espoused in the *Batson* decision.<sup>260</sup> In *Batson*, the Court stated that once a party makes out a case for purposeful discrimination at step one, the burden

<sup>251</sup> *Id.*

<sup>252</sup> *Batson*, 476 U.S. at 105 (Marshall, J., concurring); OVERLAND, *supra* note 81, at 84.

<sup>253</sup> See OVERLAND, *supra* note 81, at 96–97.

<sup>254</sup> *Id.* at 96; Melilli, *supra* note 187, at 460–64.

<sup>255</sup> See OVERLAND, *supra* note 81, at 96; Melilli, *supra* note 187, at 460–64.

<sup>256</sup> Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES, June 2, 2010, at A14.

<sup>257</sup> OVERLAND, *supra* note 81, at 96–97.

<sup>258</sup> *Batson*, 476 U.S. 106 (Marshall, J., concurring); ABRAMSON, *supra* note 58, at xxvi.

<sup>259</sup> ABRAMSON, *supra* note 58, at xxvi; A. Hendrix, *Reinforcing Batson Defining the Peculiar: Racial Profiling as an Impermissible Ground for Peremptory Challenge*, 44 CRIM. L. BULL. 691, 692–93 (2008); cf. Michael H. Meidinger, *Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape*, 32 BC J.L. & SOC. JUST. 421, 422–24, 437–38 (describing the wide latitude afforded to prosecutors and concealment of discriminatory intent in prosecuting statutory rape).

<sup>260</sup> *Batson*, 476 U.S. at 96–98; see OVERLAND, *supra* note 81, at 84.

shifts to the proponent of the strike who “must give a ‘clear and reasonably specific’ explanation” for the challenge that is “related to the particular case to be tried.”<sup>261</sup> Since the *Batson* decision the Court has significantly altered the test, and now allows “any neutral explanation, no matter how ‘implausible or fantastic,’ even if it is ‘silly or superstitious.’”<sup>262</sup> In fact, the Court currently permits any explanation so long as it is race-neutral—that is, it does not mention race—to satisfy the burden of articulating a nondiscriminatory reason for the challenge.<sup>263</sup> This construction allows attorneys to use strikes premised on stereotypes, such as occupation, insufficient community ties, or socioeconomic status, which do not mention race but have a disproportionate effect of eliminating those of a certain racial group.<sup>264</sup> Instead, the Court should return to the essence of the *Batson* decision and require the explanation as to why they believe the stricken jurors exhibited bias.<sup>265</sup> Although this may seem at odds with the use of the peremptory challenge as an “unexplained excusal” it is appropriate to require a heightened explanation after a prima facie case for discrimination has been made.<sup>266</sup> Unless something is done to rein in the use of peremptory challenges, efforts to improve representativeness at other levels of the jury selection process can easily be thwarted.<sup>267</sup>

## CONCLUSION

Society should not tolerate discrimination in a justice system that claims equal protection for all. Although the jury system is not perfect, it should be preserved because it epitomizes America’s democratic values. The jury allows ordinary citizens to ensure that the government abides by the spirit of the law, and not just the letter of the law. Stereotypes should not be used to strip certain groups of their right to participate on a jury. The notion of being tried by one’s peers is largely

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<sup>261</sup> *Batson*, 476 U.S. at 97–98 & n.20 (quoting *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

<sup>262</sup> *Purkett*, 514 U.S. at 768–69; *id.* at 775 (Stevens, J., dissenting).

<sup>263</sup> *Id.* at 769 (“What it means by a ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection.”).

<sup>264</sup> See Melilli, *supra* note 187, at 497–502 & tbl.III-S (discussing group stereotypes commonly used when exercising peremptory challenges).

<sup>265</sup> See *Batson*, 476 U.S. at 97–98 & n.20.

<sup>266</sup> See FUKURAI & KROOTH, *supra* note 124, at 3–4; OVERLAND, *supra* note 81, at 83, 96–97.

<sup>267</sup> See OLDHAM, *supra* note 59, at 205–07. As late as the 1980s, some District Attorney Office handbooks showed discriminatory intent, instructing DAs to strike African Americans from juries in criminal trials. OVERLAND, *supra* note 81, at 90.

illusory, as groups of citizens are excluded from jury service at all three stages of the jury selection process. Therefore, improvements should be made to increase jury representativeness at the initial drawing of the jury pool, statutory exemptions and excusals, and in the use of peremptory challenges when empanelling the petit jury. The jury should be preserved as an institution because “twelve persons of diverse backgrounds are capable of achieving a wisdom together that no one person is capable of achieving alone.”<sup>268</sup> All Americans—regardless of their race, gender, age, occupation, or socioeconomic status—should be allowed to participate in this democratic pursuit of wisdom.

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<sup>268</sup> ABRAMSON, *supra* note 58, at 140.