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Peremptories Or Peers--Rethinking Sixth Amendment Doctrine, Images, and Procedures

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PEREMPTORIES OR PEERS?—RETHINKING SIXTH AMENDMENT DOCTRINE, IMAGES, AND PROCEDURES

TONI M. MASSARO†

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When a prosecutor uses peremptory challenges to exclude minorities from a jury, the United States Supreme Court has required defendants to show a pattern of such exclusion to prove an equal protection violation. This requirement is difficult to meet and may not adequately protect the defendant's interest in an impartial jury. Professor Massaro suggests that the discriminatory exercise of peremptory challenges should be analyzed not under the equal protection clause but under the sixth amendment. She explores the history of the jury and the interests protected by the right to a jury—those of the defendant, the government, and the community. Within this framework, Professor Massaro isolates

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three requirements critical to the sixth amendment guarantee of a jury trial: The jury must be impartial, drawn from a cross-section of the community, and composed of at least some of the defendant's peers. She proposes a procedure to prevent the prosecutor from depriving the defendant of a jury meeting these three requirements—elimination of the prosecutor's right to peremptory challenges.

I. INTRODUCTION

The United States Supreme Court this term will address the issue whether a prosecutor may exercise peremptory challenges to exclude black persons from a criminal jury.¹ The decision to grant certiorari in the pending case signals the Court's first reexamination of its controversial ruling in *Swain v. Alabama*,² rendered twenty years ago.

Swain was a black man accused of raping a white woman. An all-white jury in Alabama convicted Swain and sentenced him to death.³ Relying on the equal protection clause,⁴ Swain challenged the prosecutor's use of peremptory challenges to exclude all black people from the petit jury. The Supreme Court held that the equal protection clause does not bar a prosecutor from using peremptories to strike black people from the jury, absent a pattern of such exclusion in several cases.⁵ Criminal defendants since *Swain* have been nearly uniformly unsuccessful in meeting this high standard of proof in challenging the alleged discriminatory exercise of peremptories.⁶

Swain has been criticized widely and vigorously.⁷ Some state courts⁸ and

1. *Batson v. Kentucky*, cert. granted, 105 S. Ct. 2111 (1985). *Batson* is a short, unpublished opinion of the Kentucky Supreme Court that discusses the issue in *Swain v. Alabama*, 380 U.S. 202 (1965), in one paragraph. *Batson*, slip op. at 4-5 (Ky. 1984). The court summarily rejected defendant's argument that the prosecutor cannot exercise peremptories to exclude all blacks from the jury, relying on an earlier Kentucky Supreme Court opinion, *Commonwealth v. McFerron*, 680 S.W.2d 924 (Ky. 1984), which announced the court's intention to adhere to *Swain* despite contrary developments in other states.

The United States Supreme Court in 1983 refused to hear a New York case that raised the *Swain* issue, *McCray v. New York*, cert. denied, 103 S. Ct. 2438 (1983), deferring to the urgings of Justices Stevens, Blackmun, and Powell that the states be left to "serve as laboratories in which the issue receives further study before it is addressed by this Court." *Id.* at 2439. Justices Brennan and Marshall disagreed with this approach and would have granted certiorari to reexamine *Swain* in light of subsequent developments. *Id.* at 2439-43.

2. 380 U.S. 202 (1965).

3. *Id.* at 231 (Goldberg, J., dissenting).

4. The equal protection clause states: "No State shall make or enforce any law that shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. *Swain*, 380 U.S. at 223-24, 226-27.

6. See *McCray v. Abrams*, 750 F.2d 1113, 1120-22 (2d Cir. 1984) (discussing difficulties defendants have experienced in meeting the *Swain* standard of proof).

7. An incomplete list of the articles criticizing the abuse of peremptories and the Supreme Court's tolerance of that abuse includes Ashby, *Jury Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1161 (1978); Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978) (advocating abolition of peremptories for prosecution absent other steps to prevent abusive exclusion of minorities from juries); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 289 (1968); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417 (1969); Comment, *Swain v. Alabama: A Constitutional*

two federal circuits⁹ have rejected the Court's parsimonious reading of a defendant's right to a fair jury in a criminal trial and have resorted to the sixth amendment,¹⁰ federal policy,¹¹ or state constitutions¹² to provide greater protection against discriminatory exercise of peremptories. These decisions have been praised by some¹³ and condemned by others.¹⁴

This Article argues that the Supreme Court has employed an incorrect theory in analyzing defendant challenges of prosecutorial use of peremptory challenges to exclude minorities. The relevant constitutional text is not the equal protection clause, but the sixth amendment, which provides the right to an impartial jury.¹⁵ The Article defines the sixth amendment text by plumbing three terms commonly used to describe a fair jury: "impartial," "cross-section of the

Blueprint for the Perpetuation of the All-White Jury, 52 VA. L. REV. 1157 (1966); NOTE, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 159-60 (1967); NOTE, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977) [hereinafter cited as Note, *Limiting the Peremptory Challenge*]; NOTE, *Fair Jury Selection Procedures*, 75 YALE L.J. 322 (1965); *Recent Development, Racial Discrimination in Jury Selection—Limiting the Prosecutor's Right of Peremptory Challenge to Prevent a Systematic Exclusion of Blacks from Criminal Trial Juries*, 41 ALB. L. REV. 623 (1977) (advocating use of sixth amendment analysis to require government either to show that peremptory was not exercised because of defendant's race or to articulate a nonracial reason for exercise of peremptory challenge of black venirepersons).

8. See, e.g., *People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984) (en banc); *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Jones v. State*, 466 So. 2d 301 (Fla. Dist. Ct. App. 1985); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). Other courts have been more reluctant to abandon the *Swain* rationale. See, e.g., *Mallott v. State*, 608 P.2d 737 (Alaska 1980); *People v. Payne*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983); *State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (N.M. Ct. App. 1980); *State v. Ucero*, 450 A.2d 809 (R.I. 1982); *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981).

9. *United States v. Leslie*, 759 F.2d 366, reh'g granted, 761 F.2d 195 (5th Cir. 1985); *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984).

10. See, e.g., *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984).

11. See, e.g., *United States v. Leslie*, 759 F.2d 366, reh'g granted, 761 F.2d 195 (5th Cir. 1985).

12. See, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979).

13. See, e.g., Note, *Peremptory Challenges in Transition*, 5 PACE L. REV. 185, 198-210 (1984); Comment, *People v. Wheeler: California's Answer to Misuse of the Peremptory Challenge*, 16 SAN DIEGO L. REV. 897 (1979).

14. The decisions in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), two cases that reject the Supreme Court's reading of the right to a fair jury, in particular, have drawn a lot of criticism. See, e.g., Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 366-74 (1982) (arguing *Wheeler* and *Soares* are wrongly decided, unworkable, and may work to disadvantage defendants in some cases); Younger, *Unlawful Peremptory Challenges*, JUDGES' J., Winter 1982, at 27 (stating *Wheeler* and *Soares* provide the right answer for the wrong reason); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979) (favoring regulation of peremptories, but arguing that *Wheeler* and *Soares* use the wrong theory to support their commendable results); Case Comment, *A New Standard for Peremptory Challenges: People v. Wheeler*, 32 STAN. L. REV. 189, 196-98 (1979) (discussing problems with *Wheeler* approach to peremptories).

15. The fifth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. CONST. amend. VI.

community," and "peers." These key terms represent distinct, sometimes contradictory values that the Supreme Court has failed to recognize fully or to reconcile. In particular, the Court has ignored the meaning and values represented by the term "peer." Yet history, constitutional theory, and nonlegal sources indicate that the presence of some jurors able to identify with the defendant—peers—is inherent in the concept of a fair jury.

As an outgrowth of its doctrinal and semantic conclusions about the fair jury, this Article proposes a modest change in jury selection procedure. Specifically, it advocates abolishing the government's peremptory challenges. This limited reform will prevent the government from defeating the accused's interest in having a jury of peers, although it will not guarantee that peers will be included in every petit jury. More extensive reforms of jury selection procedures may be warranted and desirable, but such reforms must await a shift in judicial attitude toward greater protection of criminal defendants' rights. When that shift occurs, the conceptual framework adopted herein should provide a useful foundation for more ambitious procedural innovations.

II. THE NATURE OF THE RIGHT TO TRIAL BY JURY

The general nature of the right to trial by jury provides a backdrop for discussing the specific issue of peremptory challenges. The history of the jury trial, the values the jury trial advances, and the traditional conception of a fair jury are the specifics of this backdrop.

The history of the jury is murky and variable, rendering the past an uncertain guide to specific, modern jury procedures. That history, however, confirms that the American colonists prized the right to trial by jury as a bulwark against government oppression and that they viewed the local and lay characteristics of the jury as keys to its effectiveness.

The jury is commonly said to protect several important values. These values include the promotion of government-, community-, and defendant-centered interests. Paramount among these interests are those that benefit the accused. The visual images of a fair jury depend on whether the perspective is that of the government, the community, or the defendant. What a jury "looks like" to the community will affect the community's respect for the verdict. Accordingly, jury selection procedures must produce juries that appear "fair."

A. *A Glance at History*

Seeking historical answers to what constitutes proper jury selection procedures is a confounding process. The recorded history of the jury is ambiguous, sometimes incomplete, and often conflicting. The role and form of the jury have changed significantly over time. Thus, a modern writer seeking to support a particular view of the role of the jury or jury procedure usually can find some history to support that view, although other history would contradict it.¹⁶

16. See R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* 2-3 (1983).

Not only can the reader of history interpret that history in a way that satisfies his or her pur-

The chameleon-like nature of the history of juries can be demonstrated through an examination of the phrase "a jury of one's peers." The phrase, often used to describe the right to jury trial, is traceable to the Magna Carta. It conjures up images of common people protected from arbitrary government authority by popular judgments. Historians have shown, however, that the phrase in the Magna Carta referring to peers¹⁷—*judicium parium*—did not refer to a jury as we know it.¹⁸ The barons at Runnymede wanted to ensure that when the king assumed a cause against them they would be tried by their associates, called *sectatores*, and not by judges appointed by the king.¹⁹ The king's judges tended to be ecclesiastics, who were not peers of the barons. The original "jury of one's peers," therefore, was a special right of an elite social class, not a guarantee of rights to the common people. The jury of peers transformed over time into a right enjoyed by all citizens, not just the elite. Nevertheless, the original purpose of having the judgment of one's peers was to protect the wealthy and powerful from judgments by people below their social class.²⁰

A jury trial is regarded by many people as a right that emerged to prevent the arbitrary exercise of power by the government. Early history, however, suggests a purely practical explanation for the development of the jury method of proof.²¹ A form of criminal jury, called a presenting jury, predated the Magna Carta and replaced other methods of proof, such as the ordeal, after 1215.²²

poses, but the chronicler of history may record history in a way that conforms to his or her views about the jury. As Jerome Frank has observed, "The historian 'imagines the past.' His picture of the past is a 'web of imaginative construction stretched between certain fixed points' provided by his critical judgment of his witnesses' testimony. Here, obviously, subjectivity enters." J. FRANK, *COURTS ON TRIAL* 38-39 (1949) (quoting R. COLLINGWOOD, *THE IDEA OF HISTORY* 138 (1946)).

A complete history of the jury is beyond the scope of this Article. Credible sources of in-depth treatment of the jury trial's history include the following: 4 W. BLACKSTONE, *COMMENTARIES* *349-55; F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* (1951); M. LESSER, *THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM* (1894); 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 615-32 (2d ed. 1959).

17. The Magna Carta provides in relevant part: "No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land." *MAGNA CHARTA REGIS JOHANNIS*, XXXIX, 29 (1215).

18. See, e.g., Clark, *Magna Carta and Trial by Jury*, 58 AM. L. REV. 24, 25-30 (1924); Hatcher, *Magna Carta and the Jury System*, 42 W. VA. L.Q. 1, 1-2, 6 (1935).

19. See, e.g., W. FORSYTH, *HISTORY OF TRIAL BY JURY* 108-14 (1852); M. LESSER, *supra* note 16, at 163-64; 1 F. POLLOCK & F. MAITLAND, *supra* note 16, at 173 n.3; A. SHAUFELBERGER, *BLACKS AND THE TRIAL BY JURY* 50 (1973); Clark, *supra* note 18, at 29; Hatcher, *supra* note 18, at 1-13.

20. See Clark, *supra* note 18, at 26.

21. A jury of some form—that is, citizens chosen to decide guilt or innocence—predates the thirteenth century. Some scholars say that the earliest ancestor of the jury lies in the Frankish jury—the *inquisitio* of Charlemagne. L. MOORE, *THE JURY* 13-19 (1973). The citizen jury appears in ancient Greek literature, however, suggesting a much older history. For example, Aeschylus, who died *circa* 456 B.C., described a citizen tribunal in his play *Eumenides*, the story of Orestes. Orestes killed his mother Clytemnestra after she murdered Agamemnon. Three demigods, known collectively as the Eumenides or Furies, would give Orestes no rest. Orestes sought refuge in Athens, where Pallas Athena called together twelve citizens of Athens to try Orestes for matricide. See also M. LESSER, *supra* note 16, at 22-28 (describing the dikastery of ancient Greece, a proceeding whereby citizens were paid to perform quasi-judicial functions, which Lesser calls "the first institution known to history which presents characteristic features of jury trial").

22. Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1, 1-2 (1982).

The reason the jury method of proof was eventually substituted for these other methods is unclear. One scholar reports that when the Fourth Lateran Council in 1215 forbade clerical participation in the ordeal, the ordeal lost its power as a judgment of God and so fell into disuse.²³ The jury alternative was chosen to fill the procedural void because by 1215 these juries had developed the power to issue opinions that approximated verdicts on guilt or innocence.²⁴ Thus, the jury was a logical and available replacement that, with minor modification, became an adequate method of proof.²⁵ Nothing in this early history, however, suggests that the jury method of proof was selected because it was seen as a "palladium of liberty" or as the grand bulwark of every Englishman's liberties.²⁶ Trial by jury was mothered not by notions of liberty but by practical necessity.²⁷

Most of the important characteristics of the jury trial, such as selection procedures or jury size, have changed significantly over time.²⁸ A commonly cited example of this transformation is that originally jurors were not disqualified for their knowledge about the crime; rather, they served as witnesses of sorts.²⁹ Today, jurors ideally have little specific knowledge of the crime or the defendant.

Under early procedure the defendant was required to consent to trial by jury.³⁰ The alternative to consent was "strong and hard" imprisonment—*peine forte et dure*.³¹ The modern rule allows the defendant to waive a jury trial, although often subject to approval by the prosecution or the court.³² Obviously, the modern defendant who prefers a bench trial is not imprisoned or otherwise punished until he or she agrees to trial by jury.

23. *Id.* at 1.

24. *Id.* at 1-2. The Grand Assize, or the Assize of Clarendon of 1166 A.D., provided for a jury. Moore describes this early jury as follows:

Both parties had a right to be present at the election [of the jurors] and challenge for good cause members of the proposed jury If it developed that the jurors testified under oath that they were unacquainted with the facts, other jurors were summoned until there were 12 who had knowledge and who agreed. Knowledge did not mean first-hand knowledge, but declarations of a juror's father or other equally reliable sources were sufficient. The jurors of this court were knights, and their decision was conclusive of the dispute.

L. MOORE, *supra* note 21, at 39. Until the middle of the fourteenth century, members of the accusing jury were allowed to serve on the trial panel. *Id.* at 56. A later statute prevented indictors from remaining on the panel if the defendant objected. *Id.*

25. Groot, *supra* note 22, at 1-2.

26. 4 W. BLACKSTONE, *supra* note 16, at 348. Forsyth maintains that the jury was created for administrative reasons, specifically as a means of extending the power of the king. W. FORSYTH, *supra* note 19, at 137-38.

27. See, e.g., 4 W. BLACKSTONE, *supra* note 16, at 348.

28. See R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 16, at 2-3 ("Surprisingly few guidelines are available from historical and constitutional sources to resolve such basic questions as, 'How large should the jury be?' 'How much agreement must exist to render a verdict?' 'How shall the performance of juries be evaluated?'").

29. See 2 F. POLLOCK & F. MAITLAND, *supra* note 16, at 622-23. Pollock and Maitland note that the common assertion that jurors were witnesses "does not quite hit the truth." *Id.* at 627.

30. L. MOORE, *supra* note 21, at 53.

31. *Id.* at 54. *Peine forte et dure* meant that the nonconsenting defendant was forced to bear heavy irons and to drink only standing water. *Id.* at 55. *Peine forte et dure* was not abolished until 1772. *Id.* at 67.

32. *Singer v. United States*, 380 U.S. 24, 36-37 (1965).

These two examples of changes in the role and the form of jury trial throughout English history help explain the difficulty American jurists and scholars experience in interpreting the sixth amendment right which grew out of that evolution.³³ Modern interpretation problems are compounded by the many variations regarding jury trial procedures that existed in the colonies before the Constitution became effective, by the sixth amendment's silence regarding which of the common-law requisites of the jury were to be preserved, and by the ongoing changes in jury practice since the Constitution was adopted.³⁴

At least one thing is clear from American history—the right to trial by jury was an interest of great importance to the colonists. Various forms of that right were included in King James I's Instructions for the Government of the Colony of Virginia drafted in 1606,³⁵ the Massachusetts Body of Liberties adopted in 1641,³⁶ the Concessions and Agreements of West New Jersey of 1677,³⁷ the Frame of Government of Pennsylvania of 1682,³⁸ the Declaration of Rights of the First Continental Congress of 1774,³⁹ the Constitution of Virginia of 1776,⁴⁰

33. As the Supreme Court observed in *United States v. Wood*, 299 U.S. 123, 143 (1936): These requirements [of the sixth amendment] are all of first importance. But it would hardly be contended that in all these matters regard must be had to the particular forms and procedure used at common law. These requirements relate to matters of substance and not of form. And the true purpose of the Amendment can be achieved only by applying them in that sense.

Of course, it is difficult to separate substance from form when the right at stake is procedural. The form of the procedure is, in effect, the right. Flexibility must be allowed, however, to accommodate growth and change so that the procedure continues to respond to modern needs. Thus it becomes a sensitive matter of judgment as to which "forms" are nonessential to the fundamental character of the "right" and therefore may be abandoned without unduly compromising the right.

34. The Supreme Court acknowledged the difficulty in interpreting the sixth amendment in *Apodaca v. Oregon*, 406 U.S. 404 (1972):

[A]fter a proposal had been made to specify precisely which of the common-law requisites of the jury were to be preserved by the Constitution, the Framers explicitly rejected the proposal and instead left such specification to the future. . . . [O]ur inability to divine "the intent of the Framers" when they eliminated references to the "accustomed requisites" requires that in determining what is meant by a jury we must turn to other than purely historical considerations.

Our inquiry must focus upon the function served by the jury in contemporary society.

Id. at 410 (emphasis added).

35. L. MOORE, *supra* note 21, at 97. The First Charter of Virginia provided that all subjects in the colonies should "have and enjoy all Liberties . . . as if they had been abiding and born, within this our realm of England," including the right to trial by jury, which was mentioned specifically in King James I's Instructions for the Government of the Colony of Virginia. *Id.* (quoting THE FIRST CHARTER OF VIRGINIA (1606)).

36. *Id.*; A. SHAUFELBERGER, *supra* note 19, at 59 (guaranteeing that the liberty "to choose whether they will be tried by the Bench or by a Jurie . . . shall be granted to all persons in Criminal cases").

37. L. MOORE, *supra* note 21, at 98-99 (quoting the CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY, ch. XVII (1677), guaranteeing "a due tryal, and judgment passed by twelve, good and lawful men of his neighbourhood").

38. *Id.* at 99 (quoting the FRAME OF GOVERNMENT OF PENNSYLVANIA (1682), which guaranteed that "all trials shall be by twelve men, and as near as may be, peers or equals, and of the neighborhood").

39. *Id.* at 101 (quoting the DECLARATION OF RIGHTS OF THE FIRST CONTINENTAL CONGRESS OF 1774, which stated: "[T]he respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vinctage according to the course of law.").

40. *Id.* at 101-02 (quoting VA. CONST. of 1776, which provided for a defendant's right "to a

the Declaration of Independence,⁴¹ and the first constitutions of most states.⁴² The principal reason the colonists so prized the right to jury trial apparently was their belief that layperson juries would prevent arbitrary exercise of government authority.⁴³ Their precise reasoning can only be inferred from their expansive rhetoric about the right, including their proclamations of the jury as "a valuable safeguard to liberty" and as "the palladium of free government."⁴⁴ The colonists' faith in the virtue of trial by jury culminated in the adoption of the sixth amendment to the Constitution in 1789.⁴⁵

The general language of the sixth amendment, however, reflects a compromise designed to preserve local customs.⁴⁶ For example, many colonists regarded the practice of limiting the vicinity from which jurors could be drawn as critical to the goal of preventing arbitrary exercise of government power. The terms "neighborhood" and "vicinage" figured prominently in early discussion about the proper geography for fair jury selection.⁴⁷ The sixth amendment's compromise language—that the accused "shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law"⁴⁸—preserves the local flavor of the jury, although it is less parochial and intimate than the earlier references to "neighborhood" and "vicinage."⁴⁹ This quoted language is the only direction the Constitution offers for how the jury should be selected.

The generality of the sixth amendment in defining the form of the jury has produced confusion about what procedures are included in the sixth amendment mandate. The result of this confusion is a fluid body of law under which the American jury has undergone significant changes since 1789. One example of these changes is the attitude toward the jury as a body designed to decide questions of both fact and law. Juries in some jurisdictions once enjoyed the legal right (versus the implicit flexibility) to disregard the court's instructions about

speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty, . . . that no man be deprived of his liberty, except by the law of the land or the judgment of his peers").

41. *Id.* at 102. Moore notes that the *Declaration of Independence* was "brief but to the point" in declaring that one reason for the separation from England was "[f]or depriving us, in many cases, of the benefits of Trial by Jury." *Id.* (quoting the *Declaration of Independence*).

42. *Id.* at 102-04.

43. See F. HELLER, *supra* note 16, at 22-25; L. MOORE, *supra* note 21, at 102-05.

44. THE FEDERALIST No. 83, at 521-22 (A. Hamilton) (B. Wright ed. 1961).

45. See F. HELLER, *supra* note 16, at 27-34.

46. Heller notes that the jury trial of colonial days varied among the colonies. Thus, in order to preserve local customs, only a general statement about the jury could be included in the Constitution. *Id.* at 15; see also A. SHAUFELBERGER, *supra* note 19, at 59-62 (listing laws of the 1600s and 1700s that mentioned trial by jury).

47. F. HELLER, *supra* note 16, at 21-22, 25-26; see *Williams v. Florida*, 399 U.S. 78, 95-96 (1969).

48. U.S. CONST. amend. VI.

49. F. HELLER, *supra* note 16, at 25-27; see also *supra* notes 35-40 (quoting colonial documents guaranteeing the right to trial by jury). Heller reports that the colonists were badly divided as to the definition of a proper locality for juries. After some struggle, the geographical limit of "the State and district wherein the crime shall have been committed" was approved. F. HELLER, *supra* note 16, at 31-33 (quoting U.S. CONST. amend. VI).

the law.⁵⁰ This right corresponded with America's boundless enthusiasm for juries and opposition to professional lawyers during the eighteenth century.⁵¹ Over time, however, enthusiasm for the jury waned and the jury's right to decide law was emasculated.⁵² The decline of the jury as an arbiter of law probably reflected a decline in people's trust in the common person and a shift in legal philosophy from a natural law to a positive law theory.⁵³ Today, jurors in nearly every jurisdiction are instructed to follow the law as the judge recites it, although they may not always do so.⁵⁴

There are other examples of important procedural changes in the American jury. Juries of six instead of twelve have been approved as constitutional,⁵⁵ and rules regarding whether judges or lawyers conduct voir dire have varied.⁵⁶ The composition of jury pools has changed considerably. Until fairly recent times, women rarely served as jurors. Originally, they were excluded from the jury altogether;⁵⁷ later, the rules in many states automatically excluded women who did not "opt in" to the jury pool.⁵⁸ The laws prohibiting black people from serving as jurors also have changed, progressing from exclusion of all black people⁵⁹ to inclusion of black men⁶⁰ to inclusion of both black men and women. Even today, however, a disproportionate number of black persons are either not called to serve on juries or are excused peremptorily.⁶¹ Originally, property ownership was a precondition to service as a juror.⁶² Although wealth is no longer an express condition of jury qualification, economic factors continue to play an indirect role in determining who serves on juries. Jury pools often include only those on voting rolls or those able to afford telephones, and lawyers frequently exercise their challenges during jury selection in ways that produce middle class juries.⁶³

50. See L. MOORE, *supra* note 21, at 107-13, 150-51; Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 583-96 (1939).

51. F. HELLER, *supra* note 16, at 15; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 178-79, 182 (1964).

52. Note, *supra* note 51, at 173.

53. See Broeder, *The Functions of the Jury: Facts or Fictions?* 21 U. CHI. L. REV. 386, 403 (1954); Note, *supra* note 51, at 171.

54. See J. VAN DYKE, JURY SELECTION PROCEDURES 225-26 (1977).

55. *Williams v. Florida*, 399 U.S. 78, 103 (1970).

56. See *infra* note 136.

57. See, e.g., L. MOORE, *supra* note 21, at 131-32. The Supreme Court stated in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), that the exclusion of women was constitutional. This position was not officially renounced until 1975 when the "opt-in" method of selecting women jurors was held unconstitutional. See *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

58. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Hoyt v. Florida*, 368 U.S. 57 (1961).

59. See, e.g., Hyman & Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA* 23, 25 (R. Simon ed. 1975).

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

61. See, e.g., *Swain v. Alabama*, 380 U.S. 202 (1965) (at the time of Swain's trial, no black person had ever served on a jury in Talladega County because prosecutor used peremptory challenges to exclude them).

62. See J. VAN DYKE, *supra* note 54, at 13-14.

63. See, e.g., J. VAN DYKE, *supra* note 54, at 62-65; Comment, *Underrepresentation of Economic Groups on Federal Juries*, 57 B.U.L. REV. 198, 200 (1977). Other types of discrimination occur as well, although the courts generally have been unresponsive to challenges to juries on these bases. See, e.g., *Fay v. New York*, 332 U.S. 261 (1947) (economic status); *United States v. Guzman*,

These are only a handful of examples of the dynamic character of the criminal jury in America. The purpose in presenting this cursory history is not to prove that a particular feature of the jury did or did not exist in the past but to illustrate that the form of the jury has varied. Accordingly, the problem of discriminatory exercise of peremptory challenges cannot be solved by reference to history.

Despite its many metamorphoses, the sixth amendment right to trial by jury is not wholly elastic or subject to whatever procedural modifications the Supreme Court deems expedient. As in other areas of constitutional law, the absence of specific history to direct the Supreme Court in construing the amendment is neither an invitation to eviscerate individual rights nor a license to invent them. The Court must identify and preserve the basic values the sixth amendment represents through a proper balance of discretion and vision. To effect this balance, the Court must decide what interests the lay jury fosters and what procedures best protect those interests.

B. *The Interests That Underlie the Right to Trial by Jury*

As noted above, trial by jury did not begin as a safeguard of popular input into the criminal justice system but as an acceptable means of resolving controversies after older methods of proof fell into disfavor. By the time trial by jury migrated to the United States, however, the jury was perceived as the "palladium of free government"⁶⁴ and was a right secured to all citizens, at least in theory if not in practice.⁶⁵ The modern American jury thus serves a very different function from the function served by its ancient English predecessor.

The modern jury serves a fact-finding function, but this description fails to explain the jury's significance. If fact finding were the dominant reason for having juries, jury trials would have been abolished or would have become the exclusive means of finding facts. Three centuries of using juries in this country probably would have shown either that American judges can find facts better than American juries or that juries are better fact finders than judges and so should be the preferred method of trial in all criminal cases.⁶⁶ Given the lower

468 F.2d 1245 (2d Cir. 1972) (age); *United States v. Ross*, 468 F.2d 1213 (9th Cir. 1972) (age); *United States v. James*, 453 F.2d 27 (9th Cir. 1971) (economic status and occupation); *United States v. Tijerina*, 446 F.2d 675 (10th Cir. 1971) (economic status and occupation); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970) (age). *But see* *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 224 (1946) (automatic exclusion of daily wage earners held improper).

64. *See e.g.*, THE FEDERALIST No. 83, *supra* note 44, at 521-22.

65. Hyman and Tarrant described the importance the colonists ascribed to the jury right as follows:

To a surprising extent, colonial Americans perceived and acted on a common principle: that every accused person—white person, at least—had a right to a jury trial, which adequately protected him while he was before the law. In this manner, juries helped substantially to link "nationally" the colonies with individuals. Considering the imperial expanses of the American land, the lack of other connectives such as an established church (except in Virginia and in a few counties of New York and New Jersey), and the multiplicity of ethnic ancestries, races, and languages of the inhabitants, this was no mean contribution.

Hyman & Tarrant, *supra* note 59, at 24.

66. *See* J. FRANK, *supra* note 16, at 126.

cost and time of a bench trial versus a jury trial, a tie would go to the judges. In the context of criminal juries, however, few seriously urge the abolition of jury trials.⁶⁷ Although inertia could explain this quiescence, the more plausible explanation is that juries are believed to serve interests beyond effective fact finding.

The several interests the jury is said to protect are essentially defendant-centered, community-centered, and government-centered. One defendant-centered interest is the interposition of the common sense judgment of laypeople between the accused and the accuser.⁶⁸ This common sense judgment may protect the defendant from an abuse of power by government officials. As the Supreme Court has said, the jury provides a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."⁶⁹

The defendant's interest in being heard is protected by the number of voices on the jury. The input of several voices may reduce the possibility of an unfair, short-sighted, or erroneous decision.⁷⁰ The Supreme Court has acknowledged the interest served by numbers, observing that participation by twelve laypeople can produce a "diffused impartiality."⁷¹ The need for diffused impartiality stems from the heterogeneity of society, and hence of perceptions, and from the realization that no person is really "impartial."⁷² Theoretically, a fact-finding process conducted by a number of persons is more likely to discover the "truth" than a process conducted by one person. If this theoretical underpinning is correct, the jury is especially valuable in the criminal case, because decisions about guilt or innocence reflect subjective value judgments that have tremendous im-

67. Nevertheless, the value of the jury may be overestimated if one agrees with Justice Cardozo that the right to trial by jury is "not of the very essence of a scheme of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In his view, "few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [the jury]." *Id.* The Supreme Court no longer accepts this view. In *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), the Court held that trial by jury in criminal cases is fundamental to American justice and thus is incorporated into the fourteenth amendment.

68. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972); *Williams v. Florida*, 399 U.S. 78, 100 (1970).

69. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); see *Preface to NATIONAL JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES* at x (2d ed. 1985) ("The jury is the one institution in the American criminal justice system which stands between the people and abuse of authority by the state.").

70. The preference for laypersons' judgments may also stem from a distrust of, or disinclination to rely exclusively on, lawyers' and judges' judgments. As one of George Eliot's characters in *Middlemarch* observes, "In my opinion . . . , legal training only makes a man more incompetent in questions that require knowledge of another kind." G. ELIOT, *MIDDLEMARCH* 168 (The Folio Society, London 1972), quoted in L. MOORE, *supra* note 21, at 164.

71. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting), quoted in *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

72. In terms equally applicable to the American jury, a commentator on the English system has observed:

[W]hat individual can so well weigh conflicting evidence, as twelve men indifferently chosen from the middle classes of the community, of various habits, characters, prejudices and ability? The number and variety of the persons is eminently calculated to secure a sound conclusion upon the opposing evidence of witnesses or of circumstance.

Speech by Lord Brougham, House of Commons (Feb. 7, 1828), quoted in M. LESSER, *supra* note 16, at 223-24.

plications for the accused.⁷³

Popular participation in criminal trials also serves community interests. Jurors are drawn from a limited geographical vicinity. Juries therefore satisfy the community's desire to participate in, and consequently to effect some control over, the criminal justice system. The jury interjects community conscience into the process, if only symbolically.⁷⁴ Community participation in turn enhances public confidence in and willingness to accept trial determinations.⁷⁵

Another possible advantage of popular participation is that untrained fact finders are not compelled to give reasons for their verdicts. Juries thus can introduce into the law a flexibility and responsiveness to special circumstances that may be important to its public acceptance.⁷⁶ Legal principles sometimes dictate a particular decision in circumstances in which popular sentiment would condemn that result. In this situation jurors can, and sometimes do, refuse to follow the law without providing an explanation.⁷⁷

Some people praise the jury's power to nullify statutory law and acquit a defendant it deems not blameworthy;⁷⁸ others condemn the jury's use of such

73. The need for a diffused impartiality on essentially subjective questions as a reason for the jury in criminal cases may be overstated. Other, noncriminal cases likewise entail subjective assessments that have vast implications for the participants, yet no jury right applies to these cases. For example, no jury right attaches to child custody suits. See L. MOORE, *supra* note 21, at 163.

74. See P. DiPERNA, JURIES ON TRIAL 21 (1984) ("In a sense, the jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial."); Comment, *The Prohibition of Group Based Stereotypes in Jury Selection Procedures*, 25 VILL. L. REV. 339, 345 (1979-80) ("Among the various purposes which the jury serves is that it grants legitimacy to society's perception of the jury as the collective conscience of the community."); Note, *supra* note 14, at 1782 ("[The jury] serves as a surrogate for the individual judgment of [the public's] citizens."). The locale from which the jurors are selected affects the extent to which the jury's verdict is regarded as a reflection of community sentiment. Because the jury pool is limited to a geographical area near the place of trial, the jury represents "close-to-home, law-and-order principles and practices that helped greatly to create a spirit of American nationality." Hyman & Tarrant, *supra* note 59, at 30. The locale of the jury pool thus was an issue critical to the colonists in their debates about the sixth amendment.

75. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."); see also A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (H. Reeve trans. Galaxy ed. 1946). Tocqueville wrote:

The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right.

Id.

Alexander Hamilton wrote in *The Federalist* No. 83 that to examine whether the jury is useful or essential in a representative republic would be "more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty." *THE FEDERALIST* No. 83, *supra* note 44, at 522.

76. P. DiPERNA, *supra* note 74, at 191-93.

77. A recent example of the refusal of jurors to follow the law is the case of Bernard Goetz, who attracted nationwide attention by shooting youths who harassed him on the New York City subway. Many people, frustrated by increasing crime and violence, favored nonprosecution of an apparently unremorseful Goetz. The grand jury that first heard the evidence against Goetz refused to indict him for murder. See IX Guild Notes, Spring 1985, at 1, col. 1.

78. See, e.g., Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 71-74; Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972). It may be that one's reaction to jury nullification depends in part on whether one believes in principles of natural justice, or natural law, versus positive law or legal

power.⁷⁹ Implicit in this nullification function, and in some commentators' approval of it, may be a condonation of mercy or passion over formalism and logic. The advocacy of occasional jury "lawlessness" may also reflect a basic, almost primitive, desire to return the power to fashion justice to local citizens.⁸⁰

Because juries are nameless, ever-changing bodies, they can make difficult, essentially subjective choices that would be less acceptable to the community if made by a single judge.⁸¹ In this way juries may enhance public confidence in the criminal justice system. An example is a decision of a jury in a rape case in which the defendant claims the alleged victim consented. A consent rape case involves complicated and subtle questions of credibility and evidence that evoke powerful emotional reactions in many people.⁸² A judge's decision to credit either the man's or the woman's testimony could produce a negative reaction from a variety of different groups. Although a jury's decision might evoke similar reactions, a verdict by a jury composed of representatives of key community groups—minority and non-minority women and men—is more likely to be acceptable to all of these groups than would one judge's ruling.

The role of the parties in selecting both the jury method of proof and the members of the jury is another feature of a jury trial that increases community acceptance of the verdict. Neither the parties nor the public is likely to complain that a verdict is unfair when it is rendered by persons the parties have selected.⁸³ This element of choice may be illusory for some defendants. Never-

realism. A natural law theory adherent may be more willing to give jurors free rein, as a layperson's sense of justice should be as sound and consistent over time as that of a professional judge.

79. See, e.g., J. FRANK, *supra* note 16, at 129-30; Simpson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512-20 (1976); see also Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULL. AM. ACAD. PSYCHIATRY L. 5, 10-12 (1984) (arguing that allowing juries to nullify law and to make individual, situational assessments of a defendant's blameworthiness would lead to uneven application of the law and thus would undermine the preventative function of criminal law).

80. The popular appeal of jury lawlessness is evidenced by the positive response to "The Verdict," a movie in which the professionals depicted, lawyers and doctors, are corrupt and incompetent. The hero of the film is the jury, which finds for the plaintiff, a victim of medical malpractice, despite her incompetent legal representation and an incorrect ruling by the judge excluding the only evidence that could support the jury's verdict. The filmmakers create the distinct impression that jury nullification is necessary to combat corruption in the legal profession.

81. See G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 57 (1978); A. EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* § 72, at 93 (1971). Pollock and Maitland observe:

We shall hardly explain the shape that trial by jury very soon assumed unless we take to heart the words of an illustrious judge of our own day:—"It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner." It saved the judges of the middle ages not only from this moral responsibility, but also from enmities and feuds.

2 F. POLLOCK & F. MAITLAND, *supra* note 16, at 627 (quoting 1 J. STEPHEN, *HISTORY OF CRIMINAL LAW OF ENGLAND* 573 (1883)); see also Broeder, *supra* note 53, at 418 ("Reasoning powers are often incapable of coping with knotty factual disputes; and to the extent jury magic can resolve them, legal certainty can in one sense be regarded as having been enhanced."). But see J. FRANK, *supra* note 16, at 136-37 (arguing that judges should be "able and willing to accept public criticism" and already must do so in the cases they try without juries).

82. See Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 402-10 (1985).

83. See L. MOORE, *supra* note 21, at 161; see also 2 F. POLLOCK & F. MAITLAND, *supra* note 16, at 623 (describing the jury of the thirteenth century and noting that because the litigants agreed

theless, the unfavorable verdict of a jury the parties have chosen generally will be viewed with more equanimity than would an adverse ruling by a judge the parties did not select.

The presence of jurors also adds to the trial a human dimension that is difficult to measure. As Professor Tribe has said, "The jury mediate[s] between 'the law' in the abstract and the human needs of those affected by it."⁸⁴ This humanizing function serves the community by helping the law to operate in a way that is comprehensible to the people the law must serve. If legal theories are too complex for jurors, who represent the nonlegal community, then the theories must be simplified. Otherwise, the citizen who must abide by the law will not understand what it requires and therefore may not conform to its dictates.

The elements of drama and ritual inherent in a jury trial enhance the humanizing quality of the jury. The presence of "twelve men good and true" corresponds with a deeply engrained sense of what a criminal trial "looks like" and of how our society should decide questions of guilt and punishment. This relationship does not necessarily mean that the ritual of a jury trial is a good ritual but simply that the community has come to expect and revere it.⁸⁵

In addition to the defendant-centered and community-centered interests it serves, the jury also serves several government-centered interests that are impor-

to be bound by the verdict "of the country," neither could "quarrel with the declaration that he has invoked. He has called for it, and must accept it.").

84. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971). Tribe describes much of what happens in a criminal trial as ceremonial or ritualistic expressions of "profoundly significant moral relationships and principles—principles too subtle to be translated into anything less complex than the intricate symbolism of the trial process." *Id.* at 1391. He sees the trial rights of the accused not only as devices for achieving certain legal results but also as "affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and indeed, about the society we are." *Id.* at 1392. *But see* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (arguing that the ritualist view of the trial fails to consider that the ordinary citizen does not participate in the ceremony and that the celebration of trust, equality, and individual dignity in the judicial proceeding is done exclusively by and for the lawyers).

85. Moore credits tradition as a basis for public respect for the jury and notes, "All societies that have endured have, consciously or otherwise, emphasized the authority of their institutions by appealing to the antiquity of their forms." L. MOORE, *supra* note 21, at 145. Other writers have acknowledged the importance of ritual in the law. Smith, McWilliams, and Bloomfield have observed:

[A]ll social rituals and some in particular (like religious rites) have a special shape and drama, but in few areas of life is this so obvious and important as in the law. Society wants trials to follow their special structure not only for practical reasons of hearing cases but also because that structure is satisfying in some profound way. This suggests that the standards of legal order and aesthetic order are related, and that the individual's and the community's conception of justice is based not only on principles but also on a sense of what is the most emotionally and intellectually pleasing relation of actions.

C. SMITH, J. MCWILLIAMS & M. BLOOMFIELD, *LAW AND AMERICAN LITERATURE* 15 (1983); *see also* Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre*, 28 STAN. L. REV. 81, 82 (1975) ("The live presentation of cases in the courtroom, although a means to the end of judgment, is also an end in itself. Trials and oral argument are as essential to the judicial system as performance is to drama.").

Frank acknowledges the part tradition plays in preserving the jury, but does so to criticize the jury. *See* J. FRANK, *supra* note 16, at 139 (arguing that "[i]t is extremely doubtful whether, if we did not now have the jury system, we could today be persuaded to adopt it," and that it persists only because it has "become embedded in our customs, our traditions").

tant to a democracy. Jury duty educates citizens in the mechanics of their justice system and palpably demonstrates the responsibility of citizens for the quality of government.⁸⁶ The continued exposure to the legal system that lawyers and judges experience is likely to harden them to the bewilderment, respect, and awe that the law can evoke in laypersons. A powerful reminder of the educational aspect of jury trials is the positive reaction many citizens have to their service as jurors.⁸⁷ Moreover, to the extent their encounter with the justice system increases jurors' respect for judgments, it preserves government power.⁸⁸

The significance of the various functions of the jury is qualified by the power of the defendant to waive a jury trial.⁸⁹ Thus, although trial by jury furthers the community interests described above, and despite the acknowledgment that trial by the jury is "the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses,"⁹⁰ the jury trial right remains the privilege of the accused. This fact is often ignored in discussions about various aspects of trial by jury, including the discussion about whether the prosecutor should be allowed to exercise peremptories to exclude minorities from the jury. To lose sight of the sixth amendment as a defendant-centered right, however, means to lose sight of its place in the Bill of Rights.⁹¹

86. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 171 (1929). Wigmore asserts:

In a democracy, where the operation of the law frequently becomes a political issue, it is important that the body of citizens should have a general acquaintance with court methods. They must not be a mystery. Mere publicity of trials does not effect this; for only the casual witnesses and the idle or curious now form the audience of a court room (except in certain rural regions). But jury-duty will bring all respectable citizens sooner or later to have acquaintance with court methods, and in such a way as to compel serious thought and give the needed scrap of judiciary education common to all.

With judge-trial, nothing of the kind takes place. Even the publicity of trial does not produce its modicum of effect; compare the attendance before a master or referee and the attendance at the humblest jury-court.

Id.; see also Hyman & Tarrant, *supra* note 59, at 40 (stating that jury service educates Americans in the areas of law and justice); cf. Broeder, *supra* note 53, at 419 (questioning fairness to litigants of educating the citizenry at their expense).

87. See, e.g., E. KENNEBECK, JUROR NUMBER FOUR (1973) (account of juror in trial of thirteen Black Panthers); M. TIMOTHY, JURY WOMAN (1975) (account of the forewoman of the jury in the trial of Angela Davis). The positive reactions by those who have actually served as jurors should not be confused with the reluctance of others to serve as jurors that some writers cite in contending that jury service is perceived as an "irksome" chore. See, e.g., Broeder, *supra* note 53, at 420 (widespread attempt of persons to secure exemptions from jury service).

88. A. DE TOCQUEVILLE, *supra* note 75, at 128 ("The jury, then, which seems to restrict the rights of the judiciary, does in reality consolidate its power; and in no country are the judges so powerful as where the people share their privileges."). One may argue that because the jury presents only a very limited incursion on official authority, it preserves to government the maximum power possible. Also, because it is viewed by many as representative of society, the jury may be a dangerously deceptive institution insofar as it is not, in fact, representative of those groups most powerless, most disaffected, and as such most oppressed by government and existing hierarchies. Thus, the jury may have enough power to placate the community but not enough to disturb the status quo in any significant fashion. On the contrary, it may preserve the status quo far better than no community participation would, particularly if the jurors themselves are members of the dominant middle class culture. See Broeder, *supra* note 53, at 414 (arguing that the jury protects individuals from government oppression only when the government is more powerful than the people; when the people are more powerful, jurors may support government oppression).

89. *Singer v. United States*, 380 U.S. 24, 36 (1965).

90. *Patton v. United States*, 281 U.S. 276, 312 (1930).

91. The Supreme Court in *Patton v. United States*, 281 U.S. 276 (1930), approved a defendant's

A second qualification of the discussion of the jury's functions is that many of the assertions concerning these functions are assumed, untested, or controversial. Not everyone agrees, for example, that the opinions of laypeople represent "common sense judgments." Some would argue that jury decisions are irrational and based on emotional responses to attorneys and witnesses,⁹² while others would argue that the jury represents the lowest common denominator of society,⁹³ that it is expensive,⁹⁴ and that it is subject to whim and prejudice.⁹⁵ Others maintain that the theory may be good but the practice is corrupt; juries

right to waive trial by jury in a felony case. In allowing waiver by a defendant, the Court identified no distinct state or community interest in a jury trial. The only state interest the Court mentioned was that of preventing the accused from waiving the state's interest in the *individual's* liberty. *Id.* at 295-96. The Court concluded that this interest was overcome by the improbability that a defendant would waive his or her liberty interest and go to jail; moreover, a defendant is allowed to plead guilty to a crime without impairing this state interest. *Id.*

The Court emphasized the individual-centered character of the sixth amendment in the following passage:

The record of English and colonial jurisprudence outdating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the court.

Id. at 296-97. In *Singer v. United States*, 380 U.S. 34 (1965), however, the Court retreated from its view of the sixth amendment right to trial by jury as an exclusively defendant-centered privilege. The Court in *Singer* upheld the criminal rule of procedure that allows the prosecution to override the defendant's waiver of trial by jury. The Court held that a defendant has no constitutional right to a nonjury trial; consequently, there is "no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney." *Id.* at 36. The only result of this condition is that the defendant will be tried by a jury, which is the very right secured to the defendant by the sixth amendment. The Court then added the following statement, without citation or other authority:

The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that the cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. This recognition of the government's interest as a litigant has an analogy in Rule 24(b) of the [F]ederal [R]ules [of Criminal Procedure], which permits the government to challenge jurors peremptorily.

Id. This passage is troubling; if the right to trial by jury belongs to the defendant and if the defendant can waive it, then the government enjoys no constitutional interest in a jury trial. Although the defendant has no constitutional right to *not* have a jury, the choice should be the defendant's. The government cannot reasonably complain that the alternative, a bench trial, is unfair unless the bench is biased or otherwise incompetent. If it is, then the problem is not a sixth amendment one.

The Court is correct in concluding that the defendant is neither deprived of a fair trial nor of the right to trial by jury if he or she waives a jury but nonetheless is tried by an impartial jury. The problem of *Singer* is not its result but its embrace of the notion that the state has an interest in a particular method of trial among the available, fair methods—bench or jury—that can defeat the defendant's preference for a bench trial. The vague "government-as-litigant" rationale for *Singer* is unpersuasive and unnecessary.

92. See, e.g., J. FRANK, *supra* note 16, at 130. Frank disputes the premise that jurors are sophisticated enough to selectively ignore the legal rules handed down by the judge. He argues, instead, that jury decisions are based on emotion due, in part, to jurors' failure to understand the judge's explanation of the applicable legal rules.

93. See Broeder, *supra* note 53, at 390-91 (typical jury selection process exempts from service professional men and women, or those most capable of serving).

94. *Id.* at 423 (rebutting argument that a jury trial deters litigation and, instead, arguing that the requirement of a jury trial causes, for the most part, congested court dockets, thus delaying trials).

95. *Id.* at 412, 415 (citing numerous instances in which minorities have been convicted on very slight evidence).

represent only white, middle-class Americans, not the community.⁹⁶ Some jury critics would likely applaud developments in the law that allow six-person juries,⁹⁷ nonunanimous verdicts,⁹⁸ judge-conducted voir dire,⁹⁹ and other limitations on the jury designed to save time and money.

Whether the jury is the best way to resolve criminal cases, however, is irrelevant to decisions about proper jury composition and selection procedures. A debate about whether juries are a good thing is essentially a debate about whether the sixth amendment should be abolished. Because there is no movement calling for such an abolition, this Article assumes that the sixth amendment represents a current political consensus. Accordingly, it proceeds on the premise that the right to trial by jury represents valuable interests, that paramount among these interests are those that benefit the accused, and that a proper jury procedure is one that protects, rather than undermines, these interests.

C. *The Jury as Triptych*

The negative reaction to *Swain*¹⁰⁰ stems from the appearance of unfairness in having a white jury hear a case in which a black defendant is accused of raping a white woman. No discussion of *Swain* addresses the evidence used to convict Mr. Swain in any detail, and for good reason: guilt of the defendant is irrelevant to whether the jury composition appeared acceptable.¹⁰¹

Because a jury's fairness is determined not only by its verdict but also by its visual appearance, jury selection procedures must produce juries that correspond to people's images of a fair jury. Otherwise, people will distrust jury verdicts regardless of the "correctness" of those results on the merits, and the jury will lose the respect essential to effective decision making.

The visual image of a fair jury can be described as a triptych. A triptych is a picture that has three panels, side by side. The center panel image is fixed, while the flanking panel images overlap the center panel image. In a triptych of the criminal jury, the left panel represents the defendant's image of a fair jury—a

96. See, e.g., Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L. J. 80, 80 (1973).

97. *Williams v. Florida*, 399 U.S. 78 (1970).

98. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

99. See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). In 1984 two bills to permit attorney voir dire in federal civil and criminal trials were approved by the Senate Judiciary Committee's Subcommittee on Courts, but they have not been adopted. See Riley, *Voire Dire Debate Escalates Over Lawyers' Participation*, Nat'l L.J., Dec. 24, 1984, at 1, col. 3; 9 Litigation News, Summer 1984, at 1, col. 2.

100. See *supra* note 7.

101. Although neither the apparent guilt of the defendant nor the heinousness of the crime should influence a court's decision whether the trial procedure was fair, both may affect a judge's view of the procedural objections. Thus, it is not unusual for a court that refuses to overturn a conviction to state in detail the gruesome facts of a case. See, e.g., *Wainwright v. Witt*, 105 S. Ct. 844, 847 (1985) (Brennan, J., dissenting); *Patton v. Young*, 104 S. Ct. 2885, 2886 (1984). Justice Stevens has expressed concern about this phenomenon, *id.* at 2893-94 (Stevens, J., dissenting), and has noted that the Court, in 20 consecutive cases, exercised its discretion to decide a criminal case summarily to "ma[k]e sure that an apparently guilty defendant was not given too much protection by the law." *Id.* at 2900 n.8 (Stevens, J., dissenting).

group of citizens who will listen to the defendant's version of the facts and who, ideally, will identify in some way with the defendant's life or be empathetic to the defendant's plight. The jury represents the defendant's hope of a hearing by others of common experience.

The right panel represents the government's image of a fair jury—a group of citizens who will listen to the government's version of the facts and who will perform a role in the enforcement of the penal code by convicting defendants whose guilt is established beyond a reasonable doubt. The government desires a jury that will identify with the victims of crime and that will not be afraid to punish those who violate the law and injure others.

The center panel of the triptych represents the community's image of the jury—a group of citizens who will sift through the defendant's and the government's evidence and extract the truth. The community may identify with both the defendant and the government, because its members may one day be victims of crime or of government oppression. Fearing both, though perhaps not equally, the community desires a jury system that is reasonably fair to the defendant yet willing to protect the people from criminals. It probably desires a jury composed of some—but not all—defendant empathizers and some—but not all—victim empathizers.

If this rough concept of the jury is accurate, then a jury selection procedure that allows both sides to challenge prospective jurors for cause and to challenge a limited number of others for no reason through peremptories seems acceptable. What should emerge from this procedure is a jury composed of some defendant-empathizers and some victim-empathizers, with the extremes of either side offset. The defendant might need to be allotted extra peremptories to counterbalance the government's natural advantage in a criminal case.¹⁰² This description represents, roughly, how the system operates today, at least for defendants who come from groups that are well-represented in the community.

The problem with the system is that not all defendants have enough empathizers in the community so that at least one of them is sure to get into the jury box after the prosecution has exercised its peremptories. This result is particularly likely when the prosecution intentionally exercises those peremptories to eliminate the defendant's peers. When the jury contains none of the defendant's peers, the defendant's hope of an empathetic hearing vanishes. The left panel image of the jury as citizens who will hear the defendant is distorted or even eliminated, and the center panel image of the jury becomes right-panel skewed.

This result occurred in *Swain*. Swain's jury appeared unfair because none of his peers, in this case black persons, was included. Moreover, the absence of black jurors was attributable to government exercise of peremptories. The right panel of the triptych of Swain's jury thus was doubly weighted in favor of the government: it was all-white, and the prosecution made it that way. Whether

102. Some studies indicate that 60% of prospective jurors do not accept the principle that a defendant is presumed innocent. See, e.g., NATIONAL JURY PROJECT & NATIONAL LAWYERS' GUILD, *THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE* 2 (1975).

the *Swain* result is a necessary evil in a system that is otherwise benign in appearance depends on whether reasonable alternatives to that result exist and whether those alternatives are consistent with constitutional history and values.

III. PEREMPTORY CHALLENGE PRACTICES

This section reviews peremptory challenge practices and history and the significance of voir dire to the exercise of those challenges. The review demonstrates that peremptories have never been proven to be an effective means of eliminating bias on the jury. Rather, they serve only to comfort somewhat the parties' attorneys about the jury's predisposition to rule against them, an interest that has been given undue importance by the Supreme Court when conflicts have arisen between the state's peremptories and the defendant's right to a fair jury.

A. Peremptories

Challenges to prospective jurors are of two basic types: challenges for cause,¹⁰³ which are available to both sides in unlimited numbers, and peremptory challenges, which are also available to both sides but in limited, sometimes unequal, numbers.¹⁰⁴ These challenges occur at the end of the jury selection

103. Typical bases for cause challenges are a blood relationship between a party and the potential juror, a pecuniary interest in the outcome of the case, or prejudice against either party. See A. SHAUFELEBERGER, *supra* note 19, at 121; J. VAN DYKE, *supra* note 54, at 143-44.

104. In several states, the number of peremptory challenges allowed each side is determined according to the punishment that may be imposed. See, e.g., CAL. PENAL CODE § 1070 (West 1985) (each side is allowed twenty-six peremptories if the potential punishment is death or imprisonment for life, six if the offense is punishable by a maximum of ninety days in the penitentiary, and ten in all other cases); CONN. GEN. STAT. ANN. § 54-82g (West 1985) (each side gets twenty-five peremptories if the crime is punishable by death, fifteen if the crime is punishable by life imprisonment, six if the punishment that may be imposed is imprisonment for greater than one year but less than life, and three in all other cases); Code of Criminal Procedure of 1963, § 115-4(4)(e), 1963 Ill. Laws 2836, 2868 (codified at ILL. ANN. STAT. ch. 38, § 115-4)(e) (Smith-Hurd 1977 & Supp. 1985)) (State and defense each get twenty peremptories in a capital case, ten if the offense is punishable by imprisonment in the state penitentiary and five in all other cases); N.C. GEN. STAT. § 15A-1217 (1983) (each side gets fourteen challenges in a capital case and six in a noncapital case; each party gets one additional peremptory for each alternate juror); TEX. CODE CRIM. PROC. ANN. art. 35.15 (Vernon 1966 & Supp. 1985) (each side gets fifteen peremptories in a capital case and ten in other felony cases); FLA. R. CRIM. P. 3.350 (State and defense are each given ten peremptories if the crime is punishable by death or life imprisonment; each side is allowed six challenges in other felony cases); MASS. R. CRIM. P. 20(c)(1) (State and defense each get twelve peremptories if the crime is punishable by life imprisonment and four in all other cases if tried before a jury of twelve, but if tried before a jury of six, each side is entitled to two peremptory challenges).

The manner of exercising peremptory challenges is similarly varied. Several states grant the trial court virtually unlimited discretion in determining the manner and order in which peremptory challenges may be exercised. See, e.g., *Valdez v. State*, 443 So. 2d 223 (Fla. Dist. Ct. App. 1983) (holding that trial court has discretion whether to swear jurors singly or in a group); *People v. Moss*, 470 N.E.2d 574, 576 (Ill. App. 1984) (noting that the trial court retains discretion over exercise of peremptories).

Kentucky and Texas employ a "struck" system of jury selection. Under this system each party is given a list of potential jurors, then each party exercises its peremptory challenges. Thereafter, the remaining names are given to the clerk of court. In Kentucky the clerk chooses twelve jurors at random; in Texas the clerk selects the first twelve names on the list. See KY. R. CRIM. P. 9.36(2); TEX. CODE CRIM. PROC. ANN. art. 35.26 (Vernon 1966 & Supp. 1985). In Texas the struck system is used in noncapital cases, see *Fuller v. State*, 409 S.W.2d 866, 869 (Tex. Crim. App. 1966), and in capital cases when group voir dire is employed. See *Koonce v. State*, 654 S.W.2d 705, 709 (Tex.

process.¹⁰⁵ Cause challenges are designed to eliminate individuals who demonstrate on voir dire actual or implied partiality. Peremptory challenges, which may be exercised without giving a reason, are designed to eliminate individuals whom the parties perceive as undesirable for any reason.

Lawyers rely on numerous factors in exercising their peremptories, including facial expression, dress, demeanor, race, gender, responses to voir dire questions, background information obtained through investigation of prospective jurors, and other available data. Sometimes, particularly in political trials or trials of wealthy defendants, a lawyer may use psychological and sociological data to interpret the available information and to predict the voting behavior of

Crim. App. 1983). In capital cases in which prospective jurors are questioned individually, the parties must exercise their challenges as each juror is examined. TEX. CODE CRIM. PROC. ANN. art. 35.13 (Vernon 1966 & Supp. 1985); see *Grijalva v. State*, 614 S.W.2d 420, 424 (Tex. Crim. App. 1980).

The California, North Carolina, and New York statutes contain detailed provisions for the exercise of peremptory challenges. All three states employ a "box" method of jury selection. In California the requisite number of jurors required to try the case is called to the jury box and the parties exercise challenges for cause. After the challenges for cause, the State is required to exercise any peremptory challenges on the jurors in the box. If a juror is excused peremptorily by the State, a replacement juror is called to the box. The State must tender an acceptable panel of 12 jurors to the defense before the defense can be required to exercise any peremptory challenges. The defendant then exercises his or her peremptory challenges. The 12 jurors acceptable to the defendant are then passed back to the State, and the process continues until both sides accept the panel. During this process of "passing" the panel, either side may challenge a juror it previously accepted. CAL. PENAL CODE § 1088 (West 1985).

In North Carolina the prosecutor questions the first 12 jurors; they are not passed to the defendant until the prosecutor indicates satisfaction with the panel. If the prosecutor exercises a challenge, an alternative juror is immediately chosen for the box. Once the prosecutor is satisfied with the panel, the defendant begins questioning. If the defense challenges a juror, however, no replacement is chosen until the defendant indicates satisfaction with those remaining. Replacements are then chosen and the prosecutor examines them first, then passes them to the defendant. The process is repeated until 12 jurors satisfactory to all parties are chosen. N.C. GEN. STAT. § 15A-1214 (1983).

In New York, the court calls a panel of 12 or more jurors for questioning. After both sides have been given the opportunity to challenge the jurors for cause, the State must exercise its peremptory challenges before the panel is tendered to the defense for challenge. The State cannot challenge a juror whom it has previously passed. The process continues until a jury is selected. N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1982).

The procedure for exercising peremptory challenges in Massachusetts is unclear, but it appears that MASS. R. CRIM. P. 20(b) vests broad discretion in the court to determine the manner of exercising peremptory challenges. See *Commonwealth v. Joyce*, 467 N.E.2d 214, 218-19 (Mass. App. 1984) (implicitly approving the trial court's use of a struck system).

105. See J. VAN DYKE, *supra* note 54, at 147. The first step in the process is the compilation of names for the jury pool. From the pool of eligible jurors, a venire is selected, usually through a random process. Persons qualified for exemptions then are excused. Those remaining are examined through voir dire, and those who remain after challenges are exercised become the petit jury. *Id.*

Variations among the states regarding exemptions may affect the composition of the pool. See, e.g., Brown, *Eliminating Exemptions from Jury Duty: What Impact Will It Have?*, 62 JUDICATURE 436, 437 (1979) (examining effects of eliminating list of exemptions in California in favor of "undue hardship" standard).

Different practices regarding voir dire may also play a role in the value of available challenges. In federal court, the judge typically conducts voir dire, G. BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 6 (1977), although the rules afford the judge discretion to allow counsel to examine the prospective jurors. See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). Other common methods of voir dire include allowing counsel to conduct the inquiry and allowing both judge and counsel to conduct voir dire. See Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 928-30 (1971).

prospective jurors.¹⁰⁶ In most cases, however, the lawyer relies only on his or her experience and intuition in interpreting information about prospective jurors.¹⁰⁷

106. See Babcock, *Voir Dire: "Preserving Its Wonderful Power"*, 27 STAN. L. REV. 545, 558-61 & nn.50-56 (1975) (collective authority that discusses the use of social science experts in selecting juries); Miller, *Justice Ain't Cheap—A Defense Counsel's View of the Joan Little Case*, 7 SAN FERN. V.L. REV. 59, 63-66 (1978) (discussing use of costly pretrial surveys to construct profiles of desirable jurors); Saks, *Social Scientists Can't Rig Juries*, PSYCHOLOGY TODAY, Jan. 1976, at 48 (social science experts have been used in many highly publicized trials: Camden 28; Gainesville 8; Angela Davis; Wounded Knee; Attica; Mitchell-Stans Conspiracy; Harrisburg 7).

107. Bar journals and trial magazines are replete with suggestions of things to look for in choosing or rejecting a potential juror. The most common group of suggestions focuses on demographic stereotypes—race, age, sex, and employment. Examples of the most common stereotypes appear in these excerpts from articles offering advice on jury selection:

1. In picking a jury, we know that certain nationalities are emotional and react to sympathy. Among these are the Italians, French, Jews, Spanish, Greeks, Slavs, and Irish. On the other hand, the Germans, Swedes, Norwegians, Finns, English, and the other Nordics are generally less apt to be swayed emotionally and less apt to return an excessive verdict. . . . The Swedes, Germans, and Nordics by occupation are usually carpenters, mechanics, scientists, etc. These endeavors necessitate accuracy, a sense of precision, and a logical sequence of things. . . . On the other hand, the Latins and the Slavs engage more generally in the fine arts, such as music, drama, literature, painting, etc. This type of occupation calls less for accuracy and is based upon emotion, sentiment, inspiration, and impulse. Therefore, they have a flair for the dramatic; think less logically, and are apt to return larger verdicts.

. . . .
[W]e know that the Irish are very superstitious; that they have an innate dislike for the English; that they like conviviality; and that they have a carefree spirit.

Arpaia, *Hints to a Young Lawyer on Picking a Jury*, 6 J. MAR. L.Q. 344, 345 (1941).

2. Women jurors are desirable [for the defendant] if the defendant happens to be a handsome young man. . . . Women are desirable if the principal witness against the defendant is a woman. Women are somewhat distrustful of other women. . . . The occupation of a woman's husband is important, too, for generally she will feel and think in the same manner as her husband.

Rothblatt, *Techniques for Jury Selection*, 2 CRIM. L. BULL., May 1966, at 18; see also Kelner, *Jury Selection: The Prejudice Syndrome*, 56 N.Y. ST. B.J., Feb. 1984, at 36. Kelner states:

[H]ell may have no fury like a woman juror who is to decide the case of a young and attractive woman. The juror in such cases is apt to be a severe critic of the dress, speech and deportment of the female plaintiff. The merits of the case may only be incidental.

Id.

3. I find that women on juries are extremely intolerant as to the complaints of their own sex. When a woman plaintiff starts talking about back aches and headaches to another group of women, she is talking about ailments which most of the other women have had, and the other women have never been paid for these back aches and headaches.

Heyl, *Selection of the Jury*, 40 ILL. B.J. 328, 340 (1952).

4. If the defendant is black, defense counsel should attempt to impanel a jury which is generally young, above-average occupational status, above-average income, well educated, politically liberal, not identified with organized religion or regular church attendance, and single. . . . [J]urors of higher occupational status may not feel threatened by job competition from blacks and, therefore, are more inclined to sympathize with a black defendant.

Salisbury, *Forensic Sociology and Psychology: New Tools for the Criminal Defense Attorney*, 12 TULSA L.J. 274, 289 (1976).

5. "Blacks favored acquittal more than whites There is some evidence that females and blacks are more lenient and less 'conviction-prone' than men and whites." Mills & Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts?*, 64 JUDICATURE 23, 24-25 (1980); cf. S. WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* 75 (1981):

Some defense lawyers figured that black jurors were more likely to convict a black defendant because they were frequently the victims of crime. But I wanted black jurors because I

The accounts of lawyers describing their objectives during juror selection are revealing. Their anecdotes, prescriptions, and war stories demonstrate that lawyers do not set out to choose impartial jurors. Rather, most trial attorneys probably agree with the following description of jury selection, written by a former chair of the American Bar Association Section on Litigation:

We all know that jury selection is a negative process. If you like a juror a lot, your opponent will probably strike him. What kind of people do I not want? I do not want those whose occupations, ages, social background, marital status, education, and experience will lead them to identify with my opponent and his position in the case.¹⁰⁸

felt they might have some sympathy or loyalty to a 'brother'; that was why most D.A.'s knocked all blacks off the jury.

6. Generally, retired police officers, military men and their wives are undesirable. They have adhered to a strict line of conduct throughout their lives. They believe if a man is arrested, he is probably guilty. . . . Salesmen, actors, artists, and writers are highly desirable. They have enjoyed wide and varied experiences, have witnessed the good and bad in people and are prone to forgive an indiscretion in another. . . . Bankers, bank employees, members of management, and low-salaried white-collar workers are generally undesirable. They have been trained either to take or give orders, are forced to toe the line, and usually expect others to do the same.

Rothblatt, *supra*, at 14, 19.

7. "Secretaries, teachers, and managers are trained to avoid mistakes and may be less tolerant of those who deviate from societal norms. The first impression of engineers, machinists, programmers, bankers, and accountants is likely to be that the accused is guilty." Johnson, *Voir Dire in the Criminal Case: A Primer*, 15 TRIAL, Oct. 1983, at 61, 65.

Many trial attorneys have voiced their personal biases in how to select a jury. Clarence Darrow, the well-known trial attorney of the early part of the 20th century, for example, noted that most trials are between the rich and the poor, with the poor invariably the defendants. Darrow admonished:

"Never take a wealthy man on a jury. He will convict, unless the defendant is accused of violating the anti-trust law, selling worthless stocks or bonds, or something of that kind. Next to the Board of Trade, for him, the Penitentiary is the most important of all public buildings."

Plutchik & Schwartz, *Jury Selection: Folklore or Science?*, 1 CRIM. L. BULL., May 1965, at 4 (quoting Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 211). As for ethnic groups, Darrow had a decided preference for the Irish. "'An Irishman is emotional, kindly, and sympathetic. You would be guilty of malpractice if you got rid of him. . . . Keep Unitarians, Universalists, Congregationalists, Jews and other agnostics.'" *Id.*

108. Hanley, *The Last Thirty Days*, 10 LITIGATION, Winter 1984, at 10. One commentator summarizes her impressions of lawyers' objectives in voir dire as follows:

What do attorneys want in a jury? In theory, they want an impartial representative group of people who will listen to and consider all the evidence fairly and bring in a verdict. In practice, they want people who have some disposition, some tilt, toward their client, or who can be tilted. Jury selection is, in the end, the manipulation of bias.

P. DIPERNA, *supra* note 74, at 113; see also J. FRANK, *supra* note 16, at 121 (lawyers do not strive to choose impartial jurors); Comment, *Computers and Scientific Jury Selection: A Calculated Risk*, 55 J. URB. L. 345, 345 (1978) (discussion of use of computers as jury selection tool). The stereotypes on which some lawyers operate may be inaccurate. For example, one pair of writers states that if Clarence Darrow were right about how the Irish vote, then Ireland would be a utopia for the criminal defense lawyer. Yet, they observe, "An examination of the prisons of Ireland reveals that, as a general proposition, the cells are occupied." Plutchik & Schwartz, *supra* note 107, at 5.

Another writer reports research which leads to the conclusion that "Irish jurors are the most conviction-prone ethnic group; Germans are not as 'merciless' as frequently imagined." Johnson, *supra* note 107, at 65. Other research disproves the stereotypes that women and blacks are more lenient and likely to acquit by finding that black females reached the highest percentage of guilty verdicts. Mills & Bohannon, *supra* note 107, at 27. Some writers say attorneys' choices are based merely on "superstitions," noting that "'lawyers use their own general attitudes about people when selecting a jury . . . like successful poker players and other gamblers, most criminal trial lawyers

Although litigators may seek to eliminate jurors who will sympathize with an opponent, they may not succeed in accurately predicting whether and how a juror's occupation, age, social background, or other characteristics will bear on voting behavior. Even lawyers who use expensive multidisciplinary data to make their predictions may not substantially improve the accuracy of their juror selection strategy.¹⁰⁹ One reason is that social research on jury performance is

have acquired some "superstitions" in their attitudes toward jury selection." Hawrith & Tate, *Determinants of Jury Selection*, 39 SASK. L. REV. 285, 285 (1975) (quoting Mossman, *Jury Selection: An Expert's View*, PSYCHOLOGY TODAY, May 1973, at 78).

Darrow's preference for the poor and the Irish has been explained by his own preference for them as people. "Darrow liked Irishmen, agnostics and poor people; he felt comfortable with them. This was probably the real basis for his selection of jurors." Plutchik & Schwartz, *supra* note 107, at 9.

Thus, the literature and accounts of actual practice indicate that jury selection may not produce a jury of the peers of the defendant but a jury of peers of the defendant's attorney. This rule seems to be true even when, over time, an attorney's choice of jurors proves to be the wrong choice over and over again. Lawyers "selectively perceive" those behaviors that coincide with their own preconceived biases and stereotypes and do not "learn" from inconsistent juror behavior. See Kallen, *Peremptory Challenges Based on Jurors' Background*, 13 TRIAL LAW. GUIDE 143, 152-54 (1969); see also Sperlich, *Scientific Methods for the Selection of Trial Jurors: Practical and Ethical Considerations* (unpublished manuscript available at University of Florida School of Law).

109. Use of psychologists to help choose jurors was suggested, at least tangentially, as early as 1898, see Crothers, *A Psychological Study of Jurors*, 60 ALB. L.J. 341, 343-44 (1898), and was discussed more directly by the 1920s. See Christian, *An Applied Psychology of the Court Room: Its Possibilities*, 12 VA. L. REV. 122, 126-29 (1925).

Psychologists employed to select juries often rely on several indicators in making their decisions. One major indicator of a potential juror's behavior in the jury box is whether that person can be classified as an "authoritarian" or "egalitarian." Some psychologists believe that lawyers use demographic stereotypes to make this classification.

Our assumption [of the existence of an authoritarian personality] is implicitly expressed by legal writers espousing rules of thumb for jury selection. They suggest many demographic clues to reliance on authority. Groups traditionally believed to favor [the prosecution] as an agent of society include (1) men; (2) Republicans; (3) upper income groups; (4) occupational groups such as bankers, engineers and certified public accountants, and others with positions of petty respectability; and (5) members of the Teutonic ethnic groups, particularly Germans. . . . [T]he following groups are more likely to be egalitarians: (1) women; (2) Democrats; (3) middle and lower economic groups such as butchers; (4) certain occupational groups, such as social scientists; and (5) minority racial or ethnic groups, such as Latins or Jews.

Fried, Kaplan & Klein, *Juror Selection: An Analysis of Voir Dire*, in THE JURY SYSTEM IN AMERICA, *supra* note 59, at 52.

The authoritarian/egalitarian theory was developed by researchers in the 1950s as a technique to detect profascist or antidemocratic individuals. Authoritarians are believed to be "highly punitive, racist, politically conservative, rigid, and acquiescent to authority figures. . . . [They are also] more likely to change their opinion when faced by an authority figure's (expert) opinion which [is] different from theirs." Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N.U.L. REV. 571, 575-76 (1978).

A second source of information relied on by psychologists is a juror's "body language" (technically known as kinesics and paralinguistic communication). The theory underlying observations of body language is that "body movements, posture, gestures, and vocal intonation and hesitation can be combined to provide additional information about what a person is 'really' saying." Frederick, *supra*, at 583; see also Suggs & Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629, 630-37 (1978) (discussing psychological studies that analyze communicative behaviors, such as rapidity of speech, eye contact, and facial cues that might assist lawyers in "reading" jurors).

Another technique focuses on jurors' physical proportions. See *Selection of Jurors Based on Their Physical Characteristics*, 3 CURRENT MED. FOR ATT'YS, Sept. 1956, at 2, 4 ("studies have shown that certain body types are basically generous people (endomorphs). . . . [E]ctomorphs . . . [are] people who as jurors would be quite miserly (and tend towards small awards in personal injury

limited. Another reason is that the accuracy and utility of available studies of juror behavior are necessarily qualified by, among other factors, rules that prohibit recording, listening to, or observing juror deliberations.¹¹⁰ Furthermore, jury composition changes in each case and thus confounds attempts to make general statements about jury decision making. Finally, studies about group decisions performed in laboratory settings are of limited applicability to jury decisions in actual cases.¹¹¹

trials)."). Adkins, *Jury Selection: An Art? A Science? or Luck?*, 5 TRIAL, Dec.-Jan. 1968-69, at 37, 37, observes:

Some lawyers study physiognomy and believe that certain types of people have certain characteristic responses. Fat people are said to be jovial; a fair complexion evidences a warm heart with a sense of humanity; people with light hair are sympathetic; people with thin, sharp faces are self-opinionated and stubborn.

See also Rothblatt, *supra* note 107, at 18 ("Physical characteristics are particularly important to the lawyer defending a case in the Federal courts where selection of jurors is made without personal interrogation, and only after the Judge has asked all the questions.").

Two additional techniques—use of a psychic and reliance on the defendant's own intuition—were used in the highly-publicized trial of Joan Little, a black prison inmate accused of murdering a white male guard who was found dead with semen on his leg and his pants, and whose shoes were found outside Little's jail cell. McConahay, Mullin & Frederick, *The Use of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, LAW & CONTEMP. PROBS., Winter, 1977, at 205, 214 (1977).

One last technique, not often used, is handwriting analysis. Katz, *The Twelve Man Jury*, 5 TRIAL, Dec.-Jan. 1968-69, at 40 ("Many competent psychologists use graphology to determine personality traits of a particular juror and to detect if he has ever been in an accident, has any physical defects, is generous, conservative, overbearing or mentally disturbed.").

While all the above techniques are utilized to varying extents, proponents of each technique admit that there is no foolproof way to pick the perfect juror.

The field is not one of guarantees but of probabilities based upon generalities of human behavior. Psychologists can forecast the likely cause of human behavior under certain circumstances; sociologists can forecast what certain groups of people are like and how they are likely to react as a group. But no science or art yet devised is able to predict exactly what any individual or group will do in a given situation.

Salisbury, *supra* note 107, at 292.

Not only is juror selection unpredictable, even with the use of psychologists and sociologists, it is also possible that the more sophisticated one becomes the less likely one is to select the desired jurors. For example, in the Mitchell/Stans trial, *United States v. Mitchell*, 372 F. Supp. 1239 (S.D.N.Y. 1973), the defense attorney used every form of expert juror selection aid, but the experts' predictions about voting behavior were completely wrong.

The former attorney general's lawyer had hired a professional jury selector, a member of a new and growing body of professionals with backgrounds in the social sciences. The jury selector, applying market research techniques long used in advertising, advised the trial lawyer on the types of jurors most likely to be kindly disposed toward his client. After much expensive research, this expert devised a profile of the ideal juror. Mitchell's lawyer, taking his expert's advice, had picked fifteen working-class, not-very-well-educated ethnics. Four more than the necessary twelve jurors had been selected in the event that any of the original twelve could not complete the long trial. The sixteenth juror—a New York banker—had been the exact opposite of the profile. To the horror of the defendants, the nonprofiled juror wound up participating in the deliberations. However, the social science expert's opinion notwithstanding, on the first vote in the jury room, according to Martin Arnold of the *New York Times*, eleven had voted to convict—only the upper-class WASP banker had voted to acquit. And over the days of deliberation, the non-perfect profile had persuaded the other eleven to join his position.

S. WISHMAN, *supra* note 107, at 83-84.

Pointing to instances such as that involving the Mitchell/Stans jury, many lawyers feel they have the ultimate solution: Do not employ experts, do not pick on the basis of demographics or physical traits—"accept as jurors the first twelve people called out of a panel." *Id.* at 84.

110. See 18 U.S.C. § 1508 (1982).

111. See R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 16, at 8.

The most that can be said confidently about peremptory challenges, then, is that they are used to eliminate people whom the lawyers *perceive* as biased or as inclined to sympathize with an opponent. This point is critical to the conclusion of this Article that the Supreme Court in *Swain* overvalued the state's interest in peremptory challenges. No study has ever proven that lawyers' techniques for exercising peremptories influence the verdict. The state's use of peremptories, however, can affect the composition of the petit jury and can be employed to produce juries that the defendant and the community perceive as biased against the accused.

B. *Use by the Prosecution*

The most controversial aspect of the peremptory challenge is its use by the prosecutor to exclude certain people whom he or she perceives to be inclined to sympathize with the defendant. History supports both those who favor the state's right to challenge jurors and those who would limit or eliminate this right. Prior to 1305 juries in England were selected by the government. A person unacceptable to the Crown could be removed easily because the right to challenge was unlimited.¹¹² About 1305, however, a statute was passed that removed the Crown's right to challenge jurors except for cause.¹¹³ Despite that statute, a practice developed whereby the Crown could request, for no stated reason, that certain veniremen stand aside until the entire panel was exhausted. The defendant, on the other hand, was required to exercise his challenges as the veniremen were called. No limit was placed on the number of jurors the Crown could ask to stand aside, and it was only after the panel had been exhausted that the Crown had to state a cause for its challenges.¹¹⁴ The effect of this practice was to give the Crown a de facto unlimited number of "peremptory" challenges, unless the panel was exhausted.¹¹⁵

The English practice of allowing the government to request that prospective jurors "stand aside" was not adopted by all jurisdictions in early America. New York and Virginia allowed the prosecution no peremptory challenges until 1881 and 1919, respectively.¹¹⁶ Other states afforded the government some peremptory challenges, although typically they were limited in number.¹¹⁷ During the 1800s the government's right to peremptory challenges became an accepted practice, a development that may be attributable to an increased acceptance of, and trust in, government power.¹¹⁸

This history reveals the concern of the English and of some early Ameri-

112. W. FORSYTH, *supra* note 19, at 232; L. MOORE, *supra* note 21, at 56; Moore, *Voir Dire Examination of Jurors: I The English Practice*, 16 GEO. L.J. 438, 447 (1928) (unlimited in capital cases); see also *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483 (1827) (until the statute of 23 Edward I, the crown could challenge any juror without cause).

113. See W. FORSYTH, *supra* note 19, at 232; L. MOORE, *supra* note 21, at 56; J. VAN DYKE, *supra* note 54, at 148.

114. See W. FORSYTH, *supra* note 19, at 232.

115. J. VAN DYKE, *supra* note 54, at 148.

116. *Id.* at 149.

117. *Id.*

118. *Id.* at 150.

cans about abuse of peremptories by the government. Nevertheless, in 1827 the Supreme Court in *United States v. Marchant*¹¹⁹ interpreted this history as an unambiguous confirmation of the government's power to challenge jurors. According to the Court, this history showed that "no . . . power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner."¹²⁰ Justice Field reiterated the Court's view in 1887: "[T]he power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury The right to challenge is the right to reject, not to select a juror."¹²¹ The Court carried its position one step further in *Stilson v. United States*,¹²² holding that the criminal defendant enjoys no constitutional right to peremptory challenges. Again, the Court indicated that the defendant's only constitutional right is to an impartial jury.¹²³

Despite its statement in *Stilson* that peremptories are not constitutionally required for the criminal defendant, the Court has consistently lauded the peremptory challenge as an important means of preserving the fairness of the jury process.¹²⁴ It is ironic that the Court's highest praise of peremptories occurred in *Swain*, which involved the government's, and not the defendant's, use of the challenges. The Court described the function of the peremptory challenge as

not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"¹²⁵

Many writers agree with the Court's assumption that peremptories are a desirable, if not an essential, supplement to the challenge for cause.¹²⁶ Numerous arguments have been offered in favor of peremptories. Some writers note that cause challenges often are too narrowly drawn to provide adequate safeguards against bias.¹²⁷ At least one commentator has claimed that peremptories are a necessary protection against questionable exercises of judicial discretion to deny cause challenges.¹²⁸ Other purported advantages of peremptories are that they allow the parties to act on stereotypes that society would rather not ex-

119. 25 U.S. (12 Wheat.) 480, 483-84 (1827).

120. *Id.* at 484.

121. *Hayes v. Missouri*, 120 U.S. 68, 71 (1887).

122. 250 U.S. 583, 586 (1919).

123. *Id.* at 586. *But see* Babcock, *supra* note 106, at 556 (arguing that *Swain* may be a "virtual overruling of *Stilson*").

124. *See, e.g., Swain*, 380 U.S. at 219-20; *Pointer v. United States*, 151 U.S. 396, 408-09 (1894); *Hayes v. Missouri*, 120 U.S. 68, 70 (1887).

125. *Swain*, 380 U.S. at 219 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *see infra* text accompanying notes 201-02 for a criticism of the Court's argument that allowing the state to exercise peremptory challenges on the basis of race satisfies the appearance of justice.

126. *See, e.g., Babcock, supra* note 106, at 554-55; Saltzburg & Powers, *supra* note 14, at 341-42, 356-57.

127. *See, e.g., Saltzburg & Powers, supra* note 14, at 340.

128. *See, e.g., Lempert, Jury Size and the Peremptory Challenge*, 22 LAW QUADRANGLE NOTES No. 2 at 8, 12-13 (Univ. of Mich. 1978), *reprinted in* R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE 349, 353-54 (1979); *see also* *Patton v. Yount*, 104 S. Ct. 2885, 2891-92 (1984) (applying

pressly admit through assigning them as a basis for a cause;¹²⁹ they permit the elimination of jurors whom the lawyers fear they may have alienated in voir dire;¹³⁰ and they can be used to remove prospective jurors who are believed to be biased but who deny any bias on voir dire.¹³¹

The assumptions that peremptories are an effective means of eliminating bias and that state-exercised peremptories preserve the appearance of justice, however, are dubious. Again, no studies confirm a relationship between lawyers' use of peremptories and favorable verdicts. Moreover, the appearance of justice can easily be defeated by discriminatory use of peremptories. Consequently, the Court's professed belief that peremptory challenges are necessary to ensure fair juries is based on tenuous notions. The Court's praise of peremptories also is difficult to square with its treatment of the key to effective use of these challenges—voir dire.

C. *Voir Dire*

The value of the peremptory challenge is closely linked to the scope of voir dire. Without an opportunity to elicit information on voir dire, a lawyer can base the exercise of a peremptory only on untested assumptions about the relationship between certain visible characteristics, such as race, and voting patterns. Although the Supreme Court has praised the use of peremptories, it has provided only weak protection for voir dire.¹³²

a presumption of correctness to state court's findings whether individual jurors have opinions that disqualify them as biased).

129. Babcock, *supra* note 106, at 553-54.

130. *Id.* at 554-55.

131. See, e.g., Saltzburg & Powers, *supra* note 14, at 356.

132. The parties may be able to obtain information about the veniremembers outside the courtroom. The government may have access to background information about the veniremembers through government records. Wealthy defendants also may have the means to conduct background investigations of panel members. See Babcock, *supra* note 106, at 558-59.

Whether the information elicited on voir dire is accurate and can be used correctly by most attorneys is unclear. Many commentators believe that expansive voir dire can be an effective tool for eliciting bias. See, e.g., Abramovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions—Are They Endangered Species?*, 50 FORDHAM L. REV. 30, 60 (1981); Babcock, *supra* note 106, at 563; Soler, "A Woman's Place . . .": Combating Sex-Based Prejudices in Jury Trials Through Voir Dire, 15 SANTA CLARA LAW. 535, 582-90 (1975); Comment, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy*: United States v. Barnes, 93 HARV. L. REV. 782, 790-91 (1980); Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS. L.J. 959, 982-83 (1982); Comment, *Procedure—Scope of Voir Dire—Defendants are not Deprived of the Intelligent Use of Peremptories by Voir Dire Restrictions Intended to Protect Potential Jurors' Safety and Privacy*, 55 NOTRE DAME LAW. 281, 284-85 (1979); Comment, *Criminal Procedure—Voir Dire—The Right to Question Jurors on Racial Prejudice*, Ham v. South Carolina, 409 U.S. 524 (1973) and Ristaino v. Ross, 96 S. Ct. 1017 (1976), 37 OHIO ST. L.J. 412, 422 (1976). Other commentators question the effectiveness of voir dire. See, e.g., Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505, 513, 522-25 (1965) (concluding that voir dire is "grossly ineffective not only in weeding out 'unfavorable' jurors but even in eliciting data which would have shown particular jurors as very likely to prove 'unfavorable'"; that jurors may lie; and that voir dire often is abused to indoctrinate jurors); Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245 (1981) (concluding that voir dire is an ineffective way to elicit information because it is analogous to self-disclosure interview and that the nature of voir dire and the courtroom setting make self-disclosure unlikely); Note, *Juror Bias—A Practical Screening Device and the Case for Permitting Its Use*, 64 MINN. L. REV. 987 (1980) (suggesting that a "legal attitudes questionnaire"

In 1973 the Court ruled in *Ham v. South Carolina*¹³³ that the trial judge had erred in refusing to allow voir dire questioning about racial prejudice in the trial of a young black man who was active in civil rights work. Relying on the due process clause of the fourteenth amendment, the Court concluded that "essential fairness" required trial courts to allow defendants to question prospective jurors about racial prejudice.¹³⁴ Only three years later, however, the Court interpreted *Ham* so narrowly that the decision may now be limited to the facts of the case. In *Ristaino v. Ross*¹³⁵ the Court held that although the victim of an assault and battery was a white security guard and the defendants were black, there was no constitutionally significant likelihood that voir dire questioning about racial prejudice was necessary to assure the jurors' impartiality.¹³⁶

designed to identify extremes of attitudes toward authority might be a relatively inexpensive and revealing supplement to voir dire); Note, *Voir Dire—Prevention of Prejudicial Questioning*, 50 MINN. L. REV. 1088 (1966) (arguing against use of voir dire to indoctrinate jurors and advocating limit to general inquiries into bias).

Related controversies are whether potential jurors' privacy interest should ever outweigh the defendant's interests in an impartial jury, see *United States v. Barnes*, 604 F.2d 121, 143 (2d Cir. 1979) (limiting, on privacy grounds, the voir dire inquiry into ethnic and religious background); Note, *The Right of Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 712-23 (1982) (proposing that judges balance the interests of prospective jurors in privacy against the parties' right to a fair trial on a case by case basis), and whether the press should have access to voir dire when inquiries must be made into sensitive matters. See *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819 (1984) (holding that voir dire presumptively is open to public); see also Hager, *Reformers Take Aim at Jury Process*, L.A. Times, May 7, 1983, pt. I, at 1, col. 1 (discussing movement for jury reform in California to save time and money and to protect prospective jurors from pretrial questions and investigations that invade their right to privacy).

In England, barristers rarely use challenges because challenges must be exercised before the jurors are sworn, and questioning is allowed only after the oath. See L. MOORE, *supra* note 21, at 134; Case Note, 53 J. URB. L. 119, 120-21 (1975). The differences between the two systems have led Moore to agree with the view that "[i]n England, the trial begins when the jury is picked; in the United States, the trial is over when the jury is picked." L. MOORE, *supra* note 21, at 134 (quoting "an experienced barrister").

133. 409 U.S. 524 (1973). The defendant was convicted of possession of marijuana. *Id.* at 524. He claimed that the government had framed him on the narcotics charge in retaliation for his civil rights activities. The Supreme Court found no constitutional error in the trial judge's refusal to inquire into the veniremembers' prejudice against people with beards. *Id.* at 527-28.

134. *Id.* at 527; see also *Aldridge v. United States*, 283 U.S. 308, 310 (1931) (not relying on any express constitutional grounds but holding that "essential demands of fairness" required that a black man accused of murdering a white policeman should be permitted to inquire into racial prejudices on voir dire).

135. 424 U.S. 589 (1976).

136. *Id.* at 596. The Court tempered its ruling in a footnote by stating that under its supervisory power it would require questioning regarding racial prejudice if a federal court were faced with the same circumstances. *Id.* at 597 n.9. In *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), however, a plurality of the Court construed its supervisory power narrowly, holding that a trial judge did not commit reversible error by refusing to ask specific questions regarding racial or ethnic prejudice. The defendant, a man of Mexican descent, was convicted of participating in a scheme to bring Mexican aliens into the United States. *Id.* at 184-85. The trial judge, who conducted the voir dire himself, asked the prospective jurors general questions regarding their possible prejudice toward Mexicans and toward "the alien problem." *Id.* at 185-86. Justice White wrote the Supreme Court's plurality opinion, which stressed the limited ability of appellate courts to second guess the trial judge's discretion regarding how best to conduct voir dire. *Id.* at 188-89. The plurality opinion established a nonconstitutional standard for voir dire into racial prejudice—that questions must be asked when there is "a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Id.* at 191. Justice White would have found this reasonable possibility whenever a defendant is accused of a violent crime and the victim and the defendant are from different racial or ethnic groups. *Id.* at 192. However, only four justices joined in this opinion; Justices Rehnquist and Bur-

A criminal defendant has little assurance that peremptory challenges and voir dire can always be used to protect his or her constitutional right to an impartial jury. The defendant has no constitutional right to peremptory challenges,¹³⁷ and the scope of voir dire is a matter for the trial judge's discretion.¹³⁸ Absent compelling, dramatic circumstances, no specific voir dire inquiries about prejudice are constitutionally required.¹³⁹ Thus, if the defendant believes that veniremembers are prejudiced but have not admitted their prejudices, the defendant has no clear constitutional right to challenge them without cause. The defendant likewise has no constitutional right to question the veniremembers about their prejudices, unless the defendant happens to match the profile of a well-known black civil rights worker who claims that charges were brought in retaliation for civil rights activities. Moreover, the state can exercise peremptories to exclude veniremembers whom it believes may sympathize with the accused. The only limit on the state's right to exercise peremptories is that the challenges cannot defeat the defendant's right to an impartial jury.

The absence of limitations on the state's exercise of peremptories raises the question whether the government should be able to exercise its peremptories to exclude veniremembers whom the defendant and the community regard as the defendant's peers. The discussion below will show that the government's privilege to exercise peremptories can become an abuse of power and can violate the defendant's constitutional right to an impartial jury.

IV. SUPREME COURT TREATMENT OF DISCRIMINATORY EXERCISE OF PEREMPTORIES

The government's privilege to reject jurors is qualified only by the defendant's right to an impartial jury. One might expect, then, that the Supreme Court would have defined an "impartial jury" so that government power can be measured against a meaningful standard. It has not. The Court's holdings in jury selection cases prohibit systematic and intentional discrimination and have required that jury pools—but not petit juries—represent a cross-section of the community. The Court's holdings, however, focus only on preventing exclusion; the Court has never required the *inclusion* of any group or individual. The result is a negative definition: an impartial jury is one that is not created through procedures that violate the Court's exceedingly generous prohibitions against

ger in a concurring opinion rejected a per se rule regarding violent crimes. *Id.* at 194-95. Justices Stevens, Brennan, and Marshall dissented from the opinion. *Id.* at 195-203.

The trial judge in *Rosales-Lopez* exercised his authority to conduct the voir dire, rather than allowing the lawyers to do so. Whether judge or counsel should conduct voir dire continues to be debated. Some people argue that judge-conducted voir dire is less time consuming and avoids abuse by counsel who use voir dire to condition jurors. Others maintain that lawyer-conducted voir dire is essential to an effective and fair inquiry into all relevant areas. See Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290, 292 (1972); Moreau, *Voir Dire Legislation Stalled in Congress*, 9 A.B.A. LITIGATION NEWS, Summer 1984, No. 4, at 1; Stanley & Begam, *Who Should Conduct Voir Dire?*, 61 JUDICATURE 70, 76 (1977); Note, *Attorney Participation in Voir Dire Examination in Illinois*, 1977 U. ILL. L.F. 1145, 1145 (1977).

137. *Stilson*, 250 U.S. at 586.

138. See *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981).

139. See *Ristaino*, 424 U.S. at 596-98.

exclusionary practices. Despite the Court's narrow rulings, however, its rhetoric about the right to trial by jury suggests that the composition of the jury is important to the jury's impartiality and fairness.

A. *Development of Nonexclusion Theory*

The Supreme Court's nonexclusion approach to jury selection cases originated in three 1880 decisions: *Strauder v. West Virginia*,¹⁴⁰ *Virginia v. Rives*,¹⁴¹ and *Ex parte Virginia*.¹⁴² In these decisions the Court relied on the equal protection clause of the fourteenth amendment in holding that black men may not be excluded from jury pools.¹⁴³ These holdings, however, did not establish that a defendant had a right to a jury of any particular composition.¹⁴⁴

Since 1880 several different legal theories have been used to attack unlawful exclusion in jury selection procedures. Before 1968 the right to equal protection was the most common basis for constitutional challenges to state jury selection procedures.¹⁴⁵ However, since the Court's 1968 holding that the sixth amendment right to an impartial jury is incorporated into the fourteenth amendment,¹⁴⁶ both sixth amendment and equal protection principles have been cited in attacks on jury selection procedures.¹⁴⁷ The Supreme Court has also relied on the due process clause in some jury selection cases, particularly cases in which the impartiality of jurors is compromised by pretrial publicity.¹⁴⁸ In other cases, the Court has eschewed constitutional theory altogether and instead has relied on its supervisory power over the federal courts.¹⁴⁹ This last approach enables the Court to avoid an increase in appeals of convictions by state courts without appearing totally insensitive to the fairness issues involved.

140. 100 U.S. 303 (1880).

141. 100 U.S. 313 (1880).

142. 100 U.S. 339 (1880).

143. *Strauder*, 100 U.S. at 307-08. The Court added that nothing in the fourteenth amendment prevented the State from confining jury selection to males, freeholders, citizens, persons within certain ages, or persons with certain educational qualifications. *Id.* at 310.

144. *Rives*, 100 U.S. at 322-23. The Court stated the rule as follows:

It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment.

Id.

145. See, e.g., *Whitus v. Georgia*, 385 U.S. 545 (1967); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Smith v. Texas*, 311 U.S. 128 (1940); *Norris v. Alabama*, 294 U.S. 587 (1935); *Carter v. Texas*, 177 U.S. 442 (1900); *Gibson v. Mississippi*, 162 U.S. 565 (1896). As discussed *infra*, however, an equal protection theory is not the proper basis for a defendant's challenge of discriminatory selection methods. See *infra* notes 193-96 and accompanying text.

146. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

147. See, e.g., *Wainwright v. Witt*, 105 S. Ct. 844 (1985); *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

148. See, e.g., *Murphy v. Florida*, 421 U.S. 794 (1975); *Irvin v. Dowd*, 366 U.S. 717 (1961).

149. See, e.g., *Ballard v. United States*, 329 U.S. 187, 193 (1946); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946).

The shifts in legal theories have been accompanied by shifts in rhetoric, but the changes have not been simultaneous. The Supreme Court's early jury decisions relied on the fourteenth amendment and dealt with the statutory exclusion of black men from jury pools. Accordingly, the Court's rhetoric was primarily one of equality, emancipation, and nondiscrimination. The right to a fair jury per se was not the key issue in these cases; rather, these cases focused on the jury as an important political body from which emancipated black men should not be excluded by state law.¹⁵⁰

During the 1930s the Court became pointedly critical of the states' continued de facto exclusion of black men from jury service.¹⁵¹ The standard it applied to equal protection challenges to jury selection procedures, however, remained the same: the defendant was required to show purposeful and systematic discrimination.¹⁵² Although the states no longer excluded black men from service by statute, in many areas jury commissioners applied selection criteria to exclude black people. The Supreme Court looked beyond the states' facially neutral statutes to determine whether substantive rights were denied by the selection process. The overwhelming evidence of discrimination presented in the cases that came before the Court¹⁵³ was sufficient to allow the Court to infer that purposeful exclusion had occurred. The Court in these cases still invoked equality and nonexclusion terminology; it did not address the larger issue

150. See, e.g., *Martin v. Texas*, 200 U.S. 316 (1906); *Carter v. Texas*, 177 U.S. 442 (1900); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder*, 100 U.S. at 307-08. This focus does not mean, however, that early litigants did not urge the Court to extend its theories and rhetoric beyond nondiscrimination. In *Rives*, 100 U.S. at 315, the black defendants, accused of murdering a white man, requested that a portion of the petit jury be composed of black men because they did not believe that an all-white jury would be impartial. The Court dealt at length with the allegations of discrimination in the jury selection procedures. *Id.* at 318-23. Nowhere did the majority address the argument that white jurors might not be impartial in judging a black man accused of murdering a white man. This omission is remarkable, even given the times.

In the companion case of *Ex Parte Virginia*, 100 U.S. 339 (1880), Justice Field touched on the issue of mixed juries in his dissent. Field's argument against a requirement that black people be included in juries that try black defendants deserves attention, as the argument is still made by opponents of mixed juries. He wrote:

The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidences; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race.

Id. at 368-69 (Field, J., dissenting); see also *Neal v. Delaware*, 103 U.S. 370, 407 (1881) (Field, J., dissenting) (stating that if equal protection required that all persons are entitled to serve as jurors, then it would abolish all distinctions in jury selection made between citizens and foreigners and "between those of our race and those of the Mongolian, Indian, and other races, who may be at the time within their jurisdiction").

151. See, e.g., *Norris v. Alabama*, 294 U.S. 587, 591 (1935).

152. See, e.g., *Hale v. Kentucky*, 303 U.S. 613, 616 (1938).

153. See, e.g., *Norris v. Alabama*, 294 U.S. 587, 591 (1935) (noting that no black person had ever served on a grand jury or petit jury within the memory of witnesses who had lived in the county all their lives).

whether affirmative inclusion of particular community members was an important aspect of the right to an impartial jury.

In the 1940s Justice Black brought a new vocabulary to the discourse about discriminatory jury selection procedures. In *Smith v. Texas*¹⁵⁴ the Court reversed the conviction of a black defendant after statistics showed that from 1931 to 1934, only 5 of 384 serving grand jurors were black and only 18 of 512 summoned for grand jury duty were black.¹⁵⁵ The Court concluded that although the Texas statutory scheme as written was not unfair, it had been applied in a manner that discriminated against black people in violation of their fourteenth amendment rights.¹⁵⁶ More important than the result, however, was Justice Black's description of the role of the jury:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.¹⁵⁷

This passage represented a significant departure from the tone of prior jury decisions. It is the first time the Court described discriminatory jury selection procedures as a compromise of community values and not just as a violation of the potential black juror's right to equal treatment in jury selection procedures. Even though the decision was based on the fourteenth amendment's equal protection clause and not on the sixth amendment, Justice Black's description of the jury as a body "truly representative of the community" went beyond a jury free from discrimination and hinted that a defendant may have an affirmative right to have certain members of the community included in the jury.

In *Glasser v. United States*¹⁵⁸ the Court amplified Justice Black's dictum in a case that did not involve the equal protection clause. *Glasser* concerned the exclusion from a petit jury of all women who were not members of the Illinois League of Voters. The jury that convicted Glasser was composed of six men and six women, and the defendant raised no allegation of race discrimination.¹⁵⁹ Glasser's challenge to the exclusion of non-League women was based on the fifth and sixth amendments, which together guarantee the defendant trial by a jury free from bias and prejudice.¹⁶⁰ The Court determined that the deliberate limi-

154. 311 U.S. 128 (1940).

155. *Id.* at 129.

156. *Id.* at 131-32. The Court so held, despite testimony by the jury commissioners that their failure to select black grand jurors was not intentional discrimination but occurred "because they did not know the names of any who were qualified" or were "not personally acquainted with any member of the negro race." *Id.* The Court's response was that discrimination under the fourteenth amendment "can arise . . . from commissioners who know but eliminate [blacks]." *Id.* at 132; see also *Hill v. Texas*, 316 U.S. 400, 404-05 (1942) (finding a "violent presumption" of discrimination when no black person had been summoned as a juror despite facially neutral laws).

157. *Smith*, 311 U.S. at 130.

158. 315 U.S. 60 (1942).

159. *Id.* at 84.

160. *Id.* Glasser objected to the League members because they attended "jury classes" taught by lecturers who were prosecution-biased. *Id.* at 84, 86.

tation of jury service to members of the League made the jury "not only the organ of a special class, but, in addition, . . . openly partisan."¹⁶¹ It noted that jury officials should not allow the desire to choose competent jurors "to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."¹⁶²

The Court has continued to cite cross-representativeness as a characteristic necessary to the democratic ideal of trial by jury.¹⁶³ Although the Court created this concept in an equal protection context, it since has described the concept as an "essential component of the Sixth Amendment right to a jury trial."¹⁶⁴

Almost immediately after the cross-representative concept emerged, however, the Court made it clear that this objective did not mean the defendant was entitled to a petit jury composed of all segments of the community.¹⁶⁵ Obviously, no twelve-person jury could ever be "cross-representative" in this sense.¹⁶⁶ Rather, the petit jury must be drawn from a source that is fairly representative of the community.¹⁶⁷ In defining a representative source, the Court returned to the nonexclusion analysis of the equal protection cases. A representative jury pool is one in which no distinctive group in the community is under-represented due to systematic exclusion in the jury selection process.¹⁶⁸

Although the Court's cross-representative definition speaks only to the nonexclusion of groups, the language the Court has used to explain that rule's purpose betrays a broader objective—to assure that the jury will express community values.¹⁶⁹ This goal becomes explicit in the Court's later decisions re-

161. *Id.* at 86.

162. *Id.* The Court went on to note, however, that Glasser had failed to offer evidence in support of his motion alleging that the jury was improperly constituted. *Id.* at 87.

163. See *Duren v. Missouri*, 439 U.S. 357, 365-70 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Ballard v. United States*, 329 U.S. 187, 194 (1946); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

164. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The precise doctrinal basis for the requirement remains unclear, as Justice Rehnquist pointed out in his dissent in *Duren v. Missouri*, 439 U.S. 357, 370 (1979). Justice Rehnquist stated:

The short of it is that the only winners in today's decision are those in the category of petitioner, now freed of his conviction of first-degree murder. They are freed not because of any demonstrable unfairness at any stage of their trials, but because of the Court's obsession that criminal venires represent a "fair cross section" of the community, whatever that may be. . . . I do not believe that the Fourteenth Amendment was intended or should be interpreted to produce such a quixotic result.

Id. at 377-78 (Rehnquist, J., dissenting).

165. See *Wainwright v. Witt*, 105 S. Ct. 844, 852 n.5 (1985); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Ballard v. United States*, 329 U.S. 187, 192-93 (1946).

166. See *Ballard v. United States*, 329 U.S. 187, 192-93 (1946). Moreover, if the cross-section requirement were applied alone, it could defeat the defendant's right to an impartial jury, because it could compel the seating of jurors who represent a biased viewpoint. See *Wainwright v. Witt*, 105 S. Ct. 844, 852 n.5 (1985); *infra* text accompanying note 224 (discussing the balance between impartiality and cross-representativeness).

167. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

168. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

169. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("[T]he administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials."); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the

garding jury size and unanimity of verdicts. In these cases the Court could not avoid the question of what a proper jury must include, as opposed to what it cannot exclude. Its narrow answer was that a jury must include at least six people¹⁷⁰ whose verdict must be unanimous;¹⁷¹ larger juries need not act unanimously.¹⁷² The reasons the Court gave for the six-person minimum reflect greater ambitions for the jury than its disappointingly narrow holding allows. One reason the Court cited for the minimum of six is that psychological and sociological studies "raise substantial doubt about the ability of juries truly to represent the community as membership decreases below six."¹⁷³ The Court also returned to dictum from *Strauder*, observing that a jury of less than six could exclude elements of the community and thereby contravene "the very idea of a jury . . . composed of 'the peers or equals of the person whose rights it is selected or summoned to determine.'"¹⁷⁴

The reasoning in the jury cases could lead one to believe that the Court holds the jury in high esteem. It has described the jury as an instrument of public justice,¹⁷⁵ as an integral part of our democratic heritage,¹⁷⁶ and as an assurance to the defendant of a judgment of peers,¹⁷⁷ phrases suggesting that a proper jury should include a blend of voices and at least some of the defendant's peers. The Court paints a dramatic picture of a jury that serves the many important functions described previously—functions important to the defendant, to the government, and to the community.

The Court's holdings, however, tell a different story. Although they prevent intentional and systematic exclusion of certain groups from the jury pool, they establish no requirement that the petit juries empanelled live up to the rhetoric. In essence, the only constitutional requirements the Court has set regarding what constitutes a proper jury are that at least six people must be included and that their verdict must be unanimous.

The gap between the Court's words and its deeds is manifest in *Swain v.*

range of which is unknown and perhaps unknowable."); *Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The systematic and intentional exclusion of women, like the exclusion of a racial group . . . or an economic or social class . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society.").

170. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).

171. *Burch v. Louisiana*, 441 U.S. 130, 138-39 (1979).

172. *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972).

173. *Ballew v. Georgia*, 435 U.S. 223, 242 (1978). The Court continued:

Not only is the representation of racial minorities threatened in such circumstances, but also majority attitude or various minority positions may be misconstrued or misapplied by the smaller groups. Even though the facts of this case would not establish a jury discrimination claim under the Equal Protection Clause, the question of representation does constitute one factor of several that, when combined, create a problem of constitutional significance under the Sixth and Fourteenth Amendments.

Id.

174. *Ballew v. Georgia*, 435 U.S. 223, 237 (quoting *Strauder*, 100 U.S. at 308).

175. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

176. *Glasser v. United States*, 315 U.S. 60, 85 (1942).

177. *Strauder*, 100 U.S. at 308-09.

Alabama.¹⁷⁸ Robert Swain was convicted in the Circuit Court of Talladega County, Alabama, of the rape of a white woman and sentenced to death.¹⁷⁹ Relying on the equal protection clause of the fourteenth amendment,¹⁸⁰ Swain argued that the underrepresentation of black jurors in county grand jury and petit jury venires, coupled with the State's exercise of peremptory challenges to exclude black persons from serving on petit juries, constituted a violation of his constitutional rights. His statistics showed that from 1953 to 1965 only ten to fifteen percent of the grand and petit jury panels were black people.¹⁸¹ Moreover, although an average of six to seven black people had been on the petit jury venires, *not one* black person had served on a petit jury since 1950.¹⁸² Eight black persons were included in the venire in Swain's case, but none served; two were exempt, and the remaining six were struck by the prosecutor.¹⁸³

The Court found no violation of Swain's constitutional rights on these facts. First, it noted that Alabama had neither excluded black persons from jury panels nor included them in token numbers, as the average six to eight black persons on each panel showed.¹⁸⁴ Although blacks were underrepresented in the jury venire by as much as ten percent, this factor alone did not prove intentional discrimination against blacks.¹⁸⁵ The Court noted that a defendant has no constitutional right to demand that a proportional number of his or her race be represented in the jury venire or the jury roll.¹⁸⁶ In the Court's words, "[T]he selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented . . . [b]ut an imperfect system is not equivalent to purposeful discrimination based on race."¹⁸⁷

Second, the Court concluded that the prosecutor could constitutionally use peremptories to exclude all black persons from the panel. The Court viewed peremptory challenges as "a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."¹⁸⁸ Thus, the prosecutor was entitled to strike prospective jurors on the basis of their group affiliations—"whether they be Negroes, Catholics, accountants or those

178. 380 U.S. 202 (1965).

179. *Id.* at 203.

180. Because *Duncan v. Louisiana*, 391 U.S. 145 (1968), had not yet been decided, sixth amendment principles were not involved. Post-*Duncan* decisions, *Taylor v. Louisiana*, 419 U.S. 522 (1975), in particular, rely on the sixth amendment and have been viewed by some commentators as evidence that *Swain* may no longer be controlling law. These commentators read *Taylor* as extending the cross-representation principle beyond selection of the jury pool to the petit jury selection. See, e.g., J. VAN DYKE, *supra* note 54, at 168-69; Note, *Limiting the Peremptory Challenge*, *supra* note 7, at 1731. Other commentators correctly point to the limited holding in *Taylor* as support for the argument that *Swain* remains good law. See, e.g., Saltzburg & Powers, *supra* note 14, at 347-48.

181. *Swain*, 380 U.S. at 205.

182. *Id.*

183. *Id.*

184. *Id.* at 206.

185. *Id.* at 208-09.

186. *Id.* at 208.

187. *Id.* at 209.

188. *Id.* at 212.

with blue eyes.”¹⁸⁹ The Court established a presumption that a prosecutor will use the government’s challenges to secure an impartial jury, a presumption that is not overcome by evidence that in a particular case all black people were removed from the jury or that they were removed because they were black.¹⁹⁰ Rather, to overcome the presumption, the defendant must show that the prosecutor “in case after case, whatever the circumstances,” has eliminated black persons from the jury.¹⁹¹ The evidence in *Swain* was deemed inadequate to overcome the presumption;¹⁹² therefore, the conviction was upheld.

B. *Criticisms of the Court’s Approach to Discriminatory Use of Peremptories*

Critical reading of Supreme Court cases dealing with discriminatory exercise of peremptories reveals significant analytical and practical problems. The first problem is the Court’s assertion that the defendant’s constitutional right to an impartial jury is violated only when a pattern of discrimination is established. The Constitution guarantees *each* defendant a fair jury, not just the last defendant in a series of defendants who have been deprived of this guarantee. Past discrimination is relevant to a particular defendant only insofar as it supports an inference of discrimination in that defendant’s case. Similarly, the absence of discrimination in past cases should not defeat the individual defendant’s claim of discrimination or his or her interest in a fair trial.

A related analytical problem stems from the Supreme Court’s reliance on the equal protection clause. The Court’s early decision to apply equal protection analysis to the exclusion of black people from juries was a necessary step forward in creating fair jury selection procedures. Until the sixth amendment was deemed to be incorporated into the fourteenth amendment in 1968, the Court likely saw no other constitutional text that would allow it to correct the patent and egregious violation of the rights of black male citizens. The notion that the exclusion of blacks from juries violates the defendant’s right to equal protection, however, is analytically infirm. The equal protection claim belongs to those who are barred from juries by the government’s exclusionary practices.¹⁹³ The black defendant is treated “equally” if both black and white defendants are tried by a jury of people chosen after cause and peremptory challenges have been exercised. Undeniably, the exclusion of black people from juries is unfair to the black defendant. The equal protection clause, however, is not the appropriate basis for a challenge to this unfairness.

Due process analysis likewise will not prevent the exclusion of blacks from juries unless the Court concludes that white jurors cannot fairly decide cases

189. *Id.*

190. *Id.* at 222.

191. *Id.* at 223-24.

192. *Id.* at 224-25.

193. See *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (exclusion of persons of Mexican descent from jury service because of ancestry violates fourteenth amendment); see also *Personnel Adm’r v. Feeney*, 442 U.S. 256 (1979) (unsuccessful challenge to law granting preference to veterans for civil service jobs on ground law deprived women of equal protection); *Washington v. Davis*, 426 U.S. 229 (1976) (test for police officers did not deprive blacks of equal protection under fifth amendment).

involving black defendants.¹⁹⁴ The Court obviously could not reach such a conclusion without casting doubt on its own ability to be fair; due process principles apply to bench trials as well as to jury trials. The Court cannot publicly acknowledge, let alone embrace, a view that one's color determines absolutely one's ability to understand and judge fairly another person.¹⁹⁵

The problem remains, however, that people regard the exclusion of blacks from juries as unfair to black defendants, particularly in cases in which racial prejudice may determine the result. One assumption that probably underlies this reaction is that white people *may not* be fair judges of black people. Yet white, male, middle-class, middle-aged judges regularly decide cases involving people of every color, gender, age, and background. The Supreme Court cannot and will not hold that litigants are treated unfairly simply because the judge does not share their socioeconomic characteristics. Moreover, society does not expect the Court to so hold. Society accepts this disparity of power or at least is content to correct it through the long-term solution of opening the opportunity to become judges to all groups.

194. *Peters v. Kiff*, 407 U.S. 493 (1972), therefore, was decided on the wrong theory. The Court in *Kiff*, a case involving a white defendant, held that a defendant of any race may object on due process grounds to the exclusion of black people from the jury. *Id.* at 504. In an opinion written by Justice Marshall, the Court noted that the exclusion of blacks not only injures black defendants but other defendants as well because it "destroys the possibility that the jury will reflect a representative cross section of the community." *Id.* at 500. Despite the absence of any evidence of actual harm to the defendant, the Court concluded that unconstitutional jury procedures "create the appearance of bias in the decision of individual cases, and . . . increase the risk of actual bias as well." *Id.* at 503. This risk of bias was not confined to cases that involved issues which present a clear opportunity for race prejudice to operate, nor was it confined to cases involving the exclusion of black people. *Id.* The Court observed:

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

Id. at 503-04. The three dissenting justices in *Kiff* refused to accept Justice Marshall's argument that the absence of certain voices might produce bias and that the mere possibility of bias was sufficient for a successful due process claim. *Id.* at 509-11 (Burger, C.J., dissenting). Chief Justice Burger correctly noted that although juries should not be deprived of the insight of identifiable segments of the community, *Kiff* did not involve the essential attributes of trial by jury: the case was tried two years before the Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), held that the sixth amendment applied to the states. *Kiff*, 407 U.S. at 510-11 (Burger, C.J., dissenting).

195. If the exclusion or absence of certain groups from a jury results in a biased jury, however, and if that bias can be proven through evidence other than the mere assumption that certain groups are biased against others, then due process principles apply. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970) (application of due process principles to termination of welfare benefits). The cases that involve the effects of pretrial publicity on jurors and the attitudes of potential jurors toward the death penalty also implicate due process values. Pretrial publicity and fixed opinions regarding the death penalty can affect a juror's ability to be impartial. To the extent that a juror has a fixed bias that will have a direct and adverse effect on how he or she views the defendant, due process requires that the juror not decide the defendant's fate. The sixth amendment guarantee of an "impartial jury" also may apply, but the sixth amendment concept of impartiality is not coterminous with the due process concept of impartiality. *See infra* text accompanying notes 205-17.

The argument that a defendant's race may affect a juror's judgment finds support in a recent article that canvasses social science data and concludes that whites are more likely to convict black defendants than white defendants in similar circumstances. *See Johnson, Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1643-50 (1985).

This societal acceptance, however, does not extend to jury verdicts; society does expect juries to include people like the accused. The reason is that the symbolism and function of a jury of laypeople are different from the symbolism and function of a professional judge. A judge wears a robe and has training and status that separate him or her from the parties. Only one judge decides the case in a bench trial; a jury trial involves at least six fact finders and hence implies that its purpose is to include more perspectives—black and white—in the verdict. In other words, the exclusion of black people from a jury that tries a black defendant violates society's sense of a fair jury, not of a fair hearing. Accordingly, the proper constitutional text for challenging the exclusion of black jurors from the trial of black defendants is the sixth amendment and not the right to due process or equal protection.¹⁹⁶

196. This point becomes clearer when one moves beyond the narrow problem of *Swain* to consider the exclusion of other groups from the jury. Cases that involve gender discrimination in jury selection procedures reveal that the equal protection doctrine and nonexclusion rhetoric of the early race discrimination cases simply cannot embrace all aspects of the values that the jury right represents. The Supreme Court has decided a series of cases concerning whether state or federal jury selection procedures can exclude women from jury duty. See *Duren v. Missouri*, 439 U.S. 357, 363-70 (1979) (invalidating Missouri law that granted all women an automatic exemption from jury service upon request); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (sixth amendment prevents the systematic exclusion of women from jury service); *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (Florida statute that granted women an absolute exemption from jury duty by putting only women who volunteered for jury service on the jury list was based on a reasonable classification and thus did not violate the fourteenth amendment); *Ballard v. United States*, 329 U.S. 187, 193 (1946) (in a five to four decision, Court exercised supervisory power over administration of justice in the federal courts to prevent intentional and systematic exclusion of women). When the only constitutional texts available were the due process and equal protection clauses, it was difficult for the Court to invalidate state jury selection procedures that excluded women. Women were not deemed to be a suspect class, the history of the jury clearly did not include women as jurors, and the states could offer what then was considered a rational basis for the exclusion of women—that is, that women played a special, domestic role in society which made their participation in public affairs a hardship. See *Hoyt*, 368 U.S. at 61-62 (“Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.”). Moreover, the long history of all-male juries made specious any argument that no all-male jury could be impartial.

As attitudes toward the role of women changed, however, the “rational basis” for excluding women from jury duty became suspect. Also, once the Court began to cite community participation justifications for preventing the exclusion of segments of society from juries, the stage was set for a change in the constitutional analysis of the exclusion of women from juries.

In 1975 the Court held that states could not require that women affirmatively “opt in” to the jury rolls, a practice that had resulted in a very low number of women jurors. *Taylor*, 419 U.S. at 533-35. The reason given for this ruling was *not* that women were necessary for an impartial jury or that the male defendant in that case was prejudiced by the exclusion of women. *Id.* at 538-39 (Rehnquist, J., dissenting). Rather, it was that “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.” *Id.* at 528. Moreover, to restrict jury service to special groups or to exclude identifiable segments of the community would be to undermine public confidence in the criminal justice system. *Id.* at 530.

Although the fair cross-section requirement had been applied previously to allow the exclusion of women, it could no longer be construed in that manner. In the Court's words, “Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.” *Id.* at 537. This statement implicitly acknowledges that a proper jury is defined according to contemporary expectations of fairness. By 1975 women were perceived to be full participants in the political “community.” Consequently, contemporary notions of fairness required that they be included in the jury selection process. The Court's rationale in requiring that women be included in jury pools was based neither on equal protection nor on due process, but was instead based on the community participation function of the jury. Thus, the sixth amendment was the constitutional text that required their inclusion.

The cases that address the issue of how many jurors are necessary for a proper jury likewise

The Court in *Swain* not only relied on the wrong constitutional text, it also misplaced its legal priorities. It admitted that peremptory challenges—presumably especially those of the state—are not constitutionally required. Yet it exalted the state's privilege to exercise peremptories over a clear constitutional interest—the defendant's right to an impartial jury. Unless the Court in *Swain* intended to overrule its earlier holding that peremptory challenges are not constitutionally mandated, it violated the accepted rules of constitutional interpretation.

The *Swain* Court stressed the need to preserve the appearance of fairness. In the Court's view, the peremptory challenge "affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."¹⁹⁷ The authority the Court cited for this sentiment concerns fairness to the accused only, not fairness to the state.¹⁹⁸ Apparently aware of this weakness in its reasoning, the Court relied on the general assertion that "the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution.'"¹⁹⁹

Although the Court was correct in observing that the state has an interest in an unbiased proceeding, it erred in concluding that peremptory challenges are essential to preservation of this interest. The peremptory is an uncertain tool for eliminating bias; it has never proven to be essential or effective. The state's interest in a trial free from bias is adequately protected by the state's opportunity to challenge veniremembers for cause. The effect of *Swain*, however, is to protect the state's peremptory challenges at the expense of the integrity of the proceeding, particularly when, as was true in *Swain*, the peremptory is exercised in a manner that may defeat the accused's constitutional right to an impartial jury. When a conflict arises between the state's interest in a fair jury and the accused's right to a fair jury, the Constitution provides the solution: the defendant's sixth amendment interest prevails.²⁰⁰

suggest that the sixth amendment is the correct text for resolving questions about appropriate jury procedures. Those cases attempt to preserve the jury's ability to represent the sense of the community by holding that a minimum of six people must be empanelled and that a six-person jury must reach a unanimous verdict to satisfy the sixth amendment guarantee. See *Burch v. Louisiana*, 441 U.S. 130, 138-39 (1979); *Ballew v. Georgia*, 435 U.S. 223, 239 (1978); see also *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972) (twelve-person jury need not reach unanimous verdict); *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (lack of unanimity on twelve-person jury does not indicate reasonable doubt standard was ignored); *Williams v. Florida*, 399 U.S. 78, 102-103 (1970) (sixth amendment is satisfied by six-person jury; twelve-person jury not constitutionally required). The Court has expressed concern that the jury include enough people so that it would operate free from outside intimidation—a sort of "safety in numbers" argument. See *Williams v. Florida*, 399 U.S. 78, 100 (1970).

197. *Swain*, 380 U.S. at 212.

198. *Id.* at 219 (citing *Pointer v. United States*, 151 U.S. 396, 408 (1894) (peremptory challenge deemed "one of the most important of the rights secured to the accused")).

199. *Id.* at 220 (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

200. As the Supreme Court has said in a related context:

In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Even apart from these doctrinal issues, the Court's mention of the appearance of fairness is disturbing. The "appearance of fairness" is precisely what the jury in *Swain* did not preserve. An all-white Alabama jury assembled to hear an interracial rape case hardly appears fair. The integrity of the proceeding was further compromised by the active role of the state prosecutor in producing the monochromatic result.

The most disconcerting feature of *Swain*, however, is the Court's suggestion that all forms of discrimination are equal. Defending the peremptory challenge, the Court asserted that the peremptory "provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes."²⁰¹ No imaginable case would call for striking people with blue eyes. Accountants are unlikely to be vulnerable to challenge in many cases. Catholics conceivably might be struck in some cases. But none of these other bases for challenge carries the political and social meaning of a challenge to a black veniremember on the basis of race. The Court's insinuation that all of these bases are equivalent ignores history, policy, and common sense.²⁰² The all-white jury that convicts a black defendant is deeply disturbing to many people. In contrast, juries composed entirely of non-Catholics, non-accountants, or non-blue-eyed people are unlikely to provoke comment, let alone outrage.

The final significant shortcoming of *Swain* is that the standard it embraces provides no protection against the discriminatory exercise of peremptories. Few, if any, defendants are able to meet the high burden of proof imposed by *Swain*.²⁰³ The Court's imposition of this burden of proof reflects a belief that the intentional exclusion of black persons from juries through the action of state

Peters v. Kiff, 407 U.S. 493, 504 (1972).

201. *Swain*, 380 U.S. at 212.

202. The Miami riots offer powerful and disturbing evidence of the cost of ignoring the appearance of unfairness of all-white juries. See Reynolds, *Fla. Court Overturms Swain Rule*, Nat'l L.J., Oct. 22, 1984, at 30, col. 1 (noting that riots erupted in Miami after some all-white juries acquitted police officers charged with killing black people); Stuart, *Miami Drive Is Mounted to Get Blacks on Juries*, N.Y. Times, Mar. 18, 1984, § 1, at 23, col. 1 (noting that proponents of changing jury selection laws to place more blacks on juries believe the change "might give verdicts more credibility among black citizens and lessen the prospects of unpopular verdicts being responded to with violence, as occurred [in Miami] over the past two days"). In 1965 Dr. Martin Luther King, Jr. said that some people

have come to the conclusion, based upon bitter experience, that Negroes can expect little more than lynch law justice from Dixie juries. So they regard the courts as mere instruments of continuing oppression. Many have decided to provide their own recourse to justice, having been provoked to protect themselves through resort to arms and vigilante justice.

Dr. King Calls for Federal Jury Selection Laws, N.Y. Times, Nov. 11, 1965, at 30, col. 3.

203. For a discussion of the burden of proof, see *supra* notes 5-6 and accompanying text. One writer advocates the application of statistical theory to judicial review of charges of discrimination in jury selection. Applying probability theory to the figures presented in *Swain*, Finkelstein concludes that the probability of venires with five or fewer black persons in Talladega County was one in more than one hundred million trillion groups. That is, if 30 jury venires were picked at random in Talladega County, Alabama, every day of the year, the daily selection of juries would meet the facts of *Swain* only one day, on the average, in thousands of trillions of years. This statistical analysis lends strong support to the conclusion that blacks were intentionally and systematically excluded from *Swain's* jury. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 357 (1966).

and federal prosecutors is an acceptable practice. The Court and defenders of *Swain* must believe that such exclusion is not serious enough to warrant action.

One can only speculate whether the majority in *Swain* would have regarded the problem of discriminatory exercise of peremptories as more grave if the defendant had been a white man convicted and sentenced to death by an all-black jury in Washington, D.C., for the rape of a black woman and a black prosecutor had struck all whites from the jury. To pose this question fairly, however, the facts would also have to include a history of political, social, and economic oppression of white people by a ruling majority of black people.

The Court may be unable to acknowledge this last argument against *Swain*. In effect, the argument questions whether members of the political majority can be fair judges in matters involving the rights of the political minority. If the Court were to admit that the political majority might not be fair judges, the fairness of a vast number of the Court's own judgments would be questionable. Moreover, the remedy to the problem might be to compel the immediate appointment of a significant number of minorities to judgeships and to juries so that all persons would be judged by members of their own group. Whether or not this is a remedy that the Court should grant, the Court is unlikely to consider it seriously.

A feasible proposal for reform thus cannot proceed on the basis that white people cannot judge black people fairly or vice versa, even if this conclusion were demonstrably true in some or even all cases. Nevertheless, most people probably believe that the imagination and empathy of humans—including judges and jurors—are necessarily limited by human experience, which is defined in part by one's race. Most people probably would also agree that exclusion of black people from the jury in *Swain* produced a panel whose ability to judge the defendant fairly was at least dubious. The problems of prejudice and of the differences in experience that race can produce are important aspects of the unsatisfactory result in *Swain*. The Court seemingly ignored these difficult issues. To persist, however, in ignoring problems that the vast majority of people *know* exist is to risk serious compromise of the Court's integrity and credibility. Consequently, the Court this term must admit that the problem of discriminatory exercise of peremptories *is* serious and that it does warrant action.

V. FORGING A SOLUTION TO FAIR JURY SELECTION PROCEDURES

In this section the Article offers a solution to the problem of discriminatory exercise of peremptories addressed in *Swain*. It attempts to define the sixth amendment guarantee of the right to trial by jury. It discusses the key terms "impartial," "cross-representative," and "peer," and attempts to reconcile the values that underlie these terms. Based on this conceptual framework, the Article proposes a new procedure to accommodate the multiple values of the sixth amendment right to trial by jury and to produce, in a greater number of cases, juries that correspond to widely shared notions of fairness. The proposed solution is to abolish the prosecutor's privilege to use peremptory challenges.

Professor Kurland has identified three requirements for the success of any fundamental decision based on the equal protection clause. These requirements, which are equally relevant to a decision based on the sixth amendment, are as follows:

The first requirement is that the constitutional standard be a simple one. The second is that the judiciary have adequate control over the means of effectuating enforcement. The third is that the public acquiesce—there is no need for agreement, simply the absence of opposition—in the principle and its application.²⁰⁴

A Supreme Court decision to abolish the prosecutor's privilege to use peremptory challenges would meet each of these requirements.

A. *The Relevant Terms and Values*

To identify the sixth amendment as the correct text is only the first step toward a workable and doctrinally sound solution to *Swain*. The second step is to identify the terms that define the nature of that constitutional provision. Using the correct terms and ordering the values that the terms represent will produce a better linguistic framework for discussing and solving issues of fair jury procedures.

The three terms that figure in discussions about the jury are "impartiality," "cross-section of the community," and "peers." These terms overlap in some respects, but are diametrically opposed in others. For example, a jury of peers may not be impartial and may not represent a cross-section of the community. Likewise, a jury of "impartial" individuals may not include peers or reflect the composition of the community. All three terms, however, represent important sixth amendment values. The difficulty lies in developing procedures that give appropriate weight to these various values and that preserve the appearance of a fair jury. The goal of the procedures should be to produce juries that correspond to the visual image of the jury as it appears in the center panel of the triptych. That is, the procedures should produce a jury that is composed of some—but not all—defendant empathizers, and some—but not all—victim empathizers.

1. "Impartial"

The word "impartial" is the only one of the three terms that actually appears in the Constitution.²⁰⁵ The sixth amendment guarantee of an "impartial jury" was probably intended to insure the impartiality of the individual jurors and of the process by which jurors are selected.²⁰⁶ If the term were taken to require only that the jurors be impartial, it would arguably be redundant because

204. Kurland, *Equal Education Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 592 (1968).

205. U.S. CONST. amend. VI. See *supra* text accompanying note 48 for the language of the sixth amendment.

206. Van Dyke notes that President Jefferson, in his first inaugural address in 1801, referred to "trials by juries impartially selected" as a principle of American justice. 1 MESSAGES AND PAPERS OF PRESIDENTS 323-24 (J. Richardson ed. 1876), quoted in J. VAN DYKE, *supra* note 54, at 47. This reference suggests a double meaning of the sixth amendment: the individual jurors must be impartial

the due process clause has been construed to require an impartial tribunal.²⁰⁷

The Supreme Court has acknowledged that this first type of "impartiality"—that of the individual jurors—is a relative quality not capable of precise definition.²⁰⁸ To the extent that an impartial juror can be defined, he or she is one who is indifferent to the parties or who, in the words of Lord Coke, is "indifferent as he stands unsworne."²⁰⁹ This definition means that the impartial juror is one who will base a verdict on the evidence developed at the trial²¹⁰ and not on any preconceived notion about the defendant's guilt or innocence.²¹¹

The sixth amendment right to an "impartial jury" and the component of this right that assures that the jurors be "impartial" are independent concepts.²¹² Truly impartial jurors, of course, are merely a theoretical objective because everyone has preconceived notions or opinions that incline him or her to decide one way or another. On this point, the Court and commentators

and the jury selection procedures must be impartial, that is, not skewed in favor of a certain group or point of view.

Van Dyke reads the limited historical evidence regarding how the colonists defined the term "impartial" to show that "our country's founders meant at least a jury that was not biased in favor of the prosecution, a jury independent of outside influence, a jury that was—as far as could be ensured—fair." J. VAN DYKE, *supra* note 54, at 47.

207. See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

208. The Court in *United States v. Wood*, 299 U.S. 123, 145-46 (1936), described impartiality as follows: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

209. COKE ON LITTLETON 155b (18th ed. 1832), *quoted in* *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); see also *Logan v. United States*, 144 U.S. 263, 298 (1892) ("A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."); *Hayes v. Missouri*, 120 U.S. 68, 70 (1887) ("It is to be remembered that . . . impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.").

210. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

211. *Id.* at 723. The Court has noted, however, that impartiality does not require that a juror have no preconceived idea about the accused's guilt or innocence; rather, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*

212. The recent case of *Patton v. Yount*, 104 S. Ct. 2885 (1984), distinguishes the impartial juror from the impartial jury, at least for purposes of habeas corpus review. When reviewing a case in which the impartiality of an individual juror is questioned, the Court will treat that issue as a question of fact and afford the state court's decision great deference. *Id.* at 2891-92 n.12. The impartiality of the jury as a whole can be compromised by adverse pretrial publicity, which creates such a presumption of prejudice in the community that an individual juror's claim that he or she can be impartial is not believable. *Id.* at 2889. The Court on habeas corpus review will overturn the state court's findings about the impartiality of the jury as a whole only when it finds "manifest error." *Id.*

The distinction made by the Court in *Patton* between the impartial juror and an impartial jury differs from that offered in this Article. The Court did not actually describe two types of impartiality but rather two ways in which the impartiality of individual jurors may be determined. The first way is to ask the individual on voir dire if he or she can be impartial and then to evaluate the truthfulness of the response. The second way, which the Court describes as furthering impartiality of the jury as a whole, is to presume that individual jurors cannot be fair when pervasive publicity in the community makes any contrary assertion incredible. In both cases, however, the issue is whether individual jurors can be fair. This Article argues that a true distinction exists between an impartial juror and an "impartial jury" insofar as the phrase "impartial jury" also includes the concepts of cross-representativeness and peers. The fairness or impartiality of the jury as a whole is a far more complex issue than whether the individuals who comprise that jury are impartial.

agree.²¹³ Consequently, an impartial juror is not a completely neutral person, but is one who evidences no extreme bias for or against the accused.

The impartial juror ideal must be qualified by several other practical observations. First, the traditional means by which lawyers attempt to uncover whether prospective jurors are impartial, voir dire, is a crude means for identifying all prospective jurors who harbor significant prejudice or bias.²¹⁴ Second, the parties' ideas about "impartiality" play the primary role in defining that term in actual operation. Only the parties, through their attorneys, can exercise challenges to eliminate "partial" jurors. The Supreme Court's concept of an impartial juror as one who has no bias favoring either party therefore will often have no bearing on whether the jurors sworn are actually indifferent; if the parties perceive the jurors as impartial, a court will not interfere.²¹⁵ Moreover, the way that lawyers exercise their challenges indicates that they do not seek to empanel "impartial" jurors but instead try to eliminate those partial to their opponents.²¹⁶ The interests that the "impartial juror" concept protects are, therefore, like the jury right itself, first and foremost the litigants' interests.

213. See, e.g., *Rideau v. Louisiana*, 373 U.S. 723, 731 (1963); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Babcock*, *supra* note 106, at 551; *Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 925 (1971); *Logan & Cole, Reducing Bias in a Jury Source List by Combining Voters and Drivers*, 67 JUDICATURE 87, 87 (1983); Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 349-50 (1960).

214. Some bias may be unconscious so that the veniremember could swear in good faith to be impartial yet not be. See *Murphy v. Florida*, 421 U.S. 794, 802-03 (1975); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1495-96 (1975). See *supra* text accompanying notes 137-39 for a discussion of other reasons voir dire may not uncover bias.

215. According to one observer, the result of this process is that jury selection reflects the social and political attitudes of the lawyers who conduct voir dire. See P. DiPERNA, *supra* note 74, at 107.

216. Several commentators have made this point, as the following passages show:

"Of course, lawyers proclaim sanctimoniously that they only seek fair and impartial jury, but pious protestations aside, what they really want is a jury that will favor their side and help them win." Brody, *Selecting a Jury—Art or Blind Man's Bluff?*, 4 CRIM. L. REV. 67, 68 (1957).

The true administration of justice contemplates a trial of the issues by a fair and impartial jury. The attorney, in most instances, prefers a jury which is prejudiced, or at least leaning, in favor of his cause. The party, bluntly, wants to win, and anything less is not true justice.

Adkins, *supra* note 109, at 37.

Nobody wants fair juries any more. They want juries that are selectively predisposed to their position. They say, "Get rid of the fair people. Get people that favor my position." . . . Jury selection should not be a game in which each side tries to pick the 12 most ideal jurors from their standpoint. We collectively—plaintiff, defendant, and judge—should be aiming to pick 12 people who can be fair.

Improving the Jury Selection Process, 73 ILL. B.J. 160, 160 (1984) (statement of Chief Judge David DeDoncker in panel discussion).

The general consensus gleaned from these articles is that attorneys pay lip service to the ideal of an impartial jury, but the goal of jury selection is actually to produce a biased jury. To further this aim, attorneys increasingly hire psychologists and sociologists to help them pick the perfect jury. Comments regarding jury selection by these "experts" make it clear that the objective is to pick a biased jury. "As we try to get more selective by doing psychological profiles to get the 12 jurors who are the best leaners toward our side of the case, we get further and further away from the search for truth." *Id.* at 160.

"In most instances, given an acceptable, favorable set of facts, the jury is going to give a verdict to the person they like the most. I realize that this does not sound like proper administration of justice but it is one of the psychological factors I take into account." Address given by Dennis Harrington, 88th Annual Convention of the Tennessee Bar Association (June 10, 1969), reprinted in Harrington & Dempsey, *Psychological Factors in Jury Selection*, 37 TENN. L. REV. 173, 173 (1969).

More properly, as is true of the sixth amendment right generally, the constitutional interest in impartial jurors belongs to the defendant.²¹⁷

The procedures that protect the defendant's interest in "impartial" jurors are voir dire and cause challenges. These devices help assure that no juror with a specific bias against the accused or the prosecution will hear the case. The result of voir dire and the exercise of challenges should be a jury that is reasonably fair to both sides and that will decide the case on the basis of the evidence presented. A jury composed of all "impartial" jurors, however, will not satisfy the triptych's center-panel image of a fair jury. For example, twelve "impartial" persons could be selected from one group or sector of the community. Although these twelve jurors might harbor no specific bias towards the accused or the state, together they would not appear to be a "fair jury." A "fair jury" is not merely a group of impartial fact finders, but is one that is drawn from all sectors of the community and that includes some people who are the defendant's peers. That is, the fair jury ideal not only requires that the jurors individually appear fair—impartial—but also that the composite jury appears fair.

2. "Cross-Section of the Community"

The second key term, "cross-section of the community," focuses on the jury as a whole and not on the individual jurors. Like the term "impartial," the cross-section concept represents a theoretical ideal that is impossible to achieve in any given case. Specifically, the cross-section ideal represents the community-centered interest of participation in the jury system by all people.²¹⁸ The premise of the cross-section requirement is that if all or several community groups are included in the jury process, the jury will be better able to withstand intimidation from the government, its verdict will better reflect the conscience of the

217. The state has an interest in jurors' impartiality, but this interest is not grounded in the sixth amendment. The defendant alone has a constitutional right to an impartial jury. This right does not include the right to jurors who are partial to the defendant. When the defendant's constitutional right ends, the government's power to fashion whatever system of adjudication it deems appropriate begins. This right may include a system that allows the state to exclude jurors who are partial.

218. The defendant is interested in a cross-representative jury only to the extent such a jury might be more likely to include someone with life experiences similar to those of the defendant (peers) or might be less likely to be hand-picked from one sector of society that is *biased* against the defendant (impartiality). The defendant desires empathy and fairness, best ensured by having some peers in the jury box. The government in its prosecution role likewise is uninterested in securing a cross-representative jury. The prosecutor seeks jurors who will identify with the victim of the crime and who will punish people found guilty beyond a reasonable doubt.

The assertion that the cross-section requirement represents a community-centered interest is qualified to the extent that "impartiality" and "cross-representativeness" intersect. The Court in *Taylor v. Louisiana*, 419 U.S. 522 (1975), suggested that an "impartial jury" is one in which group biases have the opportunity to interact. *Id.* at 530-31. Thus, if many groups are represented, their several viewpoints will be addressed and considered by the jurors. The result should be an impartial, or at least less partial, verdict. If the cross-section rule works to further impartiality, it could indeed further defendant-centered interests. In that context, however, the cross-section rule is merely an adjunct of the impartiality objective and does not represent an independent value. Likewise, to the extent a cross-representative jury is more likely to include the defendant's peers, it may further the defendant-centered interest of a jury of peers. Again, however, cross-representativeness is a means to a different end and not an independent feature of a proper jury. Only the community interest in participation in the justice system provides a basis for cross-representative juries that is independent of the interests in impartial jurors and in juries of peers.

community, and the verdict will be respected by a greater segment of society.²¹⁹ The procedure that protects this interest is a jury selection process that includes all segments of the community in the jury pool by consulting representative source lists and by limiting the statutory exemptions to jury service.

Recent federal²²⁰ and state²²¹ court decisions have invoked the cross-section concept as an analytical framework for offering alternatives to *Swain*. The concept does not, however, respond to the real issue in *Swain*. The problem in *Swain* was not that the petit jury failed to represent (or even approximate) a cross-section of the community. Rather, the problem was that no blacks were included in the jury and that the state prosecutor produced that result.²²² No one has expressed concern about the absence of shopkeepers, Hispanics, young people, females, or representatives of any other community groups from *Swain's* jury.

No single petit jury ever has or ever will represent a true "cross-section of the community." To persist, then, in the argument that a fair jury is one that gives the defendant the opportunity to select a "cross-representative" jury without intentional interference by the prosecutor is to pursue an analytical dead end. Even if a prosecutor were to waive the state's peremptory challenges, the jury would be unlikely to represent a cross-section of the community. If cross-representativeness is a constitutional requirement, the mere theoretical "opportunity" to obtain such a jury hardly seems an adequate protection of this right. The likely result of citing the cross-section requirement as the basis for objections to *Swain* will be to elicit an opinion, probably authored by a member of the conservative wing of the Court, correctly exposing the illogic of the approach.²²³

This analysis is not to suggest that the cross-section concept has no bearing on the sixth amendment or that the intentional exclusion of black people from a jury does not violate that concept. The triptych analysis of the jury and the jury's various functions demonstrates the limited relationship between the cross-section requirement and the sixth amendment right. One function of the jury, although not the only function, is to satisfy a community-centered interest in participation in the justice system by injecting representative community voices and values into the decision process. This community concern is satisfied by a

219. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972).

220. *United States v. Leslie*, 759 F.2d 366, 370-75 (5th Cir. 1985); *McCray v. Abrams*, 750 F.2d 1113, 1128 (2d Cir. 1984).

221. See cases cited *supra* note 8.

222. One commentator has noted that the problem is not that the parties are entitled to a fair cross-section. Rather, the problem is that the exclusion of people based on their group affiliation offends the principle that group affiliation alone does not determine whether one can be impartial. See Note, *supra* note 14, at 1781. Thus, the commentator observes:

A peremptory challenge exercised on the sole ground of group affiliation suggests that a particular juror is unfit to give the defendant a fair trial, not because of her own idiosyncratic prejudices, but rather as the inevitable consequence of group antagonism. This assumption perpetuates stereotypes that are no longer tolerated in any other area of the law.

Id.

223. This prediction is based on Justice Rehnquist's ascerbic dissent in *Duren v. Missouri*, 439 U.S. 357, 376-78 (1979), especially the footnote at 371, in which he criticized the cross-section theory. *Id.* at 371.

jury that includes *several* different community groups and that is selected through a procedure that over time is likely to include every group. Consequently, a rule that prohibits only systematic and intentional violations of the cross-section ideal is true to this community-centered aspect of the jury. Occasional mistakes or even occasional intentional miscarriages of justice will not defeat the community interest, provided that the system, on the whole, works well. Consistent random selection of jurors from a truly cross-representative source list or jury pool should satisfy the community's interest in the cross-section ideal.

The community, however, is not the first priority of the sixth amendment; the accused is. The community obviously reaps a derivative benefit from fair treatment of defendants under the Bill of Rights, but the sixth amendment is not explicitly concerned with protecting the community.

The cross-representative requirement²²⁴ could actually defeat the defendant's right to a fair jury. Depending on how local rules define the geographical area from which jury pools are to be selected, a cross-section of the "community" could be a totally homogeneous group of citizens known to harbor strong ill-will toward people of the defendant's race or background. Also, if cross-representativeness were the *only* criterion for a fair jury, then individuals with overt prejudices against an accused would have to be empanelled because all voices and values would need to be "represented" in the verdict. This construction of the Constitution, of course, has not been, and never will be, adopted. The point is simply that "cross-representativeness," taken alone, does not define a "fair jury" for the accused.

The cross-section ideal may operate to benefit some defendants; representative juries are more likely to include people who are like the defendant than are juries culled from only one group of society. For minority defendants, however, this ideal may offer little benefit. Even a jury that mirrors the community perfectly may include only one or no members of the defendant's group. The cross-section requirement means only that members of the defendant's group should have the same voice in the verdict that they have in the community in general. Unfortunately, this democratic principle works well only for defendants who already have considerable representation in, and hence whose values and experiences already are understood by, the community. The cross-section requirement represents valid sixth amendment interests, but it can operate to defeat the sixth amendment right to a fair jury in certain circumstances.

3. "Peers"

Judges and commentators have noticed the potential harshness of the cross-representative jury, even if it is composed of impartial jurors. Their awareness is reflected by their occasional use of the third term, "peers," when describing a

224. The Supreme Court defines a cross-representative jury as "one that is drawn from a pool in which no distinctive community group is underrepresented due to systematic discrimination in the selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979); see *supra* text accompanying notes 163-74.

fair jury.²²⁵ This last term is the most elusive of the three key terms in the jury discourse and therefore requires more extensive consideration. Unlike the terms "impartial" and "cross-representative," the term "peers" has not been used as the basis for specific jury selection procedures designed to preserve the values that the term represents. Rather, the term largely has been cited in passing, without real study of its meaning or of its potential importance to fair selection procedures. Nevertheless, the term represents a significant aspect of a fair jury and should be preserved in modern sixth amendment doctrine.

Although the United States Constitution makes no mention of "peers," most people believe the Constitution entitles them to a "jury of their peers."²²⁶ The Supreme Court itself has defined a jury as "a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine."²²⁷ The dictionary defines a peer as an "equal,"²²⁸ implying that nonpeers are unequal or at least different. Before a defendant can be granted a trial by a jury of his or her peers, an effort must be made to define the criteria by which one person is to be judged the "equal" of another and then to reconcile those criteria with the sixth amendment.

At one level, a jury of one's peers may mean simply a jury composed of people reasonably independent of government influence. Any persons who are not government officials and who are not employed by the government as professional judges or prosecutors satisfy this definition of equals.²²⁹

A second, complementary interpretation of a jury of peers focuses on the differences that exist among nongovernment-affiliated citizens. Under this view, more is expected of a "peer" than that he or she be free from government affiliation. This view presupposes that a common bond or shared characteristic exists

225. References to peers as a part of the right to trial by jury appear in federal cases, *see, e.g.*, *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972); *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)); in legal periodicals, *see, e.g.*, Potash, *supra* note 96, at 80 ("The objection of the minority defendant is that generally the jury is not composed of the minority defendant's 'peers.'"); in commentaries on the jury, *see, e.g.*, P. DI PERNA, *supra* note 74, at 82; J. VAN DYKE, *supra* note 54, at 9-13; in lawyers' discussions of trial tactics, *see, e.g.*, F. BAILEY, *TO BE A TRIAL LAWYER* 115 (1985) ("The United States Constitution provides that one is entitled to a trial by a jury of his peers."); in jurors' accounts of their jury service, *see, e.g.*, E. KENNEBECK, *supra* note 87, at 70-71; M. TIMOTHY, *supra* note 87, at 35 (quoting Angela Davis); in modern plays, *see, e.g.*, Moore, *Angela is Happening*, in *THE DISINHERITED: PLAYS* 164 (A. Ravitz ed. 1974); and even in popular humor. Comedian David Brenner tells his audience that the Constitution grants us the right to a jury of our peers and that "peers" means that the jurors "never peered into a book." Performance by David Brenner, Gainesville, Florida (Apr. 21, 1985).

226. *See supra* note 225.

227. *Strauder v. West Virginia*, 100 U.S. 306, 308 (1880). This interpretation of a jury composed of peers probably stems from both English history and colonial American practice. *See supra* text accompanying notes 17-19.

228. WEBSTER'S NEW COLLEGIATE DICTIONARY 845 (1973) defines a "peer" as: "1: one that is of equal standing with another: EQUAL 2: *archaic*: COMPANION 3a: a member of one of the five ranks (as duke, marquess, earl, viscount, or baron) of the British peerage b: NOBLE."

229. This definition of peers as nongovernment-affiliates is subject to further refinement. The question arises whether government employment of any kind should disqualify a juror. The answer in the United States has been that it does not. *See Dennis v. United States*, 339 U.S. 162, 165-67, 172 (1950); *United States v. Wood*, 299 U.S. 123, 134 (1936); *see also Smith v. Phillips*, 455 U.S. 209, 218-21 (1982) (no bias inferred when juror was seeking job with prosecutor's office).

between the defendant and some jurors that enables those jurors to hear and understand the defendant better than others might. Examples of potentially relevant characteristics include the juror's race, religion, gender, or socioeconomic status. Implicit in this interpretation of peers is the assumption that differences among groups of laypeople affect their perceptions of events and of each other and hence the way in which they judge one another.²³⁰

The argument that the sixth amendment requires juries composed of peers who meet this latter definition is problematic at first glance. First, the sixth amendment does not use the word "peers," despite prevalent use of the term in colonial constitutions. Second, the premise of American government is that "all men are created equal" and hence all are peers.²³¹ Third, it is enormously difficult to define who may be described as a peer.²³² Fourth, even if we were able to establish criteria for the status of peer, the requirement that courts affirmatively consider those criteria when selecting juries would be a form of "affirmative action" unpalatable to most people. Last, the Supreme Court consistently has re-

230. The assumption that people of different status, experience, age, race, gender, and so forth may not understand each other and hence may judge each other differently finds support in some psychological studies. See, e.g., D. BINDER & P. BERGMAN, *FACT INVESTIGATION—FROM HYPOTHESIS TO PROOF* 151 (1984) (citing B. COLLINS, *SOCIAL PSYCHOLOGY* 119-25 (1970)) ("When a witness is in some way similar to a fact finder, a witness' credibility may increase. And when the witness is dissimilar, credibility may well decrease."); J. VAN DYKE, *supra* note 54, at 25-35 (Jurors tend to be more sympathetic to defendants from their own racial or socioeconomic background.). But see *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 103 (1965) (reporting that some white lawyers who represent black defendants believe black jurors may be harsher to black defendants than are white jurors).

231. The sentiment is expressed eloquently in Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896):

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. *The humblest is the peer of the most powerful.* The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Id. at 559 (emphasis added).

Of course, Justice Harlan's dissent states an ideal. The problem, as always, lies in developing constitutional doctrine that not only acknowledges this objective but that also hastens its attainment for all people. The latter often entails color-conscious or gender-conscious remedies. See Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303 (1986).

232. Shaufelberger poses the problem as follows:

At the core of the Anglo-Saxon conception of justice and of the jury system, is the idea that one's peers can best judge one's actions. But the political and social development of the Anglo-Saxon world during the seven hundred and fifty years since the Magna Carta has created a problem of which nobody dreamt in 1215, 1628, or even 1760. The problem can therefore not be solved by appeal to the authority of "the barons," or Coke, or Blackstone. For philosophical reasons, the Constitution is no help either. And although this problem is very real and touches the quick of the jury system, American jurisprudence and the judiciary have never allowed the pertinent questions to be asked, let alone answered them. The problem is: Who is today, whose peer?

A. SHAUFELEBERGER, *supra* note 19, at 125; see also J. VAN DYKE, *supra* note 54, at 11 (concluding that it is administratively impossible to define "peers" and "community" for each case); cf. Saltzburg & Powers, *supra* note 14, at 366-68 (discussing the difficulty in deciding whether and when group affiliations are relevant to jury impartiality); Note, "Who is a Negro" Revisited: *Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. FLA. L. REV. 683, 691 (1983) (discussing the imprecision of race as a scientific criterion).

fused to require peer representation on the petit jury.²³³

A closer look, however, reveals that the concept of peers as people with common bonds is implied by the sixth amendment. The history of the clause is relevant, although not dispositive. The colonists' intense debates about the geographical area from which the jury should be drawn demonstrate their concern about which laypersons would serve as jurors.²³⁴ The sixth amendment's requirement that juries be drawn from "the State and district wherein the crime shall have been committed,"²³⁵ which emerged from the neighborhood restriction of some colonies,²³⁶ reflects this concern. Displaying an awareness of this parochial aspect of the jury, the Supreme Court on one occasion defined peers as the defendant's "neighbors, fellows, associates, persons having the same legal status in society as that which he holds."²³⁷ The colonists desired justice delivered by their own community, by people like themselves. Thus, one cannot disregard their second interpretation of peers without compromising an important facet of the jury.

Another historical example of the significance of same-group membership to a jury of one's peers is the ancient jury *de medietate linguae*. The history of the jury *de medietate linguae* dates back to the thirteenth century. Under John's Charter of 1201, in all actions against Jews the defendant was entitled to a judgment by Jews.²³⁸ Later statutes guaranteed a foreign merchant the right to a jury *de medietate linguae*, which meant that half of the jury had to be composed of people from his country. For example, a Welshman tried in England was entitled to a jury composed of equal numbers of Englishmen and Welshmen,²³⁹ provided a sufficient number of foreign merchants could be found.²⁴⁰

The practice of including aliens on juries in trials of aliens was known in the United States, but developed in a different manner than the English practice. Professor LaRue²⁴¹ cites the history of the American practice in his analysis of why the United States Supreme Court in 1880 disapproved of the intentional

233. See, e.g., *Fay v. New York*, 332 U.S. 261 (1947).

234. See *supra* text accompanying notes 46-49.

235. U.S. CONST. amend. VI.

236. See *supra* text accompanying notes 47-49.

237. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880).

238. Clark, *supra* note 18, at 30. This privilege was not afforded Jews out of "English liberalism," but was to protect the Crown's property interest, established by law, in Jews and all their effects. See LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 849 (1976).

239. W. FORSYTH, *supra* note 19, at 228-30; Clark, *supra* note 18, at 30.

240. W. FORSYTH, *supra* note 19, at 229. An interesting and somewhat analogous historical footnote is the obsolete practice in England whereby a female defendant who claimed to be pregnant would, if pronounced guilty, be entitled to a panel of 12 women whose duty it was to examine the defendant to determine if she was "quick with child." A pregnant defendant might be spared execution. Moore describes this practice as "the only jury of women in the history of the English jury, at least before the twentieth century." L. MOORE, *supra* note 21, at 78-79. In the American colonies this jury was known as the matron's jury. Comment, *Right to Trial by Jury—Whether Presence of Women on Juries Impairs the Constitutional Right to Trial by Jury*, 18 CHI.-KENT L. REV. 103, 104 n.14 (1939). One writer notes, however, that "[e]ven in these exceptional cases . . . the women were not the sole judges of the fact, for the jury contained, in addition to the twelve women, twelve men as well, and the examination was performed by the women in the presence of the men." Miller, *The Woman Juror*, 2 OR. L. REV. 30, 31 (1922).

241. LaRue, *supra* note 238, at 841.

exclusion of blacks from juries²⁴² yet refused to require their inclusion.²⁴³ LaRue reports that the jury *de medietate linguae* apparently was used in America until the middle of the nineteenth century.²⁴⁴ The decline of this form of jury was not, according to LaRue, caused by hostility to aliens. The expressed reason for the decline was that "things had changed"²⁴⁵ so that the right to this type of jury was perceived as unnecessary. In particular, an "alien" in the United States could change his or her status to "denizen" simply by making a permanent settlement, paying certain fees, and taking an oath.²⁴⁶ In England, an alien could become a denizen only through the Crown's grace.²⁴⁷ Thus, the privilege of the alien jury was more critical in England than in the United States. Moreover, the original purposes of the alien jury likely were to promote the commercial policy of encouraging alien merchants to trade in England and to assure fair dealing.²⁴⁸ The significance of these interests was diminished in America, again because aliens could easily change their status.²⁴⁹

As this history indicates, the colonists realized that in some circumstances human empathy and understanding hinge on individual experience and thus can affect how people judge one another. Although the colonists surely would have rejected the argument that a jury that tries a woman defendant must include women, they accepted, at least for a while, the arguments that an alien should be tried by other aliens and that a defendant should be tried by his or her "neighbors." The basic premise that differences may produce barriers to understanding was understood; only the perception of what differences may be significant was deficient. The term "peer," therefore, viewed in its historical context, must be reconstrued to accommodate modern perceptions of relevant differences and similarities among people.

242. See *Ex parte Virginia*, 100 U.S. 339 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

243. See *Virginia v. Rives*, 100 U.S. 313 (1880). In *Martin v. Texas*, 200 U.S. 316, 320-21 (1906), Justice Harlan stated this principle as follows:

A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. What an accused is entitled to demand, under the Constitution of the United States, is that . . . there shall be no exclusion of his race, and no discrimination against them, because of their race or color.

See also *Akins v. Texas*, 325 U.S. 398, 403 (1945) ("Fairness in selection [of jurors] has never been held to require proportional representation of races upon a jury."); *Neal v. Delaware*, 103 U.S. 370, 394 (1881) (noting that a mixed jury is not a constitutional right, although intentional exclusion of the members of a race is unconstitutional).

244. LaRue, *supra* note 238, at 850.

245. *Id.* at 862.

246. *Id.* at 857.

247. *Id.*

248. *Id.* at 850 (quoting J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 94 n.4 (1898)).

249. LaRue suggests that the reason the Supreme Court opposed intentional exclusion of blacks from juries but deemed their mandatory inclusion unnecessary may have been that intentional exclusion would make blacks "permanent outsiders," as aliens were in England. *Id.* at 862. Once intentional exclusion was prohibited, however, the Court saw no political reason to afford black people the right to a special jury. *Id.* at 863.

To impose this version of the peer concept on the criminal jury raises two potential definitional problems, both of which are surmountable. One problem is that "peer" may be misinterpreted to mean a "friend" of the accused. The theoretical aim of the criminal law is to protect society through predictable and appropriate enforcement of majoritarian standards of conduct. Juries composed of sympathetic "friends" of the defendant may be unwilling to enforce these standards and may thereby threaten the community's interests.

The idea behind the peer concept as defined herein, however, is to assure *empathy*, not sympathy, for the accused. Empathy in this sense means the capacity for participating in or vicariously experiencing another's feelings, volitions, or ideas. It is a form of understanding. Sympathy, in contrast, suggests an affinity or relationship with another such that the feelings, volitions, or ideas of another are shared or mutually experienced. Sympathy is a form of shared caring and will incline one to reach a particular result without regard to applicable neutral standards. In contrast, one can empathize and yet still judge impartially.

The quality of empathy is important to a fair hearing for many reasons. Determinations of guilt or innocence are not objective decisions that even impartial people can perform without regard to the defendant's individual worthiness, experience, or personality. Deciding "who did it" or "what happened" can involve credibility decisions, evaluations of eyewitness testimony, and estimations of the weight of circumstantial evidence. Evaluation of these factors may differ according to a juror's experience. For example, the juror's life experience would probably affect how he or she views the evidence in the "consent rape" case discussed earlier.²⁵⁰ A jury that includes the defendant's peers—people who are able to identify with the defendant and his experiences—may view the prosecution's case very differently than would a jury of people who are merely "impartial" or who are peers of the alleged victim.

This point is made very effectively in the early twentieth century short story, "A Jury of Her Peers."²⁵¹ In Susan Keating Glaspell's story, two women and three men go to the Wright home to investigate a murder. Mr. Wright has been strangled with a rope in his sleep. Mrs. Wright, who has been taken into custody, is the suspected murderer. The five people search the Wright house for clues to the crime.

The story emphasizes the dramatic difference between the women's perspective of the Wright home and the men's perspective. The women find a motive for Mr. Wright's murder in a stove that does not work, in their knowledge that Wright was a hard and unyielding man, in their view of Mrs. Wright's life as oppressive, isolated, and joyless, and in the discovery of a dead canary whose

250. See *supra* text accompanying note 82.

251. Glaspell, *A Jury of Her Peers*, in EVERYWEEK, Mar. 5, 1917 (copy on file at NORTH CAROLINA LAW REVIEW office). The parallels between the facts of Glaspell's story and *Hoyt v. Florida*, 368 U.S. 57, 58-59 (1961), are sobering. Still today, juries that decide cases in which a wife murders her husband after years of emotional or physical abuse need not, under constitutional law, include women.

neck had been broken and whose body had been wrapped in a piece of silk and hidden in Mrs. Wright's sewing basket.

The women discover not only who killed Mr. Wright but why. The men, however, see only that Mrs. Wright must have committed the murder without discovering a clue as to the motive. The male county attorney concludes, "[I]t's all perfectly clear, except the reason for doing it. But you know juries when it comes to women. If there was some definite thing—something to show. Something to make a story about. A thing that would connect up with this clumsy way of doing it."²⁵² The women see perfectly the reason for the murder. One of them remarks, "If there had been years and years of—nothing, then a bird to sing to you, it would be awful—still—after the bird was still."²⁵³ When the women leave the farmhouse, one of them places the dead bird in her pocket, thereby removing the only evidence of a motive that a jury would need to connect Mrs. Wright to the murder.

Significant to this story is that the two women, one of whom is the sheriff's wife, are mindful of the seriousness of Mrs. Wright's deed. At one point, the sheriff's wife observes to the other woman, "The law has got to punish crime, Mrs. Hale."²⁵⁴ But these women also perceive that the crimes committed in the Wright home were several. The women decided—out of empathy, not sympathy—that enough suffering and punishment had been meted out.

This story is a compelling illustration of the potential tension between empathy and obedience to majoritarian standards of conduct and of the difference that life experience can make in one's understanding of the facts and in one's judgment of the accused. Interpreting facts and judging defendants are the two things a jury must do; if one jury performs these functions differently from another, they are likely to reach different results. The title of the story, "A Jury of Her Peers," implies that the author understands the potential for differing judgments and that she defines "peers" as the term is used herein. The resolution of the story suggests that the author approves of the peer judgment as a fair one. The peers she depicts, however, are not friends of the accused. They offer insight and understanding, not pity or passion. Thus, to argue that the peer concept is important to a fair jury is *not* to advocate partial judgments or sympathetic hearings by people unfairly aligned with the defendant or opposed to the prosecution.

The second, more difficult, problem with the peer concept lies in deciding who is whose peer in a given situation. For example, assume that the defendant is a white woman, in her early thirties, married, born in the South, and raised as a Catholic. If she is accused of killing her husband because he was beating her and she feared he would kill her, are her peers all young women? All married women? All battered women? If she is accused of embezzling money from an employer to pay creditors, who are her peers? All embezzlers? All women with financial problems that might motivate them to steal? All people in her socio-

252. Glaspell, *supra* note 251, at 21.

253. *Id.* at 19.

254. *Id.* at 20.

economic group? If she is employed as a police officer and is accused of violating the civil rights of a black arrestee, who are her peers? All police officers? All Caucasians?

A juror's ability to understand the defendant's actions in these three scenarios would depend on different aspects of the juror's life experiences. A jury of all men would be troublesome in the battered wife hypothetical, a jury of all employers would be troublesome in the embezzlement hypothetical, and a jury of all black people would be troublesome in the civil rights hypothetical. Moreover, at least two, and possibly three, of these troublesome characteristics would be visible to the defendant and to the community: gender and race are observable and hence news-reportable²⁵⁵ characteristics. Although whether one is an employer may not be a visible trait, attire may signal socioeconomic status, which, in turn, may be perceived as affecting one's empathy with a defendant accused of stealing money from an employer. The fact that a trait is observable and reportable is of vast significance to the acceptability of the jury's verdict, because only obvious, reportable traits can affect the appearance of justice to the public. Jury composition becomes even more disturbing to the defendant and to the community when the government intentionally excludes women, whites, or nonemployers from the jury through peremptories. In that event, the body

255. The "news reportable" features of the jury play a significant role in the appearance of fairness in jury procedures and in the acceptability of jury verdicts. As Professor Kurland admonishes, one key to the success of a fundamental constitutional law decision is that the public acquiesce. See *supra* note 204 and accompanying text. Acquiescence will hinge in part on public awareness and perception of the decision. If the Supreme Court fashions sixth amendment law that produces juries that most people would regard as unfair, and if that unfairness is visible and made known to the public through news reports, then the law will not succeed. The increased use of television cameras in the courtroom should expand public awareness of court procedures and consistently underscore the need for visually acceptable procedures. The "appearance of justice" likely will become an increasingly significant factor in court procedures.

That some jury features are deemed newsworthy by reporters is reflected in news accounts of trials. See, e.g., *Jury Selection Near in CBS Libel Suit*, N.Y. Times, Oct. 10, 1984, § Y, at 18, col. 4, which described the jury in the General Westmoreland libel suit as:

[T]wo accountants, one 33-years-old and the other 42; a 32-year-old insurance casualty underwriter; a 24-year-old foreman at a cosmetics manufacturing plant; the 53-year-old owner of a gift shop; a 26-year-old dental assistant; a 55-year-old Consolidated Edison Company service representative; a 30-year-old Citibank employee, and a 49-year-old employee of the Internal Revenue Service. Many are college educated . . . None of the prospective jurors . . . had served in Vietnam. One has a son who is an Army staff sergeant and another said he "had a personal view against the Vietnam War." Like the other jurors, however, they said they would not be prejudiced in their consideration of evidence in the trial.

See also Lacayo, *A Theory Goes on Trial*, TIME, Sept. 24, 1984, at 62 (describing jury in Shockley libel case as "five whites and one black"); *Jury Awards \$395,000 in Death of Demonstrator*, St. Petersburg Times, June 9, 1985, at A13, col. 1 (noting that in two trials "all-white juries acquitted the Ku Klux Klansmen and Nazis on state and federal charges"); *Jurors Sworn In For von Bulow Trial*, N.Y. Times, Apr. 23, 1985, § Y, at 10, col. 4 (noting that "[e]leven women and four men were sworn in yesterday as jurors, three of them as alternates" in the retrial of Claus Von Bulow on charges that he attempted to murder his wife); Connors, *Jury Frees Boy who Killed Abusive Father*, Florida Times-Union, Nov. 29, 1984, at A1, col. 5 (noting that jury in murder case was composed of four men and two women); Lubasch, *Sharon v. Time Trial Begins in Manhattan Federal Court*, N.Y. Times, Nov. 14, 1984, § Y, at 15, col. 1 (noting that jury in libel case consisted of four women and two men); Cyril, *Jury Finds Archer Man Guilty in Rape, Robbery, Burglary*, U. Fla. Alligator, Oct. 26, 1984, at 3, col. 1 (noting that jury in rape and robbery case was comprised of five men and one woman); Shipp, *Two In Abuse Case Found Not Guilty*, N.Y. Times, Sept. 21, 1984, § Y, at 20, col. 1 (noting that jury in sex abuse case was composed of eight men and four women).

designed to check government power visibly becomes a tool of government power, and respect for the jury's verdict may diminish, or worse, may change to contempt.

Implicit in these observations about troublesome juries are several keys to the proper definition of a peer. First, the examples show that agreement can probably be reached on which traits are relevant in a particular case. For example, most people probably believe that gender defines one's experiences in ways that are relevant to cases that raise gender-associated issues such as rape or spouse abuse.²⁵⁶ Thus, a consensus, however inarticulate and subliminal, can be mustered as to who is whose "peer" in at least some cases. Moreover, such a consensus is likely to reveal that people do not think of a peer as a "sympathizer." A jury of peers of a battered woman who kills her abusive spouse does not, in most people's minds, mean a jury of women who have committed similar acts. Likewise, a jury of "peers" of a defendant accused of theft does not mean a jury of thieves.

Second, the examples emphasize the significance of public perception about what experiences and hence what group lines are important in a given case. That is, whether or not gender in fact would determine one's ability to be an empathetic juror in a spouse abuse case is largely irrelevant. The keys are whether the public and the participants can see the characteristic of gender and whether they believe that gender will affect the nature of the judgment.²⁵⁷ The reason that their belief, and not reality, is important has already been stated: the appearance of justice is critical to public acceptance of the jury verdict,²⁵⁸ and popular notions of fairness determine what appears just.

256. The Supreme Court has rejected the argument that the jury must include women in a case in which a woman killed her husband after years of physical and emotional abuse and asserted as her defense temporary insanity. *Hoyt v. Florida*, 368 U.S. 57, 58-59 (1961). The argument of this Article is that an all-male jury in such a case is not a jury that includes the defendant's peers; thus, such a jury would not appear fair to most members of the community.

257. Justice Douglas, in *Ballard v. United States*, 329 U.S. 187 (1946), indicated the view, likely shared by many, that gender may affect the nature of a judgment:

[I]t is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

Id. at 193-94. Justice Douglas' observations find support in the work of Carol Gilligan, who maintains that the moral reasoning of girls and women differs from that of boys and men. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982). Whether this distinction is explainable by innate differences between the sexes or by different life experiences is unclear.

258. See, for example, *Hobby v. United States*, 104 S. Ct. 3093, 3100 (1984), in which Justice Stevens stated in his dissent:

An established principle of this Court's jurisprudence is that the injury caused by race and sex discrimination in the formulation of grand and petit juries is measured not only in terms of the actual prejudice caused to individual defendants but also in terms of the injury done to public confidence in the integrity of the judicial process.

See also *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 823 (1984) ("The value of [open trials] lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed Openness thus enhances both the basic fairness of the criminal

This last point assumes that these "popular notions" of justice are discoverable. Judges have several ways of discovering popular opinions about what a fair jury should look like. One obvious way is to consult their own experiences and perceptions. A second means is to review what students learn about the jury system and about what constitutes a fair jury from traditional textbooks. The coverage of the subject in conventional textbooks is idealistic, misleading, and incomplete.²⁵⁹ The impression created by these textbooks is that all citizens are

trial and the appearance of fairness so essential to public confidence in the system." In *Johnson v. Louisiana*, 406 U.S. 356, 398 (1972), Justice Stewart wrote in his dissenting opinion:

[O]nly a unanimous jury . . . can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear. . . . And community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines.

See also *Peters v. Kiff*, 407 U.S. 493, 502 (1972) ("[E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"); *Cassell v. Texas*, 339 U.S. 282, 302 (1950) (Jackson, J., dissenting) ("A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not."). Justice Frankfurter stated in his dissenting opinion in *Dennis v. United States*, 339 U.S. 162, 182 (1950), "The appearance of impartiality is an essential manifestation of its reality."

Other examples include *Tapia v. Barker*, 160 Cal. App. 3d 761, 766, 206 Cal. Rptr. 803, 806 (1984) ("When a jury verdict is so clearly the result of [racial] bias, it cannot stand. It has often been stated, in varying forms, that not only must our courts render impartial justice, but they must also appear to do so in order to maintain confidence in our legal system."), and *People v. Payne*, 99 Ill. 2d 135, 140-41, 457 N.E.2d 1202, 1205 (1983) (Simon, J., dissenting) ("The majority's continuing support of [discriminatory exercise of peremptory challenges] will erode public confidence in the fairness and impartiality of our criminal justice system, particularly among the large portion of our population who are of the same race as the persons who are the objects of the exclusion.").

259. For example, MAGRUDER'S *AMERICAN GOVERNMENT* (W. McClenaghan rev. ed. 1977) includes only two short sections discussing jury selection. "A trial by an impartial jury is guaranteed in all federal criminal cases A State may not exclude anyone from jury service on grounds of race or color." *Id.* at 122. This quotation does not make clear that either attorney can easily exclude a juror based on race or color on a peremptory challenge. Rather, the book states only that

counsel for the accused and the prosecutor may challenge a certain number, which is limited by law, without giving any cause, and the judge will excuse such prospective jurors. The counsel for the accused and the prosecutor may also challenge any prospective juror for cause; that is, for any reason which indicates the juror may not be impartial—for example, for holding a preconceived opinion as to the innocence or guilt of the accused.

Id. at 561. This quotation suggests that both attorneys want an impartial jury and that they would remove a juror only to prevent a nonimpartial jury.

A slightly more recent textbook at least presents the possibility that jurors might be removed from service because of racial prejudice against the defendant:

If there is a jury trial, the jury must be impartial. An impartial jury is one that is neither for nor against the defendant until the members have heard the evidence. For example, the defendant's lawyers can ask jurors, before the trial, if they are against the defendant because of his or her race. People who do not appear to be impartial can be kept off the jury. A jury must also have both men and women on it.

R. GROSS, *AMERICAN CITIZENSHIP: THE WAY WE GOVERN* 159 (1979). Yet, the text also makes idealistic statements about the goal of an "impartial" jury, and asserts incorrectly that women must serve on each jury. These teachings could later cause great disillusionment when students first encounter a "real" jury selection.

The author has found only one textbook that discusses the reality of racial prejudice in jury selection:

The Constitution guarantees a trial by an impartial jury, one that has not made up its mind about a case before the trial begins. Yet fair juries are hard to obtain in some parts of the

entitled to an impartial jury and that women and minorities are not subject to exclusion solely on the basis of their gender or race.²⁶⁰ Students are taught to expect juries to include minorities and women. Thus, an American student asked to describe a fair jury for Swain, based on textbook readings on juries and jury selection, is unlikely to respond, "an all-white jury." Rather, the student would expect a jury of white and black people, men and women, and would be disappointed, if not shocked, by Swain's conviction by an all-white jury.

A third window to popular notions of fairness in juries is American literature.²⁶¹ Unlike textbook writers, American novelists and playwrights have not, by and large, been complimentary toward the jury.²⁶² One commentator ex-

country. In the South, for example, the members of juries have almost always been white men. Blacks have been kept off. When a black person was charged with a crime against a white person, the members of these juries were often prejudiced against the defendant.

M. FINKELSTEIN, J. SANDIFER & E. WRIGHT, *MINORITIES: U.S.A.* 130 (1971). This book also was the only textbook which suggested that a fairer trial could be obtained if blacks served on more juries. *Id.* at 192. However, as its title indicates, the book's focus is on minorities and problems special to minorities, unlike the other general textbooks cited.

Because of the textbooks' inadequacies, most school systems have tended to turn to other sources in order to teach students about juries. Gainesville High School is located in a relatively small city in Florida. Its Director of Social Studies, Lu LaFontaine, stated that her program teaches students through the use of "flexible materials"—paperback novels such as A. LEWIS, *GIDEON'S TRUMPET* (1964) and speakers such as judges and attorneys in the classroom. She also takes her students each year to observe a real jury selection. Interview with Lu LaFontaine, Director of Social Studies Department, Gainesville High School, Gainesville, Florida (Apr. 19, 1985). She believes these tools are "honest" and provide students with the ability to obtain a realistic, rather than an idealistic impression of our jury selection process. *Id.* She has also served on a jury several times and relates her experiences to her students, always with the reminder that one never will fully understand the jury process until one serves as a juror. Her encouragement to serve on a jury and her own service on several juries gives her students the positive message that our jury system can work but that, at the same time, one must see it realistically to correct flaws and maintain its fairness.

Student participation in courtroom field trips is more limited in a big city, such as Washington, D.C. Dr. Francis Powell, Supervising Director of History and Social Studies for the District of Columbia, stated that coordinating trips to watch court trials is unwieldy with a large number of students. Interview with Dr. Francis Powell (May 8, 1985). However, an optional course called "Street Law" is provided in eleventh grade to take the place of field trips. The course, taught by Georgetown University law students, allows eleventh graders to play all the roles in a mock jury trial that is performed at the end of the school year. One facet of the course enables students to experience jury selection first hand as they alternately play the roles of prospective jurors and attorneys. *Id.* In addition, a required Federal Government course is taught in twelfth grade. Lawyers speak in the classroom and the local bar organization also sponsors programs in the schools. *Id.* Thus, while the program, of necessity, is slightly different in a large city, the main thrust still is to provide students with a positive perception that our jury system can work and can produce fair results.

260. See *supra* note 259.

261. John Henry Wigmore made a similar point in 1922 by urging lawyers to read legal novels. Wigmore, *A List of One Hundred Legal Novels*, 17 *ILL. L. REV.* 26 (1922). He stated that the lawyer has a "professional duty to be familiar with those features of his profession which have been taken up into general thought and literature." *Id.* at 28. Legal novels enable lawyers to acquire a deeper sense of the reality of how the law operates—"to realize the operation of the old rules now gone—to feel their meaning in human life and to appreciate the bitter conflicts and their lessons for today." *Id.* at 29.

262. See Watts, *From American Literature*, in *THE JURY SYSTEM IN AMERICA*, *supra* note 59, at 161. Watts describes the jury in American literature as follows:

The jury in American literature has generally represented this "alien tribe" or group of "Odd Fellows," with the accused "plain old Adam, the simple genuine self." The "alien tribe" of jurors is, at least according to authors of American literature, unable to perform its function as impartial truth-finder for a variety of reasons . . . [T]he impartiality of jurors has been compromised by personal, racial, regional, family, or political prejudices, by weakness of will or by ignorance, by the manipulation of judges, lawyers, or witnesses,

plains that the literature that features the jury depicts the jury "as a symbol or metaphor for the organized forces of organized society (or history) against which the protagonist must struggle."²⁶³ Accordingly, the problems these writers perceive with the jury are the problems of larger society and its often callous disregard for the individual, particularly for the culturally or otherwise different individual. Not surprisingly, many novels and plays that "discuss" or "focus on" the jury underscore the problems of prejudiced,²⁶⁴ ignorant,²⁶⁵ or inflammable²⁶⁶ jurors.

One lesson to be learned from literature that depicts the jury is that nonlawyer writers are deeply disturbed by the unfair treatment of the "different" de-

by jury tampering, even by fatalistic forces of history or by the blundering of a God. When the jury has rendered a correct or merciful decision, the judgment is based on the wrong reasons.

Id. at 175-76.

263. *Id.* at 175.

264. See, e.g., J. COOPER, *THE WAYS OF THE HOUR* (1861); J. COZZENS, *THE JUST AND THE UNJUST* (1942); H. LEE, *TO KILL A MOCKINGBIRD* (Popular Library ed. 1960); R. ROSE, *Twelve Angry Men*, in *SIX TELEVISION PLAYS* (1956); B. STAVIS, *THE MAN WHO NEVER DIED—A PLAY ABOUT JOE HILL* (1972); R. WRIGHT, *NATIVE SON* (Harper Bros. ed. 1940); Moore, *supra* note 225.

Perhaps the most eloquent of these expressions about prejudiced jurors is Harper Lee's *TO KILL A MOCKINGBIRD*, in which a black man is wrongly convicted of raping a white woman. In the following passage Atticus Finch, the lawyer who defended the accused, attempts to explain to his son Jem how such injustices come to pass:

This was not good enough for Jem. "No sir, they oughta do away with juries. He wasn't guilty in the first place and they said he was."

"If you had been on that jury, son, and eleven other boys like you, Tom would be a free man," said Atticus. "So far nothing in your life has interfered with your reasoning process. Those are twelve reasonable men in everyday life, Tom's jury, but you saw something come between them and reason. . . . There's something in our world that makes men lose their heads—they couldn't be fair if they tried. In our courts, when it's a white man's word against a black man's, the white man always wins. They're ugly, but those are the facts of life."

"Doesn't make it right," said Jem stolidly. He beat his fist softly on his knee. "You just can't convict a man on evidence like that—you can't."

"You couldn't, but they could and did. The older you grow the more of it you'll see. The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box."

H. LEE, *supra*, at 245.

265. See, e.g., M. TWAIN, *ROUGHING IT* (U. Cal. Press ed. 1972). Twain indicted the jury in the following oft-quoted passage:

Trial by jury is the palladium of our liberties. I do not know what a palladium is, having never seen a palladium, but it is a good thing no doubt at any rate. Not less than a hundred men have been murdered in Nevada—perhaps I would be within bounds if I said three hundred—and as far as I can learn, only two persons have suffered the death penalty there. However, four or five who had no money and no political influence have been punished by imprisonment—one languished in prison as much as eight months, I think. However, I do not desire to be extravagant—it may have been less.

Id. at 316-17. Another passage, equally critical, points out Twain's low regard for the jury's intelligence:

In this age, when a gentlemen of high social standing, intelligence and probity, swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs.

Id. at 309.

266. See, e.g., T. DREISER, *AN AMERICAN TRAGEDY* (1926); W. FAULKNER, *SANCTUARY* (1931).

fendant. The authors' biting indictments of juries that fail to conform to their expectations about fairness betray their deep admiration for the ideal jury. Thus, American literature conveys both frustration and hope, pessimism and idealism, about the jury as an institution and about the ability of society in general to treat the individual with dignity, compassion, and fairness.²⁶⁷ It is perhaps not an overstatement to suggest that all courtroom observers experience these same conflicting hopes and fears each time twelve laypeople file into a jury box to hear the facts of a criminal case.

The general apprehension that a jury may *not* treat the individual fairly becomes pointed and palpable when an all-white jury tries a black defendant for the rape of a white woman. These facts have been used by several authors²⁶⁸ as the backdrop for powerful and sobering statements about human prejudice and bigotry. As Harper Lee's Atticus Finch sadly observes in *To Kill a Mockingbird*, "In our courts, when it's a white man's word against a black man's the white man always wins. They're ugly but those are the facts of life."²⁶⁹

Those ugly facts continue to disturb modern writers such as playwright Elvie A. Moore. In her Absurdist play, *Angela is Happening*, Moore protests the injustice of white judgments against black defendants. The play's all-white jury intones to the black defendant, "Guilty . . . guilty Our peers found you GUILTY."²⁷⁰

Richard Wright expressed a similar cynical view in *Native Son*. In Wright's novel, Bigger, a black man, has killed a white woman; he did not rape her. When his lawyer asks Bigger whether he raped the woman, Bigger responds, "Naw. But everybody'll say I did. What's the use? I'm black. They say black men do that. So it don't matter if I did or if I didn't."²⁷¹

Given these popular perceptions about the unfairness of white juries toward black defendants, the Supreme Court's assertion that the state's challenges in *Swain* preserved "the appearance of justice" appears to be either naive or insincere. Either way, the assertion is incorrect. American authors articulate a commonly felt sentiment when they suggest that white jurors are not a black

267. Professor Carl Smith describes the stance that writers have taken toward the law as follows:

American writers have spoken most eloquently about the law on those occasions when they have believed that the justice offered by the American legal system has indeed become false. Their relationship with the law has often—though certainly not always—been an adversarial one. Many writers who by common judgment have defined the American literary tradition have perceived a conflict between their own sense of law and justice and that which they have seen prevail in their time. They have spoken not as isolated individuals but as defenders of American moral and ethical idealism, which they think has been betrayed by the legal system, and they have presented their own work to balance and counteract the more dangerous "fictions" of the law. Depending on the occasion, they have attacked the legal system in and of itself and as an emblem of larger wrongs in American society that the law reflects.

Smith, *Law as Form and Theme in American Letters: An Essay in Law and American Literature*, in C. SMITH, J. MCWILLIAMS & M. BLOOMFIELD, *supra* note 85, at 19.

268. See, e.g., W. FAULKNER, *supra* note 266; H. LEE, *supra* note 264; R. WRIGHT, *supra* note 264.

269. H. LEE, *supra* note 264, at 223.

270. Moore, *supra* note 225, at 174 (emphasis added).

271. R. WRIGHT, *supra* note 264, at 296.

defendant's "peers," particularly in the context of an interracial rape case. They also imply a common belief that peers are essential to a fair jury and that a fair jury represents important interests that should not be defeated by perversion of that ideal.

A legal procedure that so distracts observers that they disregard the facts of the case altogether and begin to suspect, without more, that the outcome is unfair, is a perverse procedure. The prosecutor's use of peremptory challenges to produce a jury that is seemingly partial to the government and that does not include any of the defendant's peers is a perverse procedure. The *Swain* ruling protects this procedure from meaningful control and compromises several of the interests the jury right exists to protect. The all-white jury in *Swain*, for example, did not appear to provide a safeguard against a corrupt or overzealous prosecutor. It did not represent multiple voices or appear to produce a diffused impartiality. It did not correspond with popular expectations of what a fair criminal jury looks like.

B. *A Proposed Procedure*

What procedure for jury selection would best accommodate the key terms and values of the sixth amendment? None can accommodate all interests, and all proposed changes entail costs.

The proposal that is the easiest to adopt and to administer is to abolish the peremptory challenge privilege of the prosecution. This option, at the least, would thwart attempts by the state to defeat the defendant's effort to secure a panel that includes some peers. It will not guarantee that peers will make their way to every petit jury; consequently, jury trials will continue to take place when the jury is all-white or otherwise appears unfair to courtroom observers or to the defendant.²⁷²

Abolishing the state's peremptory would offend no constitutional interest, as neither the state nor the defendant has a "constitutional" right to peremptory challenges.²⁷³ Nor would it compromise unduly any state or community interest in an impartial jury; challenges for cause would still be available to the prosecution. The jury would, on occasion, still appear unfair to the state's case—as when an all-white jury acquits a white defendant of a crime against a black victim. This result, however, would not be caused by abolition of the state's peremptory, nor would it be produced more often because of its abolition. The all-white jury that acquits unfairly would be produced by the *defendant's* exercise of peremptories, coupled with the low number of minorities in the jury pool.

272. The only sure way to obtain a panel with peers in every case would be to adopt a method of juror selection based explicitly on race, gender, or other group lines. This alternative may be historically defensible given the past practice of empanelling juries composed in half of aliens, but it is not now politically plausible. Moreover, this alternative is administratively complicated, as it probably would involve defining who is whose peer according to an objective, predetermined standard. Given the vast range of possible factual circumstances and the fact that deciding who is whose peer depends on the facts of each case, the prospect of defining peers in advance of an actual case is daunting.

273. See *supra* note 122-23 and accompanying text.

The correct response to this problem is to assure that the jury pool does not exclude minorities.

This proposal does not advocate abolition of the defendant's right to challenge peremptorily, despite the problem of the all-white jury that acquits, because the defendant's regard of the jury is simply more important than is the state's. The state has repeated opportunities to enforce the penal code and hence to protect society; the defendant has only one day in court to protect his or her interests. The state argues on behalf of the public interest, which generally can be adequately served by favorable results over time as opposed to a favorable result in a particular case. If the state loses, it does not lose its liberty, as the defendant does if he or she loses. Moreover, the peremptory is a crude and uncertain device; it is extremely unlikely that prosecutors will be significantly handicapped or that unfair acquittals will increase without it. When it is not abused, the peremptory serves only to make the parties more confident that the jury is not opposed to them. In the context of a criminal trial, the potential and actual disadvantages of the state's peremptory outweigh its putative advantages. A principle of American criminal procedure is that it is better for a guilty person to go free than for an innocent one to be convicted. Correlatively, it is better to preserve the appearance of fairness to the defendant and possibly to compromise the appearance of empathy with the government than to exalt a nonconstitutional and dubious state interest in peremptories over the defendant's interest in a judgment by peers. The simplest, most economic, and most sensible way to preserve the appearance of fairness is to abolish the state's peremptory.

Other alternatives to *Swain* have been suggested by some federal and state courts. The most significant of these recent suggestions comes from the opinion of the United States Court of Appeals for the Second Circuit in *McCray v. Abrams*.²⁷⁴ The opinion set forth a new test for the exercise of peremptory challenges. To establish a prima facie case that the prosecution has used peremptory challenges in violation of the sixth amendment, the defendant must show (1) that the group allegedly excluded is a "cognizable group in the community," and (2) that a substantial likelihood exists that the challenges were made on the basis of the prospective juror's group affiliation and not because of that juror's inabil-

274. 750 F.2d 1113 (2d Cir. 1984). The court in *McCray* held that although a defendant has no right to a petit jury of a particular composition, the sixth amendment still is implicated at this stage of the jury selection process, as it is at the earlier stage of creating jury pools. *Id.* at 1128.

Judge Kearse wrote the majority opinion, an in-depth treatment of the Supreme Court's jury decisions. She read the Supreme Court's precedent as supporting the view that the sixth amendment guarantees a defendant "the possibility of a cross-sectional petit jury." *Id.* at 1129. She found support for this proposition in *Ballew v. Georgia*, 435 U.S. 223, 237 (1978), which held that five-person juries were unconstitutional, and in *Witherspoon v. Illinois*, 391 U.S. 510, 520-21 (1968), which held that the state could not challenge for cause all people who oppose the death penalty. In both cases the venire was properly constituted; the issue was whether the selection of the petit jury was constitutional. Judge Kearse was persuaded by the argument that the sixth amendment protects the right of each defendant to an impartial jury, not only the last defendant in a long sequence of discriminatory acts. *McCray*, 750 F.2d at 1130; see also *McCray v. New York*, cert. denied, 103 S. Ct. 2438, 2442 (1983) (Brennan and Marshall, J.J., dissenting) ("The systematic exclusion of prospective jurors because of their race is . . . unconstitutional at any stage of the jury selection process."). Judge Kearse noted that because the peremptory challenge is not a constitutional right, when its exercise conflicts with the defendant's sixth amendment rights, "it is the inscrutability of the peremptory challenge that must yield, not the constitutional right." *McCray*, 750 F.2d at 1130.

ity to decide the case on the basis of the evidence presented.²⁷⁵ The burden then shifts to the government to show that " 'permissible racially neutral selection criteria and procedures have produced the monochromatic results.' "²⁷⁶ The government is not required to show a "cause" reason for a challenge, but it must offer a "genuine" reason to believe that a prospective juror may have a "slight bias," which although insufficient for a cause challenge is enough to make excusal desirable.²⁷⁷ When the prosecutor fails to satisfy the judge that his or her reasons for excusing a juror are genuine, "the court should declare a mistrial, and a new jury should be selected from a new panel."²⁷⁸

275. *McCray*, 750 F.2d at 1131-32.

276. *Id.* at 1132 (quoting a series of equal protection cases that quote *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

277. *Id.*

278. *Id.* Lower courts in the Second Circuit have disagreed on how to apply *McCray*. One question troubling the district courts is whether *McCray* applies only to the exclusion of cognizable groups or whether the ruling extends to the exclusion of whites. See *Roman v. Abrams*, 608 F. Supp. 629 (S.D.N.Y. 1985); *Schreiber v. Salamack*, 38 CRIM. L. REP. (BNA) 2105 (S.D.N.Y. Nov. 6, 1985). The Fifth Circuit has adopted a more limited approach to preventing the discriminatory exercise of peremptory challenges. In *United States v. Leslie*, 759 F.2d 366 (5th Cir. 1985), the court invoked its supervisory power over the federal district courts to correct what it viewed as a process that compromised the integrity of the judicial process. The court did not disallow racial considerations in every case, but limited its holding to the facts presented. The standard it adopted is general and vague. It requires the district judge to inquire, on timely objection by the defendant, whether the prosecutor has used peremptory challenges for unjustifiable, racially discriminatory reasons.

Neither the Second Circuit nor the Fifth Circuit discussed whether their new standards will apply to peremptory challenges by the defendant. The implication of the decisions is that they apply only to challenges by the prosecution, as they rely on the defendant's constitutional right and the integrity of the judicial process. Both bases suggest that it is government action that must conform to the stated standards, not the actions of private individuals.

The genesis of the recent federal court movement toward closer scrutiny of the prosecutor's peremptory challenges lies in the 1978 California Supreme Court decision, *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). Relying on its state constitution, the California court held that peremptory challenges may not be exercised by either party on the sole ground of group bias, as opposed to specific bias. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The reason for this rule was that such challenges compromise the defendant's right to a representative jury. The defendant, however, is constitutionally entitled to a "petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." *Id.* at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

The California court described the purpose of the cross-section requirement as the only practical means of achieving overall impartiality in the jury. *Id.* at 270, 583 P.2d at 755, 148 Cal. Rptr. at 898. It assumed that all jurors possess opinions, preconceptions, or even biases that derive from their life experiences. By involving a variety of people of different backgrounds in the jury process, these various biases may cancel each other. *Id.* at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896. The court conceded the importance of cause and peremptory challenges to the excusal of prospective jurors whose biases are directed toward the particular case on trial, the parties, or the witnesses. Elimination of this "specific bias," however, is, according to the court, the only valid basis for a challenge. *Id.* at 277, 583 P.2d at 760-61, 148 Cal. Rptr. at 903. A party cannot exercise a challenge because the party assumes that certain veniremembers may be biased simply because they belong to an identifiable group, whether it is a racial, religious, ethnic, or other similar group. In the court's view, challenges exercised on the basis of group affiliation make impossible the interaction of diverse beliefs necessary to achieve overall impartiality. The result is a jury "dominated by the conscious or unconscious prejudices of the majority." *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

The remedy the California court proposed essentially presaged the remedy adopted by the Second Circuit in *McCray*. The California court established a presumption that a party will exercise peremptories for a valid reason. The presumption is rebuttable, upon timely objection by counsel, by a showing that the persons excluded belong to a "cognizable group" and that a "strong likelihood" exists that they were challenged on the basis of their group affiliation and not because of suspected specific bias. *Id.* at 280, 583 P.2d at 763-64, 148 Cal. Rptr. at 905. The trial court determines whether this *prima facie* case has been established. If it has, the burden shifts to the opponent to

The administrative costs of this approach and the risk that the state will mask its true motives by producing plausible explanations for excluding minorities are not worth incurring unless they are outweighed by the value of the prosecution's peremptory. This Article concludes that the prosecution's peremptory is not so valuable as to outweigh the risks and costs of an alternative approach and recommends that the peremptory be abolished. This solution is an historically defensible, constitutionally acceptable, workable solution to an aggravating and persistent problem.²⁷⁹ It is not the whole solution, but it is a fair beginning to preserving the values that underlie the sixth amendment.

VI. AN AFTERWORD

This Article proceeds on the premise that the sixth amendment represents a valuable right that should be clarified and protected. It argues for revitalization of the term "peers" in a way that corresponds to changes that have occurred in our society but not in human nature. People always have and doubtless always will respond more openly, compassionately, and understandingly to those like themselves than to those who are different. This human trait, like so many human characteristics and frailties, permeates the way people judge one another; indeed, awareness of this trait is one reason to preserve the jury option.

This Article does not suggest that judgments will become "fair" or that

show that the challenge was not based only on group bias. *Id.* at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. This showing need not be sufficient for a cause challenge; the party need only justify the challenge on grounds that are reasonably relevant to the particular case, *i.e.*, a specific bias. *Id.* at 281-82, 583 P.2d at 765, 148 Cal. Rptr. at 906.

279. The reported decisions represent only a handful of the possible alternatives to the approach in *Swain*. Commentators have proposed numerous other solutions, based on a range of legal theories. An incomplete list of the proposed approaches is as follows: (1) to limit the number of peremptories available to the government, *see, e.g.*, Saltzburg & Powers, *supra* note 14, at 375-77; Comment, *People v. Wheeler: Has California Really Assured Impartial Juries by Revision of Peremptory Challenges?*, 1979 DET. C.L. REV. 527, 542; (2) to develop a special rule limiting peremptories only in trials involving racial issues, *see, e.g.*, Comment, *Prosecutorial Misuses of the Peremptory Challenge to Exclude Discrete Groups From the Petit Jury: Commonwealth v. Soares*, 21 B.C.L. REV. 1197, 1220 (1980); (3) to impanel a "mixed jury" not unlike the jury *de medietate lingue*, *see, e.g.*, Potash, *supra* note 96, at 95; Note, *The Case For Black Juries*, 79 YALE L.J. 531, 548-49 (1970); (4) to require a jury composed totally of peers, *e.g.*, an all black jury for a black defendant, A. GINGER, JURY SELECTION IN CRIMINAL TRIALS § 10.13, at 472-73 (1975); and (5) in order to assure cross-representative jury pools, to allow people to be excused from jury duty only in exceptional cases, and then to empanel the first 12 people who do not have actual blood or friendship ties with a litigant, *see, e.g.*, Van Dyke, *Voir Dire: How Should It Be Conducted to Ensure That Our Juries are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65, 67 (1976).

The legal theories that have been offered as bases for regulating peremptory challenges include the constitutional theories of equal protection, due process, and the right to an impartial jury, *see supra* notes 140-48 and accompanying text, the statutory theory of the Jury Selection and Service Act of 1968, Pub. L. No. 90-274 § 101, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861-1874 (1970)), the administrative power theory in federal court that the higher courts have supervisory power to regulate procedure in the lower courts in order to preserve the integrity of the judicial process, *see, e.g.*, *Fay v. New York*, 332 U.S. 261, 287 (1947); *Ballard v. United States*, 329 U.S. 187, 193 (1946); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946); *Glasser v. United States*, 315 U.S. 60, 83-87 (1942); the "officer to the court" theory that the government prosecutor has an obligation only to secure a fair verdict and not a conviction at the cost of court integrity or essential fairness, *see, e.g.*, *Younger, supra* note 14, at 55; and a state law-federal law theory that the federal courts should allow the states to fashion their own rules in this sensitive area, incorporating through the fourteenth amendment only skeletal, basic features of the jury that would not cover the peremptory challenge practices, *see, e.g.*, *Johnson v. Louisiana*, 406 U.S. 356, 378-80 (Powell, J., concurring).

abusive government power will be substantially curtailed simply by the placement of a "peer" or two more into the jury box. Although these results might occur, it is possible that a peer will be swayed by other nonpeers on the jury or will be psychologically unable to overcome conditioning that makes him or her wrongly believe that some races, women, or members of any other group, including his or her own, are inferior or are prone to certain behavior. Also, even a jury that includes peers may have little impact on government power; as Tocqueville has argued, the jury is but a small amount of lay input that preserves a large amount of government power.²⁸⁰

A token peer or two may not change the way a jury rules. That peer or two, however, might affect the jury's dialogue during deliberations, the impressions the jury has of the evidence, and the jury's awareness of factors outside the individual jurors' experiences. The chance that these results might occur is not negligible and is worth protecting; changes in behavior may follow changes in the appearance of the jury.

The message that the existence of an "impartial jury" in the whole sense of that term conveys to the community may not always be an accurate portrayal of the fairness of the verdict that jury renders. But the alternative, to continue to empanel juries that exclude defendants' peers and defeat defendants' belief in the chances for fair hearings, could lead society to reject the verdicts or become resigned to unfairness.

For these reasons, and because it is consistent with the spirit of the sixth amendment, the jury right should continue to include the right to a jury of the defendant's "peers." Abolition of the state's peremptory challenge is a very small step toward this end; far more drastic steps are historically defensible and would better preserve the defendant's interests.²⁸¹ The mood of the Supreme Court, however, seems to be to reject reform designed to increase significantly the protections of criminal defendants' rights. Accordingly, this Article proposes only a modest change that may prove acceptable to the current Court, leaving more radical proposals for a more propitious time.

280. A. DE TOCQUEVILLE, *supra* note 75, at 128.

281. See *supra* note 272.

ADDENDUM

While this Article was in the final publication stages, the United States Supreme Court decided *Batson v. Kentucky*, 46 S. CT. BULL. P. B2022 (CCH) (Apr. 30, 1986) (No. 84-6263). The Court held that the same equal protection principles that govern the selection of the venire govern the State's use of peremptory challenges to strike individual jurors from the petit jury. *Id.* at B2029-30. Thus, the prosecutor may not "challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at B2030. Further, the Court held that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at B2036-37. The Court expressly overruled *Swain v. Alabama*, 380 U.S. 202 (1965), to the extent that it conflicts with the principles announced in *Batson*. *Id.* at B2041 n.25. Disappointingly, the Court expressed "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.* at B2029 n.12. Nor did the Court address the merits of petitioner's sixth amendment arguments. *Id.* at B2025 n.4. Thus, the sixth amendment principles discussed in this Article may form the basis for future development of the principles announced in *Batson*.