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Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury

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WHY THE COURT LOVES *BATSON*: REPRESENTATION-REINFORCEMENT, COLORBLINDNESS, AND THE JURY

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> Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the [fourteenth] amendment?[1]
>
> [I]t is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."[2]

I. INTRODUCTION

Racism in the criminal justice system hides behind discretion. Statistics show that race influences police, prosecutors, juries, and judges as they make decisions about arrest, prosecution, guilt and punishment.[3] Personal experience may or may not confirm this lesson, depending on what is observed. For a number of years, I have taken my first year Criminal Law students to our local state or federal court to watch portions of trials or other criminal proceedings. On those occasions when we have walked into a courtroom at random, we have never happened upon a defendant who was white, or on a judge, prosecutor, or defense counsel who was not.[4] This is a very small example, but I mention it because I am the only one who has been there each year to notice a pattern. The students have no particular reason to be impressed by the color of the several defendants, judges, and lawyers they see, because the students attend just one day of court.

The gap between our statistical knowledge and our ability to determine whether any particular decision in the criminal justice system has actually been influenced by racial bias is one reason why the system has been so unsuccessful in addressing the problem of bias. What cannot be located cannot be corrected.

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

2. McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (quoting *Strauder*, 100 U.S. at 309).

3. *See* Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-22, 1625-51 (1985) (discussing data from case studies and mock jury studies that show a tendency among white jurors to convict black defendants more readily than white defendants); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1559-60 & nn.6-12 (1988) [hereinafter *Race and the Criminal Process*] (discussing data that show racially unrepresentative juries pose a greater risk of unfair verdicts). *But see* Jeffrey E. Pfeifer, Comment, *Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?*, 69 NEB. L. REV. 230 (1990) (questioning whether studies and laboratory and archival research actually show a correlation between race and verdict). This Article focuses on the effect of racism on jury verdicts, so these are the relevant studies.

4. This random selection is more surprising in state court, where there is more diversity, both in terms of race and gender, among the lawyers and judges. Interestingly, the juries we have seen in these random visits, in both state and federal court, have been thoroughly integrated.

Statistics, even if they were to show bias in the pattern of decisions that caused a random sample of Kings County, New York, defendants to be non-white, would not reveal whether particular defendants were selected for racially significant reasons. When I asked a group of students if they thought that what we had seen reflected the racial disparities shown by statistics, their response was to inquire about the quality of the evidence against the particular defendants in question. If the evidence was sufficient, their instinct was to be satisfied that the prosecutions were not impermissibly based on race, despite the overall pattern of the statistics. On an intuitive level, individuals regard due process as satisfying any concern about inequality.

That the Supreme Court shares this approach is best demonstrated by the case of *McCleskey v. Kemp*.[5] The Court did not dispute the validity of a study showing that murder defendants whose victims were white were four times as likely to receive the death penalty as murder defendants whose victims were not white,[6] but the Court nevertheless refused to set aside McClesky's sentence, because there was no way to tell whether Warren McCleskey personally had been a victim of racially biased jurors.[7] On behalf of a majority of the Court, Justice Powell reasoned that McCleskey's jury might have been unbiased and that the racial disparity revealed by the study might have been caused by biased jurors in other cases.[8] The Court concluded that McCleskey could not claim a denial of equal protection,[9] provided that sufficient evidence existed against him to satisfy due process.

Justice Powell was right about the nature of the problem, but it is my hope that he was wrong about the impossibility of finding solutions. First, racism does not always successfully hide behind statistics. There are cases where we can be reasonably confident that a particular jury verdict was influenced by racism, conscious or unconscious. The transparency of those cases is far more traumatic than the knowledge we derive from statistics. In Scottsboro, Alabama, in the 1930s, to choose one extreme and notorious example, nine young black men aged thirteen to

5. 481 U.S. 279 (1987).

6. *Id.* at 286-87, 296-97.

7. *Id.* at 292-97.

8. *Id.* at 308 ("Statistics at most may show only a likelihood that a particular factor entered into some decisions.").

9. *Id.* at 292-97.

twenty were convicted of gang-raping two white women on a train. Over the course of multiple trials, the testimony of one of the two complainants became increasingly inconsistent and implausible, while the other recanted her testimony altogether.[10] Nevertheless, more than 140 white jurors[11] hearing the evidence found no reason to doubt the guilt of any of the defendants at any of the multiple preceedings.[12] The jurors' racial and social views rendered them as incapable of discrediting a white woman's testimony as they were of crediting the young black men's defenses.[13]

The state court trail of the Los Angeles police officers who beat Rodney King provided a more recent example of the insidious impact of race on juries. It is rare that anyone who was not in the courtroom absorbing all of the evidence is able to evaluate a jury verdict, but the ubiquity of a key piece of evidence—the infamous videotape—made that trial an exception. The fairness of the jury verdict was the subject of extensive debate as well as the cause of violent reaction. Some thought the verdict preposterous; others argued that the jury had responded fairly to defense counsel's argument that the actions in the videotape were actually more ambiguous than the casual observer might have thought. But would those jurors have been as willing to see ambiguity if King, dark-skinned, solidly built and apparently intoxicated at the time of the incident, had not appeared as dangerous to them as the officers claimed he did at the time of his

10. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 186-87, 286, 295, 300-01 (1969).

11. This figure includes both grand and petit jurors at the trials and retrials of the various groupings of defendants.

12. One defendant, Willie Roberson, was convicted of rape in the face of evidence that he suffered from syphilis and, at the time of the alleged rape, was walking with a stick because he had open sores and swelling covering his genitals. CARTER, *supra* note 10, at 221.

In the course of the trials, only a single juror had been persuaded "to hold out for less than the state demanded," *id.* at 375, preventing only one defendant on that one occasion from receiving the capital sentence demanded by the state, *see id.* at 347-48.

13. A number of prospective jurors made statements showing that they had made up their minds about the defendants' guilt before jury selection, although they later denied those statements at voir dire or hearings. *See id.* at 280. Carter's description of a culture in which this case was viewed as a challenge to fundamental social mores, however, leaves room for the possibility that many of the jurors sincerely believed that they were being open-minded when they decided the relative credibility of the witnesses. It also allows for the possibility that acquittal would have been so socially unacceptable that the jurors' views on guilt or innocence were irrelevant.

arrest? To what extent were the judgments of the jurors, like the judgments of the officers, clouded by racial stereotyping?

Even if the videotape could fairly be interpreted as showing police reacting reasonably to a dangerous situation, that interpretation outraged black citizens who, unrepresented on the jury, believed that their interpretation of the same events and the publicized evidence would have been fair but completely different. Describing that jury's verdict as an example of inequality is not the same as accusing the jurors of being unfair,[14] but it is as good a reason to deplore the verdict. The impact of racial bias can be just as real and just as transparent in cases where jurors make a good faith attempt to be objective.[15]

Questionable outcomes like these should, at the least, strengthen our resolve to find new ways to battle the distorting effects of bias. But even in such transparent cases, the courts, led by the Supreme Court, have been unwilling to confront the pervasive effects of racism in any meaningful way. On four occasions, the Scottsboro defendants brought their cases before the Supreme Court; the Court never reviewed the juries' verdicts. During the first round of appeals, in *Powell v. Alabama*,[16] the Court reversed the convictions on the ground that the defendants had been denied their constitutional right to the assistance of counsel.[17] Retrials, this time with the vigorous assistance of an experienced team of lawyers, led to a new set of convictions. On the next round of appeals, in *Norris v. Alabama*,[18] the Court held that the defendants had been denied a fair opportunity to have their racial peers serve on the jury.[19]

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14. The distinction between fairness and equality will be discussed *infra*.

15. We need not conclude that the jurors had malicious or even consciously racist attitudes to believe that race might have affected their assessment of credibility. Charles Lawrence's work on the impact of unconscious racism shows that stereotyping and racial categorizing can affect judgment in a broad variety of ways. For that reason, Lawrence argues that equal protection law must also take account of the unconscious predispositions of people, including legislators or jurors, who may sincerely believe that they are not making decisions on the basis of race. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

16. 287 U.S. 45 (1932).

17. Because the Sixth Amendment right to counsel had not yet been incorporated, the Court based its holding on the constitutional guarantee of due process. *Id.* at 64-71.

18. 294 U.S. 587 (1935).

19. *Id.* at 591. Norris was found to have established a claim by making the statistical showing that no black person in that community had been called for jury service in more than a generation. *Id.*

One commentator explains the significance of *Norris* as lying in the fact that the Court for the first time showed its willingness to involve the federal courts in factual analysis of

New jury selection procedures and new trials followed. The *Norris* holding did not yield any black jurors, or any different results. The Court denied certiorari in a final round of appeals.[20] None of the convictions was ever vacated on appeal.[21]

The current Supreme Court has selected the reasoning in *Norris*, a brand of procedural response that focuses on the race of prospective jurors, as its chief response to the problem of racism in the criminal justice system. Over the past six years, the Court has spent considerable time and energy addressing the problem of racial discrimination in jury selection, trying to close one of the last loopholes that allowed wholesale exclusion of black people from juries—use of the peremptory challenge. The rapidly growing line of cases commencing in 1986 with *Batson v. Kentucky*,[22] the case in which the Court adopted the now familiar procedure aimed at preventing the use of peremptory challenges on the basis of race,[23] is curious in several respects. First, to decide *Batson*, the Court had to reject the statistically based approach to exclusionary peremptory challenges it had taken only two decades earlier[24] and replace it with a stricter form of scrutiny of individual actions, an approach not unlike the one the Court rejected in *McCleskey* one year later.

More significantly, this is one of the very few areas in which

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jury selection claims, rather than deferring to the state courts' finding of fact. *See* Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1476-82 (1983).

The companion appeal of another defendant was dismissed because the state court had dismissed the appeal below for a procedural misstep. Patterson v. Alabama, 294 U.S. 600, 605-07 (1935). The Alabama court had held that a required bill of exceptions had not been filed within 90 days of "judgment," which the court defined as meaning conviction rather than sentence or the denial of new trial motions. *Id.* at 604-05; *see also* CARTER, *supra* note 10, at 304-307. The Supreme Court, although declining to hear Patterson's appeal because the state had found a procedural default, did suggest that the case might present exceptional circumstances and remanded it to the state courts with a strong hint that the Supreme Court might reconsider its decision not to hear the case if the state court did not reconsider its decision not to do so. *See Patterson*, 294 U.S. at 606-07.

20. Patterson v. State, 175 So. 371 (Ala.), *cert. denied*, 302 U.S. 733 (1937).

21. The sad and intricate story of the defendants' postconviction battles for clemency or release is told in CARTER, *supra* note 10, at 369-413. It was 1950 before the last of the defendants was released on parole. *Id.* at 413.

22. 476 U.S. 79 (1986).

23. *Id.* at 96-98. If the defendant makes out a prima facie case that the prosecutor has exercised peremptory challenges to exclude members of a cognizable racial group, the burden then shifts to the prosecutor to provide a race-neutral explanation for the challenge. *Id.* The trial court then determines whether the defendant has established purposeful discrimination, and disallows the challenge if the race-neutral explanation is found insufficient. *Id.*

24. *See* Swain v. Alabama, 380 U.S. 202 (1965); *infra* note 50.

the current Supreme Court has shown itself willing to expand any individual rights, whether of liberty or equality. In most other areas of constitutional adjudication today rights are being rapidly contracted[25] or barely retained.[26] On the other hand, the right developed in *Batson* has become a growth industry. During the last two terms the Court has extended the prohibition of *Batson*, a case where the prosecutor at the criminal trial of a black defendant tried to exclude black prospective jurors,[27] to civil proceedings, in *Edmonson v. Leesville Concrete Co.*,[28] and to any case regardless of the race of the party challenging the exclusion, in *Powers v. Ohio*.[29] Most recently, in *Georgia v. McCollum*,[30] the Court even found the prospective jurors' right to serve on a jury to trump a criminal defendant's right to challenge jurors perceived as potentially hostile.

Why does the Court take *Batson* so seriously? In my view, the *Batson* line of cases acts as a lightning rod for all of the Court's unexpressed concerns about racism in the criminal justice system. It is no coincidence that *Batson* was written by Justice Powell during the term before he wrote his unusually candid opinion in *McCleskey*, declaring that the Court is unable to offer any direct remedy for racism in the imposition of the death penalty.[31] *Batson* is Justice Powell's attempt to provide the Court with a judicially modest, procedurally based response to racism. The solution Justice Powell offers, consistent with the Court's procedural responses to the Scottsboro convictions, is to combat racism by providing an opportunity for those who might be the subjects of discrimination to be represented in the decision-mak-

25. For two recent examples of dramatic cutbacks in criminal procedure law, see Payne v. Tennessee, 111 S. Ct. 2597 (1991) (overruling recent case law that had prohibited any use of victim impact statements at capital sentencing proceedings); California v. Acevedo, 111 S. Ct. 1982 (1991) (overruling Fourth Amendment law that would have prohibited the warrantless search at issue).

26. *See, e.g.*, Freeman v. Pitts, 113 S. Ct. 1430 (1992) (taking a narrow view of the scope of permissible federal intervention in school desegregation disputes); Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (upholding the "essential" right of women to choose to have an abortion, while allowing increasingly onerous conditions to be imposed on that right).

27. *Batson*, 476 U.S. at 82-83.

28. 111 S. Ct. 2077 (1991).

29. 111 S. Ct. 1364 (1991) (white defendant vindicating equal protection rights of black prospective juror).

30. 112 S. Ct. 2348 (1992).

31. McCleskey v. Kemp, 481 U.S. 279, 313 (1987). Justice Powell, in fact, prominently cites *Batson* as justifying the result in *McCleskey*. *Id.* at 309.

ing process.[32] Because the jury is the seat of representation in the criminal justice system, the Court concentrates on removing any racially based obstacles to jury service. Ideally, once juries are representative the courts may comfortably defer to jury verdicts, and the criminal justice system will no longer suffer taint.[33] In other words, the Court has implicitly accepted a representation-reinforcement theory[34] as the rationale for its role in this area. There is no reason, however, to believe that this solution will achieve any considerable measure of success. John Ely, the chief expositor of representation-reinforcement theory, has recognized that enhancing access to decision-making processes is an insufficient response to the unique problem of racial discrimination.[35] The Court's decisions in the *Batson* line of cases may indeed achieve some success in ensuring that more black people have an opportunity to serve as jurors. This is a worthy goal. But the issue of greater import is whether these decisions are likely to ensure that criminal defendants are free from racially discriminatory jury verdicts. The Scottsboro cases suggest that we have little cause to be optimistic that process-based solutions will confer equality.

The cases of the past two terms show that, given a choice between enhancing representation and protecting defendants, the Court is more interested in serving the former goal—by enhancing the equal protection rights of prospective jurors. In the cases decided during the last two terms—*Edmonson*, *Powers*, and *McCollum*—the Court has declared that the principal right *Batson* protects is the right, not of a criminal defendant to be free from discrimination, but of the *prospective juror* to serve on a jury.[36] A criminal defendant is permitted to raise *Batson* challenges not on the theory that his or her own rights have been violated, but rather on the theory that he or she is being afforded standing to raise the rights of a third party—the prospective

32. Batson v. Kentucky, 476 U.S. 79, 96-98 (1986).

33. *McCleskey*, 481 U.S. at 313. "[A]ny mode for determining guilt or punishment 'has its weaknesses and the potential for misuse,' . . . [but] our consistent rule has been that constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.' " *Id.* (third alteration in original) (quoting Singer v. United States, 380 U.S. 24, 35 (1965)).

34. This theory posits that the proper role of the courts is to guarantee fair and equal access to the political arena and then defer to the political decisions made. The theory will be discussed more fully below in Part IV.

35. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-57 (1980).

36. Powers v. Ohio, 111 S. Ct. 1364, 1368-70 (1991).

juror.[37] This increasing degree of attention to the problem of access would be welcome if the cases did not also reveal a decreasing level of attention to the problem of prejudice.

In this Article, I will discuss the Court's virtually exclusive reliance on this line of jury selection cases as its response to the problem of racism in the criminal justice system, and the newly narrowed focus of these cases on the rights of prospective jurors. In Part II, I will discuss how and why the Court came to decide jury selection cases on the basis of jurors' rights, a rationale that enables the Court to avoid confronting some difficult questions *Batson* poses about the meaning of equality. These questions include inquiries into the value of colorblindness, the evils of stereotyping, and the potential tension between the goals of *Batson* and the goals of cases implementing the Sixth Amendment right to trial by a jury representing a fair cross-section of the community. This discussion includes an exploration of the nature of the connection between defendants' rights and the race of those selected as jurors. Part III discusses the probable impact of *Batson* and questions whether focusing on the rights of jurors rather than the rights of defendants is likely to make a difference, for better or worse, for defendants. Part IV discusses why the *Batson* approach, especially in its current incarnation, is an inadequate judicial response to the problem of racial bias. Part IV will also discuss the application of representation-reinforcement theory in the criminal context, and some recent work of critical race theorists that points in the direction of more ambitious solutions. One common question underlying all of these discussions is how well process in general, and the jury selection process in particular, can serve the goal of equality.

II. WHOSE RIGHTS? JURORS, DEFENDANTS, AND COLORBLIND EQUALITY

A. E Pluribus Unum*: Out of Many Rights Came One*

Strauder v. West Virginia[38] used the newly minted Fourteenth Amendment to reverse a black defendant's criminal conviction on the ground that a state statute had prohibited the selection of blacks as jurors. According to the Court, this statute violated three kinds of equality rights: first, prospective jurors have a right not to be stigmatized on the basis of their

37. *Id.* at 1370-73.
38. 100 U.S. 303 (1880).

race[39]; second, black defendants, like white defendants, have the right to a jury of their peers[40]; and third, defendants have a right to have their life and liberty protected against racially discriminatory verdicts.[41]

During the following century the Court heard dozens of similar challenges from black defendants whose chief problem was not simply the all-white juries they had confronted, but the guilty verdicts those juries had rendered.[42] In these cases, as in *Batson* itself, the Court assumed that the rights of jurors and defendants were congruent, and that race-free jury selection procedures would serve all three of the rights declared in *Strauder*. It was not until 1991, in *Powers v. Ohio*,[43] that the Court considered a *Batson* claim raised by a white defendant challenging exclusion of a black prospective juror on equal protection grounds, and was therefore forced to consider whether all of the interests identified in *Strauder* had to be implicated before the Equal Protection Clause would prohibit race-based exclusionary

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39. *Id.* at 306-08.

40. *Id.* at 309. The Court, in language too convoluted to be ringing, stated:

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.

Id.

41. *Id.*

42. Most of the cases following *Strauder* raised questions about whether juror eligibility requirements, as written or as applied, were actually race-neutral. These challenges were raised by black men convicted by all-white juries. *See, e.g.*, Carter v. Jury Comm'n, 396 U.S. 320 (1970); Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1880). In these cases, the Court could continue to assume that colorblindness was the ultimate goal. But the cases presented increasingly more complex problems of proof, because the means of exclusion were not overtly based on race. Therefore, the Court turned to statistics to decide whether some ostensibly race-neutral eligibility requirements were really pretexts for discrimination on the basis of race, and examined whether black people had ever been represented on juries in the communities at issue. In some of these cases the Court could find a discriminatory purpose, but in others, discriminatory impact seemed to be enough reason to disallow some selection practices.

The central tenet of these cases is that racial considerations are not proper in jury selection. But the venire cases resist treating race as an inherently different kind of equal protection problem. Under the law that developed after incorporation of the Sixth Amendment right to a jury representing a cross-section of the community, all discriminatory decisions distorting the jury selection process are treated alike, whether they concern race, gender, ethnicity, or age. See Castaneda v. Partida, 430 U.S. 482 (1977), for an example of the Supreme Court's approach to the problem of proof in this area. *See generally* James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555 (1985) (surveying the history and scope of cross-section law).

43. 111 S. Ct. 1364 (1991).

measures.[44] The Court's holding in *Powers*, vindicating the prospective jurors' rights,[45] suggests an analogy between jury selection cases and employment discrimination cases—an analogy that became the basis for the subsequent apotheosis of jurors' rights in *Edmonson*[46] and *McCollum*.[47] If jury selection is like an employment interview and jurors are like temporary government employees, then something like Title VII law may be appropriately brought to bear on any attempt to exclude otherwise eligible jurors on the basis of their race. If the problem is defined as whether the juror will suffer discrimination, it no longer matters whether the source of the discrimination is the prosecutor or the defense counsel, or whether the discrimination occurs in a criminal or a civil case.[48] The government employment at issue is the same no matter what the nature of the proceeding; the party allowed standing to challenge racial discrimination in jury selection, whether a criminal defendant, a prosecutor, or a party in a civil case, is merely a vehicle for promoting the interests that the juror and the community have in enhancing diversity on juries.

Why did the Court in *Powers* choose to focus on the right of the prospective jurors rather than declaring, as it well might have, that defendants, whether black or white, have an equal protection right to juries selected without racial discrimina-

44. In Peters v. Kiff, 407 U.S. 493 (1972), a white defendant was granted standing to challenge exclusion of black prospective jurors on the basis of his own Sixth Amendment rights to an impartially selected jury. *Id.* at 500. Subsequently, in Holland v. Illinois, 493 U.S. 474 (1990), the Court refused to allow defendants to use their Sixth Amendment right to a fair and impartial jury as a basis for challenging the prosecution's use of allegedly race-based peremptories, on the theory that the defendant does not have the right to any particular composition of a petit jury. *Id.* at 481-84.

45. *Powers*, 111 S. Ct. at 1370. The decision to allow defendants "third party" standing was based partly on the idea that defendants have an "interest" in the integrity and fairness of the proceeding and that prospective jurors would be unlikely to vindicate their own rights because they cannot be expected to hire lawyers to litigate their exclusion. *Id.* at 1371.

Randall Kennedy suggests that the issue in *McCleskey* also involved a question of third party rights—the rights of the black victims. Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1422 (1988).

46. 111 S. Ct. 2077, 2085-87 (1991).

47. 112 S. Ct. 2348 (1992).

48. One of the issues necessarily decided in *Edmonson* in order to reach that conclusion was that the jury selection process does entail state action. *Edmonson*, 111 S. Ct. at 2082-87.

tion?[49] There are several possible answers to this question. One possible explanation is that it was inevitable that the Court would have to choose between jurors' and defendants' rights at whatever point the rights actually came into conflict, as happened only one year later in *McCollum*.

The Court may have been willing to choose even before being compelled to do so because describing this line of cases as a declaration of the rights of jurors makes a pleasing story with a happy ending. The heroic Supreme Court confronts a set of increasingly more difficult and subtle obstacles to racial diversity on juries, starting with facially discriminatory statutes, then proceeding through distorted selection procedures, and finally culminating in attempts to hide discrimination behind the seemingly impenetrable peremptory challenge. Ironically, the Warren Court era shows the Court at its lowest level of resolve in confronting this issue. The Warren Court, otherwise famous for its zealous promotion of equal rights, found itself defeated in *Swain v. Alabama*[50] by its inability to pierce the veil of the peremptory challenge. The Burger Court in 1986 unexpectedly surpassed the Warren Court by creating an ingenious weapon to use against race-based peremptory challenges; the Rehnquist Court then demonstrated an even greater enthusiasm for clearing the path to the jury for one and all.[51]

This is a pretty story, and may indeed have a happy ending for some veniremen who will be able to serve as jurors. But if we recall that *Strauder* also presented the problem of defendants losing life or liberty because of verdicts possibly tainted by racially biased jurors, the Court's version of the story is discomfitting. It is a story whose author has become so preoccupied

49. *See* Peters v. Kiff, 407 U.S. 493 (1972) (finding such a right, at least with respect to venires, within the Sixth Amendment).

50. 380 U.S. 202 (1965). In *Swain*, the Court allowed defendants to challenge race-based use of peremptory challenges only if they could establish empirically that prosecutors had been perverting the peremptory challenge in case after case, thereby effectively excluding all black people in a community from ever serving on juries. *Id.* at 223-24. This articulation of how to state a claim suggests that the fundamental right the *Swain* Court was willing to vindicate was a community-based right to racial diversity on some juries, rather than an individual's right to serve on a jury or to be tried by a diverse jury. As in *McCleskey*, the discrimination in individual cases is deemed to be invisible; only by stepping back and examining a broad pattern of prosecutions could anyone actually detect the presence of the prohibited discrimination.

51. Justice Kennedy grandly referred to these cases as "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process." *Edmonson*, 111 S. Ct. at 2081-82.

with the fate of peripheral characters that the protagonist has been forgotten. If the Court's heroic efforts to increase racial diversity on juries also serve defendants' needs,[52] that effect is only incidental.

B. *Do Defendants Have a Right to Nondiscriminatory Jury Selection?*

In a recent article, Barbara Underwood posits that the Court was correct to champion prospective jurors' rights because defendants do not have any cognizable equal protection right to nondiscriminatory jury selection procedures.[53] Professor Underwood agrees that defendants should have the right of formal equality described in *Strauder*—to be tried by a jury selected without race-based discrimination—although she considers that right hollow.[54] Her central challenge is to the *Strauder* Court's apparent conclusion that a defendant's more substantial right to be free from racially discriminatory verdicts is implicated by racial discrimination in jury selection.[55]

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52. *See infra* Part III.

53. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726-36 (1992). Part of Professor Underwood's argument is based on her view that the case law, including some cases decided before last term, relied on jurors' rights as a critical basis for decision. *Id.* at 726-27. I think that she is, for the most part, correct in suggesting that the Court has found this rationale more palatable than any rationale grounded in defendants' rights. It is true that it is easier to explain the results in *Powers*, *Edmonson* and, especially, *McCollum* (which was decided after Professor Underwood wrote her article) as being derived from the rights of jurors. While this argument may be important in a brief, the fact that the Court has not wished to rely on defendants' rights does not mean that defendants do not or should not have any independent rights.

54. As Professor Underwood points out, *Strauder* purported to guarantee black defendants the possibility, although not the certainty, of having jurors of their own race. *Id.* at 733. This guarantee can be viewed as extending to black or white defendants the right to have jurors of different races too, because the chief point in the argument for formal equality is that the selection process must be free from race-based distortion.

Professor Underwood's only objection to this theory seems to be that the Court has not adequately recognized or protected this form of equality. *See id.* at 736 ("[T]he Court's refusal to recognize an equal right to different-race jurors compels the conclusion that formal inequality is not enough to establish an equal protection claim."). This compulsion, again, exists only in a brief, not in a critique of this line of cases.

55. For a similar viewpoint, see Schmidt, *supra* note 19, at 1421, describing the *Strauder* opinion as having avoided "the futile effort to specify just what was prejudicial about a legally required all-white jury sitting in judgment on a black defendant, which would not have been equally prejudicial if the same all-white jury, randomly selected, were to try the same black defendant." *Id.*

Professor Schmidt, like Professor Underwood, focuses on the type of prejudice typically required as a prerequisite to viable constitutional criminal procedure claims based on the due process clause. *See, e.g.*, United States v. Bagley, 473 U.S. 667 (1985) (holding that

Although I have doubts about how effective the *Batson* remedy can be in serving that right,[56] I do think that *Strauder* may legitimately be read as drawing a plausible connection between racial discrimination in jury selection and a defendant's right to be free from discriminatory jury verdicts. The wholesale exclusion of black jurors in cases like *Strauder* amounted to unequal treatment of African-American defendants because those defendants were denied the opportunity to be judged by a jury of their peers—an opportunity enjoyed by their white counterparts. Social science has confirmed our intuitions that group identification does affect how people on juries are likely to judge issues such as the credibility of a testifying defendant or the dangerousness of a police suspect.[57] In addition, if jurors share a defendant's race, they may be more likely to share some of that defendant's experiences and to understand his motivations, his context, and his language.[58] *Strauder* can be read as positing

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defendant must show likelihood that impeachment evidence withheld by prosecution would have had a reasonable likelihood of changing the jury's guilty verdict had it been presented at trial); Strickland v. Washington, 466 U.S. 668 (1984) (holding that convicted defendant must show prejudice in order to establish that he was deprived of the effective assistance of counsel). This requirement does not seem to me to be an appropriate prerequisite to a claim of a denial of equal protection. As difficult as it is in cases like *Strickland* or *Bagley* to reconstruct how a trial might have been affected if a right of the defendant had been observed, it is even more difficult to reconstruct how changing the racial composition of the jury might have affected a verdict, particularly in light of our ambivalent reaction to the question of whether race makes a difference. Therefore, it is inappropriate to demand that defendants show actual prejudice in a particular case before claiming that their right to verdicts free from race or color prejudice may be compromised by racially skewed juries. The likelihood of prejudice could be deemed established by studies showing that members of groups, including racial groups, tend to identify with one another. *See infra* notes 57-58.

My argument can be understood as either contracting the preconditions Professors Underwood and Schmidt impose on a showing that a defendant has suffered "prejudice" (which I would define as presumptively unequal treatment) or as expanding the notion of formal equality. The right of formal equality Professor Underwood recognizes—the right to an equal opportunity to select a jury of one's peers—could be construed to include the defendant's interest in avoiding biased verdicts. Why would a defendant be considered to have a right to a jury of his peers if we assume that jury composition will not affect verdicts? A right to see people of one's same race on a jury, if we assume that race makes no difference, is so formal that it will only serve interests involving the appearance of fairness and impartiality. *See* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552 (1975) (arguing that a defendant's belief that his jury is fair and impartial is an important goal of jury selection).

56. *See infra* Part III.

57. *See* William T. Pizzi, Batson v. Kentucky: *Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 129-30 ("ingroup-outgroup" bias recognized in social science literature as a real phenomenon); *see also* Johnson, *supra* note 3, at 1626-34.

58. Of course, there is not a complete correlation between race and shared experience, but group identification seems to run along racial lines frequently enough to justify projecting prospective jurors' "biases" on the basis of race.

that black defendants have the same right as white defendants to enjoy the benefit of the sympathy of same-race jurors and, at the same time, to avoid being judged exclusively by the less familiar and less sympathetic jurors of a different race.

Professor Underwood's rejection of this connection is based on the ingrained assumption of traditional jury selection law that bias is a black-and-white matter, and that biased individuals should not be permitted to sit on juries. If we accept the assumption that white jurors are "biased" against black defendants, argues Professor Underwood, improving jury selection procedure is an utterly inadequate response. Acceptance of this assumption would require us to discharge all white jurors in cases involving black defendants and to provide all-black juries.[59] Because we are unwilling to take such drastic measures, we dare not accept the generalization that white jurors will be biased, and therefore should reject defendants' claims and limit ourselves to protecting the rights of jurors.[60] This approach is reminiscent of Justice Powell's recognition in *McCleskey* that to credit the argument that courts must take responsibility for discovering and counteracting racism hidden in juries' capital punishment decisions would also require the courts to accept responsibility for racist decisions on sentencing, arrest, and all other parts of the criminal justice system.[61] Like Justice Powell, Professor Underwood seems to believe that the cure for racism is beyond the courts and that therefore the courts must simply accept defeat and withdraw.

Reading *Strauder* as drawing a connection between a defendant's rights and jury selection does not require accepting the notion that every white juror is "biased" in the strong sense in which Professor Underwood uses the word. Instead, it only requires recognizing that race may make a difference. The strong sense of "bias," which I will refer to as "prejudice," is the subject of jury selection law—if a prospective juror is so prejudiced as to be unable to render a fair verdict, that juror may be challenged for cause.[62] Defining "bias" in this context as

59. Underwood, *supra* note 53, at 730. All-black juries, under this theory, might not be any less biased, but at least their bias would favor the defendant. Therefore the black defendant would be treated equally with white defendants to the extent that the black defendant would be tried by a jury dominated by same-race jurors who might sympathize with him.

60. *Id.* at 730-31.

61. McCleskey v. Kemp, 481 U.S. 279, 314-17 (1987).

62. Lord Coke defined the goal of finding unbiased or impartial jurors as finding

prejudice that threatens the ability to be fair is, in fact, useful in promoting the due process of law. We attempt to winnow out those jurors whose preconceptions or group identifications are so strong that they cannot be expected to be fair in reaching a verdict.[63] Fairness in this sense is an objective standard that allows lawyers and judges to frame questions about potential jurors that can be answered "yes" or "no." Voir dire and jury selection procedures attempt to gain enough information to answer those questions, to expose the extreme examples of prejudgment and then, in the interest of fairness, to weed them out.

The bias *Strauder* addresses is not simply a matter of fairness; it is a matter of equality. Unconscious racism affects us all, in different ways and to different degrees, and may often have subtle effects on our judgments about who is telling the truth or who looks dangerous.[64] Jury selection might hope to discover and eliminate those who cannot be fair, as fairness connotes an objective threshold standard of reasonableness.[65] Jury selection cannot hope to eliminate everyone who is biased if by bias we refer to subjective viewpoints—group identifications, beliefs, and experiences—that may consciously or unconsciously affect our judgments. For this reason, jury selection law regarding the composition of jury pools focuses on having jury pools represent a fair cross-section of the community. Rather than demanding an impossible neutrality, cross-section law recognizes difference and tries to account for it by ensuring that juries will reflect a "range of biases and experiences."[66]

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jurors who are "indifferent as they stand unsworn." 1 EDWARD COKE, COMMENTARY UPON LITTLETON § 155b (Francis Hargrave & Charles Butler eds., 15th ed. 1990) (1794). Indifference to the result does not connote a complete lack of bias in evaluating testimony.

63. As Martha Minow points out, unacceptable bias may derive from the fact that a prospective juror is too close to the case to be indifferent, or that the events of the case are so remote that the juror will not be able to judge fairly. Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992).

64. *See, e.g.*, Lawrence, *supra* note 15, at 339-44; *see also* Kennedy, *supra* note 45, at 1419 (concluding that the Court's focus on "purposeful" discrimination is inadequate as a response to the more subtle and deeply buried forms of racism); Minow, *supra* note 63, at 1213 (defining bias as a failure to recognize entrenched assumptions about "whose perspective is the norm").

65. Some doubt the ability of voir dire to accomplish even this limited goal. *See, e.g.*, Johnson, *supra* note 3, at 1669-76.

66. *See* Babcock, *supra* note 55, at 551; *see also* Minow, *supra* note 63, at 1202-09 (noting "intense confusion" about bias and impartiality reflected in jury selection law, with cross-section law trying to serve goals of difference fundamentally at war with the goals of neutrality the voir dire and challenge system tries to serve).

Several commentaries written after the Court's decision in Holland v. Illinois, 493 U.S.

Professor Underwood's warning against embarking on a path that might take us further than we are willing to go is based on her understanding of bias in its stronger sense—that is, the inability to be fair. But our desire to eliminate this debilitating prejudice by excluding those jurors who cannot be fair should not prevent us from recognizing that bias in its weaker sense—the sense of difference—may still affect jurors who are comfortably within the range of fairness. The idea of cross-section law, to reduce this type of bias by enhancing the diversity of those in the jury pool, is just as important an idea during the selection of a petit jury. The Supreme Court has held that a defendant is not entitled to any particular composition on an individual petit jury on the theory that equality lies in the opportunity to have a diverse jury selected and not in the accident of which six or twelve individuals are actually selected.[67] Using peremptory challenges in a discriminatory manner distorts that opportunity.

Our focus on process goals has led us to create jury selection procedures that we hope will promote fair trials. This is unquestionably a worthy goal, but it should not be the only goal. Attempting to ensure the ability of minority defendants to be tried by a jury of their own peers may or may not enhance fairness, but it certainly promotes a greater measure of equality. Therefore, even if jury selection procedures cannot guarantee defendants full equality, we should recognize that defendants do have a legitimate equality-based concern about racial discrimination in jury selection and not just a convenient altruistic interest in jurors' rights.[68] The race of the jurors selected may still make

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474 (1990), *see supra* note 44, discussed the extent to which the tension between the impartiality goals and the diversity goals could be or had been resolved by *Holland*. *See, e.g.*, *The Supreme Court, 1989 Term*, 104 HARV. L. REV. 40, 168, 173 (1990) (criticizing the Court for failure to adequately harmonize what are actually compatible interests). *Holland* offered an opportunity for the Court to further promote diversity goals under the Sixth Amendment. I argue that the Sixth Amendment is not the only source of protection for a defendant interested in a diverse jury.

67. *See Holland*, 493 U.S. at 478-83. "The Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring not a representative jury (which the Constitution does not demand), but an impartial one (which it does)." *Id.* at 480.

68. Like the Court in *Strauder*, I am not basing this position on an interpretation of the legislative history of the Fourteenth Amendment or of the 1875 federal statute prohibiting discrimination in jury selection. *See* Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336 (1875), *repealed by* Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862 (1948). For a discussion of the debate over whether the framers of the Fourteenth Amendment could be said to have intended to prohibit racial discrimination in jury selection, see Schmidt, *supra* note 19, at 1423-27; *see also supra* note 19. I am indebted to Al Alschuler for the observation

a difference to the verdict, even if jurors of any race could have been fair.

C. Colorblindness and the Court

Describing defendants' interests in jury selection as resting on a recognition that race makes a difference begins to explain why the Supreme Court has been so glad to focus on the relatively easy issue of the rights of jurors. In *Batson*, the Court chose equal protection law, rather than the Sixth Amendment right to a trial by a jury of one's peers,[69] as the rationale for allowing defendants to attack race-based peremptory challenges. This choice allowed the Court to focus on the rights of jurors in subsequent decisions, even in *McCollum*, where the rights of jurors prevailed over those of defendants.[70]

Another consequence of the Court's choice of an equal protection rationale was the incorporation of the Court's current approach to issues about race-based stereotyping and the desirability of colorblindness. The Court's attraction to the notion that equality goals are generally best served by a colorblind approach[71] has spilled over to jury selection law enough to make

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that the debates preceding enactment of the 1875 statute did reflect more concern for minority defendants than for prospective jurors. *See, e.g.*, 3 CONG. REC. 1794 (1875).

69. *See* McCray v. Abrams, 750 F.2d 1113, 1129-31 (2d Cir. 1984) (holding that peremptory challenges used to exclude black prospective jurors may be challenged under the Sixth Amendment), vacated for reconsideration in light of *Batson*, 478 U.S. 1001 (1986).

In *Holland*, the Court finally considered this theory and rejected it. *See supra* note 44.

70. *See, e.g.*, Georgia v. McCollum, 112 S. Ct. 2348 (1992). *Batson* itself did not identify the extent to which the decision was based on the rights of individual defendants or of individual jurors because that choice was not yet necessary. The Court's conception of the individual rights involved in *Batson* is certainly broader than the community-based right that *Swain* protected. For a discussion of *Swain*, see *supra* note 50.

71. In affirmative action cases in other contexts, the Court has been reluctant to permit race consciousness in any form. Although a plurality of the Court in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), was willing to allow the use of race as one factor in medical school admissions decisions, *id.* at 320, the Court in later cases has seemed inclined to permit race consciousness only in contexts where a race-conscious remedy redresses previously established discriminatory conduct. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (prohibiting set-aside program in the absence of a finding of past discrimination by the city); United States v. Paradise, 480 U.S. 149 (1987) (allowing race-conscious remedy on a judicial finding of discrimination on the part of the state); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (allowing race-conscious remedy where a Title VII violation had been found); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (finding race-conscious remedy unconstitutional when the remedy was not sufficiently related to previous discrimination). The Court has also allowed some attention to race where Congress, or an agency acting on its behalf, has found a need to remedy discrimination. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-68

it difficult for the Court to explain the nature of the defendant's interest in the race of the jurors selected. In the Court's utopian colorblind world, defendants would have no reason to care about the race of jurors because the jurors themselves would be colorblind.[72] Apparently, the Court prefers to ignore defendants' claims that real jurors in the real world are not colorblind because the Court is inclined to value colorblindness as a categorical imperative. This growing tendency is revealed by the Court's discussion in *Batson* about what constitutes a race-neutral explanation, and by its decision in *McCollum* about whether a criminal defendant has the right to be race-conscious in selecting a jury.

1. Group Identification as a Race-Neutral Explanation

In its first decision on jury selection, *Strauder*, the Court declared that the principle that prospective jurors may not be excluded on the basis of race was applicable on a colorblind basis to prospective jurors of any race.[73] In *Batson*, the Court seemed

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(1990) (regarding broadcasting licenses); Fullilove v. Klutznick, 448 U.S. 448, 472-73 (1980) (regarding a set-aside provision for minority businesses supplying goods or services on public works projects). Race consciousness apparently is allowed in these limited situations on the theory that redressing past governmental discrimination is a compelling state interest.

In *Metro Broadcasting*, Justice O'Connor's dissent, joined by Justices Rehnquist, Scalia, and Kennedy, expressed what now seems to be the view held by a majority of the Court. She would not have permitted racial classifications to be used to promote diversity in the context of broadcasting licenses. *Metro Broadcasting*, 497 U.S. at 618 (O'Connor, J., dissenting). Justice O'Connor stated:

> The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because "likely to provide [that] distinct perspective" . . . . [The FCC's] policies impermissibly value individuals because they presume that persons think in a manner associated with their race.

Id. (first alteration in original) (citations omitted).

For thoughtful critiques of the Court's general attraction to the principle of colorblindness, see T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

72. Even in Sixth Amendment cross-section law, the Court has recently resisted drawing a connection between defendants' rights to a jury drawn from a cross-section of the community and substantive rights of equality or fairness. The holding in *Holland*, *see supra* note 44, that a defendant has no Sixth Amendment right to a petit jury drawn without distortion from a cross-section of the community, suggests that even under the Sixth Amendment the Court's concern with jury composition lies primarily with republican virtue and formal correctness, rather than with impact on the defendant.

73. 100 U.S. 303, 308 (1879). The *Strauder* Court announced that its ruling would also prohibit discrimination against white prospective jurors in a community where black people were in the majority, or discrimination against "naturalized Celtic Irishmen." *Id.*

to adopt an extreme version of the principle of colorblindness in asserting that challenging a juror who is the same race as the defendant because that juror is more likely to side with the defendant does not constitute a race-neutral explanation.[74] Justice Rehnquist, in dissent, argued that the generalization that a juror is more likely to sympathize with a member of his or her own race *is* a race-neutral explanation as long as it is applied to white prospective jurors as well as to black.[75] The Court did not provide much explanation for rejecting Justice Rehnquist's analysis, which has support in social science views of group identification.[76] Possibly the Court thought the theory untrue, and therefore regarded it as harmful racial stereotyping.[77] But if it is untrue, the theory stereotypes whites as much as blacks. If the Court's objection to this explanation does not question its truth, then what the Court may have found objectionable was the use of race as the basis for any classification at all. This is a broader definition of "race neutrality" than Rehnquist employed, and one that begins to call into question some of the assumptions about difference underlying the cross-section requirement.[78] The Court may have been assuming that this group identification dogma would not be applied to white potential jurors as often as to black potential jurors and that, if accepted, it would provide too convenient a race-neutral explanation—one more loophole for prosecutors engaged in the unending quest for means of excluding black people from juries. If so, this explanation might qualify as a race-based distinction disadvantaging minorities despite the fact that it is facially neutral.[79] There appears to

74. 476 U.S. 79, 97 (1986).

75. *Id.* at 137-38 (Rehnquist, J., dissenting).

76. *See* Pizzi, *supra* note 57, at 129-30.

77. The Court does not discuss the issue at all, perhaps because the relevant social science data were not briefed or argued by the parties.

78. *See* Pizzi, *supra* note 57, at 123-24 (arguing that Justice Rehnquist fails to take account of the fact that this explanation draws a line on the basis of race). Professor Pizzi's argument might enlist the Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down a miscegenation statute that equally disadvantaged blacks and whites. But *Loving* and other cases, like Brown v. Bd. of Educ., 347 U.S. 483 (1954), that find racial categorizations unconstitutional have been based on a finding that racially based categorization can be inherently stigmatizing. Accepting the conclusions of the group identification studies does not stigmatize on the basis of race in the same way that prohibiting racial intermarriage or integrated schools does. And the peremptory challenge is not potent enough to create separate but equal juries.

79. Even if the explanation were used as frequently on whites as on nonwhites, it is less likely that whites would actually be excluded from juries because whites make up a majority of the population. Therefore, white defendants would be less likely to be disad-

have been no empirical basis in the record for this conclusion, however, and it is not clear whether any such record could have been made.[80]

After *Batson*, it would have been difficult for the Court to backtrack and articulate a basis for recognizing defendants' interests while maintaining its opposition to race-based generalizations.[81] The Court, despite cross-section law, is unwilling to acknowledge that race makes a difference.

2. Colorblindness and Defense Peremptory Challenges

Strauder began with an African-American defendant challenging an all-white jury; after *McCollum*, a black defendant apparently cannot intentionally exclude whites from sitting on a jury.[82] If *Strauder* correctly assumed that black defendants

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vantaged as a group. Later cases stressing that the right at stake in *Batson* is an individual right, not just a community-based right, call into question whether the difference in impact actually could provide a basis for the court's ruling.

80. Might other facially colorblind reasons be understood not to be "race-neutral" if, empirically, they are often used to strike black prospective jurors? If a court wants to reject proffered explanations on the theory that they are not empirically race neutral, to what extent is that court using disparate impact to determine purpose in a manner the court has disdained in other contexts? *See, e.g.*, Hernandez v. Texas, 111 S. Ct. 1859 (1991) (peremptory challenges to Latino prospective jurors who had expressed doubts about whether they could accept an official Spanish-English translation they believed to be erroneous were properly found to be based on a race-neutral explanation, despite the fact that accepting this explanation could easily have the impact of drastically reducing the number of Latino or other bilingual jurors). *See* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WISC. L. REV. 761 (arguing that psycholinguistic evidence establishes a direct connection between bilingualism and the challenged jurors' responses and that permitting exclusions on the basis sanctioned by *Hernandez* will lead to a dramatic exclusion of Latino jurors. Under the individual case-oriented doctrine the Court sets forth in *Batson*, it would not appear relevant whether the same explanation is used in many cases by many prosecutors. Trial judges are told that they are supposed to judge the prosecutor's good faith and credibility in asserting each particular race-neutral explanation as to each suspect challenge. As to the explanation of anticipated group identification, *Batson* rejects race neutrality, and even the good faith of the prosecutor in a particular case as meeting the burden *Batson* imposes.

81. For the same reason, it would be difficult for the Court to accept Professor Alschuler's alternative explanation for *Strauder*: that defendants have the right to an opportunity to have minorities serve on their juries because, no matter what the race of the defendant, minority jurors are more likely than white jurors to sympathize with the accused rather than the government. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 189 (1989).

82. The NAACP brief in *McCollum*, cited in Justice Thomas's concurring opinion, urged that the Court consider tailoring its approach to the race of the defendant and race of the juror at issue. Georgia v. McCollum, 112 S. Ct. 2348, 2360 n.2 (1992) (Thomas, J., concurring). State v. Carr, 413 S.E.2d 192 (Ga.), *vacated and remanded sub nom.* Georgia v. Carr, 113 S. Ct. 30 (1992), raises the question of whether *McCollum* prohibits an Afri-

might be treated more equally if they had an opportunity to have members of their own race on their juries, then the Court's current case law chooses a principle of colorblindness that may serve jurors while actually disserving defendants.

In his concurring opinion in *Batson*, Justice Marshall advocated the abolition of the peremptory challenge system on the ground that peremptory challenges inevitably provide a mask for prejudice.[83] Justice Marshall's successor, Justice Thomas, has taken the position that, viewed from the perspective of the defense, peremptories are a sword for eliminating racial bias on the jury, not just a shield for racial discrimination. Justice Thomas has concluded that if our chief goal is to enable defendants to be judged by juries free from racial prejudice, the defense should be permitted to exercise peremptory challenges in order to root out jurors whose bias is not sufficiently overt to provide the basis for a challenge for cause.[84] Barbara Babcock's provocative view of peremptory challenges as a salutary method of venting biases we harbor, but prefer not to discuss,[85] provides another reason for questioning whether defendants would have greater freedom from biased jurors if peremptory challenges were eliminated altogether.[86]

I do not intend to take sides in this debate. Rather, I simply wish to point out that holding peremptory challenges unconstitutional in *Batson* would have been a mixed blessing for defendants for the reasons that Justices Thomas and O'Connor point out in *McCollum*: the unfettered discretion of the peremptory challenge can be used either to conceal or to combat racism.[87] After *Batson*, defendants had an edge because the defense had more opportunity than the prosecutor to use or abuse this

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can-American defendant from using peremptory challenges against white prospective jurors.

83. 476 U.S. 79, 102-03 (1986).

84. *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring). Peremptory challenges also allow the parties to participate directly in jury selection. Without peremptory challenges, the judge's power to rule on challenges for cause becomes far more critical.

85. Babcock, *supra* note 55, at 553-54.

86. The discretion the peremptory challenge permits cannot be eliminated; it can only be shifted. If peremptory challenges were abolished, judicial discretion would replace attorney discretion as the challenge for cause became the only selection device. It is impossible to predict whether Justice Thomas's desire to allow defendants to have the power to eliminate suspected racists from the jury would be better served by permitting the attorneys to make some unexplained decisions, which could either hide or fight racism, or by allowing the judge to rule on all challenges.

87. *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring); *id.* at 2364 (O'Connor, J., dissenting).

power.[88] But by the time the Court decided *McCollum*, the Court was willing to require defendants to give up that edge so that the rights of jurors could be vindicated. Colorblindness clearly benefits potential jurors; it is less clear whether the symmetrical rule of *Batson* and *McCollum* benefits defendants.[89]

D. The Batson *Remedy and the Rights of Jurors*

The *Batson* Court's focus on general equal protection law also led to the formulation of a remedy that tends to make *Batson* a more effective protection for jurors than defendants. First, the Court specified that in examining a prosecutor's suspect challenges to members of a cognizable racial group, trial judges are to ask whether the prosecutor's purpose was to discriminate against a particular prospective juror on the basis of race.[90] If the trial court accepts the prosecutor's race-neutral explanation (or explanations if more than one juror is at issue), the prosecu-

88. *See* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989) (arguing, before the decision in *McCollum*, that it would be appropriate to allow defendants but not prosecutors to exercise race-based peremptory challenges because of the differing interests of the prosecution and the defendant); Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 539 (1986) (arguing that the defendant's stake is greater than the prospective juror's). For a critique of this view, see Joel H. Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 COLUM. HUM. RTS. L. REV. 177 (1991); J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015 (1990).

89. Questions will still arise concerning what constitutes a race-neutral explanation. Because *Batson* is an inefficient tool, defendants may still challenge a juror as long as no discriminatory purpose is found, and they can provide a race-neutral explanation for their challenge. If we acknowledge that a defendant's right to equal treatment at trial is implicated at jury selection, and if we also acknowledge that the race of the jurors selected might make a difference to the verdict, then perhaps it should be considered a race-neutral explanation if a black defendant challenges a white prospective juror to avoid being judged by an all-white jury that does not reflect the defendant's own experiences. This principle would not be consistent with the *Batson* Court's apparent rejection of the group identification principle. In that case, however, the Court's rejection seems to have been based on the realization that prosecutors could use that principle to perpetuate a history of wholesale exclusion of African Americans from juries.

Defendants do not have the history, the organization, or the universal interest in excluding any particular racial group from jury service generally. Defendants also have a more intensely personal right at stake than prosecutors.

90. Batson v. Kentucky, 476 U.S. 79, 96-98 (1985). Compare *Batson* with Washington v. Davis, 426 U.S. 229 (1976), where the Court required a showing of purpose to discriminate against black applicants for positions as police officers, rather than a showing that hiring policies had a disparate impact on racial minorities.

For a critique of the purpose doctrine, especially where racism is unconscious, see Kennedy, *supra* note 45, at 1404, 1414-16, 1419-21.

tor may still use peremptory challenges to exclude all members of that racial group from the jury. A defendant may not challenge a prosecutor's practices simply on the ground that those practices will result in an all-white jury or, apparently, on the basis that the prosecutor is attempting to disadvantage the defendant by selecting jurors with racist attitudes. Instead, the defendant is limited to challenges on the grounds that the prosecutor is intentionally discriminating against the juror. It is the prosecutor's attitude toward the juror's race, not toward the juror's racial attitudes, that is the principal focus of *Batson*. This choice is better adapted to serving the equality rights of jurors than defendants, although it is not very well adapted to serving even the jurors' rights.[91]

Requiring the prosecutor to articulate a race-neutral reason for a peremptory challenge seems to allow the prosecutor to exclude a potential juror partially on the basis of race—as long as the prosecutor can also articulate a race-neutral reason.[92] The state is permitted to take this action to serve its interest in selecting jurors whom the prosecutor believes will not be too sympathetic to the defendant. Could this interest survive a strict scrutiny requirement that keeping minorities off of a jury be necessary to a compelling state interest? In a case where the defendant is black, should the prosecutor's desire to convict that defendant by selecting racially biased jurors, whatever their color, be approached with deference as a legitimate state interest, or with suspicion as a possible example of racial discrimination in itself? The level of review *Batson* imposes is certainly more demanding than that imposed in *Swain*, but not as rigorous as true strict scrutiny.

As many others have noted, allowing peremptory challenges following an acceptable race-neutral explanation also invites any inventive prosecutor to create subterfuges: to articulate acceptable reasons for excluding jurors when the prosecutor's actual reasons would be unacceptable.[93] Discrimination

91. *Cf.* Lawrence, *supra* note 15, at 347-349; *Race and the Criminal Process*, *supra* note 3, at 1493 (discussing the inadequacy of purpose-based doctrines to counter unconscious racism).

92. There is also room for slippage in the power of the trial judge to make credibility findings. Disingenuous explanations might be found adequate.

93. Given that race-neutral explanations need not rise to the level justifying a challenge for cause and that appellate courts accord a substantial amount of deference to the findings of the trial judge, overcoming the race-neutral explanation hurdle has not been that difficult. *See* United States v. Clemons, 941 F.2d 321 (5th Cir. 1991) (holding that an

may no longer hide behind the peremptory challenge, but it only has to move one small step to hide behind the race-neutral explanation. Whatever the prosecutor's reasons, judicial scrutiny cannot be expected to fully serve the defendant's right to be free from a discriminatorily selected jury when procedures are focused on whether the juror and not the defendant is being subjected to purposeful discrimination.[94]

Using current equal protection law also narrows the field of possible remedies. For example, the *Batson* Court might have developed an affirmative action approach to jury selection, possibly even requiring quotas,[95] if this approach had not been inconsistent with the colorblind law in other areas where claims of equality are raised.[96]

All of these self-imposed limitations on the Court's ability to address defendants' rights provided an incentive for the Court to concentrate on the rights of jurors.[97] The Court may also have had practical reasons for favoring jurors' rights over defendants'. If defendants enjoy only vicarious rights with respect to the misuse of peremptory challenges, the Court could limit the number of opportunities defendants will have to vindicate those rights. *Batson* claims may be raised by state or federal defendants on direct appeal.[98] Because *Batson* is clearly a new

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explanation that one venire person was approximately the same age as defendant and might be sympathetic to him was sufficiently race-neutral); United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991) (noting that three black jurors were seated while the prosecution still had three peremptory challenges left, in accepting the prosecutor's allegedly race-neutral explanation); United States v. Rudas, 905 F.2d 38 (2d Cir. 1990) (holding that prosecution's explanation that of the two jurors with Hispanic last names who were challenged, one had previously served on a hung jury, was sufficiently race-neutral).

Professor Alschuler also notes other limitations on the utility of the *Batson* remedy, such as the difficulty of establishing a prima facie case. Alschuler, *supra* note 81, at 170-73.

94. *See infra* notes 104-16 and accompanying text.

95. This is Professor Johnson's proposal. *See* Johnson, *supra* note 3, at 1695-1700.

96. The Court's current affirmative action law, as briefly described above, *see supra* note 71, strongly disfavors quotas.

97. Professor Underwood, who defines *Batson* and its progeny as exclusively geared to protecting the rights of prospective jurors, believes that the compromise the cases forge between an antidiscrimination principle and the right to exercise peremptory challenges is workable and appropriate. *See* Underwood, *supra* note 53, at 760-61.

98. In Griffith v. Kentucky, 479 U.S. 314, 328 (1987), the Court limited the retroactive effect of *Batson* to those cases "pending on direct reveiw or not yet final."

Because the right vindicated by *Batson* is defined as the right of the prospective juror, harmless error analysis would seem irrelevant on such appeals. If the right involved were the defendant's, the fact that a prosecutor had impermissibly challenged one prospective juror on the basis of race might be considered harmless if jurors of that same race were ultimately seated in sufficient number on the jury. But if the right is that of the excluded juror, then the violation of that individual's right cannot be harmless, regardless of who else

rule within the meaning of *Teague v. Lane*,[99] defendants who had suffered abuse of the peremptory challenge process prior to *Batson* could not bring habeas corpus proceedings based on those past events. May new *Batson* claims be raised prospectively in habeas corpus proceedings? Following *Batson*, a number of federal courts assumed that *Batson* claims are cognizable on habeas corpus proceedings, as long as defendant's appeal had been pending when *Batson* was decided.[100] Even after *Powers* declared the right at stake to belong to the jurors rather than the defendant, one court found that defendant had standing to raise a habeas corpus challenge to allegedly skewed grand jury selection, assuming that the defendant's interest in neutral jury selection procedures is sufficient to confer standing in this context as well.[101]

The Supreme Court's unsympathetic recent treatment of the habeas remedy, however, gives reason to wonder whether the Court might wish to preclude such claims. In the case of *Stone v. Powell*,[102] for example, the Court reasoned that because the exclusionary rule is not a constitutional right of defendants but merely a judicially-created prophylactic device designed to enforce fourth amendment rights, defendants generally may not raise exclusionary rule claims in habeas corpus proceedings.[103] In reaching this conclusion, the Court considered whether allowing such claims to be entertained in habeas proceedings would significantly enhance the deterrent effect of the exclusionary rule.[104] The Court could reason, similarly, that if defendants' own rights are not violated by racially-based peremptory challenges, it is unnecessary to allow such claims to be raised on

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might serve on the jury. This could be one respect in which the defendant gains something from the redefinition of whose rights are at stake, although the Court has seemed inclined to resist harmless error analysis with respect to jury selection claims generally. *See* Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986) (discrimination in grand jury selection not amenable to harmless error analysis); United States v. Thompson, 827 F.2d 1254, 1261 (9th Cir. 1987) (applying *Vasquez*' conclusion to petit jury discrimination).

99. 489 U.S. 288 (1989) (holding that violations of new rules may not be raised in habeas corpus petitions).

100. *See* Harrison v. Ryan, 909 F.2d 84 (3d Cir. 1990); Echlin v. Lecureux, 800 F. Supp. 515 (E.D. Mich. 1992); Pemberthy v. Beyer, 800 F. Supp. 144 (D.N.J. 1992).

101. Ramseur v. Beyer, 983 F.2d 1215, 1224 (3d Cir. 1992), quoting *Powers*, 111 S. Ct. at 1371.

102. 428 U.S. 465 (1976).

103. The exception is where the defendant was denied a full and fair opportunity to raise the claim in state court. *Id.* at 466.

104. *Id.* at 467. The Court concluded that the incremental deterrent effect on the police would not be great.

habeas corpus, unless that decision would significantly enhance the deterrent effect of the *Batson* rule.[105] The Court could also question whether a defendant should be allowed to bring a civil rights action asserting the violation of what is now defined to be someone else's rights.[106] Declaring defendants' standing to be the Court's own construct leaves the Court complete power to decide how extensively defendants' claims will be heard, if the Court is willing to build on the fiction that defendants' rights are not actually involved.

If it is true that protecting jurors' rights will effectively protect defendants' rights, the Court's reluctance to address what should be the central issue in these cases may not be of any great practical significance. The extent of that overlap is the subject of the next section. But even if defendants do not suffer from the lack of attention they have been receiving, there is a paradox in the Court's treatment of this issue. If the *Batson* remedy promotes the rights of jurors instead of defendants, and if it is not true that defendants are likely to be treated more equally by jurors of their own race, then how can this remedy be an appropriate response to concerns about unequal treatment of defendants? The Court cannot simultaneously assert that race does not make a difference and hold out hope that the jury selection cases will address the problems of defendants like Strauder and Norris, or of victims like Rodney King.[107]

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105. It could be argued that the participation of habeas corpus courts is necessary to assure that *Batson* is taken seriously in some states. In Georgia, for example, *Batson* was met with an elaborate procedural rule designed to prevent that appellate courts from having to hear *Batson* claims. The Supreme Court granted *certiorari* to invalidate the rule, unanimously, and require Georgia to hear *Batson* claims. Ford v. Georgia, 111 S. Ct. 850 (1991) (Georgia may not defeat partial retroactive application of *Batson* by retroactively imposing a rule providing that challenges to jury selection must be made after jury selection, but before that jury is sworn, or be considered waived. Defendant's allegation that prosecutors had been striking blacks from local juries "over a long period of time," with citation to Swain v. Alabama, 380 U.S. 202 (1965), raises claim under *Batson* even if the equal protection clause was not explicitly invoked). Alternatively, in a situation like the one raised in *Ford*, a habeas corpus court might hear a *Batson* claim under the exception the Court allowed in *Stone v. Powell, supra* — that the state courts had not provided a full and fair opportunity for the claim to be heard.

106. This reasoning could spare the federal courts many 1983 or *Bivens* actions.

107. Justice Powell, author of *Batson* and *McCleskey*, also wrote the opinion of the Court in *Bakke*, expressing some willingness to allow the use of race as a factor in decisions designed to promote diversity, *see supra* note 71. A majority of the Court now seems to reject his position on affirmative action in a way that requires rethinking his complementary positions in *Batson* and *McCleskey*.

III. THE IMPACT OF *BATSON*

A. The Impact on Juries

Although I do not know of any attempts to study the actual impact of *Batson* on jury composition or jury verdicts, I am willing to be optimistic about the former. While the procedure set forth in *Batson* is an imperfect way to enhance racial minorities' access to jury service, for reasons described above,[108] it seems likely that authorizing trial courts to require prosecutors to defend their reasons for excluding members of a racial minority will have some prophylactic effect. Under pre-*Batson* law, the Alabama county at issue in *Swain* had, according to the dissent's account of the facts, not allowed any black man to serve as a juror within living memory.[109] Although the requirement of a race-neutral explanation is not airtight, it still forces prosecutors[110] to explain and defend exclusionary decisions, and therefore may inspire them to be more self-conscious and more restrained in making those decisions. The law requiring a court to disallow a peremptory challenge only if it finds no credible race-neutral explanation has enough elasticity to allow some racially discriminatory decisions to pass. But because it seems likely that in some cases judges will use their authority to disallow challenges,[111] *Batson* is likely to have some direct impact beyond its deterrent effect.

The actual increase, and future increases, in the number of minorities serving on juries since the *Batson* decision is another issue. Studies are needed to determine how well the *Batson* procedure is serving its goal of at least moderating, if not eliminating, the use of peremptory challenges as an exclusionary device. Interpreting the race-neutral explanation requirement more consistently with the idea that *Batson* provides a form of strict scrutiny of facially discriminatory actions would increase the number of challenges disallowed, the number of minorities surviving this hurdle, and the deterrent effect of *Batson*.

The Rodney King trial in state court also demonstrated that the peremptory challenge is not in fact the last resort of attorneys who want to exclude minorities from a jury in a partic-

108. *See supra* text accompanying notes 89-95.

109. Swain v. Alabama, 380 U.S. 202, 231-32 (1965) (Goldberg, J., dissenting).

110. I am focusing on prosecutors in criminal cases, but the same restrictions would apply to any counsel in jury selection.

111. The cases cited above, *see supra* note 93, might suggest that this impact will be slight.

ular case. The change of venue from Los Angeles to Simi County was another effective way to ensure that few minorities would be represented on the jury.[112] *Batson* did not close the last loophole. Future courts or legislatures will have to create new law to prevent venue changes from becoming the latest and most effective way to stack a jury.

B. The Impact on Defendants

The core concept in the cases from *Strauder* through *Batson*, and the reason that in both of those cases the Court could speak of jurors' rights and defendants' rights interchangeably, is the assumption that minority defendants are more likely to achieve equal protection of the laws if their racial peers are not excluded from juries. Assuming that *Batson* and the related law of jury and venue selection can be somewhat effective in increasing the diversity of juries, I still question how much of that effect spills over to promote the equal rights of defendants. Does *Batson* help these defendants or hurt them? Does it help significantly? These are questions that are harder to study because the effect of jury selection on verdicts is far more difficult to measure than the numbers of jurors in various racial categories before and after *Batson*.

Without studies and without any meaningful empirical observations, we are left to speculate about how *Batson* and the law it has generated might affect criminal defendants. My own speculation leaves me with serious doubts about whether jury selection can be an effective means of substantially promoting racial equality for minority defendants.

1. Defendants Who Plea Bargain

It is no novelty to point out that the vast majority of criminal cases do not go to trial.[113] The opportunity to have a racially

112. *See* David Margolick, *As Venues Are Changed, Many Ask How Important a Role Race Should Play*, N.Y. TIMES, May 23, 1992, at A7 (describing the racial issues involved in the change of venue in the King case, and legislation proposed to introduce consideration of racial composition into venue decisions); *see also* Larry Rohter, *Judge in Miami Shifts Trial of Officer in Blacks' Deaths*, N.Y. TIMES, May 7, 1992, at A23 (discussing how, in light of the Rodney King verdict, a judge in Miami chose to transfer a controversial trial to a venue where racial composition was similar to that of the site of the incident, instead of proceeding in the venue previously chosen for its convenience and presumed impartiality).

113. Over 90% of criminal cases generally are disposed of by plea rather than by trial. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1991, at 545 tbl. 5.48 (Timothy J. Flanagan & Kathleen

balanced jury would seem to be less significant in a system where the jury trial is a relatively rare event. I do not discount the likelihood that significant changes in the composition of juries in a particular area could influence prosecutorial decisions and plea bargaining practices. Plea bargaining is always conducted against the background of what the parties believe would occur if their case went to trial. It could be that the parties would assess the value of some cases, or the desirability of selecting a trial rather than a deal, differently if the odds of drawing an all-white jury were reduced. Because most cases are decided by the parties themselves rather than by juries, it is the common perceptions of what juries are likely to do rather than what they actually do that will govern decisions. Myths may be more important than reality in forming these perceptions; thus, even if *Batson* has actually made little difference to the composition of juries or to verdicts, the prominence of this line of cases and the flurry of activity around this issue might well convince prosecutors that they should evaluate their cases without assuming that they will be able to muster a conviction-prone, all-white jury. Ironically, the fact that jury trials are relatively rare might actually increase the prophylactic effect of the *Batson* line of cases if the apparent effect of these cases on juries is greater than their actual effect.[114] Of course, if experience with *Batson* teaches prosecutors that the effect is minimal, any impact on the plea bargaining process will subside.

2. Defendants Who Go to Trial

To conclude that *Batson* will actually benefit defendants who go to trial, one must accept a large number of untested assumptions, many of which are implicit in *Batson* itself. First, one must assume that *Batson* will be effective enough as a prophylactic or as a judicial prohibition to have a significant effect on the racial diversity of juries. As discussed above, although I am willing to assume that there will be some effect, there is no way to know at the present time whether that effect is sufficient to create noticeable systemic change. In particular cases, *Batson* might prevent the complete exclusion of the few racial minorities on a venire and thus result in some diversity in a defendant's

Maguire eds., 1992) (91% of felony convictions in state court in 1988 based on guilty pleas).

114. This is one place where focusing on the rights of jurors rather than the rights of defendants might detract from *Batson*'s effectiveness as a matter of public relations.

jury where there otherwise would have been none. But even if this is true, it remains questionable whether this representation of minority groups on juries would in fact improve defendants' chances of enjoying the equal protection of the laws. First, to assume that minority jurors would be likely to favor minority defendants of their own race would be to accept the proposition *Batson* rejected as insufficiently race-neutral: that members of a race are more likely to sympathize with other members of their race. Despite social science data indicating that there is some truth to this generalization, it is not clear how universal this truth might be. Some studies contend that some black jurors may be less tolerant of blacks who commit crimes directed against black victims than white jurors would be.[115] *Batson* attempts to diversify the racial composition of juries; it does not attempt to address the racial attitudes of jurors.

How much of a difference *Batson* can make to jury composition will depend on the racial composition of the community in which the trial is taking place. If the community is heavily or predominantly black, *Batson* is unlikely to make a difference. Because the number of peremptory challenges is limited, prosecutors in such a community would probably be unable to challenge enough veniremen to achieve an all-white (or mostly white) jury.[116] If the community is mostly white, with only a small representation of people of color, the prosecutor will only need to come up with a few convincing race-neutral explanations to keep the jury all or mostly white. *Batson* is most likely to make a difference in a community with a significant but not dominant percentage of racial minorities—a context where peremptories might have been used to strike most, if not all, minor-

115. Group identification has also been found to influence jurors to give defendants less benefit of any doubt in cases where the juror is of the same race as the victim. *See* Johnson, *supra* note 3, at 1634-35. Racial groups can be recategorized according to class, gender, education, age, etc., so that the presumed group identification of a black juror and a black defendant may be completely neutralized.

116. An interesting twist on the racial composition of the venire occurs because of the inclination and ability of some, often the white and the middle class, to evade jury duty by using exemptions offered by law, or by manipulating the selection process. *See, e.g.*, Sam Roberts, *Questions over Verdicts and Doubts About Juries*, N.Y. TIMES, Nov. 30, 1992, at B3 (noting that many if not most evaders of jury service in New York City are white). Another article on the same day reported the removal of a state court judge in Philadelphia who tried to stem what he saw as cynical evasion of jury duty. The judge held prospective jurors in contempt if he thought that they had given false answers to voir dire questions in order to avoid jury service. *See* Michael DeCourcy Hinds, *Judge's Power Yields to Jurors' Rights*, N.Y. TIMES, Nov. 30, 1992, at A13.

ity veniremen. What *Batson* might realistically be able to accomplish, in the best scenario, is to enable a minority of the jury to represent that minority of the community. Assume, for example, that the population of the community in question is fifteen percent black. Assume that, because of the *Batson* procedures, the prosecution does not challenge, or does not successfully challenge, a proportionate number of black jurors.[117] There will now be two black jurors on what otherwise might have been an all-white jury.

This jury represents what *Batson* intended to accomplish. But assuming that this result can be accomplished, what will it provide for the defendant? We still need to assume that these black jurors are free, or relatively free, from the effects of the racial prejudice of their white neighbors, which may not be true in a community where the white population is dominant. How great an assumption is it to conclude that these two black jurors, who live in a predominantly white community, will judge the defendant without being influenced consciously or unconsciously by their neighbors' biases, or their own fear of those biases? In the Scottsboro cases, every eminent black citizen of Alabama must have dreaded that the jury selection procedures the Supreme Court opened up in *Norris* would result in their being required to sit on a jury in one of those trials.[118] Some black citizens of Alabama in the 1930s may well have been fearless and selfless enough to vote for acquittal in the face of the fervid and virtually unanimous sentiment of the white majority that the defendants must be found guilty, but it is questionable whether many could have withstood this pressure. The more intense the prejudice of the white co-jurors, the more unrealistic and unfair it is to expect that drafting black people onto the jury will change the result. Even in less intensely stratified communities, that pressure is still a great burden to impose on minorities who are selected for jury duty.

Additionally, if there are only one or two black jurors on an

117. This is assuming that cross-section law has worked to create a proportionate venire. The prima facie case in *Batson* is measured only against the venire, not against the community. Batson v. Kentucky, 476 U.S. 79, 85-88 (1986).

118. After *Norris v. Alabama*, 294 U.S. 587 (1935), prohibited the state from keeping black people off of the venire in the Scottsboro case, seven of the twelve black men who found themselves in the jury pool for the retrial sought waivers of jury service for a variety of personal reasons, and left the courthouse "looking anything but regretful." *See* CARTER, *supra* note 10, at 341. The state used peremptory challenges against the remaining five black veniremen in that proceeding. *Id.*

otherwise white jury, and if we are assuming that the defendant needs those jurors because of some prevalent bias among the white jurors, the black jurors, even if they have unusual powers of persuasion and fortitude, are unlikely to be able to change the verdict. They will still be in a minority. At most, their votes might cause a hung jury and a retrial.

There are more optimistic ways to speculate about the consequences of increasing racial diversity on juries. One could construct a tale of white jurors reluctant to voice, or perhaps even to act upon, racist sentiments or predispositions in the presence of members of the race in question, or a tale of minority jurors acting as translators of a minority defendant's language or context. One could focus on the fact that a minority of jurors can at least hang a jury and, at least temporarily, prevent an unjust conviction or acquittal. Nonetheless it seems clear that if one wishes to praise *Batson*, what one would choose to praise is its effect on the jurors themselves—the increase in civic responsibility and dignity, and the advantages to the community of having more representative juries. It does not seem that defendants, whatever their race, are likely to benefit greatly from the modest increase in jury diversity *Batson* can be expected to accomplish, even under the most optimistic scenario.[119] *Batson* enhances access to juries, but its effect on prejudice suffered by defendants is far less clear. Defendants should enjoy whatever benefit the entire line of jury selection cases, including the *Batson* cases, can provide, but we cannot realistically expect that benefit to be great.

Another ground for speculation is whether *Batson*'s injection of more overt race consciousness into the jury selection process will influence consideration of other issues concerning race during the trial itself. Trial judges who are obliged to consider whether there is a prima facie case of racial discrimination,[120]

119. One study suggests that peremptory challenges do have a measurable effect on jury verdicts. *See* Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 508 (1978).

120. If the *Batson* cases are now dedicated to protecting the rights of jurors, and if the jury selection process is considered to constitute a state action no matter which party attempts a racially based exclusion, it seems appropriate for the trial judge to raise a *Batson* problem sua sponte if a prima facie case of discrimination against a cognizable racial group has developed. *Batson* required the defendant to make out the prima facie case, but this was before the later cases which also render obsolete *Batson*'s requirement that the defendant be a member of the cognizable racial group. *See* Batson v. Kentucky, 476 U.S. 79, 96-98 (1986).

what constitutes a race-neutral explanation, and what constitutes a cognizable racial group, must spend more time thinking about racism and its manifestations than they did before *Batson*. What effect is this likely to have upon them and upon their handling of the trial? One can only hope that this race-consciousness-raising will help judges become more sensitive to other issues pertaining to race that might arise at trial. The same effects may well be enjoyed, or suffered, by the prosecutor and defense counsel, who may be compelled to become more self-reflective about whether there is any racial component to their, or their colleagues,' peremptory challenges.

If the court conducts jury selection carefully, the jurors themselves should be completely shielded from knowledge that the prosecutor (or defense counsel) was trying to exclude jurors on the basis of race. The argument as to whether a prima facie case was established, whether any race-neutral explanations were proffered, and the court's reasons for accepting or rejecting those explanations will presumably take place absent the jury, and thus should not affect the jurors.

Would the picture change if the *Batson* rights involved were defined as rights of defendants rather than of jurors? As the last section discussed, the *Batson* procedure could have been shaped differently if the Court had focused on defendants rather than jurors, and *Batson* might have become somewhat more effective. If the right *Batson* recognized had been based on the Sixth Amendment, the Court would have had the option of adopting the more demanding approach pioneered by some state courts, like the California court in *People v. Wheeler*.[121] These different approaches might have led to a modest enhancement of *Batson*'s ability to increase racial diversity on juries. But there are still limits to what can be accomplished during jury selection, because a represented minority is still a minority.

If the cases had retained a clear focus on defendants' rights rather than veering off to become cases concerning jurors' rights, they would at least declare the significance of every part of the trial process to defendants and a judicial commitment to do everything possible to ensure those defendants equal treatment.

121. 583 P.2d 748 (Cal. 1978); *see* Commonwealth v. Soares, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979) (failure to allow hearing after defendant established a prima facia case that peremptory challenges were used to exclude prospective jurors on the basis of race violated the defendant's right to trial by a jury fairly drawn from the community).

Whatever form it takes, a law of equality that focuses primarily on whether jurors are intentionally selected on the basis of their race is unlikely to promote, to any significant degree, equality for minority defendants.

IV. EQUALITY AND PROCESS-BASED REMEDIES IN CRIMINAL PROCEEDINGS

As Justice Powell recognized in *McCleskey*, taking on the pervasive racism of the criminal justice system would be a herculean task for the courts.[122] Rather than completely ignore what may be the single most important problem of the criminal justice system, the Court has decided to attack racism in the jury selection process with ever increasing zeal. *McCleskey* is related to the Court's strategy, because *McCleskey* reflects the Court's unspoken realization that the problem exists and has remained immune to most other process-based solutions. This recognition seems to have given the Court the will to commit its own time and the time of the lower courts to create, refine, and apply an enormously complex body of law.[123] Other critics have accused the Court of being more interested in symbolic rather than real solutions to the problem of racism.[124] The Court deserves credit in this context because its extraordinary commitment to this body of jury selection law reflects something more than just a concern for symbolic justice. I am willing to assume that at least some members of the Court still share Justice Powell's belief that enhancing diversity on the jury will actually solve at least part of the minority defendant's problem.

In the previous section, I discussed one reason why the Court's optimism is unwarranted—that, because of *Batson*'s structure and focus, and the world in which it is applied, *Batson* is unlikely to have a great impact on jury verdicts. In this section, I want to focus on a deeper problem—that the Court's view of the proper judicial role in this area is too limited and too focused on equality of process as a guardian of equality of result.

122. McCleskey v. Kemp, 481 U.S. 279, 314-18 (1987).

123. *Batson* is a burdensome and expensive remedy. *See* Alschuler, *supra* note 81, at 154, 199. Professor Alschuler's article explores a number of the issues opened by the *Batson* cases. Although subsequent litigation has resolved some of those issues, many new ones have been added.

124. *See id.* at 199; Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (arguing that antidiscrimination law has succeeded only in eliminating symbols of racial oppression).

A. Representation-Reinforcement and the Role of the Courts

The extensive literature on judicial review only rarely focuses on the role of the courts with respect to the criminal process.[125] Commentators' interest in this aspect of the judicial role reached its zenith in response to the Warren Court's due process revolution. Critics of the Warren Court discussed whether the Court had overextended itself, whether legislatures or administrative bodies were better qualified than courts to address issues of criminal procedure, and whether the Court's nationalization of criminal procedure was inconsistent with the spirit of federalism.[126] Those who applauded the Warren Court's activism tended to believe that the judiciary is the best source of protection for the rights of criminal defendants, a particularly despised minority. The Warren Court champions also tended to agree that careful attention to process is the best protection for liberty.[127]

There has been relatively little discussion about the courts as protectors of the equal rights of minority criminal defendants, or about whether process is the best means of protecting those rights.[128] *Batson* and its progeny have been discussed mostly by

125. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763 (1991) (expressing surprise at the lack of such commentary and attempting to construct a political process justification for the modern Supreme Court's activism in the criminal procedure area).

126. For one classic example of such criticism, see Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

127. For sympathetic accounts of the Warren Court's criminal procedure case law, see LEONARD W. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE (1974); *see also* FRED GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (1970); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518.

The Warren Court also tried to minimize the inequality of the criminal process to the indigent by declaring rights to appointed counsel. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963) (right to counsel on appeal); Lane v. Brown, 372 U.S. 477 (1963) (right to free transcripts; Draper v. Washington, 372 U.S. 481 (1963) (same); Hardy v. United States, 375 U.S. 277 (1964).

128. In their classic article on the equal protection clause, Tussman and tenBroek commented on the primacy of Americans' concern with liberty over equality, as demonstrated by the early and dominant development of the due process clause rather than the equal protection clause. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949). The same observation could be made about the Warren Court which, although concerned with problems of inequality, tended to rely predominantly on the due process clause as the guarantor of rights and liberties in the criminal justice arena, even where the underlying problem was one of inequality. *Gideon v. Wainwright*, for example, was decided as a case about the sixth amendment's right to counsel and the due process clause, rather than as a case about the right of indigent defendants to the equal protection of the laws.

criminal procedure scholars rather than by scholars whose primary concern is equality or judicial review. *Batson* has engendered as much academic commentary as it has judicial interpretation, but most of that commentary focuses on the peremptory challenge—its utility, its historical pedigree, its desirability, and its future—and how the *Batson* remedy should evolve technically. Because the Court's theoretical basis in the *Batson* line of cases is equal protection law, these cases provide a particularly good opportunity to explore application of theories of judicial review to the criminal justice system in the context of equality. They also provide an opportunity to consider the nature of the link between equality and process.

If we interpret the Court's intense interest in racial discrimination in jury selection as reflecting more than an obsession with symbols, or republican concerns about the civic virtue of universal jury service, then the Court's hope that unstacking juries will result in racial fairness seems to be inspired by an unspoken acceptance of the tenets underlying representation-reinforcement theory. As John Ely described this theory in the context of electoral rights, the courts can carve out an appropriately modest role in constitutional interpretation if they allow themselves to be guided by the Constitution's abiding concern with electoral process.[129] According to Ely, it is both appropriate and necessary for the courts to enable every person to take part in the electoral process in the manner the Constitution contemplates.[130] Therefore, if a majority tries to exclude a minority from that process—by imposing poll taxes or discriminatory voter eligibility requirements, for example—it is the courts' responsibility to clear away these obstacles to participation. Ely views this judicial role as a modest one because, first, the court is not being unduly subjective in selecting the goals it is serving—these process-based values are clearly reflected in the Constitution itself.[131] Second, if the Court perceives its chief function as ensuring that everyone is able to participate equally in voting for legislative and executive officials, then the courts' role is self-limiting once the process has been opened to all, the courts may defer to subsequent decisions made by those officials with the assurance that those decisions reflect the will of all.[132] This prin-

129. ELY, *supra* note 35, at 135-57.
130. *Id.*
131. *Id.*
132. *Id.*

ciple provides a basis for judicial activism and for defining the limits of that activism. The courts are not to usurp power from the democratically elected branches, but should assist in making those branches even more democratic in order to allow the will of the majority, now determined only after the voices of all have been heard, to prevail.[133]

Ely recognized that this rosy forecast is not responsive to the concerns of racial minorities. Even if racial minorities have been granted equal access to the electoral process, we still have reason to believe that legislatures or executive officials might take action disadvantaging those minorities.[134] Therefore, the courts cannot sit back once they have guaranteed racial minorities access to the political process. The courts must remain alert to racial minorities' claims that post-electoral governmental actions have been based on racial prejudice.[135]

In the *Batson* cases, the Supreme Court has taken on, with great enthusiasm, the job of removing all obstacles to access to the jury box. The role it has defined for itself is parallel to Ely's description of proper judicial role—enhancing access to a representative process—as well as his definition of the proper limits on that role—deferring to the decisions of the representatives once they have been fairly selected. The Court has not made a subjective choice to value juries. This value is also manifest in the Constitution.[136] And, as shown in *McCleskey* as well as in the Scottsboro cases, the Court prefers not to review the work product of juries. "[I]t is the jury," wrote Justice Powell, "that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' "[137]

But Ely's recognition that racial prejudice presents unique problems is also equally applicable in this context.[138] The jury may provide excellent protection for a defendant's liberty,[139] but

133. *Id.*

134. *Id.*

135. *See* Kennedy, *supra* note 45, at 1443 (urging that judicial intervention is required in cases like *McCleskey*).

136. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

137. McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1880)).

138. *See also* Lawrence, *supra* note 15, at 345-49 (arguing that Ely's theory of the need for special judicial attention in situations where racial bias might exist should not be limited to instances of purposeful discrimination, because unconscious racism is peculiarly unsusceptible to correction within the political process).

139. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *349 (lauding the jury as a staunch barrier against misused executive power).

when equality is at issue, the jury itself is as much the problem as the solution.[140] Just as the discretion created by jury selection procedures allowed racial discrimination to flourish, the discretion the jury enjoys in its deliberations provides its own mask. Justice Powell's optimism about how much can be achieved through fairer jury selection procedures ignores the obvious fact that even if racial diversity among jurors is increased, racially discriminatory verdicts will still pose a problem deserving special judicial attention. The previous section described why more diverse juries cannot be expected to lead to universally non-discriminatory verdicts. Despite the fact that the Constitution values the right to trial by jury as a protector of liberty, the jury, cloaked with discretion and seething with all the invisible biases of the community from which it is drawn, may not be a very good protector of equality.

The courts cannot realistically expect that adding a few more minority jurors will solve the problem of racism. A represented minority is still a minority, as Ely recognized, and can be outvoted. Placing the responsibility for guarding against discriminatory verdicts on a few minority jurors is as unfair to those jurors as it is to defendants. As the quid pro quo for the equal rights jurors have gained during the past few decades, the selected jurors are given responsibility for counteracting all racial bias in the criminal justice system. The courts' responsibility is not so easily delegated.[141] Furthermore, no matter how effective minority jurors can become, minority defendants will

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140. Gunnar Myrdal notes that:

> The American jury system, while it has many merits, is likely to strengthen this dependence of justice upon local popular opinion. If, as in the South, Negroes are kept out of jury service, the democratic safeguard of the jury system is easily turned into a means of minority subjugation.
>
> . . . The extreme democracy in the American system of justice turns out, thus, to be the greatest menace to legal democracy when it is based on restricted political participation and an ingrained tradition of caste suppression.

I GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 524 (1944) (emphasis omitted).

141. *See* Kennedy, *supra* note 45, at 1427-28, 1442-43 ("[T]he constitutional requirement of racial justice embedded in the Reconstruction amendments demands judicial intervention . . . ." *Id.* at 1443.). In a discussion of the problem of diversity in broadcasting, one commentator questions whether "the victims of racial oppresion are always the best architects of its cure." *See* Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525, 529 (1990). The question does not make as much sense in the context of jury deliberations, where diversity is not the only issue and where the minorities selected have less power and more disincentive to solve the problem of minority defendants.

still suffer the inequality born of their minority status. *Batson* takes as its goal minority representation; it cannot provide minority defendants with an equal opportunity to be judged by a jury dominated by one's racial peers.

Neither can the courts assume that legislatures will be any more likely to solve the problem of equality than they were to solve the process problems the Warren Court undertook to address.[142] Ely's concern that legislatures might not be sensitive to the interests of racial minorities is greatly heightened when those whose rights are at stake are simultaneously racial minorities and criminal defendants, a group even more notoriously underrepresented in the legislative process. So far, Congress has been unable to enact a "Racial Justice Act" in response to the Court's decision in *McCleskey*. Those states affording defendants greater rights in jury selection than does *Batson* owe those rights to their state courts, not their legislatures.[143] In some respects, it might seem easier for a legislature to act when our recognition of racism is empirical rather than individual. But even legislative remedies would have to be implemented in individual cases, and so the courts remain our best hope.

Having stated the problem and declared the inadequacy of what the Court has done to address it, I now turn to the issue of whether more effective remedies exist.

B. Critical Race Theory and Nonprocess-Based Solutions

In 1985, Professor Johnson thoroughly canvassed the Court's other attempts to find process-based means of preventing racially biased jury verdicts and found them all to be inadequate.[144] Although eight years have passed since her article was written, her pessimistic conclusions about the efficacy of these alternatives remain just as valid. As Johnson and others have shown, voir dire, particularly as it has been circumscribed by the Court, is ineffective in weeding out racial bias, in both its

142. Justice Powell suggested that *McCleskey* posed a problem appropriate for legislative solution. *See* McCleskey v. Kemp, 481 U.S. 279, 301-02 (1987). Randall Kennedy's argument that the Court legitimates discrimination by failing to address problems like the one raised in *McCleskey* suggests that judicial refusal to act, in reality, makes legislative action even less likely. One reason Kennedy ascribes for *McCleskey*'s inattention to the problem of racism is the racism of the Justices themselves. *See* Kennedy, *supra* note 45, at 1402, 1443.

143. *See supra* note 116.

144. Johnson, *supra* note 3, at 1651-81.

stronger and weaker senses.[145] Even if courts were to allow ample scope for questions that might bear on racial bias, it would still be impossible to use jury selection to eliminate biased jurors because, as I have described above, all jurors are "biased" in the sense of having experiences that will cause them to identify with certain people or situations, or to believe or disbelieve certain statements or witnesses.[146]

Having canvassed the social science literature on racism and jury verdicts, Professor Johnson declared that we know enough about the impact of racism to decide how to fashion remedies without waiting for proof of racism in particular cases.[147] Her own recommendation, also process-based, was to give black defendants[148] the right to a certain number of jurors of their own race.[149] *Batson* incorporated the sort of mild affirmative action Justice Powell favored. Professor Johnson's version of affirmative action in jury selection embraces a quota remedy the current Supreme Court would not endorse. For the reasons discussed above, I doubt that even this quota approach to jury selection would go far in addressing defendants' problems.[150] This is just a more powerful method of enhancing the access of minority jurors, and imposing the responsibility to redress racism upon those jurors.[151]

What remedies outside of jury selection might be effective? Some critics have assumed that the Court was right to rely on preventive measures like jury selection, on the theory that it is virtually impossible to detect the influence of racism on a partic-

145. *Id.* at 1669-76. The Court has been more generous in requiring that voir dire include questions about whether jurors' racial prejudice will prevent them from being impartial, *see* Turner v. Murray, 476 U.S. 28 (1986) (a capital case), than in requiring that voir dire include questions about other possible reasons for jurors' prejudice. *See* Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) (holding that a trial judge's refusal to question prospective jurors about exposure to relevant pretrial news reports is not violative of the Fourteenth Amendment). This additional attention, however, is highly unlikely to root out racial prejudice. *See* Alschuler, *supra* note 81, at 157-63.

146. *See supra* text accompanying notes 56-68; *see also* Lawrence, *supra* note 15, at 333-34, 364-65.

147. Johnson, *supra* note 3, at 1687-89 (arguing that aggregate data of studies surveyed should be regarded as establishing proof of purposeful discrimination required by current equal protection doctrine as a prerequisite to meaningful judicial scrutiny).

148. Professor Johnson does not discuss the potential application of *Batson* rights or the affirmative action rights she advocates to other cognizable racial groups.

149. Johnson, *supra* note 3, at 1695-99.

150. *See supra* notes 104-16 and accompanying text.

151. The Court might even find legislation attempting to utilize a solution like the one Professor Johnson proposes too race-conscious to be consistent with current equal protection principles. *See supra* note 71.

ular jury verdict.[152] Discriminatory influences on jury verdicts should actually be somewhat easier to identify than discriminatory arrest or sentencing decisions because jury deliberation is a group process.[153] The difficulty of ascribing motive to a decision by an individual is mitigated because other jurors can bear witness to the operation of the decisional process. The rule that jurors are not permitted to impeach their verdicts, of course, cancels this advantage. Some critics have suggested that the courts should recognize an exception to the general rule that jurors are not permitted to impeach their own verdicts in cases of possible racial discrimination.[154] I will not attempt to examine or to weigh the concerns about finality and jury integrity underlying the juror impeachment rule except to comment that, like the benign purposes underlying the peremptory challenge, this example of business as usual in the criminal courts may also need to give way if we seriously wish to address the problem of inequality. If we really want to try to counteract the effects of bias on jury verdicts, encouraging jurors to report suspected instances of biased verdicts would at least generate greater attention to the problem.

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152. *See* Schmidt, *supra* note 19, at 1421. Schmidt states:

> [G]iven the virtual impossibility of isolating the impact of jury discrimination in any particular case, the only type of prejudice that the Supreme Court can, as a practical matter, ensure against is that which is rooted in the systematic behavior of state officials, rather than in the decisions of juries.

Id. (footnote omitted); *see* Johnson, *supra* note 3, at 1691.

It is difficult to be optimistic about review of judge or jury decisions in light of Randall Kennedy's observation that "as far as reported cases disclose, no defendant in state or federal court has ever successfully challenged his punishment on grounds of racial discrimination in sentencing." *See* Kennedy, *supra* note 45, at 1402 (emphasis omitted) (footnote omitted).

153. Individual decisions, particularly in situations where there is no meaningful requirement of reasons, will be especially difficult to evaluate for bias. This difficulty is exacerbated when decisions, like decisions to stop, arrest or search, are such that any pattern that might disclose discrimination is hard to trace because the pattern would have to be discerned in part from decisions not to stop, arrest or search, which are not recorded. Because review of such decisions is virtually impossible, only a prophylactic approach seems worth trying with respect to these decisions. *See* ELY, *supra* note 35, at 172 (describing the Fourth Amendment as setting prophylactic controls of decisions that would otherwise be immune to review).

154. *See* Alschuler, *supra* note 81, at 218-29 (criticizing the reluctance under current law to review jurors' actual work product and to settle for continuously exhorting jurors to be fair); *Race and the Criminal Process*, *supra* note 3, at 1596-1601 (declaring that rules against allowing jurors to impeach verdicts are too restrictive and should be relaxed where a colorable claim of racial misconduct is raised). Professor Johnson observed that change is unlikely, in light of the longevity and pervasiveness of the rule. Johnson, *supra* note 3, at 1679-81.

Capital punishment law provides some analogues of procedures designed to expose racially discriminatory decisions. Georgia, for example, affords direct review, by the Supreme Court of Georgia, of the proportionality of capital sentencing,[155] and also requires trial judges to fill out "a 6½-page questionnaire, designed to elicit information about the defendant, the crime, and the circumstances of the trial, . . . [including] . . . whether race played a role in the trial."[156] Critics have found these efforts less than wholly effective.[157] But it is difficult to tell whether such measures raise awareness of potential problems and thus act prophylactically.

Even if review of jury verdicts is unlikely to disclose examples of racial bias on a regular basis, that is not a sufficient reason for the courts to decline to make the effort. Direct appellate review of verdicts for discrimination as well as for due process might, if undertaken in good faith, uncover at least an occasional example of bias. Even a few reversals on such grounds would be instructive both to trial judges, who might increase their efforts to minimize the impact of racial discrimination on trials, and to the community, who would be reminded that racial discrimination exists outside of the Alabama of the 1930s. Such reminders, even if they are infrequent, are a critical part of the education necessary to combat the unconscious biases of those who believe that neither they nor their neighbors act on the basis of racial bias, or of those who regard fairness as an adequate answer to claims of unequal treatment. Most significantly, the agreement of the courts that it is their responsibility to take special measures to counteract any possible racial bias would offer a necessary antidote to the defeatist attitude of *McCleskey*. Most of the possible approaches for reviewing discriminatory verdicts are criticized on the ground that they are not likely to be widely successful, especially when measured against the size of the problem. If we expect something less than immediate and total victory, we may find that some of these review procedures can make some difference. The precise form of the measures

155. GA. CODE ANN. § 17-10-35 (Michie 1990).

156. Gregg v. Georgia, 428 U.S. 153, 167 (1976) (discussing § 17-10-35).

157. *See, e.g.*, Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U. L.Q. 573, 591-608 (1985); George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Ellen Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1442-58 (1985); *see also* CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 111-56 (2d ed. 1981).

adopted may be less important than the judicial commitment to provide equal justice by any means necessary.

If prevention is indeed likely to be more effective than review, then the courts must also focus on preventive measures beyond jury selection. As I have described above, *Batson* and the other jury selection cases might make some marginal difference to the likelihood that juries will treat defendants equally. Recognizing that the problem is not the race of the jurors, but the racial attitudes of those jurors, we might design remedies that more directly address the problem of racial attitudes. I do not claim to have answers, but I want to raise possibilities that focus more directly on the problem of racial attitudes.

Clarence Darrow discovered that talking to jurors about their biases can be a successful technique of disarming conscious and unconscious racism. Darrow defended Henry Sweet in two successive trials for murder in Detroit in 1925-26.[158] Sweet's brother, Dr. Ossian Sweet, had bought a house in a predominantly white neighborhood and was met with resistance from his new neighbors. When a large and hostile mob congregated outside of the house on the second night after Dr. Sweet moved in, some of the eleven people inside the Sweet house armed themselves and, during the course of the night, someone shot and killed one white man and wounded another. At the first trial of all eleven occupants of the house Darrow argued that the Sweets were acting in self-defense. The jury was all white, despite Darrow's efforts at jury selection.[159] The prosecution argued that there had been no mob outside the house; Darrow, in customary high style, made that contention seem ridiculous: "The State claims there was no mob there that night. Gentlemen, the state has put on enough witnesses who said they were there, to make a mob."[160] After forty-six hours of jury deliberation, a mistrial was declared.[161]

At the retrial of Henry Sweet, Darrow's strategy remained the same, except for his summation. In response to the prosecutor's contention that the case involved murder, not race, Darrow argued to the second all-white jury:

I insist that there is nothing but prejudice in this case; that if it

158. *See* Clarence Darrow, *Summation in the* Sweet *Case, in* 2 THE WORLD OF LAW, THE LAW AS LITERATURE 346 (Ephraim London ed., 1960).

159. *Id.* at 347. The only black on the venire was peremptorily challenged. *Id.*.

160. *Id.* at 348.

161. *Id.*

> was reversed and eleven white men had shot and killed a black while protecting their home and their lives against a mob of blacks, nobody would have dreamed of having them indicted. . . . You twelve white men are trying a colored man on race prejudice.
>
> . . . I want to put this square to you, gentlemen. I haven't any doubt but that every one of you is prejudiced against colored people. I want you to guard against it.
>
> . . . .
>
> You need not tell me you are not prejudiced. I know better. We are not very much but a bundle of prejudices anyhow. . . . Here and there some of us haven't any prejudices on some questions, but if you look deep enough you will find them; and we all know it.
>
> All I hope for, gentlemen of the jury, is this: that you are strong enough, and honest enough, and decent enough to lay it aside in this case and decide it as you ought to.[162]

The summation called on the jurors to consider the hopes and fears of black people not represented on the jury, and called on the jurors to return a verdict of not guilty. The jury found Henry Sweet not guilty.[163]

Judges can also use this lawyer's strategy. Why not provide a formal occasion for the judge, as well as counsel, to speak to the jurors about the problem of bias? Among the multiple purposes of voir dire is education of the jury. But because the central purpose of voir dire is supposed to be to ferret out information pertinent to jury selection and to the ability of jurors to be fair, the parties are often limited in their ability to ask questions that function as more educational than informational. Why not allow the attorneys, or even the court, to educate jurors, using available social science data, not in an attempt to select imaginary bias-free jurors, but to educate the jurors actually selected? Every jury in a capital case in the area surveyed in the *McCleskey* study should be told about the results of that study so that the jurors can discuss with one another, or consider on their own, whether their verdict will become part of the problem reflected by those statistics. Requiring judges to allow expert testimony on the impact of racism on jury verdicts, to give juries a meaningful charge about the potential effect of bias on jury deliberations (prepared with the assistance of nonle-

162. *Id.* at 350-51.
163. *Id.* at 375.

gal experts on bias and jury psychology), and perhaps to include a carefully prepared videotape on this subject as part of a juror education program, might begin to educate jurors to identify and neutralize their own unconscious biases.[164]

The fact that these ideas are likely to sound extreme and unrealistic to many is simply a measure of how far we have to go. We pretend that we can eliminate all bias during jury selection, and so we rarely acknowledge the pervasiveness of the problem of racism after the jury has been selected. We do not expect to have to speak about racism in the polite company of the jury, other than in the exceptional case.[165] It is time to stop being polite. The law before *Batson* allowed discrimination by attorneys to hide behind the peremptory challenge. The potentially discriminatory attitudes of the jurors themselves are far more critical than those of the lawyers. Yet by focusing all of our attention on how jurors are selected, we allow ourselves to ignore the fact that discrimination will still be able to enter and hide in the jury room. I do not claim to have any easy or surefire solutions to this problem. But I am certain that the solution the Supreme Court offers in the *Batson* cases is not nearly enough.

V. CONCLUSION

Events like the Scottsboro cases and the Rodney King trial should inspire us to try to find ways to cut through the facile assumption that we cannot solve the problem of racism in the criminal justice system because we cannot find it, or because it is too big. Observers like Derrick Bell[166] and Kimberlé Cren-

164. Professor Johnson argues that remedies like jury instructions are unlikely to be effective in counteracting unconscious bias because jurors will not take exhortations seriously and typically do not understand jury instructions. *See* Johnson, *supra* note 3, at 1678-79. Bias is not a legal issue and does not need to be encrusted with layers of advice about the elements of offenses and alternative decision paths. I would be generally optimistic about the ability of appropriately trained nonlawyers to construct an instruction on the nature of unconscious bias that would be as comprehensible to jurors as Darrow's plea and that might cause some jurors to reflect on their own decision-making processes. It is too much to expect to influence every juror, but influencing a few would be a start.

165. *Compare* Ham v. South Carolina, 409 U.S. 524 (1973) (requiring a voir dire question about racial prejudice concerning a black, bearded civil rights worker) *with* Ristaino v. Ross, 424 U.S. 589 (1976) (finding that *Ham*'s rule was not universally applicable and refusing to require a voir dire question about racial prejudice in another case).

166. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

shaw[167] ask us to question whether antidiscrimination law is truly intended to eradicate discrimination, or whether it merely aims to keep discrimination within bounds we find tolerable. The Court's approach to the problem of racism in the criminal justice system is an ideal target for such skepticism. The law the Court has constructed makes a massive, showy effort to enable minorities to serve on juries, even though those minority jurors do not hold the cure. When the Court reviews individual criminal cases, it usually limits itself to concerns about fairness. Equality concerns of defendants, which seemed to be the subject of cases like *Strauder*, have been lost. Recognizing that the courts must do more is the first step we need to take to devise better remedies for a situation that is beyond the bounds of what is tolerable.

167. *See* Crenshaw, *supra* note 119.