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# RACISM IN THE ADVERSARY SYSTEM: THE DEFENDANT'S USE OF PEREMPTORY CHALLENGES\*

J. ALEXANDER TANFORD\*\*

## I. INTRODUCTION

Howard Beach is a racially mixed, racially troubled section of Queens, New York. In the fall of 1986, incidents of interracial violence and harassment were on the increase.<sup>1</sup> Then, on December 20, Michael Griffith's car broke down in that neighborhood. He and two friends walked to a nearby restaurant to seek help. As they left the restaurant they were attacked by a gang of white youths waving baseball bats and shouting racial epithets. One of Griffith's friends was severely beaten. Griffith was chased onto a busy freeway, where he died after being struck by a car. The only apparent motive for the attack was that Griffith and his friends were African-Americans.<sup>2</sup>

Ten months later, Jon Lester, Scott Kern, and Jason Ladone were brought to trial for the killing of Michael Griffith. Racial feelings and emotions in the community were running high. As part of their defense strategy, the white defendants began to use their peremptory challenges to remove every African-American from the jury. On September 21, after the first six jurors had been seated, presiding Justice Thomas A. Demakos stopped the jury selection. He ruled that the defendants had been exercising their peremptory challenges in a racially discriminatory

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1. See Sobran, *Howard Beach: The Use and Abuse of Race*, NAT'L REV., Mar. 27, 1987, at 29.

2. See Johnson & McKillop, *Howard Beach: An Angry Tide*, NEWSWEEK, Jan. 12, 1987, at 25; *Manslaughter, Not Murder*, TIME, Jan. 4, 1988, at 38; Stengel, *Black vs. White in Howard Beach*, TIME, Jan. 5, 1987, at 48.

manner. Invoking the recent Supreme Court case of *Batson v. Kentucky*,<sup>3</sup> he stated that he would not allow any further race-based challenges. For the remainder of the jury selection the defense would be required to state racially neutral reasons for excusing prospective jurors. The first African-American was seated soon after the ruling.<sup>4</sup>

It is not immediately obvious whether Justice Demakos' ruling was legally justifiable.<sup>5</sup> In *Batson*, the Supreme Court had invoked the equal protection clause to forbid prosecutors from using peremptory challenges in a racially discriminatory manner. The Court held that because the prosecutor represents the state, and the state is prohibited from differentiating among its citizens based on race, prosecutors could not use peremptory challenges to remove minority members of the venire solely on account of their race.<sup>6</sup> Because defense attorneys are not usually considered state actors, however, the Court explicitly reserved the issue of whether they should likewise be restricted.<sup>7</sup>

This Article addresses the issue left open: Should defendants, like those in the Howard Beach case, be allowed to engage in the racist use of peremptory challenges when it is to their tactical advantage to do so? This question is, in part, one of constitutional doctrine: Can *Batson* logically be extended to defendants, despite the apparent problem of lack of state action? The question is also, however, one of normative values: How should a court resolve the conflict between the defendant's individual interests and the community's need to be free from racial discrimination and violence? This normative issue is a deep one, ultimately implicating the current debate between traditional liberal political philosophy and modern communitarian theories of law.<sup>8</sup>

3. 476 U.S. 79 (1986).

4. *Howard Beach Jury Challenges Are Held Biased*, N.Y. Times, Sept. 22, 1987, at A1, col. 2.

5. The case is currently on appeal to the New York Court of Appeals after a lower court affirmed the conviction. See *People v. Kern*, 149 A.D.2d 187, 222-34, 545 N.Y.S.2d 4, 26-33 (1989) (affirming decision to apply *Batson* to defendants). Justice Demakos' ruling has been followed by at least one other New York trial judge. See also *People v. Muriale*, 138 Misc. 2d 1056, 526 N.Y.S.2d 367 (Sup. Ct. 1988) (racial attack similar to Howard Beach incident in Coney Island).

6. *Batson*, 476 U.S. at 89, 96-97; see also *Griffith v. Kentucky*, 479 U.S. 314, 321 (1987) (application of *Batson* principle to federal trials).

7. *Batson*, 476 U.S. at 89 n.12. The Court stated that "[w]e express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel."

8. See Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544-50 (1986) (outlining the debate between liberalism and communitarianism); see also Michelman, *Foreword: Traces of Self Government*, 100 HARV. L. REV. 4, 17-36 (1986); Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 594 (1985); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376-80 (1986) (all describing various formulations of communitarianism).

This Article concludes that the needs of the community should prevail over whatever tactical advantage an all-white jury might provide to an individual defendant. Legal policy-makers should follow Justice Demakos' lead and take steps to prohibit criminal defendants from exercising peremptory challenges in a racist manner. Part II examines the doctrinal issues underlying a defendant's racist use of peremptory challenges. It summarizes the argument against extending *Batson* to defendants, critically analyzes the no-state-action claim, and argues that ample support for a prohibition against race-based challenges can be found. Part III examines the normative issues implicated in restricting a defendant's tactical alternatives at trial. After restating the traditional claim of the importance of paying special respect to the defendant's individual trial rights, the Article argues that prohibitions against racist challenges are nevertheless justified as long as *all* the norms of our trial system are considered. The Article then suggests an alternative mode of normative analysis based on contemporary communitarian legal theory that also leads to the conclusion that *Batson* should be extended to defendants. Part IV suggests that legal policy-makers—Congress, state legislatures, and judges—have the power to curtail a defendant's racist use of peremptory challenges and should exercise that power.

## II. THE CONSTITUTIONALITY OF DEFENDANTS' RACIST PEREMPTORY CHALLENGES

I start with the premise that racial discrimination is morally wrong. Generally speaking, therefore, steps taken by courts to eliminate racial discrimination are desirable. Thus, the Supreme Court reached a correct result in *Batson v. Kentucky* when it prohibited state prosecutors from exercising overtly racist peremptory challenges. Similarly, Justice Demakos' decision in the Howard Beach case was a good one and should be upheld unless some strong argument can be made to the contrary.

Of course, not all socially desirable regulations will survive constitutional review. For example, stricter regulation of abortions, pornography, private ownership of deadly weapons, or the contents of heavy metal music might be deemed socially desirable yet still be interpreted as unconstitutional by courts. The first inquiry, therefore, is whether constitutional doctrine restricts courts from regulating race-based peremptory challenges by defendants.

A. THE ARGUMENT AGAINST EXTENDING *BATSON*

The first issue is what constitutional doctrine should be used to review Justice Demakos' decision to limit the defendants' race-based peremptory challenges in the Howard Beach case. The most obvious candidate is equal protection, both because racial discrimination is involved and because *Batson* was decided under that clause. This is the approach taken by most commentators who have addressed the question so far.<sup>9</sup>

The analysis begins with the most similar case, *Batson v. Kentucky*,<sup>10</sup> and asks if it was correctly or incorrectly decided under the equal protection clause. The commentators agree that the result in *Batson* was the right one.<sup>11</sup> The prosecution was properly prohibited from making race-based peremptory challenges because all four criteria for a successful equal protection claim were satisfied: (1) the African-American defendant on trial was a person protected by the equal protection clause;<sup>12</sup> (2) the defendant was a member of a racial minority with standing to object to the state's race-based challenges;<sup>13</sup> (3) when prosecutors exercise challenges, they engage in state action,<sup>14</sup> so judicial scrutiny is justified; and (4) the state could demonstrate no compelling interest in excluding minorities from jury service.<sup>15</sup>

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9. Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 810-12 (1989); Note, *Discrimination by the Defense: Peremptory Challenges after Batson v. Kentucky*, 88 COLUM. L. REV. 355, 358-65 (1988) (authored by E. Vaughn Dunnigan) [hereinafter Note, *Discrimination*]; Note, *The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 DICK. L. REV. 143, 144, 155-58 (1988) (authored by Michael Sullivan) [hereinafter Note, *Prosecutor's Right*]; Note, *Defendant's Discriminatory Use of the Peremptory Challenge after Batson v. Kentucky*, 62 ST. JOHN'S L. REV. 46, 52-57 (1987) (authored by John J. Hoeffner) [hereinafter Note, *Defendant's Discriminatory Use*].

10. 476 U.S. 79 (1986); cf. *Holland v. Illinois*, 110 S. Ct. 803 (1990) (holding that the sixth amendment "fair cross-section" requirement does not extend to petit juries).

11. See, e.g., Goldwasser, *supra* note 9, at 811. One might also argue that *Batson* should not be extended to defendants because it was itself wrongly decided. Cf. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 138-44 (arguing that the decision added costs to trials and was therefore inefficient); Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 373 (1982) (written before *Batson*, but arguing that no restrictions should be placed on peremptory challenges).

12. See Goldwasser, *supra* note 9, at 811 n.20.

13. The point is implicit; it is so obvious that the defendant had standing that none of the commentators writes directly about it. See, e.g., Note, *Discrimination*, *supra* note 9, at 366-68 (discussing whether the prosecutor has standing).

14. E.g., Note, *Prosecutor's Right*, *supra* note 9, at 158.

15. See, e.g., Note, *Discrimination*, *supra* note 9, at 363 (arguing that while the state has a compelling interest in providing an impartial jury, unfettered peremptory challenges are not narrowly tailored to that end).

The argument against extending *Batson* to defendants in order to prevent them from making race-based peremptory challenges is that the state and the defendant are not equivalent parties. If we substitute defendant for prosecutor and prosecutor for defendant and then try to satisfy the four criteria for a successful equal protection complaint, the case fails. The argument goes as follows.

First, the state is not a person and therefore has no constitutional rights.<sup>16</sup> Although the attorney prosecuting the case is a person in the literal sense, the prosecutor "cannot properly be viewed as personally involved in the trial,"<sup>17</sup> but is an "aggregate" representing the community and the sovereign.<sup>18</sup> While the sovereign may *give* constitutional rights to others, it does not enjoy such rights itself.<sup>19</sup>

Second, because the state is not a member of a cognizable group entitled to protection, it lacks standing under a literal reading of *Batson*. The *Batson* opinion clearly says that a complainant must be a member of a "racial group capable of being singled out for differential treatment."<sup>20</sup>

Third, the defendant is not a state actor, but the state's opponent. Therefore, a defendant's racially motivated peremptory challenges are beyond scrutiny because "[p]rivate conduct, even if blatantly discriminatory, cannot violate constitutionally guaranteed equal protection rights."<sup>21</sup> Defense peremptory challenges do not become state action

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16. See Goldwasser, *supra* note 9, at 833 (claiming that no client or constitutional rights are involved in the case of prosecutors).

17. *Id.* at 831.

18. *Id.* at 830-31.

19. *Id.* at 821-25.

20. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986); see Pizzi, *supra* note 11, at 119 (claiming that the quoted language poses a serious impediment to standing by the state and that the Court would have to modify or abandon it if standing is to be found); cf. *Holland v. Illinois*, 110 S. Ct. 803, 811 (1990) (Kennedy, J., concurring) (language in *Batson* should not be interpreted as restricting standing; no obvious reason to premise standing on race of appellant).

21. Goldwasser, *supra* note 9, at 812. In support of this assertion, Goldwasser cites the statement in *Swain v. Alabama*, 380 U.S. 202, 227 (1965) (emphasis added), that "[t]he ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials." The statement hardly seems relevant, because the racist use of peremptory challenges is not "ordinary." Goldwasser also cites *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981), in support of her no-state-action argument. In that case, the Court held that a public defender was not an agent of the state when representing a client. It is not clear what the *Dodson* case has to do with the state action requirement, however, because it concerned a § 1983 action against the public defender for asking to withdraw rather than file a frivolous appeal. *But cf. Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) (state denied defendant his right to counsel and fair trial when *privately* retained defense counsel did not provide adequate representation; state action found in "conduct of a criminal trial itself").

merely because they are state-created rights,<sup>22</sup> are exercised in a public forum,<sup>23</sup> or entail minor judicial involvement.<sup>24</sup>

Fourth, even if the first three objections are overcome, the defendant may still be able to show that a right to the unfettered exercise of peremptory challenges survives strict scrutiny because it is narrowly tailored to achieving a compelling governmental interest.<sup>25</sup> For instance, requiring that attorneys give reasons for challenging minority jurors might frustrate the attorney-client privilege by forcing attorneys to disclose confidential communications.<sup>26</sup> In addition, although peremptory challenges are not among the fundamental rights enumerated in the sixth amendment,<sup>27</sup> they might be characterized as necessary to presenting a defense<sup>28</sup> if their effective use made acquittal more likely.<sup>29</sup> Similarly, if

22. Note, *Defendant's Discriminatory Use*, *supra* note 9, at 53-55.

23. Goldwasser, *supra* note 9, at 816. Goldwasser distinguishes *Shelley v. Kraemer*, 334 U.S. 1 (1948), on two grounds: (1) The restrictive covenants in *Shelley* were racist on their face, while peremptory challenges are facially neutral; and (2) the *Shelley* court was being asked to impose racial discrimination on others, while the Howard Beach judge is not requiring anyone to engage in discrimination against their wishes. Goldwasser, *supra* note 9, at 818-19. The distinctions are merely semantic. As to the first, "covenants" and "peremptory challenges" are both facially neutral until the parties put them to racist use. Comparing racial covenants with peremptory challenges is therefore a comparison at different levels of specificity. As to the second, in both cases, as between the parties *appearing in court*, one wished to discriminate and the other objected to it. The judges in both cases were asked to override the wishes of one of the parties to the lawsuit who did not want to perpetuate racial discrimination.

24. Goldwasser, *supra* note 9, at 816-17; Note, *Defendant's Discriminatory Use*, *supra* note 9, at 55-57.

25. See, e.g., *Turner v. Fouche*, 396 U.S. 346, 364 (1970) (narrowly tailored); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964) (strict scrutiny); see, e.g., Note, *Discrimination*, *supra* note 9, at 358 (defendant may have a compelling interest in being allowed unfettered peremptory challenges).

26. Goldwasser, *supra* note 9, at 831-33.

27. U.S. CONST. amend. VI gives defendants the right to the assistance of counsel, a speedy and public trial, an impartial jury, confrontation of witnesses against them, and compulsory process to obtain witnesses in their own behalf.

28. Goldwasser, *supra* note 9, at 837 (claiming that defendant has a right "to put on a defense free from state interference," though not specifically arguing that the right is a compelling interest).

29. The claim is frequently made that attorneys can win or lose their cases based on effective use of peremptory challenges. See, e.g., W. JORDAN, *JURY SELECTION* 2 (1980); A. MORRILL, *TRIAL DIPLOMACY* 1 (2d ed. 1972); R. WENKE, *THE ART OF SELECTING A JURY* 5 (1980). The claim is bizarre. Attorneys cannot have a rational basis for making the claim, because they never know what verdicts the excluded jurors would have returned. The only controlled experiment on this question showed the claim to be dubious—some attorneys improved their juries and some made them worse. Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 *STAN. L. REV.* 491, 517-19 (1978). The experiment used excused jurors as shadow juries, and the authors concluded that the "collective performance of the attorneys is not impressive." *Id.* at 517. The authors projected that in only one out of twelve cases would the jury's verdict actually have been affected by peremptory challenges, and that was only because the prosecutor used his peremptories badly, not because the defense used them well.

challenges for cause were often wrongly denied, peremptory challenges might be considered necessary to achieving an impartial jury.<sup>30</sup>

## B. THE ARGUMENT IN FAVOR OF RESTRICTING RACIST PEREMPTORY CHALLENGES BY DEFENDANTS

### 1. *Equal Protection*

The assumption that equal protection is the most appropriate constitutional doctrine for the legal analysis of a defendant's racist use of peremptory challenges has superficial appeal. After all, the situation involves an issue of apparent racial discrimination. The problem is, however, that the way most commentators have framed the issue—whether *Batson* can be applied literally to defendants—creates an unrealistic hypothetical. Procedural barriers make it extremely unlikely that the Supreme Court will ever have to rule on a prosecutor's challenge to a defendant's racially motivated use of peremptory challenges.

In order for an issue to reach the Supreme Court, there has to be a case or controversy.<sup>31</sup> Someone has to appeal from an adverse decision in a lower court. In *Batson*, the defendant-appellant made and preserved an objection at trial,<sup>32</sup> lost on that objection, was convicted, and therefore suffered harm because of the judge's decision to permit the state to use racially motivated peremptory challenges. If we reverse the parties in a hypothetical future case, however, a problem arises. If the state objects to racist defense peremptory challenges, loses its objection, and then loses the case, the double jeopardy clause prevents it from appealing.<sup>33</sup> Therefore, a case exactly parallel to *Batson* could not arise.

For the issue to reach the appellate courts, the *defendant* would have to initiate the appeal. That means that the defendant must have *lost* the battle over peremptory challenges and been prevented from exercising race-based peremptory challenges. This is what happened in the Howard Beach case. This scenario, however, puts the case in a very different posture from *Batson*. In *Batson*, the defendant-appellant could make the easy argument that he was the victim of racial discrimination.

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30. See *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

31. U.S. CONST. art. III, § 2.

32. Failure to make an objection at trial and to preserve it for appeal results in a procedural default, generally precluding the raising of the issue at the appellate level. See *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977); *Estelle v. Williams*, 425 U.S. 501, 508-09 (1976); Tanford, *An Introduction to Trial Law*, 51 Mo. L. REV. 623, 702-06 (1986).

33. U.S. CONST. amend. V. Nor would this issue appear to qualify for interlocutory appeal under 18 U.S.C. § 3731, which allows the government to appeal the dismissal of an indictment, the grant of a new trial, the grant of a suppression order, or the release of a defendant on bail.

In the Howard Beach case, the defendant-appellants must make the less palatable argument that they should have been allowed to engage in private, racial discrimination. Can they find doctrinal support for this claim?

It is difficult to imagine that the defendants could base their appeal on the equal protection clause. They were not discriminated against on account of race; rather, they were prevented from discriminating. The defendants must therefore make the argument that some *other* constitutional right has been infringed upon—presumably, the sixth amendment right to conduct a defense. The Supreme Court would have no occasion to engage in equal protection analysis except to offer an unnecessary advisory opinion.

One commentator has suggested a possible way the equal protection issue could get to the Supreme Court: if a trial judge allowed defendants to exercise racist peremptory challenges, the prosecutor could be given third-party standing to object on behalf of the excluded jurors.<sup>34</sup> Yet this approach would still not result in the equal protection issue reaching the appellate courts. In order to satisfy the case or controversy requirement, the prosecutor would still have to lose the objection and the trial, but double jeopardy would prevent the prosecution from appealing an acquittal. Similarly, there seems to be no way that an excluded juror could personally appeal from a defendant's acquittal without also implicating the double jeopardy clause.

The only feasible route by which an equal protection issue could reach the Court would be if minority jurors brought a class action civil suit claiming that defense attorneys were discriminating against them in the exercise of peremptory challenges. If the practical problems of such a lawsuit could be overcome,<sup>35</sup> there is precedent for raising the issue this way. In *Carter v. Jury Commission*,<sup>36</sup> the Supreme Court held that African-Americans were entitled to bring a class action civil suit to complain

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34. Note, *Discrimination*, *supra* note 9, at 366-67. See *Holland v. Illinois*, 110 S. Ct. 803, 812 (1990) (Kennedy, J., concurring) (suggesting that defendants could be given third-party standing to assert the constitutional rights of jurors).

35. See *Rose v. Mitchell*, 443 U.S. 545, 558 (1979) ("Civil actions expensive to maintain and lengthy, have not often been used" to remedy discriminatory jury selection practices.).

36. 396 U.S. 320 (1970).

of race discrimination if they were excluded from jury service.<sup>37</sup> Moreover, the argument also could be made that appropriate community representatives may bring such a suit, because racist jury selection injures "the community at large."<sup>38</sup>

However, even assuming that the procedural problems could be overcome and that the matter arose in a context where the courts applied equal protection methodology to the defendant's conduct, the argument against extending *Batson* to prohibit racially-motivated peremptory challenges is nevertheless problematic. Doctrinal analysis of the scope of the equal protection clause, its standing and state-action requirements, and the compelling state interest test, all suggest that it is more appropriate to *restrict* racist conduct by defendants than allow it.

a. *The scope of the equal protection clause:* The first issue is whether a state prosecutor may assert a right to equal protection at all. While it is technically true that the state is not a "person" and therefore has no constitutional rights, in practice this statement is frequently trivial. Once the trial starts, the Supreme Court has held that, in many situations, the state's attorney is considered a litigant entitled to the same rights as other litigants. In *Singer v. United States*,<sup>39</sup> for example, the Court stated that "the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."<sup>40</sup>

Even if the state lacks constitutional rights in the formal sense, the inquiry is not ended. The Constitution is not the only source of a litigant's rights, nor do all constitutionally-based rights, however unimportant, necessarily trump all non-constitutional interests. In *United States v. Valenzuela-Bernal*,<sup>41</sup> for example, the Supreme Court balanced the government's "vitaly important" statutory duties under the immigration laws against the defendant's constitutional right of compulsory process.<sup>42</sup> Although the government had deprived the trial of material witnesses by deporting those witnesses, the Court held that the government's statutory duty to deport illegal aliens outweighed the defendant's sixth

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37. *Id.* at 329-30.

38. *Ballard v. United States*, 329 U.S. 187, 195 (1946).

39. 380 U.S. 24 (1965).

40. *Id.* at 36.

41. 458 U.S. 858 (1982).

42. *Id.* at 863-64, 867-71.

amendment rights.<sup>43</sup> Similarly, a number of states have held that the prosecutor is entitled to the same kind of fair trial as the defendant, regardless of whether the prosecutor's right is found in the constitution, statutes, or the common law.<sup>44</sup>

Further, the prosecutor represents the community. Minority jurors and minority members of the community can claim entitlement to constitutional rights, including the equal protection right not to be discriminated against. In *Batson*, the Court stated that the harm from racist jury selection touches the entire community, harming both the community and the particular jurors who were excluded.<sup>45</sup> Earlier, in *Swain v. Alabama*,<sup>46</sup> the Court said that racist jury selection denies blacks in the community "the same right and opportunity to participate in the administration of justice enjoyed by the white population."<sup>47</sup> This approach has already been used by several states to prohibit racially discriminatory peremptory challenges by defendants.<sup>48</sup>

Indeed, a determination that either the community or the jurors have the equal protection right to be free from racial discrimination is essential to engaging in *any* kind of formal equal protection argument. If neither the community nor the jurors fall within the scope of the equal protection clause, then there is no one who can challenge the defendant's conduct (beyond the trial stage), and the equal protection issue can never be brought to the appellate courts. If that were the case, arguing about whether defense peremptory challenges are subject to the equal protection clause would be an empty intellectual exercise. If, on the other hand, the community or jurors do have the right to be free from discrimination—a largely undebatable point—then the question is transformed into one of who has standing to object to a violation of those rights.

b. *Standing*: Does the state have standing to object to a criminal defendant's racist use of peremptory challenges? The Court in *Batson* stated that in order to complain, one must be a member of a "racial

43. *Id.* at 872-73.

44. *See, e.g.*, *State v. Neil*, 457 So. 2d 481, 487 (Fla. 1984) (finding that "[t]he state, no less than a defendant, is entitled to an impartial jury").

45. *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986); *see also Ballard v. United States*, 329 U.S. 187, 195 (1946) (finding that racist jury selection injures "the community at large").

46. 380 U.S. 202 (1965).

47. *Id.* at 224, *quoted in Batson*, 476 U.S. at 91.

48. *See, e.g.*, *People v. Wheeler*, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 906 n.29 (1978) ("[B]lack community as a whole has a legitimate interest in participating in the trial proceedings.").

group capable of being singled out for differential treatment."<sup>49</sup> The state obviously is not a member of a racial group. Does this mean the state cannot have standing?<sup>50</sup>

It is doubtful that the *Batson* Court meant to impose any new restrictions on equal protection standing rules by the use of this phrase. In the *Batson* context, the limitation only expressed the ordinary idea that an equal protection claim must be brought by someone who has personally suffered from discrimination; thus, African-Americans usually must be the ones to complain of discrimination against their race.<sup>51</sup> The Court undoubtedly wanted to distinguish equal protection standing from standing to assert a sixth amendment right to an impartial jury. The former is limited, the latter is not. There is *no* requirement that the person complaining under the sixth amendment's impartial jury clause be a member of the excluded group.<sup>52</sup> If race-based exclusion of citizens from jury service results in a violation of the sixth amendment's impartial jury or fair cross-section requirements, then defendants of all races have been deprived of a constitutional guarantee and may complain. Thus, the *Batson* Court was not announcing a new standing requirement, but rather was restating the existing distinction between the equal protection and the impartial jury clauses.

The Supreme Court has made it clear on several occasions that racial discrimination in jury selection constitutes harm to the community and to the excluded jurors and that this harm is redressable under the equal protection clause.<sup>53</sup> Thus, the only real issue is whether the prosecutor has standing to object during trial, at a time when the harm could be prevented, or whether the jurors or community representatives will

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49. *Batson*, 476 U.S. at 94.

50. Compare Pizzi, *supra* note 11, at 119 (arguing that *Batson* language is a significant obstacle to prosecutorial standing) with *Holland v. Illinois*, 110 S. Ct. 803, 811 (1990) (Kennedy, J., concurring) (defendant's race would not be a bar to standing despite language in *Batson*).

51. Cf. Note, *Discrimination*, *supra* note 9, at 362-63 (viewing *Batson*'s limitation that defendant must be a member of a cognizable group as a modification of the standing requirement, though applicable only to defendants).

52. *Holland*, 110 S. Ct. at 805 (white defendant has standing to raise sixth amendment challenge to exclusion of blacks from jury); see *Duren v. Missouri*, 439 U.S. 357, 359 n.1 (1979) (male defendant has standing to challenge the exclusion of females from jury); *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975) (male defendant has standing to challenge the exclusion of females); *Peters v. Kiff*, 407 U.S. 493, 496-501 (1972) (white defendant has standing to challenge the exclusion of blacks).

53. See *Carter v. Jury Comm'n*, 396 U.S. 320, 329 (1970) (injured citizens of a community have standing to bring a class action civil suit to seek redress of discrimination in jury selection); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (exclusion of women, racial groups, or social classes from jury duty harms entire community); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (denying a person the right to participate in jury service harms the excluded person).

have to bring a separate case. This is a question of third-party standing, unaffected by the group-membership statement in *Batson*.

Ordinarily, the requirement of a genuine case or controversy between the parties<sup>54</sup> prohibits litigation of third-party claims. However, third-party standing is sometimes given to appropriate litigants when to do otherwise "might result in a denial of constitutional rights and . . . it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."<sup>55</sup>

The Court in *Singleton v. Wulff*<sup>56</sup> held that third-party standing is appropriate if two conditions are met. First, the relationship between the litigant and the person whose rights are affected must be such that the litigant will be as effective a proponent of the right as the affected person would have been.<sup>57</sup> In other words, do the litigant and the affected person share similar interests? In the Howard Beach case, the answer would appear to be yes, because the minority members of the community had an interest in participating in the resolution of the case, which was exactly the same interest being asserted by the state when it objected to the exclusion of African-Americans from the jury. Second, there must be an obstacle preventing affected persons from asserting their right so that, by default, the third party becomes the right's best advocate.<sup>58</sup> The obstacle in the Howard Beach case is that rules of trial procedure permit objections only from the parties to the lawsuit,<sup>59</sup> and jurors are not parties.<sup>60</sup> A civil suit of the kind brought in *Carter v. Jury Commission*<sup>61</sup> would not prevent the defendant from exercising racist peremptory challenges in the present case. If that case is the Howard Beach trial—of tremendous symbolic importance to the community—a delayed remedy

54. U.S. CONST. art. III, § 2.

55. *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). For a full discussion of the third-party standing problem, see Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 278-82 (1984); Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981).

56. 428 U.S. 106 (1976); see also *Warth v. Sedlin*, 422 U.S. 490, 500-02, 510-17 (1975) (whether an association has standing to complain about discriminatory zoning laws depends on whether the association clearly alleges facts demonstrating that it is a proper party to invoke judicial resolution).

57. *Singleton*, 428 U.S. at 114.

58. *Id.* at 116.

59. See, e.g., *Worth v. Dortman*, 94 Mich. App. 103, 288 N.W.2d 603 (1979); *State v. Newman*, 568 S.W.2d 276 (Mo. Ct. App. 1978).

60. In some circumstances, the judge also may assert objections *sua sponte*. Since the jurors might perceive this intervention as favoritism, however, judges are not appropriate persons to protect the rights of minority jurors. See *Ristaino v. Ross*, 424 U.S. 589 (1976) (finding judge's only responsibility to be the seating of an impartial jury).

61. 396 U.S. 320 (1970).

from a civil suit is inadequate. Therefore, both tests seem to be met, and the prosecutor should have standing to object on behalf of the affected citizens.

c. *State action*: The third issue is whether the removal of prospective jurors through peremptory challenges exercised by defense attorneys constitutes state action. Commentators have reached different conclusions on this question.<sup>62</sup>

Some aspects of defense peremptory challenge procedures make them look like private conduct. The defendants themselves are private litigants. Some defense attorneys are privately retained, and all have an ethical obligation to represent only their clients' interests.<sup>63</sup> In addition, judges take a somewhat inactive role in the peremptory challenge procedure.<sup>64</sup>

In other respects, however, the state is deeply involved in the peremptory challenge process. The entire forum of the criminal trial is a public arena: the challenges arise in criminal proceedings initiated by the state, conducted in public courtrooms, and supervised by judges<sup>65</sup> who are employees of the state. These judges are supported by a staff of clerks, bailiffs, reporters, and other court officials. In addition, many defense attorneys are public defenders or have been appointed and paid by the state. The performance of defense counsel, whether appointed or retained, is regulated by the state through bar admission rules, disciplinary rules, and appeals based upon ineffective assistance of counsel.<sup>66</sup> Peremptory challenges are authorized and regulated by statute.<sup>67</sup> The jurors were summoned by the state, are paid by the state, and cannot go home without permission from the state. In many jurisdictions, defendants exercise their challenges through the trial judge, who then excuses

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62. See Pizzi, *supra* note 11, at 118.

63. See Goldwasser, *supra* note 9, at 816; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (lawyer shall abide by client's wishes and decisions).

64. See Fortune, *Voir Dire in Kentucky: An Empirical Study of Voir Dire in Kentucky Circuit Courts*, 69 KY. L.J. 273, 300-01 (1981) (survey showing wide variations in judicial practices of voir dire).

65. See *Connors v. United States*, 158 U.S. 408, 413 (1895) (Voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion."); *Stirone v. United States*, 341 F.2d 253, 256 n.3 (3d Cir. 1965) (judge must be present to supervise voir dire).

66. See *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980) (actions of an ineffective, privately retained counsel violated defendant's right to counsel under 6th and 14th amendments).

67. *E.g.*, FED. R. CRIM. P. 24(b); see J. VAN DYKE, *JURY SELECTION PROCEDURES* 282-84 (1977); Tanford, *supra* note 32, at 628-36.

the prospective juror.<sup>68</sup> Throughout the entire selection process, it is the state's responsibility to seat an impartial jury<sup>69</sup> and to protect the safety and integrity of that jury during the trial.<sup>70</sup>

The Supreme Court has found state action in cases where the state's involvement was significantly less. In *Shelley v. Kraemer*,<sup>71</sup> for instance, all interested parties were private. The only involvement of the state courts was the enforcement of private, racially discriminatory restrictive covenants contained in property deeds. The Supreme Court found that the use of the courts to enforce private discrimination constituted state action.<sup>72</sup> In *Lugar v. Edmonson Oil Company*,<sup>73</sup> a private party used the legal system for private ends. A court clerk and sheriff issued and executed a writ of attachment in a private dispute between a debtor and creditor. The Court held that even this minimal involvement by state officials created joint action between the private party and the state and therefore constituted state action.<sup>74</sup> In *Burton v. Wilmington Parking Authority*,<sup>75</sup> the operation of a private restaurant was found to be state action because the restaurant was located in a public facility—a municipal parking garage.<sup>76</sup> Furthermore, in *Cuyler v. Sullivan*,<sup>77</sup> the actions of a privately retained defense attorney were held attributable to the state.

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68. See Goldwasser, *supra* note 9, at 815; see also *Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir. 1989) (private civil litigant's peremptory challenges were state action because they were exercised through the court).

69. See *Ristaino v. Ross*, 424 U.S. 589, 592 (1976); *Ham v. South Carolina*, 409 U.S. 524, 527-28 (1973).

70. See, e.g., *Williams v. State*, 480 N.E.2d 953 (Ind. 1985) (judge has duty to control proceedings, including potentially disruptive conduct by attorneys); *State v. Franklin*, 327 S.E.2d 449 (W. Va. 1985) (judge should have banished members of Mothers Against Drunk Driving from the courtroom, as the duty to shield the jury from every possible source of pressure or prejudice overrides all other trial rights); see also *Illinois v. Allen*, 397 U.S. 337 (1970) (it is essential that the judge maintain dignity, order, and decorum throughout court proceedings; flagrant disregard of basic standards of conduct should not be tolerated; judges confronted with stubborn, contumacious parties must have discretion to meet circumstances of case; party may lose even a constitutional right by engaging in disruptive behavior).

71. 334 U.S. 1 (1948).

72. *Id.* at 13-14, 19-20; see also *Tulsa Professional Collection Serv. v. Pope*, 485 U.S. 478 (1988) (private party's use of state procedures with significant assistance of state officials constituted state action).

73. 457 U.S. 922 (1982).

74. *Id.* at 937, 939-42; see also *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1311-14 (5th Cir. 1989) (private litigant's use of state courts and state officials was state action for purposes of extending *Batson*).

75. 365 U.S. 715, 723-24 (1961).

76. *Id.* at 723-24.

77. 446 U.S. 335 (1980).

The Supreme Court noted that the "State's conduct of a criminal trial itself implicates the State."<sup>78</sup>

In *Lugar*, the Court indicated that no specific bright-line rule or semantic test should be used to determine the presence of state action. Rather, whether private conduct is fairly attributable to the state is necessarily a case-specific, fact-bound inquiry.<sup>79</sup> Nevertheless, some effort has been made to create standards for analyzing defense peremptory challenges under what have been called the "nexus," "public function," and "joint action" tests.<sup>80</sup>

Under the nexus test of *Moose Lodge v. Irvis*<sup>81</sup> and *Jackson v. Metropolitan Edison Company*,<sup>82</sup> private conduct is treated as state action when "there is a sufficiently close nexus between the State and the challenged [private] action."<sup>83</sup> One commentator has referred to this as an entanglement test.<sup>84</sup> The jury selection process, of which defense peremptory challenges are an inextricable part, is a combined effort of the defendant and numerous court officials. It takes place in a public courtroom and is part of a process to select jurors who will be temporary state employees. The trial cannot take place until the jury is selected. Thus, the defendant's conduct cannot realistically be disentangled from all the state action surrounding it.

Under the public function test of *Terry v. Adams*<sup>85</sup> and *Marsh v. Alabama*,<sup>86</sup> the state cannot avoid its constitutional responsibilities by delegating a public function to private parties. The obligation to seat an impartial jury is an important state function in a criminal trial.<sup>87</sup> One of the justifications for peremptory challenges is to assist that process by

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78. *Id.* at 344.

79. *Lugar*, 457 U.S. at 937-39 (1982); see also *Evans v. Newton*, 382 U.S. 296, 299-300 (1966) (generalizations do not decide cases; facts and circumstances must be sifted to determine whether state action requirement has been satisfied).

80. *Lugar*, 457 U.S. at 939 (finding that whether these are different tests or just different characterizations of the same test is an issue that need not be resolved).

81. 407 U.S. 163 (1972). For the Court's articulation of the "nexus" test, see *id.* at 176.

82. 419 U.S. 345 (1974).

83. *Id.* at 351.

84. Note, *Prosecutor's Right*, *supra* note 9, at 160; see *Evans v. Newton*, 382 U.S. 296, 301 (1966) (discussing whether the state was "entwined" in a private park's operation).

85. 345 U.S. 461 (1953). The Court held that a private political primary represented state action because it was the only real factor in determining who governed the country. For the Court's discussion of the public functions test, see *id.* at 469-79.

86. 326 U.S. 501 (1946). The Court found that because private facilities like bridges, ferries, turnpikes, and company towns are built and operated to benefit the public, their operation is essentially a public function. *Id.* at 506.

87. See *supra* note 69 and accompanying text.

enlisting the parties' help in "eliminat[ing] extremes of partiality on both sides."<sup>88</sup> In other words, the state is delegating part of the responsibility for selecting a proper jury to the litigants. This delegation of a function that is traditionally the exclusive prerogative of the State<sup>89</sup> does not defeat state action.

Under the joint action test of *Lugar v. Edmonson Oil Company*,<sup>90</sup> private conduct may be attributable to the state if it involves "the exercise of some right or privilege created by the State,"<sup>91</sup> and the private actor "has acted together with *or* has obtained significant aid from state officials."<sup>92</sup> Certainly when defendants exercise peremptory challenges, they exercise rights created by state statute. There is no right to peremptory challenges independent of state authorization.<sup>93</sup> Further, because the intertwined jury selection procedure calls upon the judge, prosecutor, and defense attorney to act together to remove the most biased persons from the jury, the defense attorney would appear to be acting together with state officials. Thus, under either the "nexus," the "public function," or the "joint action" tests, it would not be difficult for an appellate court to assert a doctrinal justification that racist defense peremptory challenges constitute state action.

d. *Compelling state interest*: The fourth element of the equal protection analysis of racial discrimination is whether a particular discriminatory practice is justified because it is narrowly tailored to achieving a compelling state interest. Two possible compelling reasons have been suggested for allowing defendants to base peremptory challenges on race. The first is that the unfettered exercise of peremptory challenges is necessary for a fair trial, either because the challenges are vital to obtaining an impartial jury, or because the defendant's right to present a defense

88. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

89. *Flagg Bros. v. Brooks*, 436 U.S. 149, 159 (1978). The requirement that the public function be traditionally the exclusive prerogative of the State does not appear to mean that the state must always have maintained a *monopoly*. For example, the *Marsh* Court determined that running a company town was state action although historically many towns were privately owned. *Marsh*, 326 U.S. at 508 n.5; see also *Evans v. Newton*, 382 U.S. 296 (1966) (maintaining a municipal park met the public functions test, although in many areas public parks are run by private organizations, such as the VFW, Rotary Club, or Audubon Society).

90. 457 U.S. 922 (1982). The test articulated by the Court holds that state action will be found when state officials are acting jointly with private parties. *Id.* at 932-33, 941-42; see also *Tulsa Professional Collection Serv. v. Pope*, 485 U.S. 478 (1988). The Court held that when private parties make use of state procedures with significant assistance of state officials, state action may be found. *Id.* at 486.

91. *Lugar*, 457 U.S. at 937.

92. *Id.* (emphasis added).

93. See Tanford, *supra* note 32, at 635.

means that the accused is entitled to any maneuver that provides a tactical advantage. This is essentially a sixth amendment claim that peremptory challenges are part of the right to present a defense. Rather than force this issue into a compelling interest analysis, however, I will consider it in its sixth amendment context in the next section.

The second proposed compelling interest is protection of the defendant's attorney-client privilege. Yet, while preservation of the attorney-client privilege is undoubtedly of compelling interest to society, the interest is only as extensive as the privilege itself. If a *Batson*-like rule requiring defense attorneys to articulate non-racial reasons for challenging prospective jurors does not violate the privilege, the defendant's interest vanishes.

The attorney-client privilege protects the content of communications between defendants and their lawyers.<sup>94</sup> Under a *Batson*-like rule, however, no situation is likely to arise in which the content of any communication must be disclosed. The only communication from client to attorney that would have to be disclosed would be the client's reasoning about whom to excuse. Under a *Batson*-type rule, illogical reasons would *not* be adequate justification for the racist use of peremptory challenges. Thus, if the client expressed a general dislike of African-Americans, this could *not* be put forward as a legitimate *nonracial* justification for challenging jurors. Similarly, any other illogical reason expressed by the client, such as "I don't like people whose occupations start with the letter P; get rid of that pipe-fitter,"<sup>95</sup> would not justify the challenge. Therefore, illogical reasons will not be disclosed.

If the client communicates to the attorney a legitimate reason for challenging a prospective juror—such as telling the attorney that a juror seemed hostile to,<sup>96</sup> avoided eye contact with,<sup>97</sup> or seemed nervous about<sup>98</sup> the client—the attorney can justify the challenge by explaining the reason, without disclosing that it was suggested by the client. A statement by the attorney that "My reason for removing this prospective juror is not because she is black, but because she seemed hostile to,

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94. See E. CLEARY, *MCCORMICK ON EVIDENCE* 212-13 (3d ed. 1984). The privilege may also protect other kinds of information not acquired from professional communication, but those are not relevant here.

95. See *United States v. Romero-Reyna*, 867 F.2d 834, 836 (5th Cir. 1989) (finding that reason not to be a valid justification).

96. See *United States v. Forbes*, 816 F.2d 1006, 1010-11 (5th Cir. 1987).

97. See *United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987).

98. See *United States v. Hawkins*, 781 F.2d 1483, 1485 (11th Cir. 1986).

avoided eye contact with, or appeared nervous about my client," discloses no confidential communication and is therefore not within the privilege.<sup>99</sup>

Even if such disclosure indirectly implicates attorney-client communication, the privilege protects only those communications intended by the client to be kept confidential. If a client communicates information to the attorney with the understanding that the attorney will pass the information on to others or take public action based on it, such information is not privileged to begin with.<sup>100</sup> When the client asks the attorney to challenge a juror, the client is asking the attorney to make those feelings public, not to keep them private.<sup>101</sup>

In any event, the attorney-client privilege is not a license to commit illegal acts. The privilege has never applied to conspiracies between lawyer and client to commit future crimes or frauds.<sup>102</sup> If a client consults with the lawyer about a proposed course of action and is told that the action would be unlawful, the privilege is preserved so long as the client desists from the unlawful conduct.<sup>103</sup> If the client persists in committing an illegal act, however, the privilege does not apply. Engaging in intentional racial discrimination is an unlawful act. The privilege "may be a shield . . . as to crimes already committed, but it cannot be used as a sword . . . to enable persons to carry out contemplated crimes against society. [It] does not make a law office a nest of vipers in which to hatch out frauds and perjuries."<sup>104</sup> Just because the illegal act may gain a tactical advantage for the defendant and increase his chances of acquittal does not bring it within the privilege.<sup>105</sup>

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99. See also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (The Court required an attorney to state why a witness's testimony would have been favorable and material in order to prevent deportation, assuming that, in many instances, such information would come from the client.).

100. See *Perkins v. State*, 483 N.E.2d 1379, 1383 (Ind. 1985).

101. Even if the communication arguably was privileged to begin with, when it is partially disclosed through the attorney's conduct in exercising the challenge, there has been a waiver. See 8 J. WIGMORE, EVIDENCE § 2327 (McNaughten rev. ed. 1961).

102. E. CLEARY, *supra* note 94, at 229; see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983) (lawyer shall not assist client in unlawful conduct).

103. See E. CLEARY, *supra* note 94, at 229 n.2.

104. *Gebhardt v. United Rys.*, 220 S.W. 677, 679 (Mo. 1920).

105. *E.g.*, *Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986) (attorney-client privilege cannot be used to justify the use of perjured testimony, even though it would help the defendant gain an acquittal); *In re Doe*, 551 F.2d 899 (2d Cir. 1977) (client's disclosure of intent to bribe a juror not privileged).

Even if a limitation on defense peremptory challenges does conflict with the attorney-client privilege, the privilege will not necessarily prevail. In other cases in which claims of privilege conflicted with constitutional principles, the privilege had to yield. In *Davis v. Alaska*,<sup>106</sup> the Supreme Court held that a defendant's sixth amendment right of confrontation and cross-examination was more important than a state privilege for juvenile records. The Court acknowledged the high degree of importance of the privilege, but held that it must yield to a defendant's legitimate assertion of an inconsistent constitutional right.<sup>107</sup> In *United States v. Nixon*,<sup>108</sup> the Court had to decide between a general claim of executive privilege and the "fundamental demands of due process."<sup>109</sup> The Supreme Court held that the Watergate defendants' need for the information was more important than the general assertion of privilege.<sup>110</sup>

## 2. *Fair Trial*

Given the procedural difficulties of bringing an equal protection claim to the appellate courts, a different doctrinal question might be more appropriate. Instead of asking whether the prosecutor can assert equal protection to force a judge to stop racist challenges by the defense, one could ask whether defendants have any grounds to complain if the court imposes restrictions on them. After all, the problem in the Howard Beach case is not that the prosecutor needs to find grounds on which to appeal the judge's refusal to stop a racist practice. Justice Demakos *did* prohibit the defendants from using their peremptory challenges to remove jurors on account of their race. Thus, it is the defendants who need to find grounds on which to appeal.

While the defendants could try to assert that they have an affirmative right to engage in racial discrimination, that claim hardly seems productive. If defendants are going to find constitutional grounds for complaining about restrictions being imposed on their peremptory challenges, their best hope would be to argue that their right to conduct an effective defense is being infringed. The basis for the claim would be

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106. 415 U.S. 308 (1974).

107. *Id.* at 319.

108. 418 U.S. 683 (1974).

109. *Id.* at 713.

110. *Id.* at 711-12. The Court explained that while the President was free to try to make particular showings that certain documents should be privileged, a general assertion of privilege was inadequate given that an important constitutional principle was at stake. See Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173, 1179-80 (1980).

infringement of a sixth amendment right, not violation of equal protection.<sup>111</sup> Would such a sixth amendment claim have any realistic likelihood of success? I think not.

Although the sixth amendment has been interpreted as giving defendants the general right to conduct an effective defense,<sup>112</sup> the Supreme Court has never suggested that it guarantees attorneys the right to employ whatever strategies they wish.<sup>113</sup> Other important governmental duties may take precedence. For example, in *United States v. Valenzuela-Bernal*,<sup>114</sup> the Supreme Court upheld the government's right to deport potential witnesses over an objection that the defendant's sixth amendment right to compulsory process was being infringed. One of the reasons the Court gave was that the government had an obligation to enforce the immigration laws as well as to provide a fair trial.<sup>115</sup> The possibility that government action might interfere with a defendant's sixth amendment rights does not necessarily prevent the government from enforcing other important legal policies,<sup>116</sup> especially when the possibility is somewhat speculative.

The Court has also tended to interpret the sixth amendment in light of existing state law and practice. In *Lockhart v. McCree*,<sup>117</sup> the Court looked to the states' practice of using unitary juries in capital cases in deciding that the impartial jury clause did not require the use of bifurcated juries.<sup>118</sup> In *Duncan v. Louisiana*,<sup>119</sup> the Court decided that the sixth amendment right to a jury trial in "all" criminal prosecutions only applied to non-petty offenses, stating that the clause was to be interpreted by "refer[ing] to objective criteria, chiefly the existing laws and practices

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111. The issue is not, as suggested in Note, *Prosecutor's Right*, *supra* note 9, at 152-53, and Note, *Defendant's Discriminatory Use*, *supra* note 9, at 58-60, whether the state can affirmatively assert its own quasi-sixth amendment right to a fair trial and impartial jury, because it is not the state that is bringing the appeal. The question is whether defendants' sixth amendment trial rights are infringed when the state restricts their peremptory challenges.

112. See Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 557 (1980).

113. *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978) (the obligation of the court to conduct a fair trial is more important).

114. 458 U.S. 858 (1982).

115. *Id.* at 864-66.

116. In *Valenzuela-Bernal*, the Court noted that the defendant had been unable to show that the deported witnesses would have provided evidence that was material and favorable to the defense. *Id.* at 872-74.

117. 476 U.S. 162 (1986).

118. *Id.* at 181-82.

119. 391 U.S. 145 (1968).

in the Nation."<sup>120</sup> In *Duren v. Missouri*,<sup>121</sup> the Court pointed to the fact that few states exempted women from jury duty as one reason for deciding that such an automatic exemption contravened the sixth amendment.<sup>122</sup> In *Ohio v. Roberts*,<sup>123</sup> the Court held that the use of hearsay evidence that had not been subjected to cross-examination satisfied the confrontation clause if the evidence fell within a traditional hearsay exception as defined by general American law.<sup>124</sup>

What would the Court find if it looked to state law in this case? State peremptory challenge practices generally treat both sides identically. All states give peremptory challenges to both sides to be exercised in the same manner, and most give the same number to each side.<sup>125</sup> Most states that have faced the issue of whether to extend reciprocal racial limitations to defense peremptory challenges have done so.<sup>126</sup> These state practices suggest that the Court may not be receptive to the suggestion that the sixth amendment requires defendants to be treated differently.

A more specific attempt by defendants to argue that the sixth amendment guarantee of an impartial jury grants them the right to the unfettered exercise of peremptory challenges is also unlikely to be successful. The Supreme Court has interpreted the impartial jury clause as setting only a minimal standard. In *Wainwright v. Witt*,<sup>127</sup> the Court stated that the impartiality requirement is satisfied by "jurors who will conscientiously apply the law and find the facts."<sup>128</sup> As long as the jurors promise to try to put aside their biases and do a conscientious job as jurors, the court is not even required to look for and weed out racial prejudices on the jury panel.<sup>129</sup> Instead, the impartiality requirement is

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120. *Id.* at 161. Because the sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury," U.S. CONST. amend. VI (emphasis added), the Court's decision to deny a jury for petty criminal prosecutions was in derogation of the language of the Constitution.

121. 439 U.S. 357 (1979).

122. *Id.* at 359-60.

123. 448 U.S. 56 (1980).

124. *Id.* at 66.

125. See J. VAN DYKE, *supra* note 67, at 282-84 (summarizing state laws); Tanford, *supra* note 32, at 635 (summarizing state laws).

126. See *People v. Wheeler*, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 906 n.29 (1978); *State v. Neil*, 457 So. 2d 481, 487 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 489 n.35, 387 N.E.2d 499, 517 n.35 (1979).

127. 469 U.S. 412 (1985).

128. *Id.* at 423, *quoted in* *Lockhart v. McCree*, 476 U.S. 162, 178 (1986).

129. *Ristaino v. Ross*, 424 U.S. 589, 595 (1976) (state's obligation to seat impartial jury does not require an inquiry into whether they have biases); see also *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982) (juror who had applied for a job with the district attorney's office and whose application was

satisfied by a juror's good faith promise to put aside biases and be fair to both sides. Any juror who cannot make this promise may be challenged for cause.<sup>130</sup> Therefore, all constitutionally impartial jurors can be removed before peremptory challenges are exercised. Peremptory challenges may help the defendant go further and pick a *favorable* jury, but that is not what the sixth amendment promises by the term "impartial."<sup>131</sup>

Indeed, the weight of Supreme Court precedent is against any argument that peremptory challenges are necessary to assure a constitutional jury. In *Stilson v. United States*,<sup>132</sup> the Court held "[t]here is nothing in the Constitution of the United States which requires [granting] peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."<sup>133</sup> In *Swain v. Alabama*<sup>134</sup> and again in *Batson*,<sup>135</sup> the Court said that peremptory challenges were not a constitutional right.<sup>136</sup> Any juror *proved* to be partial is subject to challenge for cause. Peremptory challenges, therefore, are by definition used only against jurors who cannot be shown to be biased. Moreover, the number of peremptory challenges may be limited by statute—reduced to as few as two or three—without running afoul of the Constitution.<sup>137</sup> Justice Marshall even suggested in *Batson* that peremptory challenges could be eliminated altogether if necessary to eliminate racial discrimination.<sup>138</sup> Therefore, it is difficult for a defendant to mount a persuasive case that there is a constitutional right to engage in the unfettered exercise of peremptory challenges.<sup>139</sup>

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pending during trial met the constitutional standard of impartiality because he had promised to be fair to both sides).

130. See KY. R. CRIM. P. 9.36(1) (If reasonable grounds develop "to believe that a prospective juror cannot render a fair and impartial verdict on the evidence," it is subject to challenge for cause.); N.C. GEN. STAT. § 15A-1212 (1983) (similar); OKLA. STAT. ANN. tit. 22, § 659 (West 1969); see also Tanford, *supra* note 32, at 634 (general discussion).

131. See *Commonwealth v. Reid*, 384 Mass. 247, 253-54, 424 N.E.2d 495, 499 (1981) (Because a defendant's right to exercise peremptory challenges is only statutory, a trial court may restrict that right without violating the constitution.).

132. 250 U.S. 583 (1919).

133. *Id.* at 586; accord *Ross v. Oklahoma*, 487 U.S. 81 (1988).

134. 380 U.S. 202 (1965).

135. 476 U.S. 79 (1986).

136. *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 219.

137. See Tanford, *supra* note 32, at 635.

138. *Batson*, 476 U.S. at 107 (Marshall, J., concurring) ("If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay." *Id.* at 108.).

139. See *supra* note 115; see also Note, *Discrimination*, *supra* note 9, at 366 (making similar arguments); cf. *Babcock, Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 550-63 (1975) (arguing that defense peremptory challenges should have a constitutional basis).

### III. THE COMPATIBILITY OF RACIST PEREMPTORY CHALLENGES WITH THE NORMS OF THE TRIAL PROCESS

Formal doctrinal analysis answers whether a court logically *can* prohibit defendants from exercising racially discriminatory peremptory challenges without radically departing from the usual legal conventions. Whether the Supreme Court *should* impose restrictions, however, is a normative issue operating at three levels. The broadest theoretical question is whether to conduct the debate within the traditional individual-rights framework of liberal political philosophy, or to start from a communitarian perspective. A second question is whether restricted or unrestricted challenges are more compatible with the norms of the trial system generally. The third question is utilitarian: Do race-based peremptory challenges in fact serve any important role in a trial?

#### A. THE TRADITIONAL NORMATIVE FRAMEWORK: INDIVIDUAL RIGHTS

##### 1. *The Claim That Defendants Deserve Special Protection*

The normative assumptions underlying the criminal justice system have traditionally been drawn from liberal political theory. That theory holds that the most important principle in criminal trials is the protection of the individual rights of defendants against the arbitrary exercise of power by the state.<sup>140</sup> Adherents to liberal theory suggest that defendants should be allowed unfettered freedom to excuse jurors as they see fit and posit three reasons why *Batson* should not be extended: (1) the adversary system in general is supposed to be asymmetrical in favor of the rights of defendants; (2) defense peremptory challenges in particular deserve special protection; and (3) requiring the defendant to justify peremptory challenges would inappropriately chill the attorney-client relationship.

The first assertion is that the adversary criminal justice system is premised on an asymmetry between the opposing sides in which the litigative advantage belongs to the accused.<sup>141</sup> This policy is supposedly

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140. See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 16 (1964); Rhode, *supra* note 8, at 594; Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 310-12 (1989); Terrell, *Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution*, 36 EMORY L.J. 541, 545 (1987).

141. See Goldwasser, *supra* note 9, at 821, 825 nn.105-06 (citing six cases in support of the asymmetry proposition). Goldwasser dismisses language in court opinions to the contrary as based on a lack of understanding, confusion, and a misreading of precedent. *Id.* at 823-25.

apparent from the fact that the defendant has constitutional rights, while the prosecution does not. Adherents to this policy justify it by arguing that defendants' rights are necessary to redress the state's advantage in resources and power.<sup>142</sup> They support the argument with language to this effect in some concurring and dissenting Supreme Court opinions.<sup>143</sup> Two common examples that are said to illustrate this policy are (1) the state has a constitutional obligation to provide discovery to the defense, while the defense has no reciprocal *constitutional* duty,<sup>144</sup> and (2) the state bears the burden of proving guilt beyond a reasonable doubt.<sup>145</sup>

The second assertion is that regardless of whether defendants should generally be given a litigative advantage, there are some special reasons why defendants should be permitted the unfettered exercise of peremptory challenges. For example, Professor Goldwasser claims that peremptory challenges were originally adopted in this country as devices to protect defendants<sup>146</sup> from government oppression,<sup>147</sup> "the corrupt or overzealous prosecutor and . . . the compliant, biased, or eccentric judge."<sup>148</sup> One could also make the utilitarian argument that because an attorney may not be able to build a record that will support a challenge

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142. *See id.* at 821-22.

143. *E.g.*, *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring) (The Constitution does not envision equality between parties.); *Williams v. Florida*, 399 U.S. 78, 111-12 (1970) (Black, J., concurring in part and dissenting in part) (The Bill of Rights was designed to give tactical advantage to accused.).

144. *See* Goldwasser, *supra* note 9, at 822. Of course, in most jurisdictions, the defense has a reciprocal duty of discovery required by statute. *See, e.g.*, FED. R. CRIM. P. 16(b).

145. *See* Goldwasser, *supra* note 9, at 822. Goldwasser suggests two other examples, but they are not persuasive. She states that only defendants have the right to hear other witnesses before testifying, and only the defendant can consult with counsel during trial. In fact, the prosecution is generally entitled to have its principal investigator remain in the courtroom during trial for consultation and to listen to other witnesses, so balance is maintained. *See In re United States*, 584 F.2d 666, 667 (5th Cir. 1978). The cases Goldwasser cites, *see* Goldwasser, *supra* note 9, at 822 nn.87-88, establish only that the defendant has these rights, not that the prosecution lacks them. *See, e.g.*, *Brooks v. Tennessee*, 406 U.S. 605, 607-13 (1972) (statute requiring defendant to testify first infringed fifth amendment rights and right to consult with counsel).

146. Goldwasser, *supra* note 9, at 827-28. Goldwasser asserts that peremptory challenges were first created by an English statute in 1305 that made them available only to defendants. This is true but misleading. The statute did not grant peremptory challenges to the Crown because it did not need them. The prosecution was entitled to exercise an *unlimited* number of "stand-asides." Stand-asides, like peremptory challenges, could be exercised for any reason and did not have to be justified. Giving a few peremptory challenges to the defense partially rectified the imbalance caused by the one-sided stand-aside system, but still left the prosecution with an overall advantage. *See* Note, *Prosecutor's Right*, *supra* note 9, at 146-47.

147. *See* *Williams v. Florida*, 399 U.S. 78, 100 (1970) (peremptory challenges intended to prevent oppression by government); *Singer v. United States*, 380 U.S. 24, 31 (1965) (jury trial clause intended to protect accused from oppression by government).

148. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). It is unclear how the racist use of peremptory challenges would further the goal of protecting the defendant from governmental oppression.

for cause,<sup>149</sup> or because judges sometimes wrongly deny such challenges,<sup>150</sup> peremptory challenges are important to “eliminate extremes of partiality on both sides.”<sup>151</sup> Finally, it could be argued that peremptory challenges are symbolically important to defendants, allowing them to express their personal dislikes, giving them some sense of control over the proceedings, and acknowledging their unique stake in the trial.<sup>152</sup>

The third policy argument for special protection of defense peremptory challenges is that an inquiry into their validity would chill the freedom necessary for an effective attorney-client relationship. Professor Goldwasser suggests that “defense attorneys’ awareness of the possibility of inquiry may deter them from speaking freely with their clients during jury selection.”<sup>153</sup> Additionally, requiring that defense counsel publicly reveal tactical reasons for peremptory challenges “could only diminish the defendant’s confidence in counsel.”<sup>154</sup> Therefore, the argument concludes, *Batson* should not be extended to defendants.

## 2. *The Argument Against Special Privileges for Defense Peremptory Challenges*

There are two responses to the claim that the defendant is entitled to special consideration. First, one can argue that the implicit liberal premise of the natural superiority of individual rights over communitarianism is wrong as a matter of critical morality. Or, at least, it is not necessarily the only normative framework within which to analyze the issue of racist peremptory challenges. I will explore the communitarian alternative in section b. Second, one can also argue that, even staying well within traditional rights-based liberal theory, a better case can be made for the

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149. See *Turner v. Murray*, 476 U.S. 28, 30-31 (1986); *Ristaino v. Ross*, 424 U.S. 589, 592 (1976); *Ham v. South Carolina*, 409 U.S. 524, 525-26 (1973). In all three of these cases the trial judge refused to allow anyone to ask the jurors if they harbored racial prejudices.

150. See Babcock, *supra* note 139, at 549-50. If legitimate challenges for cause are wrongly denied, then the defendant can appeal and usually obtain a new trial. See, e.g., *People v. Taylor*, 101 Ill. 2d 377, 399, 462 N.E.2d 478, 488 (1984). *But cf.* *Ross v. Oklahoma*, 487 U.S. 81 (1988) (The Court concedes that a challenge for cause was wrongly denied, which would usually require reversal, but upholds conviction on a combination of procedural default and harmless error.).

151. Goldwasser, *supra* note 9, at 828 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).

152. Goldwasser, *supra* note 9, at 829-31 (citing 4 W. BLACKSTONE, COMMENTARIES \*353).

153. *Id.* at 833. Professor Goldwasser gives no example of such a situation, however.

154. *Id.* The meaning of this statement is unclear, and Goldwasser offers no example. If she means that the inability of a lawyer to state sensible reasons for peremptory challenges will diminish a client’s confidence in that lawyer’s abilities, the concern seems trivial. If she means that an important dimension of client trust is how effectively the lawyer preserves client confidences, this is not harmed when the lawyer consults with her client and then articulates a reason for exercising a challenge.

opposite conclusion. Defendants should be prohibited from making race-based challenges, as are prosecutors, based on an analysis of the general principles of the adversary system, the role played by peremptory challenges in the trial process, and the impact of judicial review on the attorney-client relationship.

a. *The symmetrical nature of the adversary system:* The essence of our adversary system of dispute resolution is symmetry. As between two litigants, including the state and defendant, the rules of procedure are supposed to be balanced. No party should have an advantage apart from the strengths and weaknesses of its case. The Supreme Court has emphasized this point over and over. In *Hayes v. Missouri*,<sup>155</sup> the Court held that a fair criminal trial requires "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."<sup>156</sup> In *Herring v. New York*,<sup>157</sup> the Court held that the adversary system requires similar "partisan advocacy on both sides."<sup>158</sup> In *Kimmelman v. Morrison*,<sup>159</sup> the Court said that without "adversarial balance between defense and prosecution," a trial would be "rendered unfair and the verdict rendered suspect."<sup>160</sup>

To avoid upsetting this balance, the Court generally has been hostile to trial rules that would lopsidedly favor defendants. In *Trammel v. United States*,<sup>161</sup> the Court abrogated the privilege against adverse spousal testimony, which had given the defendant exclusive control over whether his spouse could testify.<sup>162</sup> In *United States v. Gillock*,<sup>163</sup> the Court squelched the efforts of some circuit courts to create an evidentiary privilege for state legislators accused of wrongdoing.<sup>164</sup> In *United States v. Inadi*,<sup>165</sup> the Court refused to interpret the hearsay rule and confrontation clause<sup>166</sup> in a way that would have required the state, but not the

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155. 120 U.S. 68 (1887).

156. *Id.* at 70. This passage was quoted approvingly by both sides in *Batson*. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); *id.* at 126 (Burger, C.J., dissenting).

157. 422 U.S. 853 (1975).

158. *Id.* at 862.

159. 477 U.S. 365 (1986).

160. *Id.* at 374.

161. 445 U.S. 40 (1980).

162. *Id.* at 53.

163. 445 U.S. 360 (1980).

164. *Id.* at 374.

165. 475 U.S. 387 (1986).

166. U.S. CONST. amend. VI, cl. 5.

defendant, to prove a declarant unavailable in all instances.<sup>167</sup> And, in two cases interpreting the scope of the constitutional exclusionary rule, the Court held that defendants were not entitled to any special exceptions and could be impeached by extrinsic evidence of their otherwise inadmissible prior inconsistent acts and statements, just like other witnesses. In both cases, the Court emphasized that it is essential to the proper functioning of the adversary system that the state be a full and equal player in the game.<sup>168</sup>

To be sure, the adversary system is not perfectly symmetrical. However, when there is occasional asymmetry, it is just as likely to favor the state as it is to favor the defense. The common misperception that within the adversary system the litigative advantage usually is given to the accused<sup>169</sup> is incompatible with the way most rules of evidence and trial procedure operate.

What litigative advantages are given to the defense? Four come readily to mind: (1) the state must prove guilt beyond a reasonable doubt;<sup>170</sup> (2) the state must disclose exculpatory evidence;<sup>171</sup> (3) the defendant has the right to refuse to testify;<sup>172</sup> and (4) the defendant may decide to offer evidence of character.<sup>173</sup> It is an exaggeration, however, to suggest that the defendant derives significant benefits from these "advantages." Empirical studies show that jurors draw little distinction between proof beyond a reasonable doubt and proof by a preponderance of evidence,<sup>174</sup> that if a defendant refuses to testify he is more likely to be

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167. *Inadi*, 475 U.S. at 392-94, 396-97. It had been argued that the additional showing was required by the confrontation clause of the sixth amendment. U.S. CONST. amend. VI, cl. 5.

168. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980); *United States v. Havens*, 446 U.S. 620, 626-27 (1980); see *Bradley, Havens, Jenkins and Salvucci and the Defendant's "Right" to Testify*, 18 AM. CRIM. L. REV. 419 (1981) (discussing cases); see also *United States v. Leon*, 468 U.S. 897, 907-08 (1984) (limiting the scope of the exclusionary rule because excluding incriminating evidence generates disrespect for the law and the administration of justice).

169. Goldwasser, *supra* note 9, at 821.

170. *E.g., In re Winship*, 397 U.S. 358 (1970).

171. *E.g., Brady v. Maryland*, 373 U.S. 83 (1963).

172. U.S. CONST. amend. V.

173. FED. R. EVID. 404(a).

174. See R. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 56 (1980) (Tables 4-4 and 4-5) (juror quantifications of burdens of proof averaged 77% certainty for preponderance of the evidence and 79% certainty for beyond a reasonable doubt); see also Simon & Mahan, *Quantifying Burdens of Proof: A View From the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319 (1971) (finding that jurors have difficulty understanding the "preponderance of evidence" standard); Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-81 (1976) (After being given an instruction on the presumption of innocence and proof beyond a reasonable doubt, 50% of jurors did not understand presumption of innocence, and 23% thought the defendant should be convicted if the evidence was evenly balanced.).

convicted,<sup>175</sup> and that character evidence may decrease rather than increase favorable verdicts.<sup>176</sup>

Not only are the benefits of these defense advantages relatively insignificant, but other rules of evidence and trial procedure give substantial litigative advantages to the state. In capital cases, for instance, the state may exclude jurors opposed to the death penalty, while the defendant may not automatically exclude jurors who favor the death penalty.<sup>177</sup> Psychologists have demonstrated that this death-qualification process produces a jury significantly conviction-prone and uncommonly willing to condemn the defendant to death.<sup>178</sup> In addition, the state may join multiple offenses or offenders into a single trial,<sup>179</sup> although such joinder has been shown to increase the conviction rate.<sup>180</sup> The rules of evidence also permit the state to prove that the defendant has a record of prior similar criminal activity for a host of purposes.<sup>181</sup> Empirical research

175. See Shaffer, *The Defendant's Testimony*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 124, 143-44 (S. Kassiss & L. Wrightsman eds. 1985) (summarizing the literature on the decision by defendants to testify).

176. See Borgida, *Character Proof and the Fireside Induction*, 3 *LAW & HUM. BEHAV.* 189, 200 (1979) (Calling several character witnesses on behalf of a civil plaintiff reduced the number of favorable verdicts.).

177. See *Buchanan v. Kentucky*, 483 U.S. 402 (1987); *Gray v. Mississippi*, 481 U.S. 648 (1987); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Court holds that the State may remove prospective jurors who "might" be, or are "likely" to be, biased against it, because we cannot expect jurors always to be able to express their biases clearly. See *Witt*, 469 U.S. at 424-26 (trial court may rely on finding of implied bias). The Court also holds, however, that a defendant must prove *actual* bias against him or her in order to remove a juror. See *Smith v. Phillips*, 455 U.S. 209, 214-16 (1982) (forbidding district court from taking action based on implied bias).

178. See Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 *LAW & HUM. BEHAV.* 53, 67-69, 73-75 (1984); Hans, *Death by Jury*, in *CHALLENGING CAPITAL PUNISHMENT* 151-55 (K. Haas & J. Incardi eds. 1988); *Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 *HARV. L. REV.* 567, 582-85 (1971); see also Brief for the American Psychological Ass'n, *Lockhart v. McCree*, 476 U.S. 162 (1986) (no. 84-1865), reprinted in 42 *AM. PSYCHOLOGIST* 59 (1987) (reviewing literature).

179. *FED. R. CRIM. P.* 8; see *United States v. Pierce*, 733 F.2d 1474 (11th Cir. 1984) (joinder is favored); *United States v. Nolan*, 700 F.2d 479 (9th Cir. 1983) (joinder remains the rule rather than the exception), *cert. denied*, 462 U.S. 1123 (1983).

180. See Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 *LAW & HUM. BEHAV.* 339, 343-50 (1985) (summarizing research); Greene & Loftus, *When Crimes are Joined at Trial*, 9 *LAW & HUM. BEHAV.* 193, 196-98, 201-07 (1985); Tanford & Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 *J. APPLIED SOC. PSYCHOLOGY* 453, 470-78 (1982); Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 *LAW & HUM. BEHAV.* 319, 332-33 (1985).

181. *FED. R. EVID.* 404(b) (for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). See generally E. IMWINKELREID, *UNCHARGED MISCONDUCT EVIDENCE* (1984) (for a thorough critical review of the law in this area).

shows that similar crime evidence increases the likelihood of obtaining a conviction.<sup>182</sup> Additionally, many rape victim shield laws prevent defendants from offering evidence relevant to their innocence.<sup>183</sup>

The hearsay rules also favor the state by providing numerous exceptions for out-of-court declarations that help the prosecution but few for declarations that help defendants. Prior statements of identification made by victims are admissible.<sup>184</sup> Prior statements made by the defendant may be offered *against* the defendant, but not in the defendant's own favor.<sup>185</sup> Likewise, statements of co-conspirators may be offered against a defendant but not in his or her favor.<sup>186</sup> Incriminating statements made by child sex abuse victims are admissible,<sup>187</sup> as are dying declarations naming the assailant.<sup>188</sup> Declarations against interest are easily admissible if they incriminate a defendant, but if "offered to exculpate the accused [are] not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."<sup>189</sup>

To argue that the criminal justice system *should* give the defendant a litigative advantage seems a plausible position. After all, the defendant has a great deal at stake. The impact of a wrongful conviction on the accused is enormous and immediate, while the impact of a wrongful acquittal on any particular individual is remote and speculative.<sup>190</sup> It is naive, however, to claim that the criminal justice system does in fact give the defendant a litigative advantage.

b. *The unimportance of peremptory challenges:* Regardless of whether trials generally should be structured to give defendants a litigative advantage, is there any reason to believe that defense peremptory

182. See Doob & Kirschenbaum, *Some Empirical Evidence on the Effect of S. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 93-96 (1972); Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 242-43 (1975); L.S.E. Jury Project, *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 215-18; Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 43-47 (1985).

183. See Tanford & Bocchino, *supra* note 112, at 578-89.

184. FED. R. EVID. 801(d)(1)(C); see also *United States v. Owens*, 484 U.S. 554 (1988) (hearsay evidence of prior identification admissible despite witness's subsequent loss of memory).

185. FED. R. EVID. 801(d)(2) (The defendant may not offer his own prior statements that favor him.).

186. FED. R. EVID. 801(d)(2)(E) (The defendant may not offer statements of co-conspirators in his own behalf.).

187. See IND. CODE § 35-37-4-6 (1986).

188. FED. R. EVID. 804(b)(2).

189. FED. R. EVID. 804(b)(3).

190. It is speculative whether the defendant will commit any future crimes and, if he or she does, there is only a remote chance that any particular individual will be the victim.

challenges are so essential to the fairness of the trial that they should be given special protection? I think not, because peremptory challenges are not important to the pursuit of any legitimate litigative purpose.

Peremptory challenges are not an isolated trial procedure, but occur in the overall context of jury selection. The jury commissioner arranges a panel of prospective jurors that must be drawn from a fair cross-section of the community.<sup>191</sup> Genuinely biased members of that panel are then removed by challenges for cause. Therefore, the tentative jury that exists before peremptory challenges are exercised can be expected to represent a reasonable balance of those voices<sup>192</sup> in the community that have no specific interest in the case to be tried. This is the impartial jury "of the State and district wherein the crime shall have been committed"<sup>193</sup> that is envisioned by the sixth amendment.

Within any community there will be a range of voices, some more favorable or sympathetic to defendants, some inclined against them. Attorneys use peremptory challenges to engage in "comparison shopping" for favorable jurors, not to remove biased ones.<sup>194</sup> As long as both sides have equal buying power, the inherent balance is preserved. If, however, the defendant is given greater freedom to exercise peremptory challenges than the state, then the defendant has the power *not* to move toward a fair, balanced jury, but to move *away* from a balanced jury and toward a jury in the defendant's favor.<sup>195</sup> Such a power frustrates rather than facilitates the achievement of a representative jury drawn from a fair cross-section of the community.

For this reason, most courts that have considered the matter have concluded that equal treatment of peremptory challenges is preferable to unequal treatment. If the state is to be restricted in the racial use of peremptory challenges, similar restrictions should likewise be imposed on the defendant so that the goal of a representative jury is not compromised. State courts from Florida, Massachusetts, and California have

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191. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (underinclusion of women); *Hernandez v. Texas*, 347 U.S. 475 (1954) (underinclusion of Mexican-Americans).

192. The word "voice" is borrowed from C. GILLIGAN, *IN A DIFFERENT VOICE* (1982), and is intended to convey the same notion of uniqueness.

193. U.S. CONST. amend. VI; see *Lockhart v. McCree*, 476 U.S. 162, 184 (1986); see also Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 275-76 (1988) (An impartial jury is one not acquainted with the parties or the facts and with no personal interest in case.).

194. See Pizzi, *supra* note 11, at 126.

195. See Note, *Discrimination*, *supra* note 9, at 365.

used this rationale to extend the ban against race-based peremptory challenges to defendants.<sup>196</sup>

This conclusion is consistent with the historical treatment of peremptory challenges. The early history of jury selection in England shows that the *prosecution*, not the defense, was given the advantage. Prior to 1305, the Crown could order an unlimited number of prospective jurors to stand aside, replace recalcitrant pro-defense jurors with those willing to vote for conviction, and imprison jurors who had the audacity to return a verdict of not guilty.<sup>197</sup> The defendant had no power to challenge jurors, except for cause. It was hardly a procedural system that favored defendants. In 1305, a statute gave defendants a *limited* number of peremptory challenges for the first time. The Crown, however, still had all its powers intact.<sup>198</sup> Thus, while it may be technically true that defendants historically were entitled to peremptory challenges and the prosecution was not,<sup>199</sup> it is difficult to argue that this reflects a policy that defendants should have a litigative advantage.

The history of peremptory challenges in this country must be viewed in the context of these English practices favoring the Crown. For example, in *Duncan v. Louisiana*,<sup>200</sup> the Supreme Court, in a frequently quoted passage, summarized the history of jury trials in America. It suggested that juries were intended as "a protection against arbitrary rule" and a "barrier . . . between the liberties of the people and the prerogative" of the state.<sup>201</sup> Jury trials were necessary "to prevent oppression by the Government," and were "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or

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196. *People v. Wheeler*, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 906 n.29 (1978) ("The People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section of the community."); *State v. Neil*, 457 So. 2d 481, 487 (Fla. 1984) ("The state, no less than the defendant, is entitled to an impartial jury."); *Commonwealth v. Soares*, 377 Mass. 461, 489 n.35, 387 N.E.2d 499, 517 n.35 (1979) ("[W]e deem the Commonwealth equally to be entitled to a representative jury, unimpaired by improper exercise of peremptory challenges by the defense.").

197. The general history of trial by jury is summarized in numerous sources. See, e.g., W. FORSYTH, *HISTORY OF TRIAL BY JURY* (1852); J. VAN DYKE, *supra* note 67, at 1-21; Gobert, *supra* note 193, at 273-82; Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892).

198. See J. VAN DYKE, *supra* note 67, at 146-48; Pizzi, *supra* note 11, at 148; Note, *Prosecutor's Right*, *supra* note 9, at 171 n.32.

199. See Goldwasser, *supra* note 9, at 827.

200. 391 U.S. 145 (1968).

201. *Id.* at 151.

eccentric judge."<sup>202</sup> In their historical context, these statements represent a call for jury trials as opposed to non-jury trials, and for fair, equal treatment. A demand for an end to the English system that was rigged in favor of the state, however, is not the same thing as the creation of a system favoring criminal defendants.<sup>203</sup>

Unfettered defense peremptory challenges are also hard to justify on pragmatic grounds. Although lawyers often claim that clever exercise of peremptory challenges can substantially increase their chances of winning at trial,<sup>204</sup> the claim is dubious. Lawyers have no way of knowing what verdict the jury would have returned had it been composed differently. The only empirical study of the issue concludes that the "collective performance of the attorneys is not impressive."<sup>205</sup> Professors Diamond and Zeisel conducted an experiment in which jurors who had been excused were asked to remain as shadow jurors throughout the trial. At the end, they were asked how they would have voted. Results showed that attorneys' choices hurt their cases as often as they helped them.<sup>206</sup>

The claim also has been made that peremptory challenges are useful, if not necessary, in eliminating "extremes of partiality on both sides."<sup>207</sup> This claim seems false on its face. If a juror is indeed extremely biased, that juror is subject to a challenge *for cause*. If the trial judge wrongfully denies a challenge for cause, the defendant can appeal that issue. Therefore, both challenges for cause and the right to appeal serve as useful procedures for assuring that extremely biased jurors are removed. The question is what role remains for peremptory challenges after the genuinely biased jurors are removed? At best, they are useful in eliminating basically impartial but slightly biased jurors.

202. *Id.* at 155-56. This is a somewhat Pollyannish view of jury competence, politics, and courage. See Gobert, *supra* note 193, at 282:

[G]iven the awe and respect with which jurors regard judges, it is probably unrealistic to expect them to expose, even if they were aware of it, judicial bias, eccentricity, or complacency. . . .

As for prosecutors, judges are more qualified than jurors to expose corruption or overzealousness on their part and better equipped to deal with it.

203. *But cf.* Thompson v. Utah, 170 U.S. 343, 350 (1898) ("It must . . . be taken that . . . the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was . . . in England at the time . . .").

204. See, e.g., A. MORRILL, *supra* note 29, at 1; R. WENKE, *supra* note 29, at 5; Zeisel & Diamond, *supra* note 29, at 491.

205. Zeisel & Diamond, *supra* note 29, at 517.

206. *Id.* at 516 (Table 9).

207. Goldwasser, *supra* note 9, at 828 (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)); see also Babcock, *supra* note 139, at 549-50 (claiming without empirical support that legitimate challenges for cause are often denied).

In many cases, however, defendants who are guilty may not be interested in truly impartial jurors. Instead, these defendants would rather have jurors who are biased in their favor and might acquit them despite the evidence. In such cases, peremptory challenges will not be used to eliminate even slightly biased jurors, but to eliminate neutral jurors in the hope that favorable jurors will replace them. Such challenges, especially ones to dismiss jurors on the assumption that their race will determine how they vote, generally rely on stereotypes.<sup>208</sup> Empirical research demonstrates, however, that stereotypes are poor predictors of how jurors will vote. Thus, these challenges are again not likely to be of significant benefit to defendants.<sup>209</sup>

The last argument is that defendants deserve unfettered peremptory challenges for symbolic reasons. For example, Professor Goldwasser argues that allowing removal of jurors based on intuitive dislikes is of symbolic importance to individual defendants but not to the state because the state is an "aggregate."<sup>210</sup> This argument is too broad, however. The logical consequence of this argument is that corporate defendants should not be allowed unrestricted peremptory challenges because they are also aggregates without personal intuition. A rule that would apply different standards to individual defendants and corporate defendants, however, would be difficult to justify under current equal protection law.

c. *The incompatibility of racist peremptory challenges with trial norms other than adversariness:* While individual dignity and adversariness are values integral to our trial system,<sup>211</sup> they are not its exclusive norms. Even if a plausible argument could be made that the principle of adversariness supports asymmetrical peremptory challenge rules favoring defendants, the issue would not be settled. One would still have to ask whether such a rule was compatible with other normative principles of the litigation process: Would it help achieve accurate verdicts? What

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208. Cf. Babcock, *supra* note 139, at 553 (peremptory challenges based on "the core of truth in most common stereotypes").

209. See R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* 121-50 (1983); Hans & Vidmar, *Jury Selection*, in *THE PSYCHOLOGY OF THE COURTROOM* 63-72 (N. Kerr & R. Bray eds. 1982).

210. Goldwasser, *supra* note 9, at 831.

211. See Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *GEO. L.J.* 185, 197-99 (1983); Terrell, *supra* note 140, at 545.

symbolic effect would it have? Will it help preserve order? Is it consistent with the need for an efficient dispute resolution system?<sup>212</sup>

*i. Verdict accuracy:* The Supreme Court's jurisprudence of trials does not show a one dimensional concern for preserving the trial's adversary structure at all costs. Commentators have observed that "[t]he Court's decisions reflect . . . a preoccupation with accurate results in individual cases,"<sup>213</sup> and that the "mission of the criminal justice system is to convict the guilty and let the innocent go free."<sup>214</sup> The Court itself has said repeatedly that trials have a "truth-finding function."<sup>215</sup> Opinion after opinion emphasizes the very nature of a trial as "a search for truth"<sup>216</sup> and contains statements such as "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system,"<sup>217</sup> "the normally predominant principle [is that] of utilizing all rational means for ascertaining truth;"<sup>218</sup> the mission of trial law is to advance "the accuracy of the truth-determining process in criminal trials;"<sup>219</sup> and the law should "augment accuracy in the factfinding process."<sup>220</sup>

212. For a general discussion of the diverse normative principles of trials, see Arenella, *supra* note 211, at 197-202; Sward, *supra* note 140, at 303-19; Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. (in press); Tanford, *A Political-Choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831 (1989) [hereinafter Tanford, *Political-Choice*].

213. Chase, *The Burger Court, the Individual and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 519 (1977).

214. C. WHITEBREAD, CRIMINAL PROCEDURE 4 (1980).

215. *E.g.*, Jenkins v. Anderson, 447 U.S. 231, 238 (1980). It is difficult to judge how sincere the Justices are about the need for accurate verdicts. In every case in which the Court emphasizes its importance, the evidence or procedure at issue will help the prosecution obtain a conviction, so it is possible that arguments about truth-seeking are disingenuously masking the Justices' anti-defendant biases. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 173 (1986) (approving use of conviction-prone juries despite the likelihood that they will return inaccurate convictions); Morris v. Slappy, 461 U.S. 1, 15 (1983) (repeated trials to establish the truth about a single criminal episode is a misuse of judicial resources if the trial resulted in a conviction the first time); Engle v. Isaac, 456 U.S. 107, 129 (1982) (restricting collateral review of convictions even when errors affected the truth-finding function of the trial); *see also* United States v. Frady, 456 U.S. 152, 157 (1982) (Court criticizes defendant for a "long series of collateral attacks on his sentence," despite the fact that most of his motions were successful).

216. Nix v. Whiteside, 475 U.S. 157, 174 (1986).

217. United States v. Havens, 446 U.S. 620, 626 (1980).

218. Trammel v. United States, 445 U.S. 40, 50 (1980) (citing Elkins v. United States, 364 U.S. 206 (1960) (Frankfurter, J., dissenting)).

219. United States v. Inadi, 475 U.S. 387, 396 (1986) (quoting Tennessee v. Street, 471 U.S. 409, 415 (1985)).

220. Ohio v. Roberts, 448 U.S. 56, 65 (1980); *cf.* United States v. Frady, 456 U.S. 152, 163 (1982) (Justice O'Connor asserts that accurate verdicts are important because they are more efficient than retrials.).

The question of extending *Batson* to defendants must therefore include consideration of whether the accuracy of verdicts will be increased or decreased by such a rule. Heterogeneity on the jury is likely to produce more disagreement than homogeneity. This is especially true in the case of race, where persons of different races may perceive events and participants differently.<sup>221</sup> More disagreement should produce a jury that will spend more time discussing the facts and their application to the law. Logically, then, the greater the range of voices on a jury, the more thorough the deliberation will be, which should produce more accurate verdicts.<sup>222</sup>

In addition, a heterogeneous jury is less likely to share common biases that might interfere with an accurate evaluation of the facts.<sup>223</sup> If the defendant is able to remove members of a particular race from the jury, the result can only be to reduce the voices participating in the decision. Psychological research has shown that reducing diversity reduces the accuracy of group decisions.<sup>224</sup>

*ii. Symbolic value:* The Supreme Court's decisions also indicate concern with the symbolism of criminal trials. After all, criminal trials are among the most visible legal institutions. Many of the cases in which the Court has expressed concerns over symbolism have involved questions about the composition of the jury itself. In *Williams v. Florida*,<sup>225</sup>

221. See Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 LAW & HUM. BEHAV. 89, 95 (1980) (jurors find persons of different races less credible); Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626-33 (1985) (race of defendant affects determination of guilt); *id.* at 1634-35 (race of victim affects determination of guilt); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 133, 138-42 (1979) (Persons from different races are perceived by jurors to be more culpable.).

222. See *Johnson v. Louisiana*, 406 U.S. 356, 389 (1972) (Douglas, J., dissenting) ("[E]arrest and robust argument" is necessary to reach an accurate verdict.).

223. See Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715-16 (1971); see also *Ballew v. Georgia*, 435 U.S. 223, 234 (1978) ("[T]he counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.").

224. See, e.g., Hoffman, *Group Problem Solving*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* (L. Berkowitz ed. 1965) (heterogeneous groups are more accurate at solving problems). See generally S. KASSIN & L. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 174-80 (1988) (discussing psychological literature on effects of conformity on jury deliberations); Hans & Vidmar, *supra* note 209, at 42-43 (reviewing the psychological literature on the differences between heterogeneous and homogeneous groups' problem solving abilities).

225. 399 U.S. 78 (1970).

the Court discussed the symbolic importance of the jury as the democratic bulwark against government oppression.<sup>226</sup> In *Ballard v. United States*,<sup>227</sup> the Court stated that excluding racial minorities from juries does injury "to the democratic ideal reflected in the processes of our courts."<sup>228</sup> In *Swain v. Alabama*,<sup>229</sup> the Justices emphasized that jury selection procedures must satisfy the appearance of justice.<sup>230</sup> In *Batson* itself, the Court reiterated this concern, fearing that racist jury selection would "undermine public confidence in the fairness of our system of justice."<sup>231</sup>

It is certainly true that showing symbolic respect for the rights of the individual is important. That does not mean, however, that other symbolic values should be ignored. The removal of African-Americans or any other racial minority from the jury—no matter who is responsible for the challenge—is bad political symbolism. At a time when there is serious concern over renewed racial tension in parts of this country, "a system that allows [trials] to begin . . . by removing all or substantially all the racial minorities on the jury panel sends exactly the wrong message to our citizens."<sup>232</sup> It threatens public confidence in the criminal justice system, especially among minorities, at "a time when nearly one out of two persons admitted to prisons in this country is black [and] there are deep concerns over racial discrimination in the imposition of the death penalty."<sup>233</sup> Members of the excluded group may come to see the law as treating them unequally in this situation and therefore likely to treat them unequally in other situations as well.<sup>234</sup> If the defendants in the Howard Beach case can remove all minority jurors, the result is that only the white citizens of Howard Beach are permitted to resolve a case vitally important to both blacks and whites. It is difficult to justify the symbolism of white domination that such an act carries.

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226. *Id.* at 100; see also *Johnson v. Louisiana*, 406 U.S. 356, 373-74 (1972) (citing the symbolic importance of a jury).

227. 329 U.S. 187 (1946).

228. *Id.* at 195.

229. 380 U.S. 202 (1965).

230. *Id.* at 219.

231. 476 U.S. 79, 87 (1986); see also *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (noting that the exclusion of women from jury duty is at odds with the basic concept of a democratic society); *Hernandez v. Texas*, 347 U.S. 475, 478 n.4 (1954) ("Distinctions [based on Hispanic] ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

232. Pizzi, *supra* note 11, at 138.

233. *Id.* (footnotes omitted). *But cf.* *McCleskey v. Kemp*, 481 U.S. 279 (1987) (Racial disparity in a death penalty system is not enough to invalidate it.).

234. Note, *Discrimination*, *supra* note 9, at 358.

iii. *Preserving social order*: The problem of symbolism also directly implicates the state's ability to preserve social order. For example, in 1979, amid racial tension, four white Miami police officers used flashlights and billy clubs to beat a young black man, Arthur McDuffie, to death.<sup>235</sup> McDuffie was an insurance executive who had been stopped for running a red light on his motorcycle. The four officers were tried for manslaughter.<sup>236</sup> At trial, the defendants used their peremptory challenges collectively to remove all African-Americans from the jury. When the resulting all-white jury acquitted the defendants, the Miami black community rioted again. Fourteen people were killed and the National Guard was called out.<sup>237</sup>

The Supreme Court has emphasized several times that it is important for the criminal justice system to work effectively in enforcing the criminal laws, protecting the community, and preserving order. In *Ohio v. Roberts*,<sup>238</sup> for example, Justice Blackmun wrote that "every jurisdiction has a strong interest in effective law enforcement."<sup>239</sup> Criminal trials play an important role in this process by serving a crime control function,<sup>240</sup> legitimating the state's exercise of coercive power over its citizens,<sup>241</sup> and providing a general deterrent to crime.<sup>242</sup>

The state's interest in preserving order appears to be the equal of almost any personal constitutional right the defendant can assert.<sup>243</sup> For example, in *Lockhart v. McCree*,<sup>244</sup> the defendant's constitutional right to an impartial jury was held to be less important than "the State's

235. See *4 Policemen Suspended in Death*, N.Y. Times, Dec. 28, 1979, at A14, col. 5; *Four Miami Police Officers Charged in Fatal Beating*, N.Y. Times, Dec. 29, 1979, at A12, col. 4.

236. See *supra* note 235.

237. See *2 Die as Blacks in Miami Protest Police Acquittals*, N.Y. Times, May 18, 1980, at A24, col. 1; *14 Die in Miami Riot; Arson and Looting Persist for 2d Day*, N.Y. Times, May 19, 1980, at A1, col. 6.

238. 448 U.S. 56 (1980).

239. *Id.* at 64.

240. See Belsky, *The Retaliation Doctrine: Promoting Forensic Misconduct*, 50 ALB. L. REV. 763, 772 (1986); Packer, *supra* note 140, at 9-13.

241. See Arenella, *supra* note 211, at 200-08.

242. See *id.* at 197-99; Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1360 (1985).

243. The state's interests in law enforcement have not, thus far, overridden the constitutional exclusionary rules. That may be, however, because the exclusionary rule is based not only on the individual defendant's interests but also on society's interest in limiting police powers and reducing the negative symbolism of the government's profiting from its own illegal acts. Nevertheless, even these exclusionary rules are under attack. See, e.g., *United States v. Leon*, 468 U.S. 897, 907-08 (1984) (excluding incriminating evidence generates disrespect for law and order).

244. 476 U.S. 162 (1986).

entirely proper interest in obtaining a single jury" to administer its constitutional capital sentencing scheme.<sup>245</sup> In *United States v. Valenzuela-Bernal*,<sup>246</sup> the defendant's constitutional right to call witnesses gave way to the government's duties of enforcing the criminal laws and executing immigration laws.<sup>247</sup> In a number of other cases, the Court has emphasized that defendants' rights can be outweighed by competing societal interests.<sup>248</sup>

Excluding a minority group from participating in criminal trials threatens the legitimacy of verdicts in the eyes of the community, reduces the minority group's respect for law, and makes the preservation of order more difficult. The law is supposed to eliminate racism, not institutionalize it. Several commentators have suggested, therefore, that the community's interest in being protected from crime is best served when trial verdicts are returned by juries on which all members of society are eligible to serve.<sup>249</sup>

*iv. Efficiency:* The Supreme Court has also expressed concern that the trial system be operated reasonably efficiently. Because trial resources are limited and many litigants want access to them, trial resources must be allocated efficiently.<sup>250</sup> Examples are legion. In *Morris v. Slappy*,<sup>251</sup> a defendant complained that he had been denied effective representation by being forced to go to trial only a few days after defense counsel had been appointed. The Court approved the trial judge's decision, in part because of the difficulty of reassembling the witnesses, jurors, and attorneys at a different time, and the burden of repeated court

245. *Id.* at 180; see also *Adams v. Texas*, 448 U.S. 38, 44, 49, 51 (1980) (holding that the state has a legitimate interest in obtaining jurors who are willing to vote for the death penalty and to administer a constitutionally valid death penalty scheme).

246. 458 U.S. 858 (1982).

247. *Id.* at 863, 872-73; see also *United States v. Gillock*, 445 U.S. 360, 374 (1980) (government has a legitimate interest in enforcing its criminal statutes).

248. See *United States v. Frady*, 456 U.S. 152, 164, 175 (1982) (society's interest in finality); *Engle v. Isaac*, 456 U.S. 107, 126-28 (1982) (society's interest in finality and punishing offenders); *Trammel v. United States*, 445 U.S. 40, 50-51 (1980) (society's right to every person's evidence, public interest in effective law enforcement).

249. See *Gobert*, *supra* note 193, at 288 (A racially neutral trial is more legitimate to both defendant and community.); Note, *Defendant's Discriminatory Use*, *supra* note 9, at 64 (prohibiting racist peremptory challenges damages the legitimacy of the jury's verdict in the eyes of defendant, but improves it for the community).

250. See *Arenella*, *supra* note 211, at 199-200; see also *Christie, An Essay on Discretion*, 1986 DUKE L.J. 747, 750-64 (Maintenance of a hierarchical system among judges in which discretion is granted promotes efficient operation of the court system.). But see *Gross, The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740, 748-56 (1987) (Inefficient trials are preferable because they would be more accurate and would deter needless litigation.).

251. 461 U.S. 1 (1983).

appearances.<sup>252</sup> In *United States v. Valenzuela-Bernal*,<sup>253</sup> the Court justified the deportation of material witnesses because of “several practical considerations,” noting the “financial and physical burdens” that would be imposed on the government if it was required to detain all material witnesses.<sup>254</sup> In *Wainwright v. Witt*,<sup>255</sup> the Court declined to require the judge to make an on-the-record finding of bias before excusing a juror, expressing concern about the already heavy workload of trial courts.<sup>256</sup> In *Lockhart v. McCree*,<sup>257</sup> the Court noted that states have an important interest in using unitary juries in capital cases, despite the fact that such juries are conviction-prone, because of the inefficiency of having to present evidence twice if two juries were used.<sup>258</sup> Additionally, the Court’s recent emphasis on finality and restricting “inefficient” appeals is well known.<sup>259</sup>

In one sense, efficiency concerns support the argument against imposing *Batson*-like restrictions on defendants. A rule requiring defendants to justify their challenges would cause longer trials and impose increased costs.<sup>260</sup> Time would be spent explaining reasons for peremptory challenges, and additional voir dire would be necessary so that the attorney could find non-racial justifications.<sup>261</sup> However, if efficiency becomes a serious consideration, time may be saved by eliminating peremptory challenges altogether<sup>262</sup> or by reducing the number of challenges to which each side is entitled.

d. *The social value of chilling attorney-client conspiracies to engage in racist jury selection:* Extending *Batson* to defendants would not actually prohibit racially motivated jury selection. It would require the party

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252. *Id.* at 11, 14-15; *see also* *United States v. Hasting*, 461 U.S. 499, 507 (1983) (importance of prompt administration of justice).

253. 458 U.S. 858 (1982).

254. *Id.* at 865-66.

255. 469 U.S. 412 (1985).

256. *Id.* at 430.

257. 476 U.S. 162 (1986).

258. *Id.* at 180-84.

259. *See, e.g.,* *Engle v. Isaac*, 456 U.S. 107, 126-29, 134 (1982) (limiting collateral attack based on trial procedural errors because of their “costs,” the principle of finality, and the specter of endless post-conviction collateral attacks); *United States v. Frady*, 456 U.S. 152, 163-66 (1982) (similar); *see also* *Jenkins v. Anderson*, 447 U.S. 231, 234-35 n.1 (1980) (The Court will not hear a claim raised by the state that was not presented to the court below because of considerations of judicial efficiency.).

260. *See* Note, *Defendant’s Discriminatory Use*, *supra* note 9, at 64-65.

261. *See* Pizzi, *supra* note 11, at 140.

262. *See id.* at 145.

to come up with a nonracial justification for an apparently racist challenge.<sup>263</sup> Forcing the defense attorney to articulate logical reasons for peremptory challenges will not harm the attorney-client relationship. To the contrary, it probably will have a *positive* effect on the quality of representation the client receives. Although stereotypes have been shown to be poor predictors of how jurors will vote,<sup>264</sup> many attorneys nevertheless rely on them.<sup>265</sup> If attorneys are required to look past the stereotypes for more logical reasons on which to base peremptory challenges, they may become more effective advocates.<sup>266</sup>

Professor Goldwasser, however, argues that in order to explain a challenge, an attorney might have to reveal confidential information or trial strategy, thereby creating tension between attorney and client and casting a chilling effect on the relationship.<sup>267</sup> The issue is whether this should be a significant concern.

Arguments that rules of trial procedure will chill the exercise of defendants' important trial rights have been made before, but have not been particularly successful. The Supreme Court rejected a similar complaint in *Nix v. Whiteside*.<sup>268</sup> In that case, the Court held that a defense attorney who threatened to reveal his client's intent to commit perjury did not infringe the client's right to counsel. The Justices concluded that a defense attorney was ethically *required* to disclose anticipated perjury, notwithstanding that such a rule might have a chilling effect on full and

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263. See *Maloney v. Washington*, 690 F. Supp. 687, 688-89 (N.D. Ill. 1988), *mandamus granted, order vacated*, *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988). In *Maloney*, the court declared a mistrial in a reverse discrimination suit in which plaintiff challenged blacks and defendant challenged whites. After the judge announced that he would apply *Batson* in the second trial, the plaintiff again challenged whites and the defense again challenged blacks, but this time both sides were able to state plausibly nonracial reasons for the challenges.

264. See, e.g., Sannito & Arnolds, *Jury Study Results: The Factors at Work*, TRIAL DIPL. J., Spring 1982, at 6, 9-10 (finding little correlation between race and verdict).

265. See 1 F. LANE, GOLDSTEIN TRIAL TECHNIQUE §§ 9.45-.48 (3d ed. 1984); Babcock, *supra* note 139, at 553.

266. See Zeisel & Diamond, *supra* note 29, at 516-17 (finding that most attorneys do a poor job of selecting jurors).

267. Goldwasser assumes that it is communication between attorney and client *during jury selection* that would be chilled. Goldwasser, *supra* note 9, at 832. However, most attorneys do not engage in any meaningful communication with their clients *in voir dire*. See Corboy, *Structuring the Presentation of Proof or Evidence*, TRIAL DIPL. J., Summer 1978, at 20, 22-23 (No lawyer worth his salt will ever allow a client to help select the jury.); cf. 1 F. LANE, *supra* note 265, § 9.81 (Consulting with the client is good business practice for future relation with the client.). It is more likely that the disclosure of reasons for challenges will reveal information learned from, and strategy based on, pretrial discussion with the client. See Appleman, *Selection of the Jury*, 1968 TRIAL LAW. GUIDE 207, 220 (suggesting that attorneys give the appearance of consulting with their clients because it looks good to the jury).

268. 475 U.S. 157 (1986).

frank communication between attorney and client.<sup>269</sup> In *Jenkins v. Anderson*<sup>270</sup> and *United States v. Havens*,<sup>271</sup> the Court approved of the state's using otherwise unconstitutional evidence to impeach testifying defendants. In both cases, the Court dismissed arguments that the rulings would have chilling effects on defendants' participation in the trial.

As such, fears that extending *Batson* to defendants will improperly chill the attorney-client relationship are misplaced. To the extent that the rule would have any impact at all, it will facilitate legitimate professional relationships by compelling attorneys to do a better job of jury selection. Moreover, the rule will benefit society by eliminating a highly visible form of racism. The right to counsel is not meant to permit a defendant to convert the attorney's office into a "den of thieves"<sup>272</sup> where conspiracies to deprive minority jurors of their civil rights are hatched.

#### B. AN ALTERNATIVE NORMATIVE FRAMEWORK: THE COLLECTIVE NEEDS OF THE COMMUNITY

Even if requiring defense attorneys to explain their peremptory challenges did have an adverse impact on defendants' right to counsel and ability to present a defense, that would not answer the moral question in this situation. Defendants' rights are not the only values at stake. Other political values are implicated in a decision whether to restrict racist peremptory challenges. Most importantly, the community's desire to be free of racism is at issue.

Over one hundred years ago, in *Strauder v. West Virginia*,<sup>273</sup> the Supreme Court condemned a racist system of jury selection as being a pernicious "stimulant to that race prejudice which is an impediment to . . . equal justice" in the community.<sup>274</sup> In *Swain v. Alabama*,<sup>275</sup> the Court stated that denying blacks the same opportunities to participate in the judicial system as whites harms minority members of the community.<sup>276</sup> Most recently, in *Batson* itself, the court stated that racist jury

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269. *Id.* at 174-76.

270. 447 U.S. 231 (1980) (The prosecutor used defendant's prearrest silence to impeach trial testimony that he had acted in self-defense.).

271. 446 U.S. 620 (1980) (Illegally seized and suppressed evidence was allowed to impeach testifying defendant.).

272. *Trammel v. United States*, 445 U.S. 40, 52 (1980) (eliminating adverse spousal testimony privilege).

273. 100 U.S. 303 (1879).

274. *Id.* at 308.

275. 380 U.S. 202 (1965).

276. *Id.* at 224.

selection causes harm which extends beyond the individuals involved and touches the entire community.<sup>277</sup>

Therefore, to state the case most favorably to the defendant, all that can be said is that important social principles are in conflict. The defendant has an individual right to present a defense to an impartial jury that conflicts with the community's desire to be free from racism. If the issue of limiting defense peremptory challenges were to come before the Supreme Court in that posture, the Court would be faced with a stark choice between individual and community needs.

It seems inappropriate and unnecessary to articulate some absolute rule for resolving all such conflicts in the abstract. Undoubtedly, in some situations the defendant's individual rights will be more important than the community's conflicting desires. In other cases, however, the community's needs and interests should prevail. A blanket rule saying that primary consideration must always be given to an individual's freedom within society seems unwise.

Thus, the ultimate question in the Howard Beach case is whether the defendants' right to unfettered exercise of peremptory challenges is more important than the community's desire to be free from racism. Freedom from racism is certainly among the highest priorities of society, especially in the context of the court system. Trials can hardly be expected to fulfill their role in the protection of society if they are perceived as a white racist institution.<sup>278</sup> Racial classifications generally are given the strictest scrutiny by the courts,<sup>279</sup> and attempts to inject racism into trials are considered among the most serious threats to the trial's fairness.<sup>280</sup>

By comparison, the defendant's desire to use peremptory challenges under these circumstances is not very significant. A defendant who challenges prospective jurors based on stereotypes is not likely to be effective in identifying and eliminating the antagonistic ones. That means racist use of peremptory challenges are of little benefit in obtaining a fair trial. Defendants are thus left with two possible reasons for wishing to exercise peremptory challenges in this manner. The first is that the defendant is

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277. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

278. See Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 7-9 (1988).

279. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986); *McLaughlin v. Florida*, 379 U.S. 184, 191-93 (1964); cf. *United States v. Paradise*, 480 U.S. 149, 166 (1987) (A lesser standard of scrutiny might be appropriate in reverse discrimination cases.).

280. See Tanford, *supra* note 32, at 685-86 (Appeals to prejudice are the most serious violation of rules governing proper closing argument.).

willing to sacrifice the opportunity to improve the jury's composition in order to give effect to personal racist feelings. When the desire of an individual to discriminate conflicts with the community's desire to be free from racism, the superiority of the community's desire is obvious.<sup>281</sup>

The second possibility is that the defendant believes that by removing African-American jurors, a white jury can be obtained that will acquit the defendant for a racially motivated crime, despite the fact that the defendant is guilty. For example, the Howard Beach defendants might believe that a white jury will share their resentment against blacks moving into the neighborhood and acquit them even if the evidence proves their guilt. The right to conduct a defense, guaranteed by the sixth amendment and by fundamental notions of fairness, should not be stretched this far. The gap between factual guilt and legal guilt is already wide. The Court has said that when defendants are acquitted because of difficulties in obtaining and presenting proof under the rules of evidence, it generates "disrespect for the law and the administration of justice."<sup>282</sup> To sanction the use of racial antagonism to obtain acquittals despite provable guilt is, on moral grounds, even less justifiable.

#### IV. STEPS TOWARD PREVENTING RACIAL DISCRIMINATION BY DEFENDANTS

The argument has now come full circle. We must consider again whether this has been merely an intellectual exercise, or whether the issue has practical significance. Because of the case or controversy requirement, it is unlikely that the Supreme Court will ever be in a position to review directly the exercise of peremptory challenges by defendants. That does not mean, however, that no legal actor has the opportunity to take steps to prevent peremptory challenges from being used in a racially discriminatory manner. Rules prohibiting discriminatory jury selection by all parties can be enacted by legislatures or created by courts.

Peremptory challenges are creatures of statute and may be regulated by legislation. Although there has been some debate over whether the

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281. I make no claim that the reverse would be true. Just as there is no justification for a blanket rule that individual freedom is always more important than community desires, neither is it sensible to say that the community's desires will always justify restricting individual freedom. Therefore, if a white person wanted to sell property to a black person, but the community desired that racial segregation be maintained, the community's desire should not necessarily prevail. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

282. *United States v. Leon*, 468 U.S. 897, 907-08 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

use of legislation is a good idea,<sup>283</sup> or even a realistic possibility,<sup>284</sup> no one has suggested it is beyond the power of the legislature to regulate peremptory challenges.<sup>285</sup> The Supreme Court has stated several times that the matter of peremptory challenges is entirely under legislative control.<sup>286</sup> Moreover, the matter should not simply be left to *state* legislatures. Congress has the "power to enforce, by appropriate legislation, the provisions of" the equal protection clause.<sup>287</sup>

Courts also have the power to take steps to prevent racial discrimination in jury selection. Courts have rule-making power and can propose amendments to the Rules of Criminal Procedure. For example, Rule 24 could be amended to include a provision that tracks the language of *Batson*:

The use of peremptory challenges to excuse prospective jurors solely on account of their race is prohibited. Upon the complaint of either the prosecutor or the defendant, the judge shall determine, based on all available information, if a prima facie case of racial discrimination exists. Normally a showing that the prosecution is exercising all or most of its challenges against members of the defendant's racial group, or that the defense is exercising all or most of its challenges against members of a racial group other than the defendant's, will be sufficient to establish a prima facie case of discrimination. A peremptory challenge will then be allowed only if the party exercising it can articulate a neutral explanation related to the particular case to be tried.

Even without a formal rule, individual courts could follow Justice Demakos' example and use their inherent supervisory powers to prevent racially discriminatory jury selection.<sup>288</sup>

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283. Compare Saltzburg & Powers, *supra* note 11, at 376-77 (legislative response is too inflexible) with Note, *Defendant's Discriminatory Use*, *supra* note 9, at 60 (legislative solution desirable). See also Pizzi, *supra* note 11, at 148-49 (The legislature is the appropriate body to balance the need for inquiry into reasons for peremptory challenges and efficiency concerns, and could reduce the number of peremptory challenges to two or three.).

284. Pizzi, *supra* note 11, at 150-51 (arguing that legislative reform is unlikely, citing recent attempts by states to modify voir dire practices that were defeated through intense lobbying by trial bar).

285. See Goldwasser, *supra* note 9, at 820 (conceding that the matter could be regulated by statute).

286. *E.g.*, Hayes v. Missouri, 120 U.S. 68, 70 (1887) (positing that legislatures have full disclosure to determine the appropriate number of peremptory challenges).

287. U.S. CONST. amend. XIV, § 5.

288. See Maloney v. Washington, 690 F. Supp. 687, 688-89 (N.D. Ill. 1988) (ordering civil parties in reverse discrimination lawsuit not to base their peremptory challenges on the race of prospective jurors); Clark v. City of Bridgeport, 645 F. Supp. 890, 894 (D. Conn. 1986) (similar); Holley v. J & S Sweeping Co., 143 Cal. App. 3d 588, 592, 192 Cal. Rptr. 74, 77 (1983) (similar).

The enactment of an explicit rule would be desirable for four reasons. First, it is more practical to enact such a rule to reduce racism in criminal trials than to wait for the Supreme Court to hear a class action suit brought by the community.<sup>289</sup> Second, the rule can be enforced against a defendant, and the defendant can appeal, thus creating a feasible way for the issue to reach the Supreme Court. Third, a formal rule would foster more uniform practice within a jurisdiction than leaving the matter up to individual judges,<sup>290</sup> thereby reducing rather than aggravating the appearance of arbitrariness in the judicial system. Last, changing a traditional trial procedure by announcing a rule in advance is preferable to changing it by an *ex post facto* rule imposed by an appellate court.<sup>291</sup>

## V. CONCLUSION

Both formal and normative analyses of a defendant's racist use of peremptory challenges lead to the conclusion that the courts and legislatures can and should take steps to eliminate the practice. Neither limitations on the reach of the equal protection clause, nor the defendant's fundamental right to present a defense, presents barriers to pursuing this important social policy.

Formal analysis suggests that defense peremptory challenges *can* be limited. They are not of constitutional dimension, but rather are created by statute. Therefore, such challenges can be regulated by statute in pursuit of important social objectives. Arguments that the defendant's trial conduct is beyond the reach of the equal protection clause are beside the point. Imposing limitations on a defendant's racist conduct will restore equal application of law and further the objective of the fourteenth amendment.

Normative analysis of the problem leads to the conclusion that racist defense peremptory challenges *should* be prohibited. Racism in jury selection harms the removed jurors and the community, while aggravating the social and political alienation of racial minorities. Of

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289. *Cf. Carter v. Jury Comm'n*, 396 U.S. 320 (1970) (Class action suit challenging jury system was racially discriminatory.).

290. Two cases from the same judicial district reached opposite conclusions within three months. *Compare Clark* 645 F. Supp. 890 (limiting civil parties' peremptory challenges) *with* *Esposto v. Buonome*, 642 F. Supp. 760, 761 (D. Conn. 1986) (declining to limit civil parties' peremptory challenges).

291. *See* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 44 (1978) (criticizing legal positivism because it requires trial judges to "legislate" new rules when they make decisions in areas not covered by existing rules, and then apply this new rule to the parties, which is an *ex post facto* law).

course, these communitarian interests conflict with the defendant's individual right to present a defense, so the Court must make a choice between them.<sup>292</sup> While the importance of preserving individual liberties may in many cases outweigh the desires of the community, the racist use of peremptory challenges is not such a case. The defendant's wish to engage in private discrimination advances no legitimate goal of litigation. Further, such one-sided discrimination is inconsistent with the principle of symmetry that pervades the adversary system and may frustrate the desire to assure accurate verdicts. Additionally, it is bad symbolism to reinforce the perception that the courts are a white racist institution. It is delegitimizing and thus frustrates the justice system's goal of preserving order. Therefore, if the Court must choose between the community's desire to be free of racism and the defendant's right to engage in it, the community's needs should prevail.

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292. For arguments that "choice" is a more appropriate metaphor than the usual "balancing," see Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 50-52 (1983); Tanford, *Political-Choice*, *supra* note 212, at 859-71. See also Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 978 (1987) (Balancing does not help answer questions about whose interests are entitled to consideration.).