

St. John's Law Review

Volume 62
Number 1 *Volume 62, Fall 1987, Number 1*

Article 2

June 2012

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Recommended Citation

Hoeffner, John J. (1987) "Defendant's Discriminatory Use of the Peremptory Challenge after Batson v. Kentucky," *St. John's Law Review*. Vol. 62 : No. 1 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol62/iss1/2>

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NOTES

DEFENDANT'S DISCRIMINATORY USE OF THE PEREMPTORY CHALLENGE AFTER *BATSON v. KENTUCKY*

The practice of permitting a party, by use of the peremptory challenge,¹ to exclude from a petit jury² those veniremen suspected of undue partiality is widespread,³ long-standing,⁴ and increasingly

¹ A peremptory challenge has been defined as "[t]he right to challenge a juror without assigning a reason for the challenge." BLACK'S LAW DICTIONARY 1023 (5th ed. 1979). It is "an arbitrary and capricious species of challenge," 4 W. BLACKSTONE, COMMENTARIES *353, and may generally be exercised "without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (citing *Lewis v. United States*, 146 U.S. 370, 378 (1892)). In contrast are challenges for cause, which must be approved by the trial judge, and are so approved only "on a narrowly specified, provable and legally cognizable basis of partiality." *Id.* The number of peremptory challenges allowed is fixed by statute, see *infra* note 3, but the number of challenges for cause allowed is unlimited. See J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 140 (1977). Although each type of challenge is allowed in both civil and criminal actions, see *id.* at app. D., the focus in this Note will be upon the use of the peremptory challenge in criminal trials. For a discussion of recent developments in civil actions, see Comment, *Vitiating of Peremptory Challenge in Civil Actions: Clark v. City of Bridgeport*, 61 ST. JOHN'S L. REV. 155 (1986).

² The petit jury is "[t]he ordinary jury for the trial of a civil or criminal action," BLACK'S LAW DICTIONARY 768 (5th ed. 1979), and is to be distinguished from the grand jury, whose function is to determine "whether probable cause exists that a crime has been committed and whether an indictment (true bill) should be returned against one for such a crime." *Id.*

There are three distinct stages in the selection of the petit jury. See J. VAN DYKE, *supra* note 1, at 85-175. The first stage consists of the compilation of a list of eligible jurors and the random selection from that list of a venire to serve for a particular term. See *id.* at 85-86. The second stage of selection involves the granting of excuses to those selected for the venire. See *id.* at 111. Finally, the third stage consists of for cause and peremptory challenges to those sitting on the venire. See *id.* at 139-40. This challenge stage is known as voir dire. See *id.* at 140. For a discussion of various methods of conducting the voir dire examination, see Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 546-49 (1975).

³ See J. VAN DYKE, *supra* note 1, at app. D; Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 227 (1986) [hereinafter Note,

controversial.⁵ Traditionally, two separate but related justifications

Abolishing Peremptory Challenges]. All American jurisdictions statutorily provide for the exercise of peremptories. See Note, *Abolishing Peremptory Challenges*, *supra*, at 227-29. The number of peremptories allowed each side varies widely according to both the crime and the jurisdiction. Compare CAL. PENAL CODE § 1070 (West Supp. 1988) (up to 20 peremptory challenges for capital crimes and crimes punishable by life imprisonment) and N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982) (up to 20 peremptory challenges for class A felonies) with VA. CODE ANN. § 19.2-262 (1983) (only four peremptory challenges for capital crimes and felonies). For lesser crimes, the disparity among jurisdictions is considerably smaller. See J. VAN DYKE, *supra* note 1, at app. D. The vast majority of states, for example, allow between two and ten peremptory challenges in misdemeanor cases. *Id.*

⁴ See *Swain*, 380 U.S. at 212. Prior to 1305, the prosecution could exercise an unlimited number of peremptory challenges. See J. VAN DYKE, *supra* note 1, at 147. This allowed the Crown to essentially handpick juries. See *id.* In response to the perceived injustice inherent in such a system, Parliament enacted the Ordinance for Inquests, 33 Edw. 1, ch. 2, stat. 4 (1305), which prohibited entirely the prosecution's use of peremptories. See *id.* This statute was interpreted, however, to allow the prosecution to "stand aside" jurors. See, e.g., Anonymus, [1726] 86 Eng. Rep. 199, 200 (K.B.) (holding "the King is not [required] to shew any cause"); see generally Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 193-94 (1978) (origins and judicial interpretation of 1305 Act). The right of standing jurors aside, still the law in England, see *The Queen v. Mason*, [1980] 3 All E.R. 777, 783, effectively operates as a right to exercise a type of tentative peremptory challenge, a challenge which becomes final if there is not a deficiency of jurors remaining after the defendant has exercised his available peremptory challenges and both sides have exercised their challenges for cause. *The Queen v. Geach*, [1841] 173 Eng. Rep. 929, 930 (K.B.) See *Swain*, 380 U.S. at 213; see also J. VAN DYKE, *supra* note 1, at 148 (common-law history of challenges). Because it has been extremely rare for a jury panel not to produce a sufficient number of unchallenged jurors, the right to stand aside is best considered a de facto peremptory challenge. See J. VAN DYKE, *supra* note 1, at 148.

In the United States, although the right of the defendant to challenge peremptorily has always been accepted as part of the common law, the right of the prosecution to similarly challenge, or even to stand jurors aside, has not been so widely accepted. See *id.*; Brown, McGuire & Winters, *supra*, at 194-95. Regarding the right to stand aside, the Supreme Court tacitly recognized a disparity among the states in 1855 when it held that in federal courts, the prosecutor's right was dependent upon state law, and that if state law or usage did not allow the prosecutor to stand jurors aside, the right "should be rejected." See *United States v. Shackelford*, 59 U.S. (18 How.) 588, 590 (1855). Eventually, however, the controversy in the United States surrounding the standing aside doctrine dissipated, as states, by statute, began to expressly grant prosecutors the right to exercise peremptory challenges. See J. VAN DYKE, *supra* note 1, at 150.

⁵ See *Batson v. Kentucky*, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring). In *Batson*, Justice Marshall noted that: "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system." *Id.* at 107 (Marshall, J., concurring). See generally Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 244-56 (arguing for abolishment of all peremptory challenges).

Although such calls for eliminating the use of peremptory challenges remain rare, see Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 244 n.87 and accompanying text, the controversy surrounding peremptories is not limited to the question of whether to maintain the challenge or completely eliminate it. See *infra* notes 12-20 and accompanying text.

have been advanced in support of such challenges.⁶ First, it has been asserted that peremptory challenges are the most effective means of removing "extremes of partiality" from the jury, thereby ensuring that the jury ultimately selected will be as impartial as is practicable.⁷ Second, even if a party does not make optimum use of available peremptory challenges, the mere exercise of the right at least satisfies the appearance of justice by assuring each party and the public that the jurors selected will not prejudge the case, but will instead deliberate solely "on the basis of the evidence placed before them."⁸ Notwithstanding the strength of these policy considerations, the Supreme Court has noted emphatically and repeat-

⁶ See, e.g., *Swain*, 380 U.S. at 219 (peremptory challenges eliminate partiality and assure parties of same); Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 356-57 (1982) (goal of peremptory challenges to provide impartiality and appearance of impartiality); *infra* notes 7 & 8 and accompanying text (discussion of traditional justifications).

⁷ See *Swain*, 380 U.S. at 218-19. It has been noted that the challenge system has an inherent deterrent against abuse because "a party who insists on challenging jurors on the basis of questionable stereotypes increases his chances of removing friendly jurors and decreases his opportunities for excluding more biased veniremen, thus reducing the possibility of success at trial." Saltzburg & Powers, *supra* note 6, at 365.

Although parties have the same self-interest in effectively exercising challenges for cause to remove partial jurors, for several reasons such challenges cannot be expected to be utilized with complete effectiveness:

First, jurors may be reluctant to admit their prejudices before spectators or others present in the courtroom during the *voir dire*. Second, certain prospective jurors may evade full disclosure of their prejudices in an effort to avoid being struck from the jury. Finally, other prospective jurors may simply be unaware of the existence of certain biases or prejudices they may harbor.

People v. McCray, 57 N.Y.2d 542, 547, 443 N.E.2d 915, 918, 457 N.Y.S.2d 441, 444 (1982), *cert. denied*, 461 U.S. 961 (1983).

Thus, peremptory challenges increase jury impartiality by eliminating biases that, for one reason or another, were not or could not be satisfactorily proven. See *Swain*, 380 U.S. at 219-20; *McCray*, 57 N.Y.2d at 547-48, 443 N.E.2d at 918, 457 N.Y.S.2d at 444. *But see* Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 271 (by expanding *voir dire* and questioning potential jurors privately, challenge for cause could by itself be as effective in removing biased jurors as is current system of striking jurors both for cause and peremptorily).

⁸ See *Swain*, 380 U.S. at 219. The *Swain* Court noted that "to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Indeed, the Court has gone so far as to assert that it is "necessary . . . that a prisoner . . . should have a good opinion of his jury . . . [for] the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike." *Lewis v. United States*, 146 U.S. 370, 376 (1892). See also 4 W. BLACKSTONE, COMMENTARIES *353 (allowing peremptory challenges to be exercised to exclude potential jurors based on nothing more than the challenged jurors "bare looks and gestures" justified by concern for the defendant's state of mind). The importance of this rationale decreases, however, to the degree its application conflicts with the community's sense of fairness. See *infra* note 66 and accompanying text.

edly that the use of the peremptory challenge is not a constitutional right.⁹ Thus, while peremptory challenges may generally be viewed as an effective means of ensuring jury impartiality,¹⁰ when they are exercised in contravention of a specific constitutional provision, such effectiveness becomes irrelevant and the constitutional mandate, by its nature, must prevail.¹¹

Applying this principle, the Supreme Court, in *Batson v. Kentucky*,¹² proscribed the racially discriminatory use of peremptory challenges by prosecutors in criminal proceedings, holding that such use violated the Equal Protection Clause of the fourteenth amendment.¹³ The Court emphasized the jury's central position as a protective barrier against the arbitrary exercise of power by the state, and stated that to allow purposeful discrimination in jury selection would endanger this protection.¹⁴ *Batson*, however, while

⁹ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (prosecutor's discriminatory use of peremptory challenge not protected by Constitution); *Swain*, 380 U.S. at 219 (peremptory challenge may be restricted since it does not arise from Constitution); *Stilson v. United States*, 250 U.S. 583, 586 (1919) (since peremptory challenge not constitutional right, multiple defendants may be treated as one party in allotment of such).

The language in *Stilson* is unequivocal and often cited: "[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured." *Stilson*, 250 U.S. at 586.

¹⁰ See *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 219; *United States v. Leslie*, 783 F.2d 541, 561 (5th Cir. 1986) (en banc), *vacated and remanded*, 107 S. Ct. 1267 (1987). Indeed, even courts that have limited the use of peremptory challenges have emphasized such challenge's general utility in ensuring impartiality. See, e.g., *Commonwealth v. Soares*, 377 Mass. 461, 485, 387 N.E.2d 499, 514 (retention of "a legitimate and significant role for the peremptory challenge"), *cert. denied*, 444 U.S. 881 (1979); *State v. Gilmore*, 103 N.J. 508, 530, 511 A.2d 1150, 1161 (1986) (peremptory challenge viable means of achieving jury impartiality).

¹¹ See *Batson*, 476 U.S. at 91 (peremptory challenge may not be exercised in violation of fourteenth amendment); *Swain*, 380 U.S. at 223-24 (fourteenth amendment prohibits discriminatory use of peremptory challenge). The general principle of constitutional supremacy noted here is of course beyond confutation. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803). "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it." *Id.* at 176.

¹² 476 U.S. 79 (1986).

¹³ *Id.* at 89. The fourteenth amendment provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

¹⁴ See *Batson*, 476 U.S. at 86. Eleven years prior to *Batson*, in a case decided under the sixth amendment, the Supreme Court stressed the same theme:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large,

continuing a century-old trend toward increasing the representative nature of the jury,¹⁵ expressly left unresolved the question of whether a *defendant's* discriminatory use of peremptory challenges might also be successfully challenged.¹⁶

Several state courts of last review, relying upon their respective state constitutions, have answered this question in the affirma-

distinctive groups are excluded from the pool.

Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citation omitted).

The discriminatory exclusion of certain groups from the jury by use of the peremptory challenge will result in the failure of the jury to perform its protective role because such an exclusion makes it unlikely the jury will express "the commonsense judgment of the community," since it is disproportionately composed of members of the preferred group. See *People v. Wheeler*, 22 Cal. 3d 258, 266-67, 583 P.2d 748, 754-55, 148 Cal. Rptr. 890, 896 (1978).

¹⁵ See *Batson*, 476 U.S. at 84-85. The efforts of the Court to develop a more representative jury selection system began with *Strauder v. West Virginia*, 100 U.S. 303 (1880). The *Strauder* Court relied upon the Equal Protection Clause to invalidate a state statute excluding blacks from juries. See *id.* at 309. The *Strauder* rationale was later extended to the discriminatory administration by state officers of facially neutral laws delineating juror qualifications. See *Pierre v. Louisiana*, 306 U.S. 354, 357, 360 (1939). Development toward increasing the representative nature of the jury continued in *Hernandez v. Texas*, 347 U.S. 475 (1954), in which the Court first recognized the unconstitutionality of non-race based discrimination in jury selection by holding that citizens of Mexican descent could not be systematically excluded from jury duty. *Id.* at 482. The Court has also applied a sixth amendment analysis to find a juror selection system that resulted in disproportionate exclusion of women from juries unconstitutional. See *Taylor*, 419 U.S. at 525.

All of the cases cited above, however (except *Batson*), dealt with eligibility for and selection to the venire of an entire group, either blacks or women or Mexican-Americans. Their relevance regarding the discriminatory exclusion of those already on the venire from the petit jury is thus debatable, for exclusion from the venire differs from exclusion by peremptory challenge in several important respects:

[Systematic exclusion from all venire pools] singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not.

Batson, 476 U.S. at 122-23 (Burger, C.J., dissenting) (quoting *United States v. Leslie*, 783 F.2d 541, 554 (5th Cir. 1986) (en banc), *vacated and remanded*, 107 S. Ct. 1267 (1987) (emphasis in original)).

When the defendant's exercise of the peremptory is being challenged, the distinction between venire and petit exclusion is particularly acute, as the Court in *Batson* impliedly noted. See *Batson*, 476 U.S. at 89 n.12.

¹⁶ See *Batson*, 476 U.S. at 89 n.12. The Court stated, "[w]e express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.*

tive,¹⁷ and at least one trial court has expressly cited *Batson* as authority for similarly limiting a defendant's discriminatory use.¹⁸ Whether the federal Constitution, if properly construed, will yield the same result as the several state constitutions is highly uncertain, however.¹⁹ Indeed, the extension of the *Batson* analysis to encompass defendant's use has been attacked as especially constitutionally dubious.²⁰

This Note will discuss the applicability of *Batson*'s equal protection analysis to a defendant's discriminatory use of peremptory challenges. Furthermore, this Note will examine whether, if the equal protection analysis should be found wanting, an alternative provision of the Constitution might be employed to prohibit such discrimination. Additionally, public policy concerns relating to the

¹⁷ See *Wheeler*, 22 Cal. 3d at 282 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 906 n.29 (prosecution "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) (prosecution as well as defense entitled to challenge discriminatory use of peremptories); *Commonwealth v. Reid*, 384 Mass. 247, 254-56, 424 N.E.2d 495, 499-501 (1981) (within judge's discretion to limit improper use of peremptory challenges by defendant). See also *United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986) (en banc) ("[E]very jurisdiction which has . . . prohibited [discriminatory] prosecution case-specific peremptory challenges . . . has held that the defense must likewise be so prohibited"), *vacated and remanded*, 107 S. Ct. 1267 (1987).

¹⁸ See *In re Ladone*, N.Y.L.J., Sept. 22, 1987, at 3, col. 3 (Sup. Ct. Queens County).

In *Ladone*, white defendants were charged with second-degree murder of a black man. *Id.* The attack which led to the victim's death was racially motivated. *Id.* at 1, col. 3. During voir dire, defendants sought to exercise their peremptory challenges to exclude blacks from the jury. *Id.* Relying upon *Batson*, the trial court ordered defendants to give race-neutral reasons for any further exclusion of black potential jurors. *Id.* at 3, col. 4. Defense attorneys attacked the ruling as groundless, with the director of the National Association of Criminal Defense Attorneys attributing it to the trial judge's "temporary loss of legal sanity." See Cheever, *Defense Jeers Ruling Denying Peremptories in Howard Beach*, *Manhattan Law.*, Oct. 6-12, 1987, at 5, col. 4; *infra* note 20. Presumably, any loss of faith suffered by the director in the mental well-being of the judiciary was restored by the holding in *Holtzman v. Supreme Court*, N.Y.L.J., Mar. 11, 1988, at 20, col. 2 (Sup. Ct. Westchester County). In *Holtzman*, the trial judge, Justice Rosato, rejected the applicability of the *Batson* analysis to a defendant's discriminatory exercise of the peremptory challenge. *Id.* at 33, col. 1. Justice Rosato based his decision on the failure of the plaintiff to demonstrate "state action" sufficient to implicate the fourteenth amendment. *Id.* After the ruling, the plaintiff asserted the case would be appealed. *Id.* at 6, col. 6. As of the time of publication of this Note, however, the appeal had not yet been filed.

¹⁹ See *supra* note 16; *infra* notes 21-63 and accompanying text.

²⁰ See Cheever, *supra* note 18, at 5, col. 4 and at 38, col. 3. Two separate constitutional grounds have been noted for opposing extension of *Batson* to limit a defendant's discriminatory use of peremptories: impermissible interference with defendant's fifth amendment right to counsel; and the inapplicability of the fourteenth amendment due to an absence of state action. *Id.* at 38, col. 3. The fifth amendment argument is not examined in this Note; the fourteenth amendment argument is examined extensively. See *infra* notes 21-45 and accompanying text.

wisdom of permitting defendants to discriminate will also be examined. In this area, inquiry will focus upon whether the allowance of discriminatory use of the peremptory challenge is antagonistic to the values peremptories are purported to serve, and if so, whether use of peremptories may feasibly be limited to non-discriminatory usage without abrogating their legitimate role in ensuring jury impartiality. Finally, this Note will argue that there is a conflict between the discriminatory use of peremptories and the rationale advanced in support of that use, and propose that due to the confluence of the uncertain efficacy of the peremptory challenge when exercised discriminatorily, and the strength of countervailing policy concerns, discriminatory use of the challenge be limited, if not by the courts, then by statute.

THE REQUIREMENT OF STATE ACTION

In *Batson*, the Supreme Court held violative of the Equal Protection Clause of the fourteenth amendment, a prosecutor's discriminatory use of the peremptory challenge.²¹ Extension of the *Batson* rationale to defendants is problematic, however, because the fourteenth amendment demands that the denial of equal protection involved be a product of "state action."²² Although the Court in *Batson* had no difficulty in properly invoking the four-

²¹ See *Batson*, 476 U.S. at 89. In *Batson*, the trial judge had flatly rejected the defendant's timely objection to the prosecutor's discriminatory exclusions. See *id.* at 100. The Supreme Court reversed and remanded, with instructions to reverse petitioner's conviction if the prosecutor was unable to provide a neutral explanation for his actions. See *id.*

²² See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (Equal Protection Clause inapplicable as private club not a state actor by virtue of its being granted state liquor license); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-22 (1961) (operation of fourteenth amendment implicated by discriminatory practices of restaurant leasing space from municipality within public parking facility); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (judicial enforcement of privately enacted, racially restrictive covenants constituted state action for purposes of fourteenth amendment). The state action requirement was first enunciated by the Court in 1883. See *The Civil Rights Cases*, 109 U.S. 3 (1883). Writing for the Court in the *Civil Rights Cases*, Justice Bradley stated that "[i]t is State action of a particular character that is prohibited [by the fourteenth amendment]. Individual invasion of individual rights is not [its concern.]" *Id.* at 11.

The benefits of the state action requirement, and the implications of it for the courts, have been explained as follows:

[T]he 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot be fairly blamed . . . [It thus] require[s] the courts to respect the limits of their own power as directed against state governments and private interests.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982).

teenth amendment,²³ the state action implicated in a defendant's discriminatory use of peremptories is much more attenuated.²⁴ Indeed, until the 1940's, when the scope of the state action doctrine was first broadened, an assertion of state action in such a case would no doubt have been summarily rejected.²⁵ Since that time, however, the requirement has been liberalized, the change being predicated upon two separate analytical frameworks: "public function" analysis; and "nexus" analysis.²⁶

Public Function Analysis

Public function analysis is premised on the idea that government cannot free itself from constitutionally-imposed limitations by delegating that authority which is "clearly governmental in nature" to private individuals.²⁷ Initially, the public function doctrine was employed to find state action in disputes involving the at-

²³ See *Batson*, 476 U.S. at 84-85. In fact, no issue regarding satisfaction of the state action requirement was even raised, it being well established that a prosecutor is a state actor. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) (prosecutors immune from suits under 42 U.S.C. § 1983 even when acting "under color of state law"); *McCray v. Abrams*, 750 F.2d 1113, 1130 (2d Cir. 1984) (contention that systematic exclusion of identifiable groups by prosecutor not state action rejected on grounds prosecutor is agent of state), *reh'g denied*, 756 F.2d 277 (2d Cir. 1985) (en banc), *vacated and remanded*, 471 U.S. 1097 (1986) (mem.).

²⁴ See *Batson*, 476 U.S. at 107-08 (Marshall, J., concurring). In his concurrence, Justice Marshall called for the complete abolishment of the peremptory challenge. *Id.* at 107 (Marshall, J., concurring). Moreover, he would accomplish this end "by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptory as well." *Id.* at 107-08 (Marshall, J., concurring). Justice Marshall thus implicitly recognized the distinction between the defendant's and the prosecutor's discriminatory use of the peremptory challenge, and intimated he would find no state action in such use by the defendant. *Id.* (Marshall, J., concurring).

²⁵ Compare *Corrigan v. Buckley*, 271 U.S. 323 (1926) (court decree enforcing racially restrictive covenants does not constitute governmental action) with *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicially enforced, privately enacted, racially restrictive covenants come under umbrella of state action).

²⁶ See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 12.1-3, at 425, 426, 432 (3d ed. 1986) [hereinafter *CONSTITUTIONAL LAW*]. It has been noted that the Court's rejection of a strict interpretation of the state action requirement has not weakened judicial support for the principle, arising from the *Civil Rights Cases*, that "the state and not the private individual is the addressee of the fourteenth amendment." See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1085 (1960).

²⁷ See *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968); see also *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 859-60 (2d Cir. 1975) (no state action in performance of civic functions by non-profit organization); *CONSTITUTIONAL LAW*, *supra* note 26, § 12.2, at 426 (activities traditionally associated with and performed by government when performed by private parties may be deemed public functions); *infra* notes 29-33 and accompanying text.

tempted derogation of the voting rights of blacks by means of privately-controlled white primaries.²⁸ Subsequently, the Supreme Court in *Marsh v. Alabama*²⁹ decided that activities permitted under the first amendment could no more be infringed on the streets of a company-owned town than on the streets of "any other American town."³⁰ Exclusivity has been noted as the common element between these two applications: the streets in *Marsh* were the only streets, and the primary elections in the White Primary cases were the only significant elections.³¹ In addition to exclusivity, the requirement that the activity of the private actor be one "traditionally and historically associated with sovereignty" has also often been noted by the Court.³² These factors, it is submitted, point toward the conclusion that the public function doctrine should not be applied to state action when a defendant has exercised his peremptory challenges in a discriminatory manner. Government *has* traditionally and exclusively determined eligibility requirements for jurors;³³ however, it cannot correctly be asserted

²⁸ See, e.g., *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring) (racially discriminatory practices by association of white voters state action); *Smith v. Allwright*, 321 U.S. 649, 660 (1944) (primary elections public function subject to constitutional limitations); *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (state statute authorizing Executive Committee of political party to prescribe members qualifications implicates state when such authority exercised in discriminatory manner). The *Smith* Court noted expressly "that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." *Smith*, 321 U.S. at 660. See generally CONSTITUTIONAL LAW, *supra* note 26, § 12.2, at 426-27 (discussing case law).

²⁹ 326 U.S. 501 (1946).

³⁰ *Id.* at 502, 508-09. In *Marsh*, the Court found state action based on the fact the state allowed private ownership of land and property which placed those functions and activities which would normally be performed by the government in the hands of a corporation. *Id.*

³¹ See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978). Although the exclusivity requirement has been attacked, see *id.* at 172-73 (Stevens, J., dissenting), it has also been cited approvingly by the Court and now seems firmly established. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2985 (1987) (nationwide coordination of amateur athletics by corporation chartered by Congress private action); *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982) (no state action involved in discharge and transfer of nursing home patients as nursing home operation not traditionally exclusive state function); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (private school education not public function implicating fourteenth amendment because education not "exclusive province of the State"); see also CONSTITUTIONAL LAW, *supra* note 26, § 12.2, at 430-31 (discussing Court's adherence to and application of exclusivity requirement).

³² See *Flagg Bros.*, 436 U.S. at 171-72 (Stevens, J., dissenting); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974); *Evans v. Newton*, 382 U.S. 296, 301-02 (1966).

³³ See generally *J. VAN DYKE*, *supra* note 1, at 85-109 (juror eligibility requirements imposed by government). Some current requirements for jurors in various jurisdictions include being a taxpayer, WASH. REV. CODE ANN. § 2.36.070 (1987), not being a pauper, W. VA.

that the acceptance and rejection of jurors during voir dire has ever been, in fact or in theory, an exclusive function of the state.³⁴ Indeed, there is good reason such an arrogation of authority has never been successfully advanced,³⁵ for it would go far toward undermining the jury's most important institutional characteristic, its independence.³⁶

Nexus Analysis: Establishing the Link Between the Discriminatory Act and the State

Absent a finding of public function, acts of a private individual are attributable to the state only if there is "a sufficiently close nexus between the State and the challenged action" so that such action "may be fairly treated as that of the State itself."³⁷ The vagueness of this standard is purposeful: the Supreme Court has stated expressly that it has never formulated "an infallible test" as to what constitutes a sufficiently close nexus because it is only by weighing all of the relevant facts and circumstances that a proper determination may be made.³⁸ Prediction in this area is therefore

CODE § 52-1-2 (1981), and not having been convicted of adultery. *See* *Beasley v. State*, 39 Ala. App. 182, 96 So. 2d 693 (1957) (interpreting title 30 of ALA. CODE (1940)).

³⁴ *See* *People v. Buford*, 69 N.Y.2d 290, 297-98, 506 N.E.2d 901, 905, 514 N.Y.S.2d 191, 195 (1987). The court in *Buford* stated that a defendant is constitutionally entitled to a "jury chosen according to law, in whose selection [the defendant] has had a voice." *Id.* (quoting *People v. Ivery*, 96 App. Div. 2d 712, 712, 465 N.Y.S.2d 371, 372 (4th Dep't 1983) (mem.)). The distinction between the establishment of jurors' qualifications and the selection of particular jurors for a particular trial was noted by the New York Court of Appeals in 1886: "The law prescribes the qualifications of jurors. The court cannot add to, or detract from them. It cannot itself select the jury, directly or indirectly." *Hildreth v. City of Troy*, 101 N.Y. 234, 239, 4 N.E. 559, 562 (1886).

³⁵ *See* *J. VAN DYKE*, *supra* note 1, at 147; *supra* note 4. It was precisely to prohibit such a system of sole governmental selection of jurors that Parliament passed the Ordinance for Inquests, 33 Edw. 1, ch. 2, stat. 4 (1305). *See* *J. VAN DYKE*, *supra* note 1, at 147.

³⁶ *J. VAN DYKE*, *supra* note 1, at 5. "[I]f the jury is to play its intended role as an impartial fact-finder, expressing the community's decision, it must be independent. Otherwise, it is not really the community's voice but the voice of the crown (or state), and the entire rationale for using a jury is erased." *Id.*

³⁷ *See* *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). *See also* *Junior Chamber of Commerce v. United States Jaycees*, 495 F.2d 883, 888 (10th Cir.) (private organization receiving federal grants and substantial tax benefits by itself does not create sufficient nexus to implicate fourteenth amendment), *cert. denied*, 419 U.S. 1026 (1974).

³⁸ *See* *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967). *See also* *Jackson*, 419 U.S. at 350-51 (whether heavily-regulated private utility company was state actor requires "detailed inquiry"); *Moose Lodge No. 107 v. Irisv.*, 407 U.S. 163, 172 (1972) (determination of state action "frequently admits of no easy answer"); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (finding of state action in ostensibly private discriminatory acts by restaurant owner required investigation into particular facts and circumstances).

unusually unreliable; nonetheless, it is submitted that, regarding a defendant's discriminatory use of the peremptory challenge, the nexus test provides no more sufficient a rationale for finding state action than did the public function analysis.

Indeed, an examination of analogous cases suggests a contrary holding would require an unprecedented expansion of the state action doctrine.³⁹ Recently, for example, in holding a corporation chartered by Congress was not an agent of the state, the Supreme Court stated that absent coercion or significant encouragement from the government, a private individual's actions would not be held to constitute state action.⁴⁰ Thus, while the discriminatory ex-

The Court's most detailed explanation of its approach to the question of state action was provided by *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1981). In *Lugar*, Justice White, writing for the Court, noted that the Court utilizes a "two-part approach" in resolving issues involving the existence of state action:

[T]he conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State. . . . First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State

Although related, these two principles are not the same. . . . The two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i.e.*, against a private party.

Id. at 937.

Applying the *Lugar* framework, it is conceded that the state did create the right to challenge peremptorily, and that right when discriminatorily exercised does result in the deprivation of a right guaranteed by the federal government to the discriminated-against jurors. See *Carter v. Jury Comm'n*, 396 U.S. 320, 329-30 (1970). It is submitted, however, that the requirements of the second part of the *Lugar* approach are not satisfied by the discriminatory act of a defendant acting contrary to the will of the state, for such action by the defendant is not properly "chargeable to the state."

³⁹ See *infra* notes 41-47 and accompanying text. But see Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 295-99 (1968) (defendant's discriminatory use of the peremptory challenge "may" constitute state action).

⁴⁰ See *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2986 (1987). In support of this proposition, Justice Powell cited, among other cases, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson*, 419 U.S. at 357; and *Moose Lodge No. 107*, 407 U.S. at 173. *San Francisco Arts*, 107 S. Ct. at 2986. Justice Powell quoted with approval the *Blum* Court's assertion that a state "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the [government]." *Id.* (quoting *Blum*, 457 U.S. at 1004). It is suggested the word "normally" in the preceding sentence is merely a reference to those cases decided under a public function analysis, and does not imply the Court might ever consider a less substantial nexus than usual sufficient to constitute state action.

ercise of state trespass laws by store owners might properly be attributable to the state when the state had expressly assured the store owners it would enforce discriminatory usage,⁴¹ enforcement of that same law would not be considered state action if the store owners had called upon police for enforcement absent any official action tantamount to an encouragement of private discrimination.⁴²

Applying this reasoning to the defendant's discriminatory exercise of peremptories, it is suggested that although allowing such exercise of the peremptory challenge creates an opportunity for discrimination, the state cannot reasonably be viewed as encouraging the same since the discriminatory action is typically performed independently from, indeed, in opposition to,⁴³ any express or implied direction by the state. The most appropriate comparison might be to a claim that the state has acted by allowing a voter to vote for or against a candidate on expressly racial grounds.⁴⁴ Although both situations involve structures erected and maintained by the state, the uncoerced and unencouraged discriminatory exercise of each right is simply insufficient to satisfy the requirements of the nexus analysis, for in neither case can the private actor's action be "fairly [attributed] to the state."⁴⁵

⁴¹ See *Lombard v. Louisiana*, 373 U.S. 267, 268-73 (1963); see also *Reitman v. Mulkey*, 387 U.S. 369, 378-79 (1967) (state constitution prohibiting state interference in private-sector real property transactions deemed state promotion of racial discrimination); *Anderson v. Martin*, 375 U.S. 399, 402-04 (1964) (statute requiring candidate's race be noted on ballot unconstitutional state promotion of discrimination).

⁴² See *Walker v. State*, 220 Ga. 415, 419-20, 139 S.E.2d 278, 282 (1964), *rev'd on other grounds*, 381 U.S. 355 (1965) (per curiam). In *Walker*, the Supreme Court of Georgia distinguished *Lombard* by noting that the state had resolved in this instance to urge its citizens not to discriminate. *Id.* at 418-19, 139 S.E.2d at 281-82.

The Supreme Court's reversal was founded upon its holding in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). See *Walker*, 381 U.S. at 355. *Hamm* had abated a similar trespass conviction based upon the Civil Rights Act of 1964. *Hamm*, 379 U.S. at 308. Thus, as the Court in *Hamm* expressly noted, the question of the fourteenth amendment's applicability was not addressed "in any manner." *Hamm*, 379 U.S. at 310 n.3.

⁴³ Cf. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (public defender not acting under color of state law for purposes of 42 U.S.C. § 1983 because a defense lawyer "opposes . . . the State").

⁴⁴ It might be maintained the concreteness of the harm to the particular juror involved makes the analogy inapposite. It is suggested, however, the correspondingly greater stake of the defendant being prosecuted vitiates any distinction upon these grounds.

⁴⁵ See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). See also *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (state's mere acquiescence in private parties' transfer of nursing home patients does not create sufficient nexus to invoke fourteenth amendment).

The fact that during voir dire a defense attorney acts as an "officer of the court" does

RIGHT TO IMPARTIAL JURY AS GROUNDS FOR LIMITING DEFENDANT'S
DISCRIMINATORY USE

Various state courts, based upon the respective state versions of the sixth amendment guarantee to an impartial jury, have limited the criminal defendant's ability to exercise peremptory challenges discriminatorily.⁴⁶ These decisions are founded upon the belief that the state, no less than the defendant, is entitled to an impartial jury.⁴⁷ The discriminatory use of the peremptory challenge, it is maintained, by skewing the representative nature of the jury, impermissibly impinges upon this right.⁴⁸ While independent state grounds insulate these decisions from the Supreme Court's purview,⁴⁹ a question arises as to whether the Supreme Court might follow the lead of these states and hold that, in the federal court system, a defendant's discriminatory use of peremptory challenges similarly violates a right of the federal government to an impartial jury.⁵⁰ Despite supportive dicta to the contrary,⁵¹ it is submitted that such a holding by the Court would be both constitutionally and logically untenable.

The sixth amendment, for example, grants "the *accused* . . .

not change the legal analogousness of the two situations noted above; indeed, in other contexts, the Supreme Court has explicitly rejected the contention that by so acting an attorney becomes a state actor "under color of state law." See *Polk County*, 454 U.S. at 318; *supra* note 43. See also *In re Griffiths*, 413 U.S. 717, 729 (1973) (attorneys not government officials by virtue of being officers of court); *Cammer v. United States*, 350 U.S. 399, 405 (1956) (lawyers not officers of court for purposes of 18 U.S.C. § 401(2) (1982)).

⁴⁶ 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, 486 (Fla. 1984); *Commonwealth v. Reid*, 384 Mass. 247, 254-56, 424 N.E.2d 495, 499-501 (1981). See also *People v. Pagel*, 186 Cal. App. 3d Supp. 1, 7-8, 232 Cal. Rptr. 104, 107 (1986) (applying *Wheeler* principle to defendant's discriminatory use of peremptory challenges), *cert. denied*, 107 S. Ct. 1953 (1987).

⁴⁷ See *Wheeler*, 22 Cal. 3d at 276-77, 282 n.29, P.2d at 761-62, 765 n.29, 148 Cal. Rptr. at 902-03, 906 n.29; *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 488, 489-90 n.35, 387 N.E.2d 499, 515-16, 517 n.35, *cert. denied*, 444 U.S. 881 (1979).

⁴⁸ See *supra* note 47.

⁴⁹ See generally *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1331-67 (1982) (discussing extent of independence of state courts in interpreting state constitutions).

⁵⁰ See *Batson v. Kentucky*, 476 U.S. 79, 84-85 n.4 (1986). The defendant in *Batson* based his claim upon an alleged violation of sixth amendment rights. See *id.* The Court, in deciding the case under equal protection principles, explicitly noted it was expressing "no view on the merits of . . . Sixth Amendment arguments." *Id.*

⁵¹ See *id.* at 107 (Marshall, J., concurring) (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

the right to . . . an impartial jury.”⁵² Although this language alone does not preclude a finding that the state too is entitled to such a right,⁵³ it is suggested that such language does add considerable weight to the already compelling historical data supporting the constitutional validity of allowing the state to be treated less favorably than the criminal defendant. Such historical support includes recognition at common law that the right to challenge peremptorily is designed primarily to benefit the defendant;⁵⁴ state statutes that make available a greater number of peremptories to defendants than prosecutors;⁵⁵ and the fact that although Congress granted defendants the right to exercise peremptory challenges in 1790,⁵⁶ prosecutors in federal courts were not granted any similar right until 1865.⁵⁷ The incompatibility of interpreting as restrictive of a defendant’s rights a constitutional guarantee unquestionably designed to protect and enhance those rights further suggests the benefits of the Constitution’s impartial jury guarantee might prop-

⁵² U.S. CONST. amend. VI (emphasis added).

⁵³ See *id.* art. III, § 2, cl. 3. Article III is thought to have incorporated within its terms most of the rights later expressly guaranteed by the sixth amendment. THE CONSTITUTION OF THE UNITED STATES OF AMERICA (ANNOTATED), S. DOC. NO. 232, 74th Cong., 2d Sess. 501-02 (1938). Thus, it is submitted, the claimed constitutional right of the state to an impartial jury upon the same terms as that granted to defendants need not necessarily be found in the sixth amendment, for Article III could provide the same result, as could the common law. See *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, C.J.) (“impartial jury . . . required by the common law”). Except for the express limitation of the rights of the sixth amendment to “the accused,” however, all the arguments against finding a state right in the sixth amendment can also be mustered against finding either an Article III or common-law basis.

⁵⁴ See *Swain v. Alabama*, 380 U.S. 202, 242 (1965) (Goldberg, J., dissenting). Justice Goldberg quoted Blackstone’s characterization of the peremptory challenge as “a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.” *Id.* See also *supra* note 4 (delineating historical differences in treatment of prosecutor’s and defendant’s right to peremptorily challenge).

⁵⁵ See, e.g., GA. CODE ANN. § 59-805 (Harrison 1986) (state allowed one-half number of peremptory challenges allocated to defendant); MICH. COMP. LAWS ANN. § 768.13 (West 1982) (upon trial for crimes punishable by death or life imprisonment defendant entitled to 20 peremptory challenges and state 15); N.J. STAT. ANN. § 2A:78-7 (West Supp. 1987) (upon trial for serious crimes of violence defendant entitled to 20 peremptory challenges and state 12). Currently, seventeen states grant the defendant more peremptory challenges than the prosecution in capital cases, ten grant the defendant more peremptories in non-capital felony trials, and five provide the defendant a greater number of peremptories in misdemeanor trials. See Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 228-30.

In federal criminal trials the number of peremptory challenges allowed each side is equal, except in trials for non-capital felonies, in which the defendant is granted the right to exercise ten peremptory challenges and the government only six. See FED. R. CRIM. P. 24(b).

⁵⁶ 1 Stat. 119, ch. 30 (1790).

⁵⁷ 13 Stat. 500, ch. 86, § 2 (1865).

erly be limited to the defendant.⁵⁸

Moreover, whatever the degree of solicitude that should be accorded a defendant beyond the constitutionally required minimum, a limitation upon the *manner* of each side's exercise of its available peremptory challenges cannot be distinguished on any principled constitutional basis from a prosecutor's demand for an equal *number* of peremptory challenges.⁵⁹ Thus, it is asserted the logical inconsistency between invalidating on the basis of the state's right to an impartial jury the defendant's discriminatory use of the peremptory challenge, while retaining the constitutionally unquestioned and more significant disparity of inequality in the number of peremptories allowed,⁶⁰ suggests that the issue is not one of constitutional dimensions and is left most wisely to Congress and the respective state legislatures.⁶¹ While legislative bodies may act to ensure that the state's rights are equal to those enjoyed by the defendant,⁶² they are also free, as a policy matter, to grant the defendant increased rights in relation to the state.⁶³

⁵⁸ See *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Singer v. United States*, 380 U.S. 24, 31 (1965). In *Singer*, the Court noted the trial by jury guarantee of Article III "was clearly intended to protect the accused from oppression by the Government." *Singer*, 380 U.S. at 31.

⁵⁹ In fact, it is suggested that numerical inequality is more injurious to the state's alleged right to an impartial jury than differing restrictions upon the exercise of peremptories might be, since as a practical matter the former disparity will almost always affect the jury's composition. Differing restrictions, in contrast, can be expected to impact upon the composition of the jury in only a small percentage of trials. See *McCray v. Abrams*, 750 F.2d 1113, 1132 (2d Cir. 1984), *reh'g denied*, 756 F.2d 277 (2d Cir. 1985) (en banc), *vacated and remanded*, 471 U.S. 1097 (1986) (mem.).

⁶⁰ See *supra* note 59 (explaining why inequality in numbers is more significant).

⁶¹ Cf. Saltzburg & Powers, *supra* note 6, at 376-77. Professor Saltzburg and Ms. Powers suggest a constitutional solution to the problems raised by allowance of differing numbers of peremptory challenges is unwise because it would freeze into law a particular means of achieving impartiality—an end which can be reached only by maintaining maximum flexibility as to means. *Id.*

⁶² See DEL. CODE ANN. tit. 10, § 4503 (Supp. 1986); Anderson, *DA, Lawmakers Ask Action on Bill For Jury Challenges*, N.Y.L.J., Feb. 19, 1988, at 1, col. 2. Regarding the effect of the sixth amendment on the rights of the state in a criminal prosecution, it has been noted:

Although the sixth amendment protects only the defendant, there is nothing in its language, and certainly nothing in its history, to suggest that the state may not protect itself from jurors who are partial to the defense. The amendment [simply] assures that . . . if the state is willing to tolerate biased jurors, the defendant need not.

Saltzburg & Powers, *supra* note 6, at 354.

⁶³ See *supra* note 55. For example, in criminal cases, it is not constitutionally required that the prosecutor carry the burden of proving affirmative defenses. *Patterson v. New York*, 432 U.S. 197, 210 (1977). Yet, the trend in recent years has been to require the prose-

SHOULD THE DEFENDANT'S USE OF THE PEREMPTORY CHALLENGE
BE LIMITED AS A MATTER OF PUBLIC POLICY?

Peremptory challenges are favored to the extent they ensure impartiality in, and provide legitimacy for, the judicial decision-making process.⁶⁴ In deciding whether to limit their use, a two-step analysis is required.⁶⁵ Initially, it must be determined that the proposed limitation will not adversely affect impartiality and legitimacy.⁶⁶ It must then be shown that implementation of the limita-

cutor to do exactly this. *Id.* at 208 n.10 Thus, legislatures placing the burden of proving affirmative defenses on the state have made a policy decision to treat the state as prosecutor with less favor than is constitutionally mandated, just as, it is submitted, a legislature could decide to grant a defendant more peremptory challenges than are available to the state, and just as a legislature could grant each party the right to exercise its challenges with complete freedom, subject only to constitutional limitations, even if the limitations placed upon each side's use were not identical.

⁶⁴ See *supra* notes 7 & 8 and accompanying text. The consequences of a criminal justice system's failure to attain legitimacy among the public due to perceived discrimination in jury selection procedures are severe:

To the disfavored minority, the law . . . seems unjustly harsh To the extent that there is imbalance on juries, then, the underrepresented group will less readily accept their decisions and will rarely feel the ameliorating effect which is one of the supposed advantages of the jury system.

Another primary objective of the jury system is to increase confidence in and support for the law-enforcement process. . . . Selection which is or even appears to be discriminatory . . . destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness.

Kuhn, *supra* note 39, at 246.

Thus, while the defendant's perception of what is just is important, see *supra* note 8, protection of that interest should be measured against and limited by due regard for the wider interests of the community. See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). Significantly, these community interests are harmed equally, regardless of whether the source of the discriminatory use of the peremptory challenge is the defendant or the state. 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).

⁶⁵ See *infra* notes 66 & 67 and accompanying text.

⁶⁶ See *Batson*, 476 U.S. at 125-29 (Burger, C.J., dissenting). Chief Justice Burger argued against placing any limitations on the arbitrary use of the peremptory challenge precisely because he believed it would further neither the ends nor the appearance of justice: [T]oday's holding, while purporting to "further the ends of justice," will not have that effect. . . . The effect . . . will be to . . . produce juries that the parties do not believe are truly impartial. This . . . will diminish confidence in the jury system.

. . . .

[Indeed, t]oday . . . the Court accepts a positive evil for a perceived one. *Id.* at 128-29 (Burger, C.J., dissenting) (citations omitted).

Justice Rehnquist agreed, and additionally asserted that the discriminatory use of peremptory challenges "may be extremely useful in eliminating from the jury persons who might be biased in one way or another." *Id.* at 139 (Rehnquist, J., dissenting). See generally

tion is practicable; that it will not restrict beneficial use of peremptories or otherwise detrimentally affect the judicial system.⁶⁷ If both aspects of the analysis are satisfied, and it is here suggested they are, the proposed limitation should be accepted.

The Impact upon Impartiality and the Perception of Legitimacy

Regarding jury impartiality, the central issue initially resolves itself into whether one accepts or rejects the concept of "diffused impartiality," the idea that true impartiality can be achieved only through the interactions of a representative grouping of necessarily biased jurors.⁶⁸ If this idea is accepted, and one believes the state

Saltzburg & Powers, *supra* note 6, at 353-75 (objecting to restricting use of peremptory challenges on grounds that impartiality will suffer in fact and in appearance).

The majority in *Batson* considered these concerns as well, but reached contrary conclusions, with Justice Powell contending the prohibition of a prosecutor's discriminatory use would further "the ends of justice" and increase "public respect for our criminal justice system and the rule of law." *See Batson*, 476 U.S. at 99.

⁶⁷ *See id.* at 98-99. In *Batson*, both the opinion of the Court and Chief Justice Burger's dissent considered the practical effect of limiting discriminatory use of the peremptory challenge. The Court stated that jurisdictions which have applied a version of the restriction set forth in *Batson* have experienced neither administrative problems nor a hindrance of non-discriminatory usage of the challenge. *Id.* Chief Justice Burger, in contrast, contended the majority's opinion was founded less on reason than upon the urge to achieve "utopian bliss," *id.* at 131 (Burger, C.J., dissenting), and argued the most likely result of the Court's ruling would be to "force 'the peremptory challenge [to] collapse into the challenge for cause.'" *Id.* at 127 (Burger, C.J., dissenting) (quoting *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984)). Concurring, Justice White acknowledged the existence of uncertainties as to both the application and effect of the Court's ruling, but stated that despite such uncertainties, "the time has come [for the Court] to rule as it has." *Id.* at 102 (White, J., concurring). *See also United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984) (inquiry into basis for peremptory challenges would lengthen already overly long criminal trials).

⁶⁸ *See Commonwealth v. Soares*, 371 Mass. 461, 484-88, 387 N.E.2d 499, 512-15, *cert. denied*, 444 U.S. 881 (1979). The term "diffused impartiality," which apparently originated in a dissenting opinion by Justice Frankfurter, *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946), has been explained as follows:

[D]iversity of opinion among individuals . . . is envisioned when we refer to "diffused impartiality." No human being is wholly free of the interests and preferences which are the product of his cultural, family, and community experience. Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room.

Soares, 371 Mass. at 486-87, 387 N.E.2d at 515. *See also Peters v. Kiff*, 407 U.S. 493, 503 (1972). The Court in *Peters* stated that "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Id.* at 503.

Although commentators have generally approved of the concept as legitimate, *see Saltzburg & Powers, supra* note 6, at 353, acceptance of it is by no means universal. *See People v. Wheeler*, 22 Cal. 3d 258, 292, 583 P.2d 748, 771, 148 Cal. Rptr. 890, 913 (1978)

should have a jury equally as impartial to it as to the defendant, the logic of limiting both parties' discriminatory usage becomes obvious.⁶⁹ It is submitted, however, that such acceptance should not be viewed as a prerequisite to legislative adoption of a prohibition against all discriminatory use of peremptory challenges. Even if critics of diffused impartiality are correct and the perceived injustices caused by imbalanced juries have no foundation in fact, the harm to the community caused by the perception itself is no less real for being based largely upon a faulty premise.⁷⁰ By eliminating discriminatorily used peremptory challenges, legislatures could eliminate the very real harm that emanates from such use.⁷¹ Any consequent dangers to the legitimate rights of the defendant could be averted by expanding voir dire and maintaining the requirement of jury unanimity.⁷²

(Richardson, J., dissenting); *Fields v. People*, 732 P.2d 1145, 1159-60 (Colo. 1987) (Vollack, J., specially concurring in result only). Justice Richardson stated in *Wheeler* that "[d]issension . . . is no guarantee whatever of impartiality. Impartiality is not assured by balancing 'biases.' Quite the opposite." *Wheeler*, 22 Cal. 3d at 292, 583 P.2d at 771, 148 Cal. Rptr. at 913 (1978) (Richardson, J., dissenting). In *Fields*, Justice Vollack agreed, adding that he could not "endorse the adoption of [the diffused impartiality] analysis . . . because it would carry the divisive implication that without such a system of proportional representation, juries would be unable to be impartial." *Fields*, 732 P.2d at 1160 (Vollack, J., specially concurring in result only). See generally Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 246-48 (jurors' innate diversity essential to production of impartial jury).

⁶⁹ See cases cited *supra* note 17 (indicating when both propositions accepted by court, restriction of peremptory challenge inevitable result).

⁷⁰ See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("[c]ommunity participation in the administration of the criminal law . . . is . . . critical to public confidence in the fairness of the criminal justice system"). Cf. *In re Murchison*, 349 U.S. 133 (1955) (judge serving as "one-man grand jury" could not try and convict witnesses of contempt for statements made during those same grand jury proceedings). In *Murchison*, Justice Black's majority opinion noted that:

[N]o man is permitted to try cases where he has an interest in the outcome. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

Id. at 136 (citations omitted).

⁷¹ See generally Kuhn, *supra* note 39, at 244-50 (legitimacy of verdicts enhanced by non-discriminatory selection of jurors). Even if the diffused impartiality concept is without merit and discriminatory use of the peremptory challenge does not result in biased verdicts, the harms resulting from such use are still considerable, both to the community as a whole, see *supra* note 64, and to the groups discriminated against in particular. See Kuhn, *supra* note 39, at 247.

⁷² See Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 262-73. Although the author of the preceding Note is concerned primarily with eliminating entirely the use of the peremptory challenge, it is suggested many of the author's arguments support equally the practicability of effectively limiting the exercise of the peremptory to instances of non-dis-

Thus, if the diffused impartiality concept is correct, justice is most truly served by prohibiting the discriminatory use of peremptory challenges.⁷³ If individual impartiality is possible, on the other hand, justice may not benefit from additionally restricting the defendant's use of such challenges, but by scrupulously maintaining and expanding the defendant's other protections, neither will it suffer.⁷⁴ The only harm not remediable is the possible damage to the legitimacy of the jury's verdict in the eyes of the defendant.⁷⁵ It is suggested such a harm, as long as it has no basis in fact, is outweighed by the damage to the legitimacy of the jury's verdict in the eyes of the community, which has, after all, at least suffered the tangible harm of the original discriminatory act.⁷⁶

The Practicability of the Limitation

Opposition to restricting the discriminatory exercise of the peremptory challenge is also based upon the belief that enforcement of any such restrictions will be administratively unworkable and will only inexorably and inevitably lead to the peremptory challenge's complete evisceration.⁷⁷ The merits of this position are

criminatory use. This Note asserts, for example, by decreasing restrictions on the types of questions allowed during voir dire, and by eliminating exclusive judicial and en masse questioning, a defendant will not need any peremptory challenges since he will be able, because of the increased questioning allowed, successfully to challenge for cause all biased jurors. *See id.* at 268-71. Thus, restricting the manner of a defendant's use of the peremptory challenge also need not necessarily inure to his detriment. *See id.*

⁷³ *See supra* note 68 and accompanying text. The most succinct statement of this idea was forwarded in *State v. Neil*, 457 So. 2d 481 (Fla. 1984), in which the court stated "[t]he primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. . . . [But discriminatory use hampers selection] of an impartial jury." *Id.* at 486.

⁷⁴ *See supra* note 72.

⁷⁵ *See Batson*, 476 U.S. at 128-29 (Burger, C.J., dissenting).

⁷⁶ *See supra* notes 64 & 71.

⁷⁷ *See Batson*, 476 U.S. at 128-31 (Burger, C.J., dissenting); *Swain v. Alabama*, 380 U.S. 202, 221-22 (1965) (restrictions upon peremptory challenges would change nature of same); *McCray v. Abrams*, 750 F.2d 1113, 1140 (2d Cir. 1984) (Meskill, J., dissenting) (peremptory challenges subject to examination ineffective jury selection tool), *reh'g denied*, 456 F.2d 277 (2d Cir. 1985) (en banc), *vacated and remanded*, 471 U.S. 1097 (1986) (mem.); *People v. Wheeler*, 22 Cal. 3d 258, 295, 583 P.2d 748, 773, 148 Cal. Rptr. 890, 915 (1978) (Richardson, J., dissenting) (prohibition upon discriminatory use of peremptory challenge will result in excessive administrative burden). Regarding the administration of a rule limiting the discriminatory use of peremptories, it has been predicted that:

Even assuming the existence of a clear theoretical rule regarding what types of peremptory challenges are legal, enormous difficulties would arise from any attempt to implement such a rule in practice. A great deal of time, effort and expense would be necessary to attempt to determine whether any given peremptory challenge is legal. Any such determination would entail the extremely difficult

doubtful, however, particularly since the practical experiences of states that have adopted the limitation convincingly suggest the feasibility of its implementation.⁷⁸ Fears of increased costs and prolonged trials also appear exaggerated,⁷⁹ especially since the minimal increases associated with the limitation's implementation are, it is suggested, a small price to pay for the elimination of a too tempting opportunity for discrimination that has been too long tolerated within our courts of law.

CONCLUSION

Traditionally, the peremptory challenge has been thought to satisfy the interests of both justice and the appearance of justice. The discriminatory use of such challenges, however, serves neither

task of assessing the internal motives of the attorneys. . . . Most important of all, attorneys, confronted with a rule completely or partially restricting their right to act with the internal motive of helping their clients when making peremptory challenges, will be under enormous pressure to lie regarding their motives. Such a rule will foster hypocrisy and disrespect for our system of justice.

King v. County of Nassau, 581 F. Supp. 493, 501-02 (E.D.N.Y. 1984). See also *supra* note 67.

⁷⁸ See *Batson*, 476 U.S. at 99; *McCray*, 750 F.2d at 1132; *People v. Hall*, 35 Cal. 3d 161, 169, 672 P.2d 854, 859, 197 Cal. Rptr. 72, 76 (1983).

Every jurisdiction that has adopted a limitation on the discriminatory use of the peremptory challenge has adopted a test similar to that the California Supreme Court first established in *Wheeler*:

If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and . . . establish that the persons excluded are members of a cognizable group [Then], he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.

. . . .

If the court finds that a prima facie case has been made, the burden shifts to the other party [T]o sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant [W]e rely on the good judgment of the trial courts. . . .

Wheeler, 22 Cal. 3d at 280-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 905-06 (footnotes omitted).

The differences among courts in applying this test primarily concern its proper scope, see *State v. Neil*, 457 So. 2d 481, 487 (Fla. 1984); Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 278-79, and the remedy to be used upon finding discrimination. See *Batson*, 476 U.S. at 99-100, n.24. For a recent example of a case in which a prosecutor was able to provide a sufficient race-neutral explanation for excluding black jurors, see *People v. Gregory "ZZ"*, N.Y.L.J., Nov. 30, 1987, at 2, col. 3 (3d Dep't).

⁷⁹ See Note, *Abolishing Peremptory Challenges*, *supra* note 3, at 255-56, 272. A Massachusetts Superior Court Justice has asserted that implementation of the test has not posed any problems. See *Cheever*, *supra* note 18, at 39, col. 1.

interest. Nonetheless, the Supreme Court should not act to prohibit the practice as unconstitutional, for to do so would require extending unduly the contours of constitutional jurisprudence. Thus, the issue remains one within the realm of legislative competence, and the proper legislative response is to limit the exercise of peremptory challenges to instances of non-discriminatory use. The price of continued inaction is the loss of an opportunity to make the jury experience a truly effective cohesive force for society,⁸⁰ and to limit the concomitant harmful effects of divisive stereotyping.

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⁸⁰ See Tucker, *Racial Discrimination In Jury Selection In Virginia*, 52 VA. L. REV. 736, 750 (1966). Professor Tucker provided an early and eloquent elucidation of the impact of increased jury participation upon societal cohesiveness, as he noted that:

No other institution conducted under government compulsion has the capacity for bringing together for a common purpose adults who may be likely to represent so many varying experiences, backgrounds, and conditions or stations in life. As these persons labor toward their objective of finding and pronouncing their community's average judgment of the disputed facts, they will find that they are not as different from one another as their prejudices may have led them to believe. And they will see that the strength of their community, indeed the strength of their state and nation, grows out of those individual differences which they will learn to respect.

Id.