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ARTICLE

PETERS v. KIFF AND THE DEBATE ABOUT THE STANDING OF WHITE DEFENDANTS TO OBJECT TO THE EXCLUSION OF BLACK JURORS AFTER *BATSON*: THE NONUSE AND ABUSE OF PRECEDENT

STANTON D. KRAUSS*

In *Batson v. Kentucky*,¹ the Supreme Court held that the racially based use of the prosecution's peremptory challenges to exclude blacks from a black defendant's jury violates the defendant's rights under the Equal Protection Clause of the fourteenth amendment.² In addition, the Court noted that "denying a person participation in jury service on account of his race"³ in this manner violates the excluded juror's rights under that Clause. As might be expected, this decision has fueled the debate about whether white defendants may complain when the State uses peremptory challenges to exclude blacks from their juries.⁴

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1. 476 U.S. 79 (1986).

2. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Due Process Clause of the fifth amendment, U.S. CONST. amend. V, requires the federal government to respect the same rights. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

3. 476 U.S. at 87.

4. This controversy began before *Batson*, *see, e.g., People v. Wheeler*, 22 Cal. 3d 258, 281, 583 P.2d 748, 764 (1978); *Castillo v. State*, 466 So. 2d 7 (Fla. Dist. Ct. App. 1985), *aff'd on other grounds*, 486 So. 2d 565 (Fla. 1986), but the more pressing issue at that time was whether a black defendant could object to the State's use of its peremptories to exclude black jurors in his or her case.

Although *Batson* involved a black defendant, the Court extended its ruling to defendants belonging to any "cognizable racial group" whose members are peremptorily challenged by the prosecutor due to their race and (by implication) to the group members so removed from the jury. 476 U.S. at 96. *See infra* notes 26-32 and accompanying text. Nonetheless, for the sake of simplicity, I will speak only of discrimination against black defendants and jurors. So, too, I will speak of the standing of white defendants to attack this discrimination, even though nonblack defendants need not be white. *See, e.g., Kline v. State*, 737 S.W.2d 895 (Tex. Ct. App. 1987) (Oriental defendant attacking use of prosecution's peremptories on black jurors).

Although I will speak of the standing of white defendants to object to discrimination against black

One remarkable aspect of this post-*Batson* controversy has been the way courts and commentators have treated *Peters v. Kiff*,⁵ the only Supreme Court decision actually to determine the standing of a white defendant to protest discrimination against blacks in the selection of juries. More often than not, *Peters* has simply been ignored by courts considering this issue since *Batson*. Those exceptional opinions that do not overlook it entirely display a truly breathtaking inability accurately to report what the Justices said in that case. Nor has *Peters* fared much better at the hands of the commentators.

There are two reasons why it is important to bring this situation to light. One is doctrinal: *Peters* must somehow be rescued from this morass, and its bearing upon the standing of white defendants to contest the use of peremptory challenges to exclude black jurors clarified. As a practical matter, this problem is pressing, because the Supreme Court will address the standing question this Term in *Holland v. Illinois*.⁶ The other reason to examine *Peters*' fate, although not doctrinal in nature, is no less important: it is only by studying this spectacle that we can hope to learn what lessons it holds for our legal system and our profession.

With these twin goals of exposure and explication in mind, I begin by introducing the reader to *Batson* and *Peters*. Once this has been accomplished, Part II of the Article surveys the treatment of *Peters* in the judicial opinions and commentary discussing the standing question. In Part III, I speculate about the reasons for the abuse that *Peters* has endured in this context.

I. AN INTRODUCTION TO THE CRITICAL PRECEDENT:

Batson AND *Peters*

A. *Batson v. Kentucky*

Despite the Civil War Amendments and the Civil Rights Act of 1875,⁷ which makes the exclusion of any qualified citizen from a grand or petit

jurors, my research and analysis also include civil rights cases in which the standing of white plaintiffs to object to the defendant State's racially discriminatory use of its peremptories has been contested. See, e.g., *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986). The issue in these cases is analytically indistinguishable from the issue in criminal cases with white defendants. However, the Article will not consider the standing of prosecutors to object to defendants' discriminatory use of their peremptory challenges, as this issue may be subject to an extremely different type of analysis. See, e.g., *People v. Gary M.*, 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (Sup. Ct. 1988).

5. 407 U.S. 493 (1972).

6. 109 S. Ct. 1309 (1989) (granting certiorari).

7. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (codified at 18 U.S.C. § 243 (1988)).

jury in any state or federal court “on account of race, color, or previous condition of servitude”⁸ a federal crime, the exclusion of black potential jurors has remained a prominent feature of the American legal landscape. The Supreme Court has decried this situation for over a century, but the Court has failed to put an end to it. In fact, the Court actually licensed one potent form of racial jury-vetting in its 1965 decision in *Swain v. Alabama*.⁹

Swain was the Court’s first decision to consider a claim of discrimination in the selection of the petit jury, as opposed to the venires from which grand and petit jurors are chosen. Given its belief in the importance of the unfettered use of peremptory challenges—challenges made “without a reason stated, without inquiry and without being subject to the court’s control”¹⁰—, the Court held that peremptories may be used to exclude black jurors because of their race whenever a prosecutor thinks that would help win a case. At most, the Court allowed that the Equal Protection Clause might forbid the systematic use of peremptory challenges to lock blacks completely out of the criminal jury system.¹¹

Needless to say, *Swain* did nothing to stem the widespread disenfranchisement of black jurors,¹² so the search was on for ways to supplant it. Commentators advanced two different rationales for changing the law. Some condemned *Swain* as an overly stingy reading of the Equal Protection Clause and advocated its outright reversal.¹³ Others urged courts to sidestep *Swain* by pronouncing the racially based use of peremptory challenges offensive to the sixth amendment¹⁴ right, first recognized a decade after *Swain*,¹⁵ to be tried by a jury drawn from a fair

8. 18 U.S.C. § 243 (1988).

9. 380 U.S. 202 (1965).

10. *Id.* at 220. Prospective jurors who are actually or legally presumed to be biased may be challenged for cause. See generally 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.3(c) (1984).

11. See Krauss, *Death-Qualification After Wainwright v. Witt: The Issues in Gray v. Mississippi*, 65 WASH. U.L.Q. 507, 540 n.145 (1987).

12. See *Batson*, 476 U.S. at 92-93; *id.* at 101 (White, J., concurring); *id.* at 103-04 (Marshall, J., concurring).

13. See, e.g., Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283-303 (1968); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357 (1985).

14. The sixth amendment provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed” U.S. CONST. amend. VI.

15. See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

cross-section of the community.¹⁶

The judicial response to these arguments was mixed. The Court expressed no interest in reconsidering *Swain*. A few lower courts accepted "fair cross-section" arguments and forbade the State to exercise its peremptories on racial grounds,¹⁷ but most refused to impose any restrictions upon the use of peremptory challenges in excess of those that *Swain* required them to acknowledge.¹⁸

For a long time, the Supreme Court remained entirely above the fray. Finally, five Justices broke their silence in 1983, when the Court denied certiorari in a group of cases raising the issue of the constitutionality of the use of these challenges to remove black jurors because of their race.¹⁹ Justices Marshall and Brennan, dissenting from the Court's disposition of these cases, made it clear that they would support a sixth amendment attack upon *Swain*.²⁰ Justices Blackmun, Powell, and Stevens, who cast the deciding votes against hearing the cases, explained that they did so because they wanted to see what they could learn by giving the lower courts more time to experiment with regulating peremptory challenges.²¹ Two years later, this "study period" had ended,²² and the Court granted certiorari in *Batson*.²³

James K. Batson was charged with second-degree burglary and receiving stolen goods. Over Batson's objection, the prosecutor peremptorily challenged all four blacks on the venire, and this black defendant was tried before an all-white jury. After the Kentucky Supreme Court affirmed Batson's conviction on both counts,²⁴ he sought relief from the United States Supreme Court.

Speaking through Justice Powell, a seven-Justice majority reversed the

16. See, e.g., Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977).

17. *Batson*, 476 U.S. at 82 n.1. As the *Batson* Court noted, some of these decisions were predicated upon state law or federal courts' supervisory power over the administration of justice in the federal courts, rather than the sixth amendment.

18. See *Gilliard v. Mississippi*, 464 U.S. 867, 870-71 (1983) (Marshall, J., dissenting from denial of certiorari).

19. *McCray v. New York*, 461 U.S. 961 (1983).

20. 461 U.S. at 963-70 (Marshall, J., dissenting).

21. 461 U.S. at 961-63 (opinion of Stevens, J.).

22. It is not clear why the Court now found the issue ripe for consideration. In any event, the substantive and procedural questions that troubled Justices Blackmun, Powell, and Stevens in 1983 seem not to have been resolved in *Batson*.

23. 471 U.S. 1052 (1985).

24. *Batson*, 476 U.S. at 84.

state court judgment. Although Batson pitched his argument in the High Court on a sixth amendment theory, the Court chose not to pursue this line of analysis. Instead, it elected to overrule *Swain*²⁵ and held that a prosecutor's use of peremptory challenges to strike jurors because of their membership in a defendant's "cognizable racial group"²⁶ violates that defendant's right to the equal protection of the laws. Because the Kentucky courts, consistent with *Swain*, had denied that the use of peremptories is subject to any such constitutional constraint, they had not given Batson a chance to prove that the prosecutor had acted improperly in his case. If, on remand, Batson showed that the selection of his jury had been tainted, the Court declared that his conviction could not stand.

Much of Justice Powell's opinion is devoted to a discussion of how such a violation may be proven.²⁷ A defendant may make out a prima facie case of the denial of his rights under the Equal Protection Clause, the Justice explained, simply by showing that the prosecutor's conduct in selecting the jury "raise[s] an inference" that the State's peremptories had been used to exclude potential jurors on account of their membership in the defendant's "cognizable racial group."²⁸ Once the defendant establishes such a prima facie case, Justice Powell continued, the State must articulate "neutral" reasons "related to the particular case to be tried"²⁹ for the jurors' exclusion. The burden then falls upon the defendant to persuade the court that these reasons are pretextual, or his complaint will fail.

Justice Powell also explained why a defendant who meets this burden of proof has shown a violation of his rights under the Equal Protection Clause. The reason our society values jury trials, he observed, is that we trust that groups of lay persons selected from the community at large are

25. As I have explained elsewhere, see Krauss, *supra* note 11, at 540 n.147, the Court's insistence in *Batson* that it was only revising an evidentiary component of its decision in *Swain*, see *Batson*, 476 U.S. at 89-98, was entirely disingenuous.

26. 476 U.S. at 96. This term is misleading. The Court's reference in this regard to *Castaneda v. Partida*, 430 U.S. 482, 494 (1977), indicates that it meant only that the defendant and the excluded jurors must be members of "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Id.* (citation omitted). Thus, *Castaneda* held Mexican-Americans to be a cognizable group, although they are not usually thought of as a distinct race. *But see* *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

27. Indeed, Justice Powell claimed merely to be altering an evidentiary component of the ruling in *Swain*. See *supra* note 25.

28. 476 U.S. at 96-97.

29. *Id.* at 98.

more likely than judges “to prevent oppression by the Government.”³⁰ But keeping members of a defendant’s “cognizable racial group” off the jury due to their race, Justice Powell suggested, compromises the jury’s ability to protect the defendant against racial prejudice.³¹

More broadly, however, Justice Powell noted that the State’s racially based exclusion of any juror from jury service violates the juror’s right to the equal protection of the laws.³² Indeed, he insisted that the goal of the *Batson* decision itself was to “ensure that no citizen is disqualified from jury service because of his race.”³³ Given that prosecutors have never limited their use of peremptories on the basis of jurors’ race to prosecutions in which the defendant and excluded jurors belong to the same race,³⁴ one need not have been psychic to see that the standing of defendants of a different race to object to this practice would be a “live” issue in the wake of *Batson*. This, in turn, would have suggested that the legal community would thenceforth be paying much more attention to the Supreme Court’s 1972 decision in *Peters v. Kiff*.

B. *Peters v. Kiff*

Dean R. Peters, who was indicted and convicted of burglary, alleged that blacks were systematically excluded from the pool from which his grand and petit juries were selected.³⁵ Had Peters also been black, proof

30. *Id.* at 87 n.8 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

31. *Id.*

32. *Id.* at 87.

33. *Id.* at 99. *See also id.* at 99 n.22.

34. The facts of *Swain* itself reflect the use of prosecutorial peremptories to exclude blacks from criminal jury service generally—no black had ever served on *any* petit jury in Talladega County, Alabama. *See* 380 U.S. 202, 231-41 (1965) (Goldberg, J., dissenting). There is ample evidence that prosecutors did not stop using peremptory challenges to keep blacks off American juries after *Swain*. *See, e.g.,* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 187-88 (1989); Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 143. At least in part, prosecutors choose to exclude blacks from juries in cases not involving minority defendants because they correctly perceive blacks, as a group, to be more liberal, more hostile to the death penalty, and less authoritarian or prosecution-prone, than other groups in our society. *See, e.g.,* T. FINNICAL, STRATEGY AND TACTICS IN THE JURY SELECTION PROCESS IN DEATH PENALTY CASES, A PROSECUTOR’S PERSPECTIVE 29, 31 (1985) (available at the Missouri Attorney General’s Office); Alschuler, *supra*, at 187, 210; Pizzi, *supra*, at 99, 143. It is therefore important to note that these sociological generalizations cannot be considered racially “neutral” explanations for the use of peremptory challenges, as they fly in the face of *Batson*’s insistence that “[a] person’s race simply ‘is unrelated to his fitness as a juror.’” 476 U.S. at 87 (citation omitted). To hold otherwise would be to render *Batson* a dead letter.

35. Oddly enough, although the court of appeals initially suggested that an earlier decision be

of this charge would have led to the automatic reversal of his indictment and his conviction under the Court's previous equal protection decisions. But Peters was white, and so his appeal presented the Court with a question of first impression: whether a white defendant may complain of the racially based exclusion of blacks from his grand or petit jury venire.³⁶

The issue was further complicated by a question of timing. Peters' trial was held before *Duncan v. Louisiana*³⁷ recognized that people prosecuted for serious crimes in state courts have a right to trial by jury. Thus, he could not claim standing on the theory that the racially based peremptory removal of black jurors is the equivalent of their exclusion from the venire, which the Court would shortly pronounce barred by a sixth amendment right to a trial jury drawn from a source fairly representative of the community.³⁸

Nonetheless, by a six-to-three vote, the Court ruled that neither Peters' indictment nor his conviction could stand if he could prove his allegations to be true.³⁹ No single rationale commanded a majority—or even a plurality—of the Court. Justice Marshall, who spoke for Justices Douglas and Stewart as well, observed that he would have granted Peters standing on a sixth amendment theory if only that amendment applied to this case.⁴⁰ However, that theory was not available to Peters, and so Justice Marshall went on to conclude that anyone indicted or convicted by a jury from which “any large and identifiable segment of the commu-

regarded as having finally settled the discriminatory nature of the Muscogee County jury selection system, *Peters v. Rutledge*, 397 F.2d 731, 740 (5th Cir. 1968), it ultimately concluded that, while Peters presented other evidence in support of his claim, he did not make a prima facie case of jury discrimination. *Peters v. Kiff*, 491 F.2d 967, 968 (5th Cir. 1974).

36. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), the Court had found it unnecessary to decide whether a male defendant could complain of a state's exemption from grand jury service of women who did not volunteer to serve. Outside of the jury discrimination context, *Barrows v. Jackson*, 346 U.S. 249 (1953), had held that whites have standing to challenge the enforcement of restrictive covenants directed against nonwhites.

37. 391 U.S. 145 (1968).

38. *DeStefano v. Woods*, 392 U.S. 631 (1968), decided that *Duncan* would not be applied retroactively. Three years after *Peters*, the Court found the sixth amendment right to jury trial to include a right to a jury drawn from a source fairly representative of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975). The Court has never ruled on the impact of the latter right upon the State's freedom to exercise its peremptory challenges as it sees fit.

39. Even the three dissenters seemed to acknowledge that *Peters* would have had standing if the sixth amendment right to trial by jury drawn from a fair cross-section of the community applied to his case. See 407 U.S. at 510-11 (Burger, C.J., dissenting).

40. 407 U.S. 493, 500 (1972) (opinion of Marshall, J.). See *supra* note 38 and accompanying text.

nity”⁴¹ was unconstitutionally excluded has been denied due process of law.⁴² Because the jury selection system described by Peters would violate the excluded jurors’ right to equal protection, and because blacks are a “large and identifiable segment of the community,” these Justices held that the Due Process Clause gave Peters standing to object to the jurors’ exclusion. In an opinion by Justice White, a second trio of Justices—White, Brennan, and Powell—decided that Peters had standing to complain of the violation of the excluded grand jurors’ rights because that would best comport with “the strong statutory policy” of the Civil Rights Act of 1875.⁴³

Neither of these three-Justice blocs found it necessary to consider the other’s rationale. Likewise, neither addressed Peters’ claim that allowing blacks, but not whites, to protest the exclusion of blacks from the jury pool violates the white defendants’ right to the equal protection of the laws.⁴⁴ The Court has never corrected either omission, and *Peters* remains the only Supreme Court decision addressing the standing of white defendants to challenge discrimination against black jurors outside of the sixth amendment context.⁴⁵ Indeed, because none of the Court’s “fair cross-section” decisions has involved racially based exclusions,⁴⁶ *Peters* is the Court’s only decision that actually rules on a white defendant’s standing to protest the State’s attempts to limit the participation of racial minorities on its grand or petit juries.

41. *Id.* at 503.

42. The Due Process Clause of the fourteenth amendment provides that “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. An analogous provision of the fifth amendment applies to the federal government.

43. 407 U.S. at 507 (White, J., concurring in judgment).

44. See Brief of Petitioner 16-19, *Peters v. Kiff*, 407 U.S. 493 (1972) (No. 71-5078). The dissenting Justices evidently rejected this claim because they regarded prejudice as essential to the existence of an equal protection claim and doubted that the exclusion of blacks from Peters’ grand and petit juries prejudiced him. See 407 U.S. at 508-10 (Burger, C.J., dissenting).

45. The sixth amendment governs the selection of petit juries only.

46. *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Duren v. Missouri*, 439 U.S. 357 (1979), involved the exclusion of women from petit juries. The Court’s only other “fair cross-section” decision, *Lockhart v. McCree*, 476 U.S. 162 (1986), involved the exclusion for cause of venire members whose opposition to capital punishment rendered them unfit to serve in the death sentencing phase, but not the guilt/innocence phase, of a capital case. Last Term, the Court heard oral arguments on whether the “fair cross-section” rule bars the discriminatory use of peremptory challenges to keep blacks off a black defendant’s jury, but it disposed of the case without ruling on the matter. *Teague v. Lane*, 109 S. Ct. 1060 (1989).

II. *Peters* AND THE STANDING ISSUE AFTER *Batson*: A SURVEY OF THE COURT DECISIONS AND COMMENTARY

Despite its obvious relevance to the question whether, in light of *Batson*, white defendants may challenge the State's use of peremptory strikes to keep blacks off of their petit juries,⁴⁷ *Peters* is usually unmentioned in the reported decisions examining this issue. When not ignored, or cited for another purpose, it is generally miscited or cavalierly distinguished by the courts. And the performance of the commentators has not been much better.

I have found a total of fifty-one reported post-*Batson* decisions discussing the standing question. They come from sixteen states and seven federal circuits.⁴⁸ In seven of these decisions, the issue is disposed of with a

47. Given the evident, albeit surprising, confusion about *Peters*' relevance to the question mentioned in the text, it may be helpful to summarize the *Peters*-based standing argument at this point. See also *infra* notes 88-93 and accompanying text. This analysis would run as follows: If, as Justice Marshall asserted in *Peters*, a white defendant's right to due process is violated by the unconstitutional exclusion of blacks from his jury, that result should equally obtain whether the exclusion occurs in the selection of the venire or the petit jury. On the other hand, if "the strong statutory policy" of the Civil Rights Act of 1875 requires that white defendants be granted standing to object to the racially based exclusion of blacks from the venires from which their grand juries are chosen, as Justice White maintained in *Peters*, a similar result should obtain in this context. After all, the Civil Rights Act bars the racially based exclusion of blacks from grand and petit juries, and without regard to the procedural device by which their exclusion is carried out.

48. *United States v. Angiulo*, 847 F.2d 956 (1st Cir.), *cert. denied*, 109 S. Ct. 314 (1988); *United States v. Townsley*, 856 F.2d 1189 (8th Cir. 1988) (en banc); *Wilson v. Cross*, 845 F.2d 163 (8th Cir. 1988) (white plaintiff challenging State's use of peremptories against black jurors in civil § 1983 case); *United States v. Van Daal Wyk*, 840 F.2d 494 (7th Cir. 1988); *United States v. Townsley*, 843 F.2d 1070 (8th Cir.), *rev'd on rehearing en banc*, 856 F.2d 1189 (1988); *United States v. Chavez-Vernaza*, 844 F.2d 1368 (9th Cir. 1987); *Lindsey v. Smith*, 820 F.2d 1137 (11th Cir. 1987) (dictum); *United States v. Vaccaro*, 816 F.2d 443 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987); *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986) (white plaintiff challenging State's use of peremptories against black jurors in civil § 1983 case); *Esposito v. Buonome*, 642 F. Supp. 760 (D. Conn. 1986) (white plaintiff challenging State's use of peremptories against black jurors in civil § 1983 case); *Smith v. State*, 515 So. 2d 149 (Ala. Crim. App. 1987); *State v. Superior Court*, 157 Ariz. 541, 760 P.2d 541 (1988); *State v. Superior Court*, 156 Ariz. 512, 753 P.2d 1168 (Ct. App. 1987), *aff'd*, 157 Ariz. 541, 760 P.2d 541 (1988); *Fields v. People*, 732 P.2d 1145 (Colo. 1987) (Spanish-surnamed jurors, nongroup member defendant); *Kibler v. State*, 546 So. 2d 710 (Fla. 1989); *Torres v. State*, 541 So. 2d 1224 (Fla. Dist. Ct. App. 1989) (question certified to Florida Supreme Court); *Kibler v. State*, 501 So. 2d 76 (Fla. Dist. Ct. App. 1987), *rev'd*, 546 So. 2d 710 (1989); *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988); *Pruitt v. State*, 258 Ga. 583, 373 S.E.2d 192 (1988); *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988); *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831 (1986), *cert. denied*, 484 U.S. 873 (1987); *McGuire v. State*, 185 Ga. App. 233, 363 S.E.2d 850 (1987); *Heaton v. State*, 180 Ga. App. 718, 350 S.E.2d 480 (1986); *People v. Rivera*, 176 Ill. App. 3d 781, 531 N.E.2d 372 (1988); *People v. Rivera*, 160 Ill. App. 3d 214, 513 N.E.2d 584 (1987); *People v. Trece*, 159 Ill. App. 3d 397, 511 N.E.2d 1361 (1987); *People v. Zayas*, 159 Ill. App. 3d 554, 510 N.E.2d 1125 (1987); *People v. Holland*, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), *cert. granted*, 109

simple citation to governing precedent.⁴⁹ In only nineteen is *Peters* even cited.⁵⁰

S.Ct. 1309 (1989); *State v. Lynch*, 512 So. 2d 1214 (La. Ct. App. 1987); *State v. Wagster*, 489 So. 2d 1299 (La. Ct. App. 1986); *State v. Gorman*, 315 Md. 402, 554 A.2d 1203 (1989); *Chew v. State*, 71 Md. App. 681, 689-94, 710-17, 527 A.2d 332, 336-38, 347-50 (Ct. Spec. App.) (dictum), *cert. granted*, 311 Md. 301, 534 A.2d 369 (1987); *Nixon v. State*, 533 So. 2d 1078 (Miss. 1987), *cert. denied*, 109 S. Ct. 2458 (1989); *State v. Vincent*, 755 S.W.2d 400, 403 (Mo. Ct. App. 1988) (dictum), *cert. denied*, 109 S. Ct. 3155 (1989); *State v. Bruce*, 745 S.W.2d 696 (Mo. Ct. App. 1987); *State v. Bolanos*, 743 S.W.2d 442 (Mo. Ct. App. 1987); *State v. Hamilton*, 740 S.W.2d 208 (Mo. Ct. App. 1987); *State v. Smith*, 737 S.W.2d 731 (Mo. Ct. App. 1987), *cert. denied*, 109 S. Ct. 1311 (1989); *State v. Christensen*, 720 S.W.2d 738 (Mo. Ct. App. 1986); *State v. Gilmore*, 103 N.J. 508, 536 n.9, 511 A.2d 1150, 1164 n.9 (1986) (dictum); *State v. Hall*, 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987); *State v. Podborny*, 41 Ohio App. 3d 135, 534 N.E.2d 926 (1987); *Nguyen v. State*, 769 P.2d 167 (Okla. Crim. App. 1988), *cert. denied*, 109 S. Ct. 3264 (1989); *State v. Kelly*, 554 A.2d 632 (R.I. 1989); *State v. Chakouian*, 537 A.2d 409 (R.I. 1988) (dictum); *Castillo v. State*, 761 S.W.2d 495 (Tex. Ct. App. 1988); *Mead v. State*, 759 S.W.2d 437 (Tex. Ct. App. 1988); *Seubert v. State*, 749 S.W.2d 585 (Tex. Ct. App. 1988) (petition for review granted); *Easter v. State*, 740 S.W.2d 107 (Tex. Ct. App. 1987) (black defendant, Hispanic jurors); *Kline v. State*, 737 S.W.2d 895 (Tex. Ct. App. 1987) (Oriental defendant, black jurors); *Catley v. State*, 726 S.W.2d 595 (Tex. Ct. App. 1987) (black defendant, "minority" jurors).

I exclude from this group of cases the inscrutable *Cash v. State*, 507 So. 2d 1159 (Fla. Dist. Ct. App. 1987) (per curiam), the opinion in which reads, in its entirety, "Affirmed on the authority of *Batson v. Kentucky*, ___ U.S. ___, 106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986), *Neil v. State*, 457 So. 2d 481 (Fla. 1984), *Kibler v. State*, 501 So. 2d 76 (Fla. 5th DCA 1987), and section 775.087(b), Florida Statutes (1985)."

I also exclude *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), in which the Second Circuit merely reaffirmed the sixth amendment theory that it had adopted before *Batson*.

It bears noting that the issue of a white defendant's standing to object to the exclusion of black jurors in light of the *Batson* decision has largely been moot in those jurisdictions which had previously held that the "fair cross-section" theory limits the State's use of its peremptories. See, e.g., *People v. Wheeler*, 22 Cal. 3d 258, 281, 583 P.2d 748, 764 (1978); cf. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (male defendant has standing under sixth amendment to challenge exclusion of women from venire). The exception is Florida, where the supreme court only recently decided that white defendants have such standing under that State's "fair cross-section" theory. See *Kibler v. State*, 546 So. 2d 710 (Fla. 1989).

49. *Moon v. State*, 258 Ga. 748, 754, 375 S.E.2d 442, 448 (1988); *Pruitt v. State*, 258 Ga. 583, 587, 373 S.E.2d 192, 197 (1988); *Skipper v. State*, 257 Ga. 802, 805, 364 S.E.2d 835, 838 (1988); *McGuire v. State*, 185 Ga. App. 233, 237, 363 S.E.2d 850, 853 (1987); *Heaton v. State*, 180 Ga. App. 718, 719, 350 S.E.2d 480, 482 (1986); *People v. Rivera*, 176 Ill. App. 781, 7—, 531 N.E.2d 372, 377 (1988); *People v. Rivera*, 160 Ill. App. 214, 216-17, 513 N.E.2d 584, 587 (1987); *State v. Bruce*, 745 S.W.2d 696, 697 (Mo. Ct. App. 1987).

50. *United States v. Townsley*, 856 F.2d 1189, 1190 (8th Cir. 1988); *id.* at 1193 n.2 (Henley, J., dissenting); *United States v. Townsley*, 843 F.2d 1070, 1084 n.16 (8th Cir. 1988); *Lindsey v. Smith*, 820 F.2d 1137, 1146 (11th Cir. 1987); *State v. Superior Court*, 157 Ariz. 541, 543-46, 760 P.2d 541, 543-46 (1988); *State v. Superior Court*, 156 Ariz. 512, 514-15, 753 P.2d 1168, 1170-71 (Ct. App. 1987); *id.* at 516, 753 P.2d at 1172 (Shelley, J., dissenting); *Fields v. People*, 732 P.2d 1145, 1153 (Colo. 1987); *Torres v. State*, 541 So. 2d 1224, 1225-26 (Fla. Dist. Ct. App. 1989); *Kibler v. State*, 546 So. 2d 710, 711-12 (Fla. 1989); *Kibler v. State*, 501 So. 2d 76, 78 (Fla. Dist. Ct. App. 1987) (Orfinger, J., concurring); *McGuire v. State*, 185 Ga. App. 233, 239, 363 S.E.2d 850, 854 (1987)

Yet this figure overstates *Peters*' impact on this debate. Five of these nineteen cases cite *Peters* in other contexts. In one instance, the reference to *Peters* consists of a quotation of the following language from Justice Marshall's opinion: "The exclusion of [blacks] from jury service, like the arbitrary exclusion of any well-defined class of citizens, offends a number of related constitutional values."⁵¹ In another case, the court erroneously includes *Peters* in a list of cases said to have "repeated" an earlier Supreme Court decision's "language" declaring the fair cross-section principle a part of our tradition that cannot be breached without disrespecting our basic values.⁵² A third decision quotes Justice Marshall's opinion in commenting that "the focus [of sixth amendment jurisprudence] is primarily on guaranteeing that juries are selected in such a manner as to permit 'a fair possibility for obtaining a representative cross-section of the community.'"⁵³ A fourth cites *Peters* as authority for allowing a white defendant to challenge the systematic use of peremptories to exclude blacks from serving on criminal juries, but fails to mention it in denying the defendants standing to challenge the State's use of peremptories to remove black jurors in his case.⁵⁴ Finally, in deciding whether a black defendant "has standing to raise a *Batson* challenge" when his jury included five blacks, *State v. Vincent*⁵⁵ states that the Justices noted in *Peters* that the Court's previous equal protection decisions "had been brought under the single analytical umbrella of the *defendant's* right to equal protection" and that the Court did not expand the scope of that Clause's coverage in *Batson*.⁵⁶

(Beasley, J., dissenting in part); *People v. Holland*, 121 Ill. 2d 136, 184, 520 N.E.2d 270, 292 (1987) (Simon, J., dissenting); *State v. Wagster*, 489 So. 2d 1299, 1303 (La. Ct. App. 1986); *State v. Gorman*, 315 Md. 402, 417, 554 A.2d 1203, 1210 (1989); *id.* at 427-38, 544 A.2d at 1215-20 (Eldrige, J., dissenting); *State v. Vincent*, 755 S.W.2d 400, 403 (Mo. Ct. App. 1988) (dictum), *cert. denied*, 109 S. Ct. 3155 (1989); *State v. Gilmore*, 103 N.J. 508, 526, 536, 511 A.2d 1150, 1159, 1165 (1986); *State v. Kelly*, 554 A.2d 632, 633-34 (R.I. 1989); *Mead v. State*, 759 S.W.2d 437, 444 (Tex. Ct. App. 1988); *Seubert v. State*, 749 S.W.2d 585, 586-88 (Tex. Ct. App. 1988) (petition for review granted); *Kline v. State*, 737 S.W.2d 895, 899 (Tex. Ct. App. 1987).

51. *Lindsey v. Smith*, 820 F.2d at 1146 (quoting *Peters*, 407 U.S. 493, 498 (1972) (opinion of Marshall, J.)).

52. *State v. Gilmore*, 103 N.J. 508, 525-26, 511 A.2d 1150, 1159 (1986). In fact, none of the decisions cited in the list "repeated" this "language".

53. *Kline v. State*, 737 S.W.2d 895, 899 (Tex. Ct. App. 1987) (quoting *Peters*, 407 U.S. at 500, quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

54. See *State v. Wagster*, 489 So. 2d 1299, 1303 (La. Ct. App. 1986).

55. 755 S.W.2d 400, 403 (Mo. Ct. App. 1988), *cert. denied*, 109 S. Ct. 3155 (1989).

56. 755 S.W.2d at 403 (emphasis in original). The court saw the question before it as turning upon whose rights *Batson* was meant to protect. The fact that there were five blacks on the jury would be irrelevant, according to the court, if other jurors had been challenged discriminatorily and

Of the remaining fourteen cases, only two so much as suggest the argument—based on Justice White’s opinion in *Peters*—that a white defendant may have standing to make a *Batson* claim under the Civil Rights Act of 1875. In *United States v. Townsley*,⁵⁷ an Eighth Circuit panel ruled that white defendants being tried with a black codefendant could share in his *Batson* claim. The panel’s sole reference to *Peters* is in a footnote saying that, because the defendants made only an equal protection argument on appeal, “[w]e express no opinion on any due process or statutory argument [the defendants] may have. See *Peters v. Kiff*.”⁵⁸

The only other allusion in these cases to Justice White’s theory of decision in *Peters* appears in a dissenting opinion in a Maryland case, *State v. Gorman*.⁵⁹ In the sole remotely thorough analysis of the standing question in the entire set of decisions, Judge Eldridge noted Justice White’s rationale and argued that it applies when a white defendant attacks the racially based use of peremptory challenges to remove blacks from his jury.⁶⁰ The majority of the court ruled that the white defendant lacked standing in this situation, but it did not even mention Justice White’s argument.

Justice Marshall’s due process analysis has fared somewhat better in these cases. It is cited in eight of them.⁶¹ One such reference, by the

if *Batson* was intended to allow defendants to vindicate jurors’ rights. If *Batson* was designed to protect the defendant’s right to a jury from which his “cognizable racial group” had not been excluded, however, and if a sufficiently large number of group members remained on the jury despite the State’s discriminatory use of its peremptories, the court felt that the defendant would lack standing to make a claim under *Batson*. Having found that *Peters* had not expanded equal protection analysis to allow defendants to assert jurors’ rights under that Clause, the court read *Batson* as not working this doctrinal expansion, and so it held that Vincent did not have “standing to raise a *Batson* challenge.” *Id.*

While the clear implication of this discussion, consistent with previous decisions of the Missouri Appellate Court, see cases cited in note 47, *supra*, is that a white defendant would lack standing to bring an equal protection claim under *Batson*, the court was silent about whether such a defendant would have standing to complain under any other legal theory, such as the due process theory it erroneously asserted the Court to have employed in *Peters*.

57. 843 F.2d 1070 (8th Cir.), *rev’d on rehearing en banc*, 856 F.2d 1189 (1988).

58. 843 F.2d at 1084 n.16 (citation omitted). When the case was reheard en banc, the defendants added a sixth amendment standing argument in their briefs, but apparently not one based on *Peters*. See 856 F.2d at 1190; *id.* at 1194 (Henley, J., dissenting). Therefore, when the full court rejected the panel’s decision, *Peters* was not mentioned.

59. 315 Md. 402, 554 A.2d 1203 (1989).

60. 315 Md. at 430-31, 435, 554 A.2d at 1216-17, 1219 (Eldridge, J., dissenting).

61. Although the matter is not crystal clear, neither *State v. Wagster*, 489 So. 2d 1299 (La. Ct. App. 1986), the case referred to in the text accompanying note 53, *supra*, nor *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1375-76 (9th Cir. 1987), appears to belong in this category. In *Wagster*, the court seems to have regarded the defendant’s *Batson* claim as based on a sixth amendment

Eighth Circuit panel in *Townsley*, has already been mentioned.⁶² His opinion was relied upon by Judge Eldridge in *Gorman*, and expressly rejected by the majority of the court.⁶³ It was invoked by dissenters, and ignored by majorities, in two other cases.⁶⁴ It was cited and rejected without dissent by the Texas Court of Appeals for the Second District in *Mead v. State*⁶⁵ and embraced as a basis for granting a white defendant standing by the First District in *Seubert v. State*.⁶⁶ Justice Marshall's views were deemed strong authority in favor of granting a white defendant standing by the Florida Supreme Court.⁶⁷ Finally, they were held dispositive with respect to this issue by the Arizona Court of Appeals.⁶⁸

Perhaps more striking is the abuse that *Peters* has taken when courts have acknowledged its existence. On the one hand, the case is almost invariably miscited. The most common error committed by the courts that discuss *Peters*' bearing upon this standing question is that an overwhelming majority of them refer to Justice Marshall's opinion as the opinion of the Court.⁶⁹ A second mistaken view of the case—that it is a

theory, and it did not cite *Peters* in this context. 489 So. 2d at 1303 n.2. While the opinion in *Chavez-Vernaza* states (and rejects) the white defendant's claim that the State's peremptory challenge of black venire members in his case denied him due process of law, it never mentions *Peters*. While this may have been an oversight on its part, I am inclined to doubt that it was. *Chavez-Vernaza* was tried in the federal courts, and the Equal Protection Clause was therefore inapplicable to his case. However, equal protection principles did apply, through the Due Process Clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Because the court neither mentions the Equal Protection Clause, suggests that *Chavez-Vernaza* was invoking a different part of the Constitution than the one construed in *Batson*, nor cites *Peters* or any other decision involving the fourteenth amendment's Due Process Clause, it is likely that this case involved a *Bolling*-type due process claim, not a *Peters*-type due process claim.

62. See *supra* note 58 and accompanying text.

63. 315 Md. at 417, 554 A.2d at 1210; 315 Md. at 427-31, 435, 554 A.2d at 1215-17, 1219 (Eldridge, J., dissenting).

64. See *Kibler v. State*, 501 So. 2d 76, 78 (Fla. Ct. App. 1987) (Orfinger, J., concurring), *rev'd*, 546 So. 2d 710 (1989); *McGuire v. State*, 185 Ga. App. 233, 239-41, 363 S.E.2d 850, 854-56 (1987) (Beasley, J., dissenting in part).

65. 759 S.W.2d 437, 444 (Tex. Ct. App. 1988).

66. 749 S.W.2d 585, 586-88 (Tex. Ct. App. 1988).

67. See *Kibler v. State*, 546 So. 2d 710, 711 (Fla. 1989).

68. See *State v. Superior Court*, 156 Ariz. 512, 514-15, 753 P.2d 1168, 1170-71 (Ct. App. 1987), *aff'd*, 157 Ariz. 541, 760 P.2d 541 (1988). The Arizona Supreme Court affirmed this decision on sixth amendment grounds and, while citing Justice Marshall's opinion in *Peters*, the court did not mention his Due Process Clause analysis.

69. See, e.g., *Lindsey v. Smith*, 820 F.2d 1137, 1146 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 1327 (1989); *State v. Superior Court*, 156 Ariz. at 514-15, 753 P.2d at 1170-71; *Fields v. People*, 732 P.2d 1145, 1153 (Colo. 1987); *Mead*, 759 S.W.2d at 444; *State v. Vincent*, 755 S.W.2d 400, 403 (Mo. Ct. App. 1988); *Seubert*, 749 S.W.2d at 586-88. Cf. *United States v. Townsley*, 856 F.2d 1189, 1193 n.2 (8th Cir. 1988) (en banc) (Henley, J., dissenting) (Justice Marshall's opinion cited as "plurality

sixth amendment decision—is also widely held.⁷⁰ Nor has the Court been entirely immune from this syndrome. Dissenting from the denial of certiorari in a 1984 case involving the standing of a middle-aged black defendant to challenge the underrepresentation of women and young people on local grand juries, Justice Marshall incorrectly described his own opinion in *Peters* as having been based on both the Equal Protection and Due Process Clauses!⁷¹

On the other hand, the explanations given for distinguishing *Peters* by the three courts that have expressly rejected statutory or due process standing arguments based thereon⁷² are just plain embarrassing. *Mead* dismissed a defendant's due process argument under *Peters* because "the right to a fair cross-section of the community [a different right] is limited to the venire and may not be invoked to invalidate the use of peremptory challenges."⁷³ A Florida appellate court baldly asserted that "the United States Supreme Court in *Batson* has receded from its position in *Peters*."⁷⁴ Finally, *Gorman* states that *Peters* does not give a white defendant standing to contest the peremptory challenge of both blacks on his venire for this "reason":

Peters did not involve . . . peremptory challenges. As [the court below] points out, the case was decided on due process grounds because "Peters

decision"); *Townsley*, 843 F.2d at 1084 n.16 (single citation to pages in opinions of Justices White and Marshall ends with parenthetical "(plurality opinion)"); *State v. Superior Court*, 156 Ariz. at 514, 753 P.2d at 1170 (citing this opinion as "plurality opinion"); *Gorman*, 315 Md. 402, 420-38, 554 A.2d 1203, 1212-21 (1989) (Eldridge, J., dissenting). This phenomenon is doubtless related to the fact that Justice White's *ratio decidendi* is so often overlooked in the cases.

70. See *United States v. Townsley*, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc); *State v. Superior Court*, 157 Ariz. 541, 544, 546, 760 P.2d 541, 544, 546 (1988); *Fields v. People*, 732 P.2d 1145, 1153 & n.15 (Colo. 1987); *People v. Holland*, 121 Ill. 2d 136, 184, 520 N.E.2d 270, 292 (1987) (Simon, J., dissenting), *cert. granted*, 109 S.Ct. 1309 (1989); *State v. Kelly*, 554 A.2d 632, 633 (R.I. 1989).

71. *Ford v. Kentucky*, 469 U.S. 984, 985 (1984) (Marshall, J., dissenting from denial of certiorari). (Citing *Ford*, Judge Eldridge made the same mistake in *Gorman*, in addition to falsely asserting that Justice Marshall had deemed *Peters*' claim a good one on the merits. See 315 Md. at 429, 554 A.2d at 1216. *But see* 407 U.S. at 505 (opinion of Marshall, J.)) Justice Marshall is also guilty of calling his opinion in *Peters* a "plurality" opinion. *Hobby v. United States*, 468 U.S. 339, 358 (1984) (Marshall, J., dissenting).

72. Two other courts have rejected such arguments implicitly. See *supra* text accompanying note 63. Only the Texas appellate court in *Seubert*, 749 S.W.2d 585 (Tex. Ct. App. 1988), the Florida Supreme Court in *Kibler*, 546 So. 2d 710 (Fla. 1989)—which was actually decided on state constitutional grounds—, and (apparently) the intermediate appellate court in *Superior Court*, 156 Ariz. 512, 753 P.2d 1168 (Ct. App. 1987), have found these arguments persuasive.

73. 759 S.W.2d at 444 (citation omitted).

74. *Torres v. State*, 541 So. 2d 1224, 1226 (Fla. Dist. Ct. App. 1989) (question certified to Florida Supreme Court).

had been indicated [sic] by an illegally composed jury." We have noted that *Batson* did not declare peremptory challenges *per se* unconstitutional. *Peters* spoke in terms of "[i]llegal and unconstitutional jury selection procedures . . ." and of "the exclusion from jury service of a substantial and identifiable class of citizens."⁷⁵

While the commentators do a better job than the bench or bar of recollecting that *Peters* exists,⁷⁶ they are not much more successful at reporting it correctly. Of the twenty-five law review pieces discussing the standing question since *Batson*,⁷⁷ nineteen cite *Peters* as a relevant case.⁷⁸

75. 315 Md. at 429, 554 A.2d at 1210 (citation omitted). Similarly, Judge Shelley of the Arizona Court of Appeals rejected the claim that *Peters* is controlling in this context on the ground that "peremptory challenges were not involved" in *Peters*. *State v. Superior Court*, 156 Ariz. at 516, 753 P.2d at 1172 (Shelley, J., dissenting). In the same vein, the Rhode Island Supreme Court justified its rejection of a *Peters*-based equal protection or sixth amendment standing argument simply by noting that Justice Marshall's statement of his holding in *Peters* does not say that a white defendant has standing to challenge the use of the State's peremptories. *State v. Kelly*, 554 A.2d 632, 634 (R.I. 1989).

76. I infer from the courts' failure to mention *Peters*-based statutory or due process claims in such a large percentage of cases raising the standing question that counsel are rarely making these arguments. See *infra* text accompanying note 82.

77. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1447 (1987); Alschuler, *supra* note 34, at 183-95; Breck, *Peremptory Strikes after Batson v. Kentucky*, 74 A.B.A.J. 54, 60 (April 1, 1988); Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 283 n.59 (1988); Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 820 n.74 (1989); Lindsay, *Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations*, 8 CAMPBELL L. REV. 71 (1985); Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1095-1104 (1987); Mayfield, *Batson and Groups Other Than Blacks: A Strict Scrutiny Analysis*, 11 AM. J. TRIAL ADVOC. 377, 406-07 (1988); Pizzi, *supra* note 33, at 117; Polelle & Hourihane, *In Batson's Wake*, BARRISTER 53, 53-54 (Summer 1988); Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLAMETTE L. REV. 293, 332, 342-48 (1989); Robinson, *The Peremptory Challenge After Batson: Limits on the Prosecutor or License to Discriminate?*, 76 ILL. B.J. 620, 624 (1988); Sagawa, *Batson v. Kentucky: Will it Keep Women on the Jury?*, 3 BERK. WOMEN'S L.J. 14, 46 (1988); Thompson, *Fair and Impartial Jury—Catch as Catch Can*, 31 ST. LOUIS U.L.J. 191, 220 (1987); Uelmen, *Striking Jurors Under Batson v. Kentucky: Lessons from California*, 2 CRIM. JUST. 2, 3-4 (Fall 1987); Note, *Batson v. Kentucky: Challenging the Use of the Peremptory Challenge*, 15 AM. J. CRIM. L. 263, 292, 295 (1988); Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 361-63 & n.65 (1988); Note, *Batson v. Kentucky: Jury Discrimination and the Peremptory Challenge for Cause*, 20 CREIGHTON L. REV. 221, 240 (1986); Note, *Batson v. Kentucky: Peremptory Challenges Redefined*, 64 DEN. U.L. REV. 579, 595 (1988); Note, *The Prosecutor's Right to Object to a Defendant's Abuse of Peremptory Challenges*, 93 DICK. L. REV. 143, 154 n.97 (1988); Note, *Batson v. Kentucky: Sixth Amendment Remedy in Equal Protection Clothes*, 22 GONZ. L. REV. 377, 389 (1986/87); Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1214-15 (1987); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV.

However, these discussions are plagued by the same errors committed in the judicial opinions. Only four of them mention Justice White's opinion;⁷⁹ most speak as if Justice Marshall had written for the Court.⁸⁰

891, 957-58 (1988); Note, *The Death Knell of the Insurmountable Burden: Batson v. Kentucky*, 31 ST. LOUIS U.L.J. 473, 503 (1987); Note, *Challenging the Peremptory Challenge: Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges*, 67 WASH. U.L.Q. 547, 549 & n.21 (1989). I do not include in this list pieces purporting merely to catalogue the lower court decisions on the question or discussions of the prosecution's standing to contest defendants' use of peremptories, which raises somewhat different issues.

78. See Alschuler, *supra* note 77, at 1447; Alschuler, *supra* note 34, at 183, 186; Gobert, *supra* note 77, at 283 n.59, 284 n.64; Goldwasser, *supra* note 76, at 820 n.74; Magid, *supra* note 77, at 1098-1100; Mayfield, *supra* note 77, at 406 n.178, 407 n.185; Polelle & Hourihane, *supra* note 77, at 54; Raphael, *supra* note 77, at 345; Robinson, *supra* note 77, at 624; Sagawa, *supra* note 77, at 46 n.216; Thompson, *supra* note 77, at 220; Uelmen, *supra* note 77, at 3-4; Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 363 n.65 (1988); Note, *Batson v. Kentucky: Jury Discrimination and the Peremptory Challenge for Cause*, 20 CREIGHTON L. REV. 221, 240 n.174 (1986); Note, *Batson v. Kentucky: Peremptory Challenges Redefined*, 64 DEN. U.L. REV. 579, 595 n.163 (1988); Note, *Batson v. Kentucky: The New and Improved Peremptory Challenges*, 38 HASTINGS L.J. 1195, 1214 (1987); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891, 904 & n.67, 958 & n.280 (1988); Note, *The Death Knell of the Insurmountable Burden: Batson v. Kentucky*, 31 ST. LOUIS U.L.J. 473, 503 nn.214, 215 (1987); Note, *Challenging the Peremptory Challenge: Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges*, 67 WASH. U.L.Q. 547, 549 n.21 (1989).

79. See Alschuler, *supra* note 34, at 183; Goldwasser, *supra* note 77, at 820 n.74; Uelmen, *supra* note 77, at 4; Note, *Challenging the Peremptory Challenge: Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges*, 67 WASH. U.L.Q. 547, 550 n.21. None of these sources does complete justice to Justice White's opinion. Professor Alschuler fails to note that the Civil Rights Act condemns discrimination in the selection of petit, as well as grand, jurors. This error, together with his failure to note the relationship that Justice Marshall's opinion (which he seems to misread as giving Peters standing to object only to the exclusion of blacks from his grand jury) perceived between defendants' rights under the Due Process Clause and jurors' rights under the Equal Protection Clause, may have led Professor Alschuler to suggest that *Batson* was decided on equal protection grounds in order to get around *Peters*. See Alschuler, *supra* note 34, at 183, 186. Although Professor Goldwasser says Justice White rejected Justice Marshall's due process analysis in *Peters*, he did not even mention it. Dean Uelmen asserts that Justice White's opinion does not provide a white defendant with standing to make out a claim under *Batson*. His sole justifications for this claim seem to be the fact that *Peters* was not decided under the Equal Protection Clause (which did, however, form the basis for the Civil Rights Act) and the unsupported suggestion that *Peters* is limited to the exclusion of blacks from grand juries. Finally, while the student note emphasizes that Justice White's opinion is not founded on the Equal Protection Clause, it does not seem to recognize the statutory basis of Justice White's opinion, and so it does not appreciate the relevance of that opinion to the standing question presently under consideration.

80. See Mayfield, *supra* note 77, at 406 n.178; Raphael, *supra* note 77, at 345; Robinson, *supra* note 77, at 624; Thompson, *supra* note 77, at 220; Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 363 n.65 (1988); Note, *Batson v. Kentucky: Jury Discrimination and the Peremptory Challenge for Cause*, 20 CREIGHTON L. REV. 221, 240 n.174 (1986); Note, *Batson v. Kentucky: Peremptory Challenges Redefined*, 64 DEN. U.L. REV. 579, 586 (1988); Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38

Consequently, the literature generally misstates the legal basis for the decision in *Peters*, and many commentators (like their judicial brethren) actually claim it to be based on the fair cross-section rule of the sixth amendment.⁸¹ Thus, even though commentators examining the standing question raised by *Batson* appear to take *Peters* much more seriously, the academic literature demonstrates the same confusion about its meaning as the relevant judicial decisions.

III. THE FATE OF *PETERS* IN THE POST-*BATSON* STANDING DEBATE: AN ANALYSIS

This record of neglect and abuse in the courts and academia cries out for an explanation. In the paragraphs that follow, I will explore several possibilities. In the end, I will identify the one that I believe to be the most viable, and touch upon its broader implications for our legal system and our profession.

Because *Peters* is not only the sole Supreme Court decision to rule on the standing of white defendants to object to the State's exclusion of black jurors, but a favorable one as well, one might expect defense counsel to invoke it at every opportunity.⁸² Yet, judging by the deafening

HASTINGS L.J. 1195, 1214 (1987); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891, 905 n.67, 958 n.280 (1988); Note, *The Death Knell of the Insurmountable Burden: Batson v. Kentucky*, 31 ST. LOUIS U.L.J. 473, 503, nn.214, 215 (1987); Note, *Challenging the Peremptory Challenge: Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges*, 67 WASH. U.L.Q. 547, 550 n.21 (1989) (citing Justice Marshall's opinion as Court's after noting no "Court" existed).

81. With respect to the "sixth amendment error," see Alschuler, *supra* note 76, at 1447; Sagawa, *supra* note 77, at 46; Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 363 n.65 (1988); Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1214 (1987); Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891, 904 & n.67, 958 & n.280 (1988); Note, *The Death Knell of the Insurmountable Burden: Batson v. Kentucky*, 31 ST. LOUIS U.L.J. 473, 503 & nn.214, 215 (1987). See also 2 W. LAFAVE & J. ISRAEL, *supra* note 10, § 21.2(c), at 709 n.17. On the other hand, one leading treatise calls *Peters* an equal protection case, see JURYWORK 4-18 (E. Krauss & B. Bonora 2d ed. 1989), and one of the law review pieces mentioned in the text seems to agree, see Thompson, *supra* note 77, at 220. Cf. Polelle & Hourihane, *supra* note 77, at 54 ("the [*Peters*] Court held a white defendant had standing to raise equal protection and due process claims for the exclusion of black jurors").

82. It is worth noting that an argument based on *Peters* would not be inconsistent with or preclude counsel from making any other arguments he or she might wish to make in support of a standing claim.

silence with respect to *Peters* in the reported cases, this seems not to be happening. How is this possible?

It would make most sense for counsel (and the courts) to overlook *Peters* if reliance upon it would be either unnecessary or implausible. But neither of these premises even remotely approximates the truth.

Peters arguments could not reasonably be considered superfluous in this context. Only six jurisdictions have allowed white defendants to take advantage of *Batson* as a result of the litigation discussed in Part II of this Article.⁸³ While five of these six courts have done so pursuant to their understanding of the fair cross-section principle,⁸⁴ the signals emanating from the Supreme Court do not augur well for its endorsement of this position. On the contrary, the Court has gone out of its way in recent years to manifest hostility to the notion that this principle has any bearing upon the selection of petit juries at trial.⁸⁵ Hence, even though the sixth amendment argument has considerable intellectual appeal⁸⁶ and

83. These are a federal district court in the district of Connecticut, *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986), and state courts in Arizona, *State v. Superior Court*, 157 Ariz. 541, 760 P.2d 541 (1988), Colorado, *Fields v. People*, 732 P.2d 1145 (Colo. 1987), Florida, *Kibler v. State*, 546 So. 2d 710 (Fla. 1989), New Jersey, *State v. Gilmore*, 103 N.J. 508, 536 n.9, 511 A.2d 1150, 1164 n.9 (1986) (dictum), and Texas, *Seubert v. State*, 749 S.W.2d 585 (Tex. Ct. App. 1988). Courts in several jurisdictions have left open the possibility that they might allow white defendants to capitalize on *Batson* under a legal theory not available to the defendant in the case at bar. See *Lindsey v. Smith*, 820 F.2d 1137, 1145-46 (11th Cir. 1987); *Kline v. State*, 737 S.W.2d 895, 899-900 (Tex. Ct. App. 1987).

84. The exception is *Clark*. It is also worth noting that these five courts did not all locate this principle in the sixth amendment. The Florida and New Jersey Supreme Courts based their decisions upon their state constitutions. The Colorado Supreme Court relied upon both the sixth amendment and its counterpart in the Colorado constitution. The Arizona Supreme Court invoked only the sixth amendment, but *Seubert* appears to have been based upon both the sixth amendment and the Due Process Clause.

85. See *Alschuler, supra* note 77, at 1446-48; *Alschuler, supra* note 34, at 183-86. However, the Court has not decided the question or disturbed lower court decisions to the contrary.

86. The Court's "fair cross-section" decisions have clearly established that a white defendant's sixth amendment rights would be violated by the systematic exclusion of blacks from the venire from which his jury was selected. As Justice Marshall has noted,

[t]he desired interaction of a cross-section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues. The systematic exclusion of prospective jurors because of their race is therefore unconstitutional at any stage of the jury selection process. There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can then be struck because of their race by a prosecutor's use of peremptory challenges.

McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of certiorari). Because *Batson* denies that any significant state interest is unduly imperiled by the modest steps it took to regulate the State's peremptory challenge, see 476 U.S. at 98-99, it follows that the State's discriminatory use of its peremptories on black jurors should violate the sixth amendment, regardless of the defendant's race. See *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979).

potentially broader ramifications than an argument based on *Peters*,⁸⁷ its acceptance by the Court can scarcely be deemed a sure thing.

The “implausibility” hypothesis appears equally to fly in the face of reality. The idea that *Peters*’ two *rationes decidendi* apply in this context is anything but frivolous. There is no obvious reason why the timing of the improper exclusion of black jurors should affect either its impact on the legitimacy of the resulting jury or the policies underlying the Civil Rights Act of 1875.⁸⁸ Despite the widespread confusion caused by a passage in *Castaneda v. Partida*⁸⁹ regarding the prima facie equal protection claim of a defendant who belongs to the group excluded from the jury venire, the Court has not cast the slightest doubt on the correctness of the holding in *Peters* or the validity of either of *Peters*’ rationales in any subsequent case.⁹⁰ Indeed, only by allowing white defendants to chal-

87. It is not clear which classes of jurors defendants who are not class members may seek to protect against discriminatory exclusion under either theory. While the Court has never spelled out just what groups are cognizable classes for sixth amendment purposes, see Krauss, *The Witherspoon Doctrine at Witt’s End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 45 & n.184 (1986), it is clear beyond peradventure that women, blacks, and Mexican-Americans are. See Lockhart v. McCree, 476 U.S. 162, 175-77 (1986). On the other hand, blacks are the only class that is clearly cognizable under *Peters*, inasmuch as Justice White’s rationale in that case applies only to the type of discrimination barred by the Civil Rights Act of 1875. Although the Court has not indicated how broadly it would construe this statute, cf. *infra* note 90, it could not plausibly construe it to cover gender discrimination. Thus, a sixth amendment theory may have a wider reach than one relying on *Peters*. This could be true even if the Court were to embrace Justice Marshall’s *ratio decidendi*, as his opinion in *Peters* does not address the question of which, if any, nonracial groups may be excluded from a defendant’s jury without violating his rights under the Due Process Clause. (This opinion does argue that the exclusion of any protected group may not be deemed a harmless error, *Peters*, 407 U.S. at 502-05 (opinion of Marshall, J.), but it never says what nonracial groups are protected. At most, it obliquely hints that women may be such a group. See *id.* at 504 n.12.)

88. Indeed, there is no reason at all for a defendant’s standing to depend on the timing of the discrimination against black jurors. See *supra* note 86. The logic of the opinions delivered by Justices Marshall and White in *Peters* does not bar this result. Justice Marshall argued that the unconstitutional exclusion of black grand or petit jurors could not be deemed harmless error in a case involving a white defendant. This theory obviously requires that white defendants be granted standing to protest the State’s discriminatory use of peremptory challenges against black jurors. Although Justice White spoke only of the invalidity of *Peters*’ indictment, the Civil Rights Act of 1875 forbids the discriminatory exclusion of black grand and petit jurors. Hence, the sanction of reversal would seem at least as appropriate in this context as in *Peters*. Cf. Vasquez v. Hillery, 474 U.S. 254, 267-77 (1986) (Powell, J., dissenting) (arguing conviction renders discrimination in grand jury selection harmless error). But see *State v. Powers*, No. 87AP-526, at 17 (Ohio Ct. App. Dec. 13, 1988).

89. 430 U.S. 482 (1977). This passage reads as follows: “Thus, in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs.” *Id.* at 494.

90. There was no question of the standing of the defendant in *Castaneda*—both the defendant and the excluded jurors were Mexican-American—and there is no reason to believe that the Court

lunge the peremptory excusal of black jurors on account of their race could the Court have any hope of achieving *Batson's* stated goal, "ensur[ing] that no citizen is disqualified from jury service because of his race."⁹¹

Of course, *Batson* also says that only a black defendant may make a prima facie case of a denial of his rights under the Equal Protection Clause by relying "solely on evidence concerning the prosecutor's exercise of peremptory challenges [on black jurors] at [his] trial."⁹² But this dictum, like the above-mentioned language in *Castaneda*, does not reduce the prima facie relevance of *Peters* to the standing of a white defend-

intended to consider or reject the equal protection claims of some hypothetical non-Mexican-American defendant. In any event, the availability of an equal protection claim is a different question from the availability of another (be it due process or statutory) claim. Indeed, precisely this point was made in a later case on racial discrimination in the selection of grand jury forepersons. *Hobby v. United States*, 468 U.S. 339, 347 (1984). (Incidentally, *Hobby's* discussion of *Peters* contains not the slightest hint that *Peters* is no longer good law. See 468 U.S. at 343-46.)

91. 476 U.S. at 99. Indeed, as *Batson* simply purported to be harmonizing the law regarding racial discrimination in the use of peremptory challenges with the principles developed in cases involving discrimination in the selection of the venire, *id.* at 92-98, it would be perverse for the Court to deem the standing rules developed in the latter context inapplicable in the former.

Justice White's concurring opinion in *Batson* suggests that his view of what constitutes impermissible racial discrimination in this context may be a narrower one: that the Constitution only bars the peremptory exclusion of black jurors "on the assumption that no black juror could fairly judge a black defendant." *Id.* at 101 (White, J., concurring). It is not clear that this is the right way to read his opinion, because *Batson* was black and Justice White may simply have been expressing his views on this subject only to the extent necessary for him to resolve the issue raised by this case. Indeed, Justice White expressly noted that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today." *Id.* at 102. However, even if Justice White meant to reject a broader conception of the rights of black jurors, he did not speak for the Court.

Justice Powell, who spoke for seven Justices, plainly shared Justice White's concern about the removal of black jurors "on the assumption that they will be biased in a particular case simply because the defendant is black." 476 U.S. at 97. But he seems to have had a much broader conception of the extent of a black juror's rights under the Equal Protection Clause. This scope is revealed most clearly in three passages in his opinion. First, there is the general statement that because "[a] person's race simply 'is unrelated to his fitness as a juror,' . . . by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror." *Id.* at 87 (citations omitted). Then there is his statement of *Batson's* goal, which appears twice, both times in the sweeping language quoted in the text. *Id.* at 99 & n.22. A final, perhaps more explicit, indication of the extent of Justice Powell's vision may be found in his pronouncement that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89 (emphasis added). The use of the word "or" in this context makes the most sense if the passage is read as repeating the lesson of the earlier discussion, that the State violates a juror's right to equal protection whenever it challenges him on account of his race. See also *supra* note 34.

92. 476 U.S. at 96.

ant to complain of the State's racially based peremptory challenge of black jurors at his trial. After all, *Peters* neither discussed nor determined a white defendant's rights under the Equal Protection Clause.⁹³

Thus, only a heedless literalist could regard this language in *Batson* as rendering a *Peters* claim frivolous.⁹⁴ Even then, however, there are two other compelling reasons why a literalist theory could not satisfactorily account for *Peters*' fate. First, the literalist objection to the sixth amendment standing argument appears to be much stronger, and yet the defense bar (and the commentators) seem to be quite fond of "fair cross-section" arguments.⁹⁵ Second, and more important, the literalist hypothesis would not explain the mischief worked by the courts and commentators—friend and foe of a liberal standing rule alike—when they do recall *Peters*. Indeed, this phenomenon seems to render the "redundancy" and "implausibility" theories fatally inelegant.⁹⁶

If that were not enough to discredit these theories thoroughly, there is more. The problems surrounding *Peters* did not commence with *Batson* and are not limited to the question of white defendants' standing to make a *Batson* claim. Thus, a few years before *Batson*, when the debate concerning the standing of defendants to challenge discrimination against members of other groups in the selection of grand jury forepersons was at its height,⁹⁷ many courts facing the issue ignored Justice White's opinion and called Justice Marshall's the opinion of the Court,⁹⁸ and *Peters* was

93. See *supra* text accompanying note 44. Moreover, the Court has never decided whether the exclusion of grand or petit jurors belonging to a cognizable group violates the rights under the Equal Protection Clause of a defendant who does not belong to the group.

94. In *Torres v. State*, 541 So. 2d 1224 (Fla. Ct. App. 1989) (question certified to Florida Supreme Court), and *Kibler v. State*, 501 So. 2d 76 (Fla. Ct. App. 1987), *rev'd*, 546 So. 2d 710 (1989), the courts refer to a *Peters* argument and then deny a white defendant standing on the ground that *Batson* imposes a "same race" requirement. As has already been noted, see *supra* text accompanying note 74, *Torres* argues that *Batson* "receded" from *Peters*. But the court deemed the issue serious enough to certify it to the state supreme court. The *Kibler* majority, on the other hand, simply ignored the concurring judge's argument that a *Peters* claim is not foreclosed by the "same class" language in *Batson*. See *supra* note 64 and accompanying text.

95. See, e.g., *State v. Superior Court*, 157 Ariz. 541, 544-46, 760 P.2d 541, 544-46 (1988); *State v. Gorman*, 315 Md. 402, 412, 417-19, 554 A.2d 1203, 1208, 1210-11 (1989); *State v. Bruce*, 745 S.W.2d 696, 697 (Mo. Ct. App. 1987); *Magid, supra* note 77; Note, *Batson v. Kentucky: Sixth Amendment Remedy in Equal Protection Clothes*, 22 GONZ. L. REV. 377, 389 (1986/87).

96. For a discussion of elegant theories, see Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827.

97. This controversy reached the Supreme Court in *Hobby v. United States*, 468 U.S. 339 (1984). The confusion about *Peters*' meaning and relevance to this question that prevailed in the lower courts is noted in *Magid, supra* note 77, at 1099, 1100.

98. See, e.g., *United States v. Coletta*, 682 F.2d 820, 823-24 (9th Cir. 1982), *cert. denied*, 459

often described as an interpretation of the Equal Protection Clause.⁹⁹ Moreover, since *Batson*, courts have made the same kinds of mistakes when considering issues other than white defendants' standing under *Batson* to attack the State's race-based use of peremptory challenges against black jurors.¹⁰⁰ In fact, due to its apparent inability to notice that *Peters* is not inconsistent with *Castaneda*, at least one court now appears to believe that it is no longer good law at all.¹⁰¹

All of the errors in characterizing *Peters* point to what strikes me as the real cause of its plight: sloppiness. How else can one account for the fact that the courts and commentators say that Justice Marshall spoke for the Court, when the syllabus in *Peters* says that "Mr. Justice Marshall, joined by Mr. Justice Douglas and Mr. Justice Stewart, concluded that" and "Marshall, J., announced the Court's judgment and delivered an opinion, in which Douglas and Stewart, JJ., joined";¹⁰² when the lead opinion begins, "Mr. Justice Marshall announced the judgment of the Court and an opinion in which Mr. Justice Douglas and Mr. Justice Stewart join";¹⁰³ and when the header at the top of every page of this opinion in the United States Reports reads "Opinion of Marshall, J."? How else can one explain the fact that Justice White's opinion

U.S. 1202 (1983); *United States v. Musto*, 540 F. Supp. 346, 352-53 (D.N.J. 1982); *But see, e.g., United States v. Cronn*, 717 F.2d 164, 167 n.5 (5th Cir. 1983); *United States v. Cross*, 708 F.2d 631, 633 n.4 (11th Cir. 1983).

99. *See* Magid, *supra* note 77, at 1099.

100. *See, e.g., Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (stating Justice Marshall's opinion based on Equal Protection Clause); *Brown v. Rice*, 693 F. Supp. 381, 390 (W.D.N.C. 1988) (citing Justice Marshall's opinion as Court's); *United States v. Biaggi*, 680 F. Supp. 641, 649-51 (S.D.N.Y. 1988) (citing Justice Marshall's opinion as Court's, asserting decision based on Due Process Clause alone); *United States ex rel. Yates v. Hardiman*, 656 F. Supp. 1006, 1016 (N.D. Ill. 1987) (citing *Peters* as authority for cognizability of blacks under sixth amendment "fair cross-section" rule).

Peters has also been ignored or abused in a series of cases considering the standing of male defendants to attack the State's use of peremptory challenges to remove female jurors because of their gender. *See, e.g., Potts v. State*, 376 S.E.2d 851, 856 (Ga. 1989); *People v. Crowder*, 161 Ill. App. 3d 1009, 1013, 515 N.E.2d 783, 786 (1987); *id.* at 1027-28, 515 N.E.2d at 795-96 (Pincham, J., dissenting); *People v. Irizarry*, 142 Misc. 2d 793, 812, 815, 536 N.Y.S.2d 630, 641, 643 (Sup. Ct. 1988).

101. *See Ford v. Seabold*, 841 F.2d 677, 687-89 (6th Cir. 1988). In another case, an Eleventh Circuit panel manifested a clear agreement with this view, but indicated that a previous, contrary, decision of a different panel prevented it from acting upon its belief. *See United States v. Holman*, 680 F.2d 1340, 1355-56 (11th Cir. 1982). Several other puzzled courts have said that these two decisions appear inconsistent. *See, e.g., United States v. Biaggi*, 680 F. Supp. 641, 649 (S.D.N.Y. 1988); *United States v. Abell*, 552 F. Supp. 316, 319, 320 (D. Me. 1982). (A commentator has declared that *Peters* was overruled by *Taylor v. Louisiana*, 419 U.S. 522 (1975). Lindsay, *supra* note 77, at 96 n.98, 98 n.107, 100 n.121.).

102. *Peters*, 407 U.S. at 493.

103. *Id.* at 494 (opinion of Marshall, J.).

is so generally ignored, when all but one of the members of the *Peters* majority who were still on the Court when *Batson* was decided joined that opinion, and when Justices White and (until his retirement) Powell were voters of whose support white defendants could by no means otherwise have been certain, but whose support might well have seemed essential if a liberal standing rule were to prevail in the Supreme Court? How else can one explain the numerous assertions that *Peters* is an equal protection or sixth amendment decision, when Justice Marshall's opinion explicitly noted that the sixth amendment did not apply in that case and that *Peters*' equal protection claim would not be considered,¹⁰⁴ and when each of the opinions supporting the Court's judgment identified the legal basis for its position in the plainest imaginable language?

This theory could also explain *Peters*' absence from so many of the cases considering the standing question. Recently, in an unreported decision, an Ohio court faced with this standing issue refused to follow *Peters*, basically because it "neither addressed nor determined" the question of standing under *Batson* and because the court found *Peters* confusing, "there being no clear majority decision."¹⁰⁵ If the criminal defense bar shares this court's misplaced substitution of myopic literalism for legal reasoning (and the fact that other courts are doing the same thing suggests that this may be true) or its unjustified mystification about *Peters* (and the general confusion surrounding *Peters* suggests that it might) these lawyers may find it necessary, or at least easier, to ignore *Peters* altogether and rely on other standing theories.¹⁰⁶

I do not claim that *Peters*' fate is exclusively attributable to sloppy reading and sloppy analysis. The chaos surrounding *Peters* is surely magnified because of the general disarray of law governing jury selection, in which the Justices have recognized claims under the Due Process and Equal Protection Clauses, the fair cross-section principle, and the Civil Rights Act of 1875, but have not explained the relationship between these legal rules. The confusion is doubtless amplified to a still greater extent because of the slavish literalism with which the Supreme Court

104. *Id.* at 497 n.5, 500. *But see supra* note 71 and accompanying text.

105. *State v. Powers*, No. 87AP-526, at 18 (Ohio Ct. App. Dec. 13, 1988).

106. That would leave the question why *Peters* is more often noted in the commentary than the cases. Perhaps it is felt to be less inappropriate to mention a puzzling decision in a scholarly piece than an advocacy piece. Or maybe academics have more time to try to "work things out", or more interest in doing so. Finally, academics may be good at collecting cases relating to any given legal problem, but not overly interested in the doctrinal complexities generated by *Peters*. *See infra* note 108.

has interpreted many of its own precedents in recent years.¹⁰⁷ Indeed, some of the judicial mistreatment of *Peters* may be attributable to judges' ideological opposition to the rule announced in that case.

But still, much of this situation can only be chalked up to sloppiness, and this raises some alarming questions about how well our legal system works. If the bench and bar cannot distinguish a majority opinion from a nonmajority opinion in a case in which a defendant's life may depend upon the resolution of the standing question, what does this portend for the more typical, lower-profile cases, or those in which the relevant decisions or legal rules are truly difficult to comprehend? If commentators, who should have the time, the ability, and the objectivity to make these kinds of distinctions in their published work, fail to do so, what does this portend for the training of the lawyers of tomorrow?¹⁰⁸

IV. EPILOGUE

Although the Supreme Court is obviously not responsible for the larger problems adverted to above, the Justices can eliminate the mess surrounding *Peters* with a stroke of the pen. *Holland v. Illinois* gives them the opportunity to clarify the relationship between the constitutional rules (for these purposes I include the Civil Rights Act of 1875 among their number) governing jury selection and to determine the impact of *Peters* on the standing of white defendants to attack the use of peremptory challenges on black jurors because of their race. Unless the Court accepts Holland's argument that the sixth amendment gives him standing to contest the State's peremptory challenge of the only blacks on his venire—and it seems unlikely that it will¹⁰⁹—the Court should seize this opportunity to (at the very least) remind us that *Peters* lives.¹¹⁰

107. Professor Alschuler has commented on this tendency in the Supreme Court's opinions and its effects on the lower courts. See Alschuler, *supra* note 34, at 180 & n.107.

108. *Quaere* whether the commentators' failure to give an accurate account of what the Justices said in *Peters* is related to the fact, which has been noted by Professor Alschuler, among others, see Alshuler, *supra* note 77, at 1451, that doctrinal scholarship is commonly accorded little prestige in the academic community.

109. See *supra* note 85 and accompanying text.

110. Although a *Peters* argument would fall within the scope of the "question presented" in Holland's petition for certiorari, see 44 Crim. L. Rep. (BNA) 4192-93 (Mar. 8, 1989), Holland does not make such an argument in his Supreme Court brief. A similar omission did not prevent the Court from deciding *Batson* on equal protection grounds, even though the "question presented" in that case was confined to the legitimacy of the State's racially based use of peremptory challenges under the sixth and fourteenth amendment rights to an impartial jury and to a jury drawn from a fair cross-section of the community. See 476 U.S. at 84 n.4; *id.* at 108-11 (Stevens, J., concurring);

[As this Article went to print, the Supreme Court handed down its decision in Holland v. Illinois, 110 S. Ct. 803 (1990). As the Article anticipated, Holland held that the sixth amendment does not bar the race-based use of the State's peremptory challenges. The Justices also heeded the Article's call to emphasize the fact that white defendants may nonetheless have a legal basis for challenging the State's discriminatory use of peremptory challenges on black jurors. Such an admonition may be found in every opinion delivered in the case. In fact, five Justices indicated that they would have voted to allow Holland to challenge the removal of the black venire members in his case if only he had relied upon another legal theory. Id. at 811-12 (Kennedy, J., concurring); id. at 812-14 (Marshall, J., concurring); id. at 821-22 (Stevens, J., dissenting). These Justices focused on considerations of policy, including the notion that the State should not be able to violate the right of black jurors to the equal protection of the laws with impunity, and they did not dwell on doctrinal niceties of the kind discussed in this Article. Thus, it is hardly surprising that Peters is unmentioned in any of the opinions handed down in Holland, or that none of them purports to contain a careful marshalling of the precedents on the standing question.]

id. at 112-18 (Burger, C.J., dissenting). However, it did so because the State of Kentucky urged it to decide *Batson* under the Equal Protection Clause, and the issue was extensively briefed. See 476 U.S. at 84 n.4; *id.* at 108-11 (Stevens, J., concurring). Neither condition obtains with respect to a *Peters* argument in *Holland*. Still, even if the Court were to feel that the matter (which has never been raised in the case) is not properly before it, it could nonetheless say something about *Peters* in *Holland*. See *supra* text accompanying note 40.

