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Challenging the Peremptory Challenge: Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges

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CHALLENGING THE PEREMPTORY CHALLENGE: SIXTH AMENDMENT IMPLICATIONS OF THE DISCRIMINATORY USE OF PEREMPTORY CHALLENGES

Attorneys commonly use peremptory challenges[1] in jury selection to effect a fair and impartial jury.[2] Notwithstanding the importance courts accredit to this function,[3] the peremptory challenge should not survive a conflict with constitutionally protected rights.[4]

Courts perpetually struggle to reconcile those rights guaranteed by the sixth and fourteenth amendments with the unconstrained nature of peremptory challenges. *Batson v. Kentucky*[5] marked the Supreme Court's first overt intrusion[6] into the prosecutor's use of peremptory challenges. The Court held a prosecutor violates the equal protection clause of the fourteenth amendment[7] if his peremptory challenges exclude venire members[8] based on their race.[9] Further, the Court reduced the evidentiary burden required of a defendant to establish a prima facie case of purposeful discrimination.[10]

The Court in *Batson* specifically declined to express a view on the mer-

1. A "peremptory challenge," as opposed to a challenge for cause, allows an attorney to exclude a potential juror without a reason. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 212 n. 9 (1965) (quoting 4 BLACKSTONE COMMENTARIES 353 (15th ed. 1809)) ("[A]n arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all . . . is called a *peremptory* challenge. . . .") (emphasis in original)). "Challenges for cause have the virtue of being unlimited, and peremptories have the advantage of not needing to be defended." J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 140 (1977).

2. Lewis v. United States, 146 U.S. 370, 376 (1892); Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1199 (1987).

3. *Swain*, 380 U.S. at 211; McCray v. Abrams, 750 F.2d 1113, 1130 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986).

4. *McCray*, 750 F.2d at 1130. If a peremptory challenge does conflict with a constitutionally protected right, "it is the inscrutability of the peremptory challenge that must yield, not the constitutional right." *Id.*

5. 476 U.S. 79 (1986).

6. Prior to *Batson*, the Court relied on the stringent standard in Swain v. Alabama, 380 U.S. 202 (1965). *See infra* notes 49-50 and accompanying text. Because of its stringency, this test left the peremptory challenge relatively untouched.

7. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

8. A jury pool or "venire" refers to the panel of potential jurors summoned. From this group, the actual or "petit jury" is selected.

9. 476 U.S. at 96.

10. 476 U.S. at 93-98. *See infra* note 54 and accompanying text.

its of the petitioner's sixth amendment[11] claims.[12] However, a number of federal circuit courts have considered the potential for a sixth amendment "fair cross section" objection to the petit jury's composition.[13]

Despite its narrow holding, the *Batson* decision has created controversy and confusion.[14] Prior to *Batson*, the potential of a sixth amendment claim was important because of the difficulty of obtaining relief against peremptories under an equal protection theory.[15] Even though *Batson* eased the restrictions on equal protection claims, a viable sixth amendment claim remains valuable because of *Batson*'s limitations. First, *Batson* is not retroactive,[16] whereby it deprives many defendants[17]

11. The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

12. 476 U.S. at 84-85 n.4. "The Court has avoided any confrontation between the sixth amendment guarantee of an impartial jury and the peremptory challenge, although *Batson* presented a ripe opportunity for such an appraisal of these apparently conflicting principles." Note, *supra* note 2, at 1204.

The sixth amendment guarantee applies to criminal matters only. This Note, therefore, analyzes the peremptory challenges solely as used in criminal prosecutions. This Note will not discuss peremptory challenges regarding civil litigation except to note "[t]he *Batson* rationale has not widely been held to apply" there. D. Breck, *Peremptory Strikes after Batson v. Kentucky*, A.B.A. J., 54, 60 (April 1, 1988). *But see, e.g.*, Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) (*Batson* applies to civil as well as criminal cases); Edmonson v. Leesville Concrete Co., Inc., 860 F.2d 1308 (5th Cir. 1988) (same).

13. *See infra* notes 65-85 and accompanying text. The Supreme Court has interpreted the sixth amendment right to an "impartial" jury as guaranteeing a jury drawn from a fair cross section of the community. Taylor v. Louisiana, 419 U.S. 522, 528-29 (1975). *See also* Irvin v. Dowd, 366 U.S. 717, 723 (1961) (guarantee of "impartial, indifferent jurors"); Booker v. Jabe, 775 F.2d 762, 767-68, 770 (6th Cir. 1985) (further discussion of what amounts to an impartial jury), *remanded*, 478 U.S. 1001, *aff'd*, 801 F.2d 871 (6th Cir. 1986) (per curiam).

Several lower courts have extended *Taylor*'s requirement of a fair cross section in the jury pool to a fair cross section in the petit jury. This creates the possibility that a venire's improper cross sectional composition will carry over to the actual jury. *See, e.g.*, Roman v. Abrams, 822 F.2d 214, 226-27 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989); Booker, 775 F.2d at 772; McCray v. Abrams, 750 F.2d 1113, 1129 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986).

14. *See, e.g.*, Bologna, Batson v. Kentucky: *The Hybrid Peremptory Challenge*, 1 DET. C.L. REV. 151, 163-67 (1987) (*Batson* has the "appearance" of settling the debate regarding peremptory challenges, but it leaves many questions unanswered).

15. Before *Batson*, the challenger had to overcome a virtually impossible burden of proof to establish an equal protection violation. *See supra* note 6, *infra* notes 49-52 and accompanying text.

16. *Allen v. Hardy*, 478 U.S. 255, 259-261 (1986) (*Batson* decision not retroactive on collateral review of convictions made final prior to *Batson* opinion). The Court defined "final" as " 'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before' . . . *Batson v. Kentucky*." *Id.* at 258 n.1 (quoting Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)).

17. *Batson* will not apply to defendants who initially challenged jury composition any time prior to the Court's opinion in *Batson*, if the Court deems such challenges to be "final." *See supra* note 16.

of its decreased burden of proof.[18] Because the Court stripped pre-*Batson* defendants of a feasible equal protection claim by denying retroactivity, they must look for alternative grounds to challenge a jury make-up.[19] Second, the scope of a sixth amendment claim may be broader than an equal protection challenge. While unavailable to date under the equal protection clause, a sixth amendment claim would provide a defendant with a vehicle to challenge the jury composition on nonracial grounds.[20] Moreover, a sixth amendment challenge eliminates the problem of standing potentially raised by an equal protection claim.[21] Finally, sixth amendment and equal protection challenges may provide distinct

18. *Batson*, as opposed to its predecessor Swain v. Alabama, 380 U.S. 202 (1965), *see supra* note 6, permits a defendant to establish a prima facie showing of discriminatory selection merely using facts from the defendant's trial, rather than requiring a prior pattern of discriminatory exclusions. *See infra* notes 49, 54-56 and accompanying text.

19. Teague v. Lane, 820 F.2d 832, 836 (7th Cir. 1987) (en banc), *aff'd*, 109 S. Ct. 1060 (1989), exemplifies a situation where timing dictated the unavailability of a *Batson* application. In *Teague*, the defendant argued the sixth amendment requires the petit jury to "reflect the trial community." 820 F.2d at 836. *See also* McCray v. Abrams, 750 F.2d 1113, 1124 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986) (*Swain* burden not met, hence, decision rested on sixth amendment rather than equal protection grounds).

20. The Supreme Court applies a "strict" level of scrutiny when analyzing race-based classifications under the equal protection clause. Hunter v. Erickson, 393 U.S. 385, 391-92 (1969); (The "core" of the equal protection clause is to combat racial discrimination, thus, race-based classifications are "suspect" and merit "rigid scrutiny."); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."); *See also* Alschuler, *The Overweight Schoolteacher from New Jersey and Other Tales: The Peremptory Challenge after Batson*, 25 CRIM. L. BULL. 57, 65 (1989) ("Whether some nonracial forms of discrimination are as invidious as racial discrimination [to merit such heightened scrutiny] remains a subject of dispute."). The Supreme Court's holding in *Batson* rested only on race-based discrimination. Whether the Court will broaden the scope of *Batson* to include other racial minority groups and women remains uncertain.

A sixth amendment challenge rests on the right to a possible fair cross section of the community on one's jury. It extends to discrimination against any cognizable group. *See infra* note 68. Of course, a future clarification of "cognizability" (*see infra* note 68) will assist in defining the parameters of a sixth amendment claim. *See, e.g.*, Krauss, *The Witherspoon Doctrine at Witt's End: Death Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 46 n.185 (1986) (While the Court in Thiel v. Southern Pacific Co., 328 U.S. 217, 222-24 (1946), recognized daily wage earners as cognizable for fair cross section purposes, "it is unclear whether the Court considers *Thiel* to have precedential significance in the sixth amendment context."). Hence, the nature of the underlying claim is potentially broader for the sixth amendment claim than for equal protection. Unless the Court extends *Batson* to groups such as women and daily wage earners, the availability of a sixth amendment claim is imperative to combat alternative forms of systematic discrimination in jury selection.

21. Pursuant to article III of the United States Constitution, a person has standing to bring a claim only if he meets three conditions. First, he must show a distinct and palpable injury. Second, the challenged activity must have caused injury. Finally, the court must be able to redress the

injury. 13A C. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3531.4 (1984).

The Supreme Court's current position on standing to challenge jury composition is muddled. In Peters v. Kiff, 407 U.S. 493 (1972), six members of the Court held a white defendant had standing to challenge the systematic exclusion of blacks from the jury pool. *Id.* at 504. No majority of the Court, however, agreed to the theory behind its holding. Justice Marshall's opinion, joined by Justices Douglas and Stewart, recognized a due process violation "[w]hen any large and identifiable segment of the community is excluded from jury service." *Id.* at 503 (opinion of Marshall, J.). Justice Marshall explicitly declined to consider the defendant's equal protection claim. *Id.* at 497 n.5 (opinion of Marshall, J.). Justice White's opinion, joined by Justices Brennan and Powell, arrived at a judgment granting standing without detailing its holding on either the due process or equal protection grounds. Instead, Justice White recognized a "central concern of the Fourteenth Amendment with racial discrimination." *Id.* at 507 (White, J., concurring in judgment). *Peters v. Kiff* articulates a standard of eligibility to contest the exclusion of a group from jury service. Moreover, the decision is not based on the equal protection clause. Alschuler, *supra* note 20, at 65. Hence, *Kiff* fails to set clear precedent for lower courts to determine standing when the defendant asserts an equal protection claim based on the exclusion of a group from the petit jury. *Compare*, United States v. Townsley, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc) (no basis exists for white defendant to argue the prosecutor's exclusion of black jurors violated defendant's rights under the equal protection clause) and United States v. Angiulo, 847 F.2d 956, 984 (1st Cir. 1988) (nonblack defendants cannot complain about prosecutor's use of peremptories to eliminate blacks from jury) *with* United States v. Gometz, 730 F.2d 475, 478 (7th Cir. 1984) (en banc) (citing *Peters v. Kiff*, a white defendant has standing to make a sixth amendment challenge to the exclusion of blacks from his jury), *cert. denied*, 469 U.S. 845 (1984) *and* United States v. Cabrera-Sarmiento, 533 F. Supp. 799, 804 (S.D. Fla. 1982) (a defendant has standing to challenge—under the fourteenth amendment—the exclusion of a cognizable group from his grand and petit juries, even though he is not a member of the group).

Perhaps because *Kiff* is a poor guide, lower courts rely more readily on the Court's language in Batson v. Kentucky, 476 U.S. 79, 96 (1986), expressly requiring that the defendant be a member of the excluded racial group. *See, e.g., Townsley*, 856 F.2d at 1190; *Anguilo*, 847 F.2d at 985.

Thus, the issue of who has standing to make an equal protection challenge alleging racially based exclusions from the petit jury remains unclear. Moreover, it is also uncertain whether *Kiff* would extend standing in an equal protection claim of gender based or some alternative discrimination. Of course, the viability of such equal protection claims to date remains unclear. *See infra* note 138.

In contrast to an equal protection objection, a sixth amendment challenge may survive regardless of the correlation between the defendant and the challenged jurors. In *Teague*, Justice Brennan, noted that a sixth amendment extension:

> would bar the prosecution from excluding venire persons from the petit jury on account of their membership in some cognizable group even when the defendant is not himself a member of that group, whereas the Equal Protection Clause might not provide a basis for relief unless the defendant himself belonged to the group whose members were improperly excluded.

Teague v. Lane, 109 S. Ct. 1060, 1092 (1989) (Brennan, J., dissenting).

Under a sixth amendment challenge, defendant would argue a violation of his right to a possible fair cross section. The defendant might suffer a distinct and palpable injury if he were unable to benefit from the diverse viewpoints or the impartiality that certain groups in the community might afford. Therefore, any defendant could have standing if denied a fair cross section pursuant to the prosecutor's systematic exclusion of a group of prospective jurors.

In *Kiff* the Court hypothesized that the white petitioner "would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service" if he brought the claim under the sixth amendment. 407 U.S. at 500. The Court reasoned that excluding a "discernable class"

safeguards.[22]

Resolution of the sixth amendment issue is crucial in understanding the scope of peremptory challenges.[23] Because of the conflict among the circuit courts concerning the relevance of the sixth amendment to petit juries,[24] this issue is ripe for the Supreme Court's consideration.[25]

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injures all defendants—even those who are not members of that class—because it eliminates the potential for a cross section represented on the jury. *Id.* at 500.

The breadth of a sixth amendment claim, in contrast to that of an equal protection challenge, would further expand the potential groups of defendants with valid challenges to their petit juries. *See supra* note 20.

22. *See* Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979) (equal protection challenges are "not entirely analogous" to fair cross section claims). *But see Duren*, 439 U.S. at 371 (Rehnquist, J., dissenting) (sixth amendment justification for classification by gender has strong overtones of equal protection standard). *See also* Lindsey v. Smith, 820 F.2d 1137, 1145 (11th Cir. 1987) (if sixth amendment offered defendant any protection, this protection would be inseparable from protection afforded under the equal protection clause); United States v. Forbes, 816 F.2d 1006, 1012 n.8 (5th Cir. 1987) (same). Furthermore, as one commentator argues:

> Although some observers maintain that the Sixth Amendment's "fair cross-section requirement" differs from the Fourteenth Amendment's requirement of equal protection and looks to discriminatory effect rather than discriminatory intent, the Supreme Court has never suggested that the "fair cross-section requirement" forbids more than the "systematic" exclusion of distinctive groups from jury service. The difference between "deliberate" exclusion and "systematic" exclusion is far from clear.

Alschuler, *supra* note 20, at 66 n.38 (citation omitted).

23. The danger in extending the fair cross section analysis to the petit jury is the resulting "virtual limitlessness" of defendants' challenges to exclusions by prosecutors. McCray v. Abrams, 750 F.2d 113, 1139 (2d Cir. 1984) (Meskill, J., dissenting) ("It effectively eliminates the peremptory challenge for all but the most frivolous reasons (people who wear gray, smile, or wear contact lenses)."), *vacated*, 478 U.S. 1001 (1986).

24. *See infra* notes 65-85 and accompanying text.

25. In a recent decision, Teague v. Lane, 109 S. Ct. 1060 (1989) the Supreme Court once again sidestepped a resolution of the sixth amendment controversy. *See supra* note 12 and accompanying text; *see infra* note 57. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, held it unnecessary to consider whether to extend the fair cross section requirement to the petit jury. O'Connor reasoned that a new rule would not retroactively apply to Teague because his case reached the Court on collateral review, not on direct appeal. *Id.* at 1069 (opinion of O'Connor, J.). Conversely, Justices Brennan, Marshall, Stevens and Blackmun, not only believed the Court should have decided the sixth amendment issue, but that it should have extended the fair cross section requirement to the petit jury. *Id.* at 1079 (Stevens, J., concurring in part and in the judgment); 1092, 1094 (Brennan, J., dissenting).

This split among the Justices merely heightens the sixth amendment issue.

For the distribution of votes and a further discussion of the Supreme Court's action in *Teague*, see *infra* notes 61-62.

In *Teague*'s lower court opinion, the Seventh Circuit sitting en banc refused to extend the sixth amendment to the petit jury's composition. *See infra* notes 73-77 and accompanying text for further discussion of *Teague*. Most recently, the Supreme Court denied a petition for certiorari in Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989). The Second Circuit in *Roman*, unlike the circuit court in *Teague*, did utilize a sixth amendment analysis to examine the peremptory challenges used in selecting a petit jury. 822 F.2d at 224-27.

This Note considers the sixth amendment implications[26] on the discriminatory use[27] of peremptory challenges in petit jury selection. Part I introduces the history and intended purpose of peremptory challenges. Part II examines the extent to which courts have limited attorneys' use of peremptories. The section reviews both the equal protection approach and federal courts' positions on sixth amendment guarantees regarding the petit jury. Part III analyzes the merits of a sixth amendment claim. Finally, Part IV considers alternatives to the existing peremptory challenge. This Note concludes that peremptory challenges should be eliminated because of their procedural deficiencies and their innate failure to effectuate their intended purpose.

I. HISTORY AND PURPOSE OF PEREMPTORY CHALLENGES

The peremptory challenge, although not a constitutional right,[28] has existed since common law.[29] Though originally a defendant's right,[30] the prosecutorial use of peremptory challenges developed by the nineteenth century.[31] Today, both state and federal rules of procedure and statutes grant defendants and prosecutors the right to utilize peremptory challenges.[32]

26. The equal protection guarantee under the fourteenth amendment is the other major ground for challenging the alleged discriminatory use of peremptory challenges. While this Note focuses on challenges based on the sixth amendment, the analysis will require some discussion of equal protection.

27. While both prosecutors and defense attorneys can use peremptory challenges, *see infra* notes 30-32 and accompanying text, only their discriminatory use by prosecutors is at issue in this Note. See *infra* note 151 and accompanying text for a brief consideration of the defense's use of peremptory challenges. Extensive consideration of this issue is beyond the scope of this Note.

28. *See, e.g.*, McCray v. Abrams, 750 F.2d 1113, 1130 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986).

29. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 211-14 (1965). *See generally* VAN DYKE, *supra* note 1, at 147-51 (general discussion of development of peremptories).

30. Note, *supra* note 2, at 1198 (citing VAN DYKE, *supra* note 1, at 85-175). *See also* Pointer v. United States, 151 U.S. 396 (1894) (the peremptory challenge is one of the most important rights of the accused).

31. Note, *supra* note 2, at 1198-99.

32. *See McCray*, 750 F.2d at 1130. All state and federal courts permit some use of peremptory challenges. *See, e.g.*, Bertolet, *Peremptory Challenges Should be Eliminated in Criminal Trials*, 34 ST. LOUIS B.J. 23 (1987). However, the number of challenges allowed to each party varies by jurisdiction. *Swain*, 380 U.S. at 217. In general, the number of allotted challenges increases with the seriousness of the crime. Note, *supra* note 2, at 1197. In addition, the defense has more peremptory challenges than the prosecution. Bologna, *supra* note 14, at 151. In the federal system each side in a capital case receives twenty peremptories. FED. R. CRIM. P. 24(b). In all other felonies, the defendant receives ten peremptories and the prosecutor six. *Id.* In a misdemeanor prosecution each side is

In theory, the peremptory challenge's primary purpose is attaining an "impartial" jury.[33] By affording each litigant a limited number of unquestioned juror exemptions, the selected jury will be partial to neither party.

Peremptory challenges allow attorneys great latitude in the jury selection process. Unquestioned challenges allow removal of a potential juror without expressing reasons for the actual challenge.[34] Peremptories thus provide an accepted mode for dismissing a legally qualified juror merely because the attorney does not want that type of person on the jury. Because peremptories traditionally permitted exclusion without an explanation, courts were unable to review for possibly unconstitutional exclusions.

Thus, the peremptory challenge supplements "challenges for cause."[35]

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entitled to three peremptory challenges. *Id. See also* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 385 (1982) (discussion of the use of peremptories in federal criminal trials).

33. Note, *supra* note 2, at 1199. Lord Coke defined "impartial" as "indifferent." 1 COKE, COMMENTARIES UPON LITTLETON § 155b. In Irvin v. Dowd, 366 U.S. 717, 722 (1960), the Supreme Court adopted this definition of impartiality. Notwithstanding the sixth amendment's impartiality requirement, people's biases and opinions inevitably influence their decisions. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 551 (1975). Nevertheless, an essential component of the sixth amendment's impartiality guarantee is the selection of a petit jury from a representative cross section of the community. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 528 (1975). Therefore, "[t]he reason for a cross section . . . is that it assures that a range of biases and experiences will bear on the facts of the case." Babcock, *supra*, at 551.

Despite the sixth amendment's guarantee of an "impartial" jury, the litigants actually strive to eliminate jurors potentially partial to the other side while keeping those biased for their own side. *Id. See also* VAN DYKE, *supra* note 1, at 140 ("Challenges are essentially a negative kind of selection . . . ."). Thus, the guarantee of "impartiality" as "indifference" is somewhat misleading in light of these realities. Van Dyke recognized two factors affecting an attorney's ability to impanel a desirable jury: (1) the number of peremptory challenges allotted, and how the attorney uses them, and (2) his success in challenging for cause, in other words, proving bias to the judge's satisfaction. *Id.*

34. Babcock, *supra* note 33, at 553-54 ("[T]he peremptory challenge . . . allows the covert expression of what we dare not say but know is true more often that [sic] not."). Attorneys consider factors such as race, religion, nationality, occupation and group affiliation in jury selection. *Swain*, 380 U.S. at 220-21. "The peremptory challenge is thus a nicety for disguising socially unpopular prejudices, rationalized as a necessary tool for choosing what appears to be a 'fair' jury." Note, *supra* note 2, at 1200.

35. *See* Krauss, *Death-Qualification After* Wainwright v. Witt*: The Issues in* Gray v. Mississippi, 65 WASH. U.L.Q. 507, 537 (1987) ("[P]eremptories allow the parties to exclude people whose bias they can sense or infer, but not prove to the judge's satisfaction.") (footnote omitted). *See also* Note, *supra* note 2, at 1200. A number of reasons justify a for cause challenge. *See, e.g*, VAN DYKE, *supra* note 1, at 143 (citing typical state statute authorizing challenges for cause). A primary cause for exclusion is a showing of bias. The peremptory challenge enables an attorney to exclude an individual he or she suspects is biased without having to prove bias. Note, *supra* note 2, at 1200. *See also* Swain v. Alabama, 380 U.S. 202, 220 (1965) ("[T]he peremptory permits rejection for a real or

Peremptories provide a vehicle for eliminating potential jurors based on an attorney's intangible uneasiness regarding that individual's likely performance on a jury. This "uneasiness" alone would not justify disqualification for "cause." Moreover, peremptories allow aggressive voir dire without fear of provoking resentment or hostility in the prospective juror.[36]

In *Swain v. Alabama*,[37] the Court declared the use of peremptory challenges was to be "without inquiry and without being subject to the court's control."[38] The Court reasoned that when analyzed in light of their intended purpose, peremptory challenges do not merit scrutiny. Despite *Swain*, several courts have exercised a considerable degree of judicial scrutiny over the utilization of peremptory challenges.[39] These courts require attorneys to use their peremptories within the confines of the sixth amendment's guarantee of impartiality and fair cross section of the community. Such judicial scrutiny clearly encroaches upon the traditionally unqualified right which afforded attorneys wide latitude in jury selection.

II. JUDICIAL SCRUTINY

A. Equal Protection Analysis

Strauder v. West Virginia[40] provides the foundation for nondiscriminatory jury selection analysis. In *Strauder*, the Supreme Court held the state's purposeful exclusion of black jurors deprived Strauder, a black defendant, of his right to equal protection.[41] Although *Strauder* did not

imagined partiality that is less easily designated or demonstrable." (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887))).

Attorneys also use peremptory challenges to exclude an individual for other, less tenuous reasons, including: (1) "sudden impressions and unaccountable prejudices" conceived from the person's looks and gestures, Lewis v. United States, 146 U.S. 370, 376 (1892), *cited in Swain*, 380 U.S. at 220, and (2) the juror's "habits and associations," *Hayes*, 120 U.S. at 70, *cited in Swain*, 380 U.S. at 220.

36. *See Lewis*, 146 U.S. at 376, *cited in Swain*, 380 U.S. at 220; Krauss, *supra* note 35, at 537; Note, *supra* note 2, at 1200. *See also* Babcock, *supra* note 33, at 554-55 ("[T]he peremptory challenge is . . . a shield for the exercise of the challenge for cause. Questioning . . . may have so alienated a potential juror that, although the lawyer has not established any basis for removal, the process itself has made it necessary to strike the juror peremptorily.").

37. 380 U.S. 202 (1965).

38. *Id.* at 220.

39. *See, e.g.*, McCray v. Abrams, 750 F.2d 113, 1130 (2d Cir. 1984) (peremptory challenge not beyond scrutiny under the sixth amendment or the equal protection clause), *vacated*, 478 U.S. 1001 (1986). *See supra* note 13.

40. 100 U.S. 303 (1880).

41. *Id.* at 310.

involve peremptory challenges,[42] it did require impartiality in venire selection.[43] Other cases have extended the equal protection guarantee to both grand juries[44] and petit juries.[45]

The legal principle expressed in *Strauder*[46] was instrumental in guiding the permissible use of peremptory challenges.[47] In *Swain v. Alabama*,[48] the Supreme Court held it would find improper and purposeful discrimination by the State only when the defendant proved systematic juror exclusion *over a period of time*, solely based on race.[49] This evidentiary burden, however, was nearly impossible to satisfy.[50] Coupling the defendant's difficult burden with the long recognized good faith presumption afforded prosecutors,[51] the Court showed its reluctance to impinge upon the prosecutor's use of his peremptory challenges.[52] While the Court could not condone the unconstitutional discriminatory use of peremptory challenges, it clearly tried to protect the unqualified nature of peremptories by making their impermissible use so difficult to prove.

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42. *Strauder* involved a West Virginia statute which provided only white males were eligible to participate on a jury. *Id.* at 305. The Court vacated the defendant's murder conviction by such a restricted jury and ordered the case retried in federal court. *Id.* at 312.

43. *Id.* at 308-09.

44. *See, e.g.*, Ex parte Virginia, 100 U.S. 339 (1879) (judge held liable for discriminatory grand jury selection in violation of equal protection clause).

45. Swain v. Alabama, 380 U.S. 202, 203-04 (1965). *See* Alexander v. Louisiana, 405 U.S. 625, 626 n.3 (1972) (no petit/grand jury distinction for purposes of the fourteenth amendment) (citing Pierre v. Louisiana, 306 U.S. 354, 358 (1939)); Bologna, *supra* note 14, at 154.

46. In *Strauder*, the Court reasoned:

> The very fact that colored people are singled out and expressly denied . . . all right to participate . . . as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them,. . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

100 U.S. at 308.

47. *See, e.g.*, Bertolet, *supra* note 32, at 23.

48. 380 U.S. 202 (1965).

49. *Id.* at 227. In *Swain*, an all-white jury convicted a black defendant of raping a white girl. The prosecutor utilized his peremptory challenges to exclude all blacks from selection. Despite the fact that no black had served on a jury in that jurisdiction since 1950, petitioner failed to satisfy his evidentiary burden. *Id.* at 226.

50. Note, *supra* note 2, at 1203 (citing State v. Washington, 375 So.2d 1162 (La. 1979)); State v. Brown, 371 So. 2d 751 (La. 1979) (only two cases ever to satisfy evidentiary burden set by *Swain*).

51. The *Swain* Court approved the existence of a presumption in each case that the prosecutor fairly and impartially used his peremptory challenges. 380 U.S. at 222.

52. The Court was concerned about subjecting the prosecutor's challenge to equal protection demands. *Id.* at 221. It feared requiring an examination of the prosecutor's reasons for challenge would radically alter the nature and operation of the challenge. *Id.* at 222.

In *Batson v. Kentucky*,[53] the Supreme Court's reluctance to intrude upon prosecutorial discretion came to an end. The Court concluded, "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury *solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.*"[54] Contrary to the good faith presumption in *Swain*,[55] the *Batson* Court recognized that peremptory challenges permit "those to discriminate who are of a mind to discriminate."[56] The decreased standard of proof approved in *Batson* affords defendants a greater opportunity to prove the unconstitutional use of peremptories. *Batson* will undoubtedly promote more frequent claims contesting a prosecutor's peremptory challenges.

The Supreme Court, however, narrowly stated the *Batson* holding, resting the decision solely on equal protection principles.[57] Thus, the

53. 476 U.S. 79 (1986). In *Batson*, the prosecutor used his peremptory challenges to exclude all four black veniremen from the petit jury. An all-white jury convicted the black defendant of burglary in the second degree.

54. *Id.* at 96 (emphasis added). Hence, the Court rejected the evidentiary burden it imposed in *Swain*. *See supra* note 18 and accompanying text. The defendant no longer must establish a " 'long-continued unexplained absence' of members of his race 'from many panels.' " 476 U.S. at 95 (quoting Cassell v. Texas, 339 U.S. 282, 290 (1950) (plurality opinion)). In *Batson* the Court permitted a defendant to establish a prima facie case of purposeful discrimination based on the following showings: membership in a "cognizable racial group;" prosecutor's removal of members of defendant's race from the venire; and facts that allow an inference that the prosecutor excluded veniremen from the petit jury solely on account of their race. 476 U.S. at 96-97. Once defendant makes the prima facie showing, the burden shifts to the prosecutor to provide a "neutral" explanation for his challenges. *Id.*

In defining a "cognizable" group, the *Batson* Court cited Castenada v. Partida, 430 U.S. 482 (1977), which required a "recognizable, distinct class singled out for different treatment under the laws." *Id.* at 494 (citations omitted).

55. *See supra* note 51 and accompanying text.

56. 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

57. 476 U.S. at 84 n.4. In the trial court, Batson alleged a violation of both his sixth and fourteenth amendment rights. *Id.* at 83. Justice Powell, writing for the majority, contended that petitioner brought both claims before the Supreme Court. *Id.* at 84 n.4. Justice Powell then resolved petitioner's claims solely on equal protection grounds. *Id.* In his dissent, Chief Justice Burger found the Court's equal protection holding troublesome. Petitioner did not press the fourteenth amendment equal protection issue in *Batson*. On the contrary, petitioner argued the sixth amendment guarantee of "an impartial jury and jury composed of persons representing a fair cross section of the community." Brief for Petition of Certiorari, *quoted in* 476 U.S. at 113 (Burger, C.J., dissenting). Chief Justice Burger noted that during oral argument, petitioner's attorney based his claim solely on sixth amendment grounds. *Id.* at 113-14.

Question: Your claim is based solely on the Sixth Amendment?
Mr. Niehaus [Batson's attorney]: Yes.
Question: Is that correct?
Mr. Niehaus: That is what we are arguing, yes.

status of the sixth amendment as a challenge to the discriminatory use of peremptories in petit jury selection is unclear.

B. Sixth Amendment Analysis

1. The Supreme Court's Position

When the Court decided *Swain v. Alabama*,[58] it had yet to apply the sixth amendment's impartial jury guarantee to the states.[59] Hence, the *Swain* Court, in reviewing the state's use of peremptories, did not address the sixth amendment. Controversy remains whether *Swain* grants constitutional protection through the sixth amendment against discriminatory petit jury selection.[60]

To date, the Supreme Court has not held whether a defendant has a sixth amendment right to a nondiscriminatory petit jury. Although a majority of the Court declined to address the issue in *Teague v. Lane*,[61] four Justices expressly approved of the sixth amendment extension to the

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Question: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

Mr. Niehaus: We have not made an equal protection claim.

Id.

The Chief Justice explained that the Court should have asked the parties to brief the equal protection issue in addition to the sixth amendment, directed reargument on the issue, or dismissed the petition "as improvidently granted." *Id.* at 115. The Court, however, refused. *Id.* at 114.

58. 380 U.S. 202 (1965).

59. The Supreme Court extended the sixth amendment right to an impartial jury to the states through the fourteenth amendment in Duncan v. Louisiana, 391 U.S. 145 (1968). The Court handed down *Swain* in 1965.

60. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 173 (1986) ("We have never invoked the fair cross-section principle to invalidate the use of either for cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large."). The Court wrote the *Lockhart* decision more than twenty years after its *Swain* opinion. This language suggests *Swain* did not invoke the sixth amendment. *See also* McCray v. Abrams, 750 F.2d 1113, 1124 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986) (constitutional analysis in *Swain* focused on equal protection clause and nothing was intended to remove this focus); People v. Payne, 106 Ill. App. 3d 1034, 1042-43, 436 N.E.2d 1046, 1052 (1982) ("*Swain* does not apply to an accused's right not to have the State affirmatively frustrate his 6th Amendment right to a jury drawn from a fair cross section of the community. . . ."); *But see* United States v. Childress, 715 F.2d 1313, 1320 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984) (courts have consistently followed the systematic exclusion analysis in *Swain*, both before and after *Taylor*, hence *Taylor* does not overrule *Swain*).

If *Taylor's* sixth amendment analysis did not overrule *Swain*, arguably no subsequent authority has. *See Childress*, 715 F.2d at 1320 ("Supreme Court has not reconsidered *Swain* and until that time, of course, we must follow *Swain*."). If the contrary body of case law holds true, however, the scope of the sixth amendment right to a nondiscriminatory petit jury is unclear, especially in light of Batson v. Kentucky, 476 U.S. 79 (1986).

61. 109 S. Ct. 1060, 1069 (1989). *See infra* note 62. A majority of the court affirmed Teague's

petit jury.[62]

2. *Dissension among the Circuits*

a. *The* Taylor *Approach*

The Supreme Court, in *Taylor v. Louisiana*,[63] emphasized there is "no requirement that petit juries actually mirror the community and reflect the various distinctive groups in the population."[64] Essentially, two schools of thought exist among the circuit courts delineating the impact of *Taylor* on the potential expansion of the sixth amendment right to a fair cross section in the venire to the actual petit jury. Both views agree that the Supreme Court has failed to sufficiently address the issue. However, the circuits are split in their reading of the *Taylor* language.

Under one approach this language is not a barrier to a sixth amendment extension to the petit jury. For example, the Second Circuit, in *McCray v. Abrams*[65] interpreted the *Taylor* holding[66] to afford the de-

conviction on alternative grounds, concluding petitioner was procedurally barred from asserting his equal protection claim under both *Batson* and *Swain*. *Id.* at 1067 (opinion of O'Connor, J.).

Previously, the Court has deferred consideration of this issue by denying certiorari in several cases petitioned to the Court. *See, e.g.*, Sgro v. United States, 108 S. Ct. 1021 (1988); Jones v. Garrett, 108 S. Ct. 233 (1987); Michigan v. Booker, 479 U.S. 1046 (1987); United States v. Childress, 464 U.S. 1063 (1984). Most recently, the Court declined to consider the issue in Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989).

62. *See supra* note 25. "The requirement [that the sixth amendment extend to the actual jury] does not go far beyond our mandates in *Taylor*, *Duren*, and *Batson*; indeed, it flows quite naturally from those decisions." *Teague*, 109 S. Ct. 1060, 1092 (1989) (Brennan, J., dissenting).

The ultimate resolution of the issue is uncertain. In Part IV of her opinion, Justice O'Connor avoided expression of her view on the viability of the sixth amendment extension. *Id.* at 1069 (opinion of O'Connor, J.). Chief Justice Rehnquist, along with Justices Scalia and Kennedy, joined in Justice O'Connor's decision to dismiss the issue on retroactivity grounds. *Id.* at 1065. Justice White, however, concurred only with Parts I through III of Justice O'Connor's opinion. *Id.* at 1078 (White, J., concurring in part and in judgment). Hence, Justice White apparently does not approve of Justice O'Connor's sidestepping of the sixth amendment issue. However, Justice White himself chose not to address the issue. The positions on the sixth amendment extension of five Justices of the Court are therefore unknown to date. The fact that the traditionally liberal branch of the Court favored the extension may indicate the continuing viability of the issue. However, the fate of the sixth amendment analysis rests in the hands of the five more conservative Justices of the Court.

63. 419 U.S. 522 (1975).

64. *Id.* at 538. *Taylor* concerned the systematic exclusion of women from the jury venire. The Court reversed the defendant's conviction for kidnapping because "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528. Hence, women as a class are no longer excludable from the venire if exclusion produces an almost totally male venire. *Id.* at 537.

65. 750 F.2d 1113 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986). In *McCray*, the prosecutor utilized his peremptory challenges to eliminate all blacks and Hispanics from the jury. *Id.* at 1114. The all-white jury convicted McCray (who is black) of first and second degree robbery. *Id.* at 1115.

fendant the *possibility* that the venire's representative character translates to the petit jury.[67] The *McCray* Court concluded the sixth amendment prohibits the state from unreasonably restricting the chance of a fair cross section of the community on a petit jury.[68] This prohibition exists during both the venire and petit jury selection processes.[69]

The Eighth Circuit, representing the opposing school of thought, does not recognize a sixth amendment right against a prosecutor's allegedly discriminatory use of his peremptory challenges in petit jury selection. In *United States v. Childress*,[70] the court interpreted the *Taylor* language[71] as expressly limiting the fair cross section analysis to the venire.[72]

The court in *McCray* concluded a defendant "has no right to a petit jury of *any particular composition*." *Id.* at 1128 (emphasis added). However, the court stated this conclusion did not preclude all sixth amendment effects on petit jury selection. *Id.* The court determined that the defendant established a prima facie case of purposeful discrimination based on group affiliation. *Id.* at 1135. The court remanded the case to afford the prosecutor the opportunity to rebut the defendant's prima facie showing. *Id.*

66. The Court in *Taylor* held the jury venire—the pool from where the jury is drawn—must fairly represent the community. 419 U.S. at 538. *See supra* note 64 and accompanying text.

67. 750 F.2d at 1128-29. *See Taylor*, 419 U.S. at 537 ("[T]he Sixth Amendment affords the defendant in a criminal trial the *opportunity* to have the jury drawn from venires representative of the community. . . ."(emphasis added)).

68. 750 F.2d at 1129. To establish a prima facie case of a sixth amendment fair cross section violation, the court adapted the standard established in Duren v. Missouri, 439 U.S. 357, 364 (1979). 750 F.2d at 1131. Retaining two of the three original *Duren* prerequisites, the court stated the defendant must show an allegedly excluded group "cognizable . . . in the community" and a "substantial likelihood" the challenges were "made on the basis of the . . . venire persons' group affiliation" as opposed to "any indication" that the individual was potentially unable to decide the case on the evidence presented. 750 F.2d at 1131-32 (quoting *Duren*, 439 U.S. at 364). In paraphrasing the original *Duren* standard, the Second Circuit altered the first requirement to a "cognizable" group. *Duren* originally required a "distinctive group," which is one "sufficiently numerous and distinct . . . so that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." 439 U.S. at 364 (quoting *Taylor*, 419 U.S. at 531). The "contours" of what is "cognizable" are unclear. *See, e.g.*, Roman v. Abrams 822 F.2d 214, 227 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989); Krauss, *supra* note 20, at 46 nn.184 & 185. For a further discussion of "cognizability," see Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983). Once the defendant makes a prima facie showing, the prosecutor then must show the infringement has "adequate justification" to be a "significant state interest." *Duren*, 439 U.S. at 368 & n.26. This showing need not rise to the level of "cause." 750 F.2d at 1132.

69. 750 F.2d at 1129.

70. 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984).

71. *See supra* text accompanying note 64.

72. 715 F.2d at 1319-20. *See also* Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983) (defendant "not entitled to a jury of any particular composition").

In *Childress*, the prosecution utilized peremptory challenges to remove almost all black prospective jurors from the venire. The all-white jury convicted the defendant on firearm violations. At its

Similarly, in *Teague v. Lane*,[73] the Seventh Circuit refused to extend the sixth amendment analysis to the actual jury.[74] Relying largely on a series of decisions in which the Supreme Court stopped short of making such an extension,[75] the *Teague* court refused to "disrupt the trial process by making such an enlargement of the parameters of prior decisions."[76] The Supreme Court recently affirmed *Teague* on other grounds, specifically declining to address Teague's sixth amendment claim.[77]

b. An Alternative Approach: Booker v. Jabe

At least one circuit deemphasized the *Taylor* language when it analyzed the sixth amendment expansion.[78] In *Booker v. Jabe*, (*Booker I*)[79] the Sixth Circuit held the systematic use of peremptory challenges to

initiation, the Eighth Circuit ordered reargument en banc, specifically requesting the parties to consider People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982). 715 F.2d at 1313-14. In *Payne*, an Illinois court applied *Taylor* and concluded, "the 6th Amendment precludes the State . . . from affirmatively frustrating the right of the accused to a jury drawn from a fair cross section of the community by utilizing peremptory challenges to exclude Blacks from the jury solely because they are Blacks." 106 Ill. App. 3d at 1043, 436 N.E.2d at 1052. While the *Childress* court did not "entirely disapprove" of the analysis in *Payne*, it came to a different result. 715 F.2d at 1320. *See infra* note 118.

73. 820 F.2d 832 (7th Cir. 1987) (en banc), *aff'd*, 109 S. Ct. 1060 (1989).

74. *Id.* at 841. In *Teague*, pursuant to the prosecutor's exclusion of ten black potential jurors, a nonblack jury convicted the black defendant of attempted murder and armed robbery. *Id.* at 833. Teague's contention that such a jury was not comprised of his peers failed in each of the lower courts.

75. *Teague*, 820 F.2d at 837-40. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162 (1986); Taylor v. Louisiana, 419 U.S. 522, 529 (1975) (requiring merely the *possibility* of a fair cross section jury); Irvin v. Dowd, 366 U.S. 717, 723 (1961) (requiring a panel of jurors to be *indifferent*); Fay v. New York, 332 U.S. 261, 285 (1947) (declaring the lack of class representation in an actual jury not alone an unconstitutional composition); Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (recognizing the distinction between a jury comprised of a fair cross section and an impartial jury) (Frankfurter, J., dissenting).

76. 820 F.2d at 841.

77. *See supra* note 25 and accompanying text. Because the Court relied on procedural grounds when it declined to address the sixth amendment issue, the Court's affirmance of Teague's conviction does not moot consideration of either the rationale of petitioner's claim or the Seventh Circuit's analysis.

78. The Sixth Circuit in Booker v. Jabe, 775 F.2d 762, 770 (6th Cir. 1985) (*Booker I*), did recognize *Taylor* as the "seminal authority governing the application of the Sixth Amendment to state jury trials." Moreover, the court did cite the critical *Taylor* language. *Id.* at 768. However, the *Booker I* court chose an alternative line of Supreme Court authority from which to base its sixth amendment extension to the petit jury. *See infra* note 82 and accompanying text. The rationale underlying the *Booker* approach, just as in the *Taylor* approach (*see supra* notes 64, 66-67 and accompanying text) remains the same—that selection of the petit jury must preserve the mere *possibility* of a fair cross section.

exclude members of a cognizable group from a criminal petit jury violates the sixth amendment.[80] The court reasoned that *Swain* foreclosed the defendant's fourteenth amendment claim, but it did not exempt peremptory challenges from sixth amendment review.[81] The *Booker I* court relied on the principles of a series of Supreme Court cases in construing the true nature of the "impartial jury" guaranteed by the sixth amendment.[82] The court concluded that the "selection methods" for both the venire and the actual jury must guarantee the "possibility for obtaining a representative cross-section of the community."[83] On appeal, the Supreme Court remanded *Booker I*[84] pursuant to *Batson*. On remand the Sixth Circuit in *Booker v. Jabe (Booker II)* adhered to its prior ruling.[85]

79. 775 F.2d 762 (6th Cir. 1985), *remanded*, 478 U.S. 1001 (1986), *aff'd*, 801 F.2d 871 (6th Cir. 1986).

80. *Id.* at 772. *Booker I* involved the removal of jurors by both the prosecution and defense on the basis of race. *Id.* at 764-65. Booker and his codefendant, both black, faced armed robbery charges. *Id.* Booker's co-defendant faced an additional charge of intent to commit rape on a white female. *Id.* The prosecutor used peremptory challenges to remove blacks. *Id.* An all-white jury convicted Booker. *Id.* at 763.

81. *Id.* at 767.

82. *Id.* at 768-70.

> Collectively, *Glasser*, *Thiel* and *Ballard* teach that an impartial jury is the product of jury selection methods that do not systematically exclude members of a distinct group from jury service. . . . [A sixth amendment] violation lies in the exclusionary conduct or policy, not in any documented partiality by a particular jury.

Id. at 769.

83. *Id.* at 770-71.

84. 478 U.S. 1001 (1986). Chief Justice Burger believed the Supreme Court simply should have reversed *Booker I*. *Id.* at 1001-02 (Burger, C.J., dissenting). As in *McCray*, however, the Court chose to remand. *See infra* notes 86-94 and accompanying text.

85. Booker v. Jabe, 801 F.2d 871 (6th Cir. 1986) (per curiam). The Supreme Court denied the state's petition for certiorari. Michigan v. Booker, 479 U.S. 1046 (1987). This case perhaps furthers the proposition derived from *McCray v. Abrams*—that the sixth amendment analysis is viable—because the Sixth Circuit actually decided, on remand, to adhere to its prior decision. The Second Circuit in *McCray* did not have that opportunity, *see infra* note 86. In light of its action in Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989), however, the Second Circuit would likely have reaffirmed its prior decision.

Roman involved a joint trial of two white defendants who subsequently alleged the prosecutor improperly utilized his peremptories to exclude whites from the petit jury. *Id.* at 216. The Second Circuit in *Roman* expressly praised *McCray*'s sixth amendment analysis. *Id.* at 215-16. The court relied on the United States Supreme Court's actions in Batson v. Kentucky, 476 U.S. 79 (1986), Lockhart v. McCree, 476 U.S. 162 (1986), *Booker I* and *Booker II* to confirm its belief in the supremacy of the sixth amendment analysis it held viable in *McCray*. 822 F.2d at 226-27.

III. ANALYSIS OF THE SIXTH AMENDMENT APPROACH

An examination of the circuit cases suggests the viability of applying a sixth amendment analysis to the petit jury. The Second Circuit's *McCray v. Abrams* decision has meaningful repercussions for the future breadth of the fair cross section requirement. The Supreme Court's decision not to reverse *McCray* but vacate and remand[86] in light of *Allen v. Hardy*[87] and *Batson v. Kentucky*[88] has several implications. First, the Court would have simply reversed *McCray*[89] if it intended to restrict challenges of discriminatory peremptory use to the equal protection clause. The Court did not address *Batson*'s or *McCray*'s sixth amendment analysis.[90] Therefore, *McCray* reveals by negative inference the Court's refusal to restrict challenges to an equal protection analysis.[91] Second, the Court's remand of *McCray* may indicate an intent to endorse a sixth amendment challenge in the future.[92] Finally, remanding *McCray*'s sixth amendment claim suggests *Batson* may have sixth amendment implications.[93] If so, the breadth of permissible judicial scrutiny concerning peremptories could possibly[94] permit a fair cross section complaint.

The Supreme Court's denial of certiorari in *Booker II* adds additional support for application of the sixth amendment analysis.[95] Even though a denial of certiorari has no precedential value,[96] at least one court has noted that "the denial of review in *Booker II* certainly seems inconsistent

86. 478 U.S. 1001 (1986). Pursuant to the remand, the parties stipulated the state would withdraw its appeal. *Roman*, 822 F.2d at 225.

87. 478 U.S. 255 (1986) (concerning the retroactivity of *Batson*). *See supra* note 16.

88. 476 U.S. 79 (1986).

89. *See Roman*, 822 F.2d at 226 (the Second Circuit's final decision came down before *Batson*). The possibility exists that the Court remanded *McCray* to enable the parties to brief their arguments in light of an equal protection analysis.

90. *McCray*, 478 U.S. at 1001. *See Roman*, 822 F.2d at 226.

91. *Accord* Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *remanded*, 478 U.S. 1000 (1986), *aff'd*, 801 F.2d 871 (6th Cir. 1986) (similar refusal by Supreme Court to reject sixth amendment analysis).

92. *See supra* note 85 and accompanying text. *But see* Lockhart v. McCree, 476 U.S. 162, 173-74 (1986) (Court negated any intent to extend the fair cross section requirement at that time).

93. *See supra* note 57.

94. *See supra* notes 6-13 and accompanying text; *infra* note 138 and accompanying text and text accompanying note 139.

95. *But see Teague*, 820 F.2d at 844 ("subsequent denial of certiorari in . . . [Booker II] . . . [is] worthy of little weight in our determination").

96. Roman v. Abrams, 822 F.2d 214, 226-27 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989); Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979)).

with any view that the remands in *McCray* and *Booker I* were meant to foreclose adherence to our Sixth Amendment analysis."[97]

Opponents of the sixth amendment extension note Supreme Court precedent, such as *Lockhart v. McCree*,[98] as foreshadowing the Court's refusal to apply the fair cross section requirement to the petit jury.[99] In *Lockhart* the Court refused to extend the fair cross section requirement to petit juries.[100] Nevertheless, the Court expressed ambivalence in foreclosing all sixth amendment claims by hypothetically entertaining the sixth amendment argument.[101] Furthermore, in light of the Supreme Court's action in *McCray v. Abrams* and *Booker I*, the Court's *Lockhart* decision cannot be construed as foreclosing the opportunity for sixth amendment analysis.[102] The *McCray* majority concedes that the sixth amendment guarantees no particular petit jury composition.[103] Nonetheless, nothing in *Lockhart* prevents finding the sixth amendment forbids peremptory challenge usage that eliminates *all possibility* that a petit jury will reflect a cross section of the community.[104] Arguably, the *Lockhart* Court believed it would be premature to take the drastic step of ex-

97. *Roman*, 822 F.2d at 227.

98. 476 U.S. 162 (1986).

99. *See, e.g.*, Teague v. Lane, 820 F.2d 832, 840 (7th Cir. 1987) (en banc), *aff'd*, 109 S. Ct. 1060 (1989).

100. 476 U.S. at 174. The Court recognized the practical impossibility of providing every defendant with a petit jury which was a truly representative cross section of the community. *Id.* The Court concluded such a broad extension of the sixth amendment would be "unworkable and unsound." *Id. See also Teague*, 820 F.2d at 840.

101. 476 U.S. at 174 ("if we were willing to extend the fair cross-section requirement to petit juries . . .").

102. In *Lockhart* the judge removed for cause all prospective jurors who expressed inability under any circumstances to impose the death penalty. *Id.* at 106. The jury convicted the defendant of murder. *Id.* The defendant filed a federal habeas corpus petition under the sixth and fourteenth amendments. *Id.*

Although *Lockhart* is distinguishable from the peremptory challenge situation at issue in this Note, both concern the same sixth amendment issue.

For a discussion of the history of death-qualified juries, see generally Krauss, *The Witherspoon Doctrine*, *supra* note 20.

103. 750 F.2d at 1128. *See supra* note 64 and *infra* note 107.

104. Roman v. Abrams, 822 F.2d 214, 226 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989). It is the preservation of this possibility which comprises the *McCray/Booker* ideology.

> If there is a Sixth Amendment requirement that the venire represent a fair cross section of the community, it must logically be because it is important that the defendant have the chance that the petit jury will be similarly constituted. The necessary implication is that the Sixth Amendment guarantees the defendant that possibility.

750 F.2d at 1128-29. *See also, Booker I*, 775 F.2d at 770-71 (discussion of rationale behind the guarantee of an impartial jury).

tending the fair cross section analysis to the actual jury.[105]

Critics of the sixth amendment argument rely on the Supreme Court's language in *Taylor v. Louisiana*[106] that denied a defendant a jury of any particular composition.[107] In *Taylor* the Court expressly "impose[d] no requirement that petit juries actually chosen must mirror the community."[108] Lower federal courts, however, have misconstrued this language[109] in considering the premise of the sixth amendment guarantee.[110] The sixth amendment fair cross section requirement does *not* guarantee a venire of a particular composition.[111] The requirement merely guarantees the method used for venire selection will provide the *possibility* of a representative cross section.[112] Similarly, extending the sixth amendment guarantee to the petit jury will do no more than retain the *possibility* of a jury comprised of a representative cross section of the community.[113]

Contrary to the holdings by these courts, the *Taylor* decision actually supports the sixth amendment's extension to the petit jury. The Court

105. Pursuant to respondent McCree's "invitation" the Court merely "decline[d] . . . to adopt such an extension." *Lockhart*, 476 U.S. at 174.

106. 419 U.S. 522, 538 (1975). *See supra* text accompanying note 64.

107. *See, e.g.*, Lindsey v. Smith, 820 F.2d 1137, 1145 (11th Cir. 1987); United States v. Childress, 715 F.2d 1313, 1319-20 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984).

108. 419 U.S. at 538.

109. *See infra* note 126 and accompanying text. Despite believing "[t]he extension of *Taylor v. Louisiana* from the venire to the petit jury has much logical and practical appeal[,]" the Eighth Circuit interpreted the *Taylor* language to limit the fair cross section analysis to the venire. 715 F.2d at 1319-20.

110. In *Booker I*, the court elaborated on the rationale requiring the presence of a cross section of the community drawn from a pool selected absent the systematic exclusion of a cognizable group. 775 F.2d at 770. An impartial jury provides diversity in the judicial process, enabling greater "public confidence" in the system. In addition, an impartial jury deters an improper conviction by supplying laypersons' views to interpret the evidence against a defendant. *Id.*

111. *See supra* note 103 and accompanying text. To require that a venire reflect a particular composition would be at least as "unworkable and unsound" as it would be in the context of the petit jury. *Lockhart*, 476 U.S. at 174.

112. *See* Teague v. Lane, 109 S. Ct. 1060, 1092 (1989) (Brennan, J., dissenting) (citing Brief for Petitioner 4); Taylor v. Louisiana, 419 U.S. 522, 529 (1975); *Booker*, 775 F.2d at 771. Indeed, "[t]he essence of a fair cross-section claim is the systematic exclusion of a 'distinctive' group in the community." *Lockhart*, 476 U.S. at 174 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

113. *See Teague*, 109 S. Ct. at 1092 (Brennan, J., dissenting) ("Sixth Amendment's command . . . applies with equal force to . . . petit juries."); Roman v. Abrams, 822 F.2d 214, 226 (2d Cir. 1987), *cert. denied*, 57 U.S.L.W. 3570 (1989).

Courts such as the Seventh Circuit in Teague v. Lane have misconstrued defendants' sixth amendment challenges to demand the petit jury be "identical" in composition to the community. 820 F.2d at 837.

recognized the sixth amendment guarantees a "fair possibility for obtaining a jury constituting a representative cross section of the community."[114] Unless a fair possibility exists that the actual jury will represent a cross section of the community, requiring that possibility for venire selection is senseless.

In addition, the leading cases opposed to the *Booker/McCray* analysis, *United States v. Childress*[115] and *Teague v. Lane*,[116] have several defects. To begin with, although *Childress* has garnered some support among other circuits,[117] *Childress* has two flaws. First, the Eighth Circuit in *Childress* expressed ambivalence in its opinion. The court admitted it did not "entirely disapprove" of the sixth amendment analysis.[118] It conceded the practicality and logic of extending sixth amendment analysis to the petit jury.[119] Nevertheless, the court ultimately rejected the sixth amendment analysis.[120] The second flaw is timing. The Eighth Circuit decided *Childress* prior to several important decisions, including *Booker II*[121] and *McCray*.[122] Furthermore, neither the Eighth Circuit nor the Supreme Court has had the opportunity to reconsider *Childress* in light of *Batson v. Kentucky*.[123]

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114. 419 U.S. at 528 (citing Peters v. Kiff, 407 U.S. 493, 500 (1972)).

115. 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984). *See supra* note 72 and accompanying text.

116. 820 F.2d 832 (7th Cir. 1987) (en banc), *aff'd*, 109 S. Ct. 1060 (1989). *See supra* notes 73-77 and accompanying text.

117. *See, e.g.*, United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984) (pre-*Batson* decision concluding *Swain* still good law to adjudicate a sixth amendment claim of racial discrimination in jury selection).

118. 715 F.2d at 1320. The *Childress* court examined the sixth amendment proposition accepted in People v. Payne, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982). In *Payne*, the state court relied on the sixth amendment to restrict the prosecutor's use of peremptories. 106 Ill. App. 3d at 1041-43, 436 N.E.2d at 1051-52, (cited in *Childress*, 715 F.2d at 1318). The *Payne* court reasoned "[t]he systematic exclusion of prospective jurors solely because of their race is equally invidious and unconstitutional *at any stage of the jury selection*, i.e., from the time the general jury list is prepared . . . until the jury is actually selected." 106 Ill. App. 3d at 1036-37, 436 N.E.2d at 1051-52 (emphasis added). The Eighth Circuit in *Childress* recognized *Payne* when the *Childress* court made a motion to rehear the *Childress* appeal en banc. 715 F.2d at 1313-14. The Eighth Circuit found *Payne*'s sole reliance on the federal Constitution more significant than other state cases which relied on their state constitutions. 715 F.2d at 1318.

119. 715 F.2d at 1319. *See supra* note 109 and accompanying text.

120. 715 F.2d at 1318, 1320. The court's reluctance to entirely disprove of the *Payne* proposition, notwithstanding its ultimate rejection of the analysis suggests the Eighth Circuit could at some point change its position. *See infra* note 123.

121. 801 F.2d 871 (6th Cir. 1986).

122. 750 F.2d 1113 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986).

123. 476 U.S. 79 (1986). In *Childress*, a pre-*Batson* decision, the Eighth Circuit relied on Swain

The circuit court's opinion in *Teague v. Lane* has similar deficiencies. The Seventh Circuit in *Teague* rested its decision on a mere refusal to expand the scope of prior Supreme Court decisions.[124] The factors the court considered in its decision lack accuracy and merit.[125] In addition, the court misconstrued the essence of the defendant's sixth amendment claim.[126] Moreover, the court discussed a number of Supreme Court cases which do not foreclose the viability of a sixth amendment claim.[127] Finally, the *Teague* court failed in its attempt to minimize[128] the support of a series of cases dealing with jury size.[129] *Teague* determined a small number of jurors decreases the opportunity for fair cross section representation.[130] Applying similar reasoning to the facts of *Teague*, removing potential jurors solely on the basis of race would decrease—if not eliminate[131]—the opportunity for minority jury representation,[132] and

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v. Alabama, 380 U.S. 202 (1965). The *Childress* Court was "not convinced that *Taylor* and its sixth amendment analysis have in effect overruled *Swain* and now restrict the government's use of the peremptory challenge to remove black prospective jurors." 715 F.2d at 1320. The court's opinion suggests a different outcome might result now that the Supreme Court has "reconsidered *Swain*" in *Batson*. *Id.*

124. 820 F.2d at 839.

125. The court relied on two factors which allegedly "mandate against such an unwarranted expansion" of precedent. First, the *Teague* court considered that a randomly selected venire, or a petit jury selected only with the use of challenge for cause might result in under or over representation of particular groups. Second, the court considered the administrative problems that would result if the court required the representation of a specific group on a petit jury. Both factors grow out of an erroneous belief that proponents of the sixth amendment extension propose a guaranteed representation of certain groups on a given jury. *See supra* note 113 and accompanying text.

126. Teague and other defendants relied on sixth amendment entitlement to a fair possibility of a cross sectional jury. Nowhere did they contend the Constitution guarantees any specific representation on a jury. *See supra* note 113 and accompanying text. On appeal in *Teague*, Justice Brennan believed the plurality of the court guilty of that same misconstruction or "mischaracterizing" of petitioner's claim. 109 S. Ct. 1060, 1091 (Brennan, J., dissenting).

127. *See Teague*, 820 F.2d at 839-40. Nothing in *Batson*, *Taylor* or *Lockhart* alters the Constitution's ensuring the *chance* of a proportionately representative petit jury. Admittedly, "it would be impossible to apply a concept of proportional representation to the petit jury." *Id.* (citing *Batson*, 476 U.S. at 85-86 n.6).

128. *See Teague*, 820 F.2d at 842-43.

129. *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970). In *Williams*, the Court held a six member jury is constitutional because it effectively satisfies the purpose of the jury trial—to protect against governmental oppression. *See also* Ballew v. Georgia, 435 U.S. 223, 243 (1978). In *Ballew*, the Court held a five member jury violates the sixth and fourteenth amendments. *Id.* at 243. The Court suggested a jury of fewer than six may promote "inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that *prevents juries from truly representing their communities*." *Id.* at 239 (emphasis added). Such a jury "attains constitutional significance." *Id.*

130. *Teague*, 820 F.2d at 837.

131. The court's opinion does not reflect that Teague alleged such improper selection may actually eliminate all opportunity for minority representation. However, if such conduct effectively de-

thus violate the sixth amendment. However, the *Teague* court rejected this analysis, noting "*decreasing* the possibility of obtaining a fair cross section . . . does not violate the sixth amendment right to a trial by an impartial jury."[133] Contrary to the court's reasoning, the systematic challenge of all blacks solely on the basis of their race would in fact eliminate the very requirement *Teague* acknowledged: the "*possibility* of obtaining a truly representative jury."[134]

An examination of existing case law, therefore, does little to refute the arguments for extending the fair cross section analysis. However, before recommending an extension of the fair cross section requirement one must consider the ramifications of an extension. The Supreme Court with its decision in *Batson* has already made a drastic intrusion[135] into the traditional nature of peremptory challenges.[136] This infringement upon the peremptory challenge will continue to produce undesirable repercussions. First, because of the decreased standard for a prima facie showing of prosecutorial discrimination, defendants will challenge a prosecutor's conduct more frequently. This will add to the burden of an already overburdened judicial system.[137] Second, the bases for intrusion into discretionary challenges undoubtedly will expand limitlessly.[138]

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creases minority representation, elimination is the next step. A prosecutor who utilizes his peremptories solely on the basis of race will continually strike each minority juror until he attains a non-minority jury, unless he runs out of peremptories first. Given the substantial number of peremptories allotted to the prosecutor, *see supra* note 32, minority representation will likely lose the race. *See* VAN DYKE, *supra* note 1, at 140 (number of peremptories allotted is major factor in impanelling desirable jury).

132. *See* 820 F.2d at 837 (discussion of defendant Teague's reliance on Ballew v. Georgia, 435 U.S. 223 (1978) and Williams v. Florida, 399 U.S. 78 (1970) to support his sixth amendment claim for the retention of at least an opportunity for minority representation on the jury).

133. *Id.* at 843 (emphasis added).

134. *Id.*

135. *See Batson*, 476 U.S. 79 (1986). *See supra* note 6 and accompanying text.

136. *See supra* note 1 and 33-35 and text accompanying note.

137. *See, e.g.*, King v. County of Nassau, 581 F.Supp. 493, 501 (E.D.N.Y. 1984); Bologna, *supra* note 14, at 163 (discussing Chief Justice Burger's fear that *Batson* motions will "clog" courts) (citation omitted).

138. In *Batson*, Chief Justice Burger feared the extension of the *Batson* principle to challenges on the basis of sex, group affiliation, mental capacity, number of children living arrangements, and profession. Batson v. Kentucky, 476 U.S. 79, 124 (1986) (Burger, C.J., dissenting). *See also* Hernandez v. Texas, 347 U.S. 475, 478 (1954) ("The Fourteenth Amendment is not directed solely against discrimination . . . based upon differences between 'white' and Negro."); United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 1021 (1988) (assuming, without deciding, that *Batson* principles extend to ethnic constituencies); People v. Irizarry, 536 N.Y.S. 2d 630 (N.Y. Sup. Ct. 1988) (extending *Batson* to gender-based discrimination). *But see* United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988) (declining to extend *Batson* to gender-based discrimi-

Batson's increased judicial scrutiny may suggest a trend away from deferential treatment. Such a trend could extend the lenient *Batson* standard to racial and nonracial attacks on grounds other than equal protection, thereby opening the door to a sixth amendment objection.[139] Finally, unless the Supreme Court clarifies the permissible scope of sixth amendment challenges,[140] attorneys and judges will continue to misinterpret the law.[141]

Moreover, the desirability of a sixth amendment extension is questionable. The extension would provide greater opportunity to challenge the improper use of peremptory challenges[142] and consequently might deter discriminatory conduct. However, permitting substantial judicial scrutiny of peremptories would undeniably destroy their original purpose of allowing unquestioned exclusion, making survival of the peremptory challenge doubtful.[143] In addition, the Courts' burden would increase, given the potentially infinite challenges based on sixth amendment grounds.[144]

Even if the Court refuses to extended sixth amendment analysis to the petit jury composition, the existing scrutiny made possible in *Batson*

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nation); Note, *supra* note 2, at 1213 (other classifications do not merit same protection under equal protection clause as does race, hence, *Batson* will not necessarily extend further).

139. In McCray v. Abrams, Judge Meskill in dissent, expressed concern regarding the limitlessness of the sixth amendment analysis. 750 F.2d 1113, 1139 (2d Cir. 1984) (Meskill, J., dissenting). Judge Meskill feared the less burdensome standard for a prima facie case under the sixth amendment—showing the exclusion of a cognizable or distinctive group—will eliminate the use of peremptories for all but the most frivolous reasons. *Id. See supra* note 23. *See also* United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984); *infra* note 147.

140. *See supra* note 20.

141. Such misinterpretation exists in *Sgro*, 816 F.2d at 30. The defendant in *Sgro* claimed the government improperly used its peremptory challenges to exclude Italian-Americans from the jury, in violation of equal protection under *Batson*. A jury without any Italian-American members convicted the Italian-American defendant. The First Circuit affirmed Sgro's conviction. In its analysis, the court utilized the standard from Duren v. Missouri, 439 U.S. 357, 364 (1979), to define a "constitutionally cognizable group." 816 F.2d at 33. The court's reliance on this standard is misplaced because *Duren* involved a *sixth amendment*, not equal protection, analysis of a jury venire from which the state excluded all women as a group. The *Duren* Court held the defendant established a prima facie case of discrimination against women, producing a jury in violation of the fair cross section requirement. 439 U.S. at 367-70. *See supra* notes 54 & 68 (recognizing different standards for equal protection and sixth amendment claims).

142. *See supra* notes 20-21 and accompanying text. The sixth amendment challenge would likely be broader than its equal protection counterpart.

143. *See infra* note 146.

144. *See* McCray v. Abrams, 750 F.2d 1113, 1139 (2d Cir. 1984) (Meskill, J., dissenting) (discussing the limitlessness of sixth amendment claim and its undesirable consequences), *vacated*, 478 U.S. 1001 (1986), and *supra* note 139.

thwarts the efficacy of peremptory challenges.[145] The intrusion already allowed in *Batson* may alone destroy the peremptory challenge.[146] Future courts may also apply *Batson* to a broader scope of cases other than those concerning the exclusion of blacks.[147]

IV. PROPOSAL

Peremptory challenges do not fulfill their purpose unless exercised with full freedom.[148] Therefore, unless the Court preserves the unqualified nature of peremptories, the Court will deny peremptories their intended and necessary flexibility. Peremptory challenges mock their purpose when misused.[149] Regardless of the Court's ultimate decision on the sixth amendment issue, its decisions to date have decimated the peremptory challenge.[150]

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145. "Jury trials once were simple, straightforward, and expeditious proceedings; and the right to jury trial was a right that defendants got not merely one that they had . . . . [W]e appear to be headed in the wrong direction, and *Batson* illustrates some fundamental defects of American trial procedure. Alschuler, *supra* note 20, at 79 (footnote omitted).

146. *See infra* note 147. *See also* Batson v. Kentucky, 476 U.S. 79, 125-26 (1986) (Burger, C.J., dissenting) (the *Batson* decision "sets aside the peremptory challenge"); United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984) ("opponent would have to come forward with a reason for wanting to exclude the juror. . . . [i]n other words he would have to provide good cause, or something very close to it; and the peremptory challenge would collapse into the challenge for cause"). *But see Batson*, 476 U.S. at 97 (though potentially limiting "the full peremptory character of the historic challenge" it "need not rise to the level justifying . . . challenge for cause").

147. United States v. Clark, although decided prior to *Batson*, effectively expresses the fear accompanying such intrusive inquiry into the use of peremptories.

> If such objections [to an adversary's use of peremptories] are allowed, it is hard to see how the peremptory challenge . . . will survive. Whenever counsel alleged that his opponent had a racial or similar type of motivation in exercising a peremptory challenge (whether he used that challenge to exclude a white or a black—and it would have to be one or the other—or, *extending the principle as one could hardly resist doing, a man or a woman, a Jew or a gentile, etc.*) the opponent would have to come forward with a reason for wanting to exclude the juror.

737 F.2d at 682 (emphasis added). *See also* Alschuler, *supra* note 20, at 65 (Although limiting of *Batson* to cases of racial discrimination is "unattractive," an extension of *Batson* might leave "little left of the peremptory challenge.").

148. Lewis v. United States, 146 U.S. 370, 378 (1892). *But see Batson*, 476 U.S. at 98 (decision will not undermine the value of peremptory challenges to the administration of justice).

149. First, any assertion that peremptories serve to keep questions of race out of the jury selection process is empty in the face of *Batson*, *Booker*, and *McCray*. Clearly, these are cases in which this time-honored right has been misused in a manner that propels racial issues to the forefront. Secondly it is said that peremptories protect minority jurors from oppression at the hands of their communities; the best that can be said for this idea is that it is condescending.

Bologna, *supra* note 14, at 164 (citations omitted).

150. *See supra* notes 1, 145-47 and accompanying text and *infra* note 157. This destruction of

A. Alternatives

In light of the inherent deficiencies of peremptories, the Court should consider a reevaluation of the peremptory challenge. One alternative may be to eliminate the prosecutor's right but preserve defense counsel's right to use peremptory challenges. This solution would better protect defendants from historical prosecutorial discrimination. However, it would have the drastic disadvantage of enabling the accused to select a jury biased in his favor.[151] A second alternative might be to reduce the

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the traditional peremptory challenge is precisely what the Supreme Court feared as early as 1965 in *Swain*. See *supra* note 52 and accompanying text.

151. Booker v. Jabe, 775 F.2d 762, 766 (6th Cir. 1985), *remanded*, 478 U.S. 1000 (1986), *aff'd*, 801 F.2d 871 (6th Cir. 1986). *See also* Batson v. Kentucky 476 U.S. 79, 102 (1986) (Marshall, J., concurring). The sixth amendment does not afford the defendant a "partial" jury. *Booker*, 775 F.2d at 772.

Nonetheless, support exists for treating the prosecutor differently than the defendant. To begin with, the Constitution affords no particular right to the "prosecution." In contrast, the sixth amendment protects only an "accused," while the fourteenth amendment protects "any person" from certain conduct of the "State." In addition, the prosecution generally possesses fewer allotted challenges than the defense. Bologna, *supra* note 14, at 151. This different treatment may also be the system's acknowledgment that prosecutors use peremptory challenges in a discriminatory manner more often than defendants. *But see Batson*, 476 U.S. at 125-26 (Burger, C.J., dissenting) (suggesting the need to balance the "scales" between the defendant and state by similarly limiting the defense's discriminatory use of peremptories); *Booker*, 775 F.2d at 772 ("neither prosecutor nor defense counsel may improperly use their peremptories"); McCray v. Abrams, 750 F.2d 1113, 1138-39 (2d Cir. 1984) (Meskill, J., dissenting) (because restrictions on the defense's use of challenges are probable once the prosecutor's use is limited, it will likely "spell the end of peremptory challenges") (quoting United States v. Newman, 549 F.2d 240, 250 n.8 (2d Cir. 1977)), *vacated*, 478 U.S. 1001 (1986); *Clark*, 737 F.2d at 682 (recognizing the need to provide prosecutors with comparative protection against discrimination).

In an analysis of this so-called reverse-*Batson* issue, one commentator supports the need for an equivalent power for a prosecutor to attack the defense's use of peremptories. However, he recognizes the standing dilemma accompanying such a concept. As with the standing issue presented when a defendant alleges discrimination against a group other than his own, *see supra* note 21, this commentator would reconcile both problems by approving a less "restricted concept of [third-party] standing." Alschuler, *supra* note 20, at 73.

Another commentator believes the selection of constitutional approach of the challenge made against a defense attorney's use of his peremptories may be dispositive on this reverse-*Batson* issue. A fair cross section limitation, for example, will apply equally to the defense as to the prosecution. An equal protection challenge, on the contrary, raises concerns of the absence of state action and standing. Fisher, Batson v. Kentucky: *Purposeful Discrimination in Jury Selection*, N.Y.L.J., Nov. 3, 1988, at 1, Col. 2. Hence, a resolution of the potential sixth amendment extension may have significant bearing on the viability of a future, reverse-*Batson* extension.

The Court in *Batson* specifically declined to "express . . . whether the Constitution imposes any limit on the excercise of peremptory challenges by defense counsel." 476 U.S. at 89 n.12. The Supreme Court recently declined to settle the reverse-*Batson* controversy when it denied the state of Alabama's petition for certiorari in Alabama v. Cox, 109 S. Ct. 817 (1989). In that case, the state sought to restrict the defense's use of its peremptory challenges. The state claimed that in the trial of

number of challenges allotted.[152] A reduction in challenges would provide fewer opportunities for discriminatory use.[153] However, the presence of a few peremptory challenges will still afford attorneys some flexibility in jury selection.[154]

A third alternative might be to recognize a right to minority representation on the jury.[155] This would protect minority defendants by providing for their representation on a jury. However, such a solution would require the court to impose an unconstitutional quota.[156]

Given the apparent dissatisfaction and potential catastrophe accompanying *Batson*,[157] a fourth alternative would be for the court to either modify or overrule *Batson*[158] and revert to the rigorous burden of *Swain*. While this would solve the current dissatisfaction with *Batson* and prevent any future poor decisions caused by courts misinterpreting *Batson*, such a return to *Swain*[159] would be unsatisfactory. The defense's virtual inability to meet the *Swain* burden[160] would deprive defendants of any recourse against the prosecution's discriminatory jury selection.

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two Ku Klux Klan members accused of killing a black man, the defense impermissibly struck all blacks from the jury.

152. There are two possible alternatives. Jurisdictions may decide to reduce the privilege for both parties. This would maintain the "even-handed balance" between the litigants (*Booker I*, 775 F.2d at 766) yet still reduce their opportunity to discriminate. On the other hand, jurisdictions might reduce only the prosecution's number of challenges. This alternative is not necessarily unfair considering the existing disparate treatment. *See supra* note 151 and accompanying text.

153. *But see* United States v. Sgro, 816 F.2d 30, 32 (1st Cir. 1987), *cert. denied*, 108 S.Ct. 1021 (1988) (defendant still claimed the government unconstitutionally discriminated pursuant to prosecutor's challenges to the only two Italian surnamed jurors in the venire).

154. *See supra* notes 34-36 and accompanying text.

155. Bologna, *supra* note 14, at 165.

156. *Id.*

157. The inescapable first impression drawn from the *Batson* jurisprudence is failure. The Supreme Court's "middle-ground" remedy, which attempted to eliminate discriminatory jury selection while at the same time preserving the common law institution of peremptory challenge, has thus far disserved both interests. Racism can still pervert jury selection, and prosecutorial explanation has bastardized the peremptory challenge. Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 62 (1988). *See also* Alschuler, *supra* note 20 at 78. (*Batson* "added further complications to an already complicated system of criminal procedure."). *See supra* notes 140-145, 147-148 and accompanying text.

158. *See* Serr & Maney, *supra* note 157, at 63 (*Batson* leaves the Court with two alternatives: return to *Swain* or eliminate peremptories altogether). See *infra* notes 161-168 and accompanying text for consideration of a ban on peremptory challenges.

159. *See supra* notes 6, 49-52 and accompanying text. *See* McCray v. Abrams, 750 F.2d 1113, 1139 (2d Cir. 1984) (Meskill, J., dissenting) (supporting a return to *Swain*), *vacated* 478 U.S. 1001 (1986).

160. *See supra* note 50 and accompanying text.

B. Solution

Peremptories do little more than provide a vehicle for jury selection manipulation. In addition, they burden the judicial system with additional causes of action for litigants claiming discrimination. Although peremptories may provide flexibility in jury selection, they fail to effect the intended impartial jury. In reality, they provide an opportunity for each party to select a *partial* jury. Essentially no distinction exists between an unconstitutional law purposefully excluding a group solely on the basis of race[161] and a prosecutor's peremptory challenge misuse in a discriminatory manner.[162] Both involve a form of inappropriate state action. The Court should not condone either conduct. As a solution, this Note proposes the elimination of peremptory challenges.

This suggestion has received some support, most notably by Justice Marshall in his *Batson* concurrence.[163] Justice Marshall recognized that the peremptory challenge is not a constitutional right.[164] He articulated that a court may withhold peremptory challenges "without impairing the constitutional guarantee of impartial jury and fair trial."[165] As noted above,[166] the court *must* withhold the peremptory challenge should the challenge impair a constitutionally granted right.[167]

Such a solution is problematic because it would require a reconstruction of current jury selection procedure. Peremptories supply attorneys with significant discretion in jury selection. Therefore, attorneys will likely disfavor the elimination of such cause-less challenges.

To minimize the harsh impact of this solution, the Court might consider increasing the allowable criteria of challenges for cause.[168] This increase would provide attorneys with more flexibility in challenging jurors yet deter the unconstitutional discriminatory elimination of jurors.

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161. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879); *supra* note 42.

162. Bologna, *supra* note 14, at 166. "The reality of the practice . . . shows that the challenge may be, and unfortunately at times has been, used to discriminate. . . ." Batson v. Kentucky, 476 U.S. 79, 98 (1986). The court in United States v. Clark feared that entertaining certain objections to peremptory challenge use would undesirably stretch out trials. 737 F.2d 679, 682 (7th Cir. 1984).

163. *Batson*, 476 U.S. at 103 (Marshall, J., concurring); Bertolet, *supra* note 32, at 26. *But see* Bologna, *supra* note 14, at 164-65 (conceding that the elimination of peremptory challenges would "provoke a rash of protest from the trial bar.").

164. 476 U.S. at 108. *See also supra* note 28 and accompanying text.

165. 476 U.S. at 108 (citations omitted).

166. *See supra* note 4 and accompanying text.

167. *See supra* note 4 and accompanying text (the inscrutability of the peremptory challenge must yield to a constitutionally granted right).

168. *See* Bertolet, *supra* note 32, at 26.

V. CONCLUSION

The Supreme Court's decision in *Batson v. Kentucky*[169] left many questions unanswered.[170] The question of whether the sixth amendment guarantees a defendant the *possibility* of a cross sectional petit jury remains unresolved. In light of the conflict among the circuits[171] the issue is ripe for adjudication.[172]

The peremptory challenge is a paradox, by nature immune to review, but nonetheless subject to constitutional scrutiny. Because of the peremptory challenge's deficiencies,[173] its elimination may better protect litigants and their constitutional rights.

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169. 476 U.S. 79 (1986).
170. *See supra* note 14 and accompanying text.
171. *See supra* notes 65-85 and accompanying text.
172. *See supra* note 25 and accompanying text.
173. *See, e.g., supra* notes 148-50 and accompanying text.