ARTICLES

CONSTRUCTING A JURY THAT IS BOTH IMPARTIAL AND REPRESENTATIVE: UTILIZING CUMULATIVE VOTING IN JURY SELECTION

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One of the main and ongoing problems plaguing the American jury system has been ensuring that juries in civil and criminal trials are truly representative of the communities in which they serve. Historically, minorities have been disproportionately excluded from jury service. This shortfall results from a combination of factors at each stage of the juror identification process. At the jury pool stage, juror notification methods often fail to identify or reach minorities for the simple reason that minorities generally are poorer and more transient. At the venire stage, those minorities who actually receive notification report to the courthouse at a lower rate than the majority because they ignore the summons and claim hardship more often. Finally, at the petit jury stage, prosecutors and other litigants typically eliminate most, if not all, minority venirepersons through the use of both peremptory and for cause strikes. Authors Edward Adams and Christian Lane take on this problem of underrepresentation on juries by focusing on the latter stage of jury selection—the use of peremptory strikes. They argue that prosecutors often use peremptories in a discriminatory manner to eliminate potential jurors based on their race. The authors argue that although it intended to remedy the striking of minority venirepersons for racial reasons, the Supreme Court in Batson v. Kentucky *failed to deter the practice effectively.* Batson *prohibits the striking of jurors based on race, but allows the use of peremptory challenges with a "race neutral" explanation. Dean Adams and Mr. Lane propose a new method of jury selection which dispenses with peremptory challenges and which, they assert, will rid the jury selection process of discrimination. Borrowing a concept from corporate law, they propose a new method based on a cumulative voting model. The authors contend that this new method for impaneling juries is free of the pitfalls that plague the current system and other alternative proposals. They argue that adopting their method will result in more representative juries.*

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As two of the more well-known criminal cases of the 1990s have shown, race can play a major role in the perception of guilt or innocence. Two white police officers who were acquitted by a nearly all-white jury of assaulting an African American motorist[1] were later convicted by a mostly minority jury of violating the same motorist's civil rights.[2] The acquittal of an African American football star, a surprise and disappointment to many whites, was welcomed with affirmation and applause by many African Americans.[3] A subsequent civil judgment elicited virtually reciprocal responses from the public.[4] Although reasonable minds may not agree on the justness of the verdicts in the Rodney King and O.J. Simpson cases, they can agree on one thing demonstrated in the aftermath of both cases: Many African Americans and whites use different perspectives to evaluate evidence and determine justice.[5]

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1 See Richard A. Serrano & Tracy Wilkinson, All 4 in King Beating Acquitted: Violence Follows Verdicts, L.A. Times, Apr. 30, 1992, at A1 (reporting on 1992 state trial of four police officers charged with assaulting Rodney King and subsequent civil unrest). The jury that acquitted the four police officers of assaulting Rodney King included two minority persons—a Latino and an Asian American. See Jacqueline Soteropoulos, With Juries, Appearances Matter: Experts Say Minority Representation Low, Tampa Trib., Dec. 5, 1994, Fla. Metro Sec., at 1, available in LEXIS, NEWS Library, TAMTRB File.

2 See Jim Newton, 2 Officers Guilty, 2 Acquitted: Guarded Calm Follows Verdicts in King Case, L.A. Times, Apr. 18, 1993, at A1 (reporting on 1993 trial of Rodney King defendants on federal civil rights charges). For more details concerning the King trials, see Jeffrey S. Brand, The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters, 1994 Wis. L. Rev. 511, 514 n.4 (naming accused officers and describing charges and verdicts).

3 A poll taken shortly after the verdict was announced showed that the majority of white Americans thought O.J. Simpson was guilty while over four-fifths of African Americans thought he was innocent. See Richard Morin, Poll Reflects Division Over Simpson Case: Trial Damaged Image of Courts, Races Agree, Wash. Post, Oct. 8, 1995, at A31 (citing poll that found 55% of white Americans thought Simpson was guilty and 85% of African Americans thought he was innocent).

4 See Frank Newport & Lydia Saad, Civil Trial Didn't Alter Public's View of Simpson Case (visited Feb. 12, 1998) <http://www.gallup.com/poll/news/970207.html> [hereinafter Simpson Poll]. The poll, conducted February 5, 1997, showed an across the board feeling that justice had not been served by the sum of the two trials. Though uniform on the surface, blacks and whites maintained a racial divide over which trial was unjust. White Americans overwhelmingly thought that the civil verdict was correct (68%) and that the criminal charges were probably or definitely true (71%). African Americans held a strikingly contrary view: only 26% thought the civil jury came to the right verdict and 28% thought the original murder charges were probably or definitely true. These poll numbers reflect the dichotomous views the public expressed throughout the trial. See id.

5 See Leland Ware, Essays on Race Reach Beyond the Superficial, St. Louis Post-Dispatch, Feb. 18, 1996, at 5D, available in LEXIS, NEWS Library, SLPD File (stating that "the reaction to the verdict proves, beyond any doubt, that white and black Americans view the same events from vastly different perspectives").

While the impact of race on jury verdicts cannot be established definitively,[6] the use of race as a factor in selecting juries is irrefutable.[7] In the one hundred seventeen years since the Supreme Court first held unconstitutional a statute specifically barring "colored people" from grand and petit juries,[8] racial and other minorities have remained underrepresented at all stages of the jury process.[9] Despite efforts to raise minority participation throughout the jury selection process,[10] the rate of underrepresentation reaches a critical point at the determinative stage: the sitting jury.[11]

This shortfall results from a combination of factors at each stage of the juror identification process.[12] At the jury pool stage, juror notification methods often fail to identify or reach minorities for the simple reason that minorities generally are poorer and more transient.[13] At the venire stage, those minorities who actually receive notification report to the courthouse at a lower rate than the majority because they ignore the summons and claim hardship more often.[14] Finally, at the petit jury stage, prosecutors and other litigants typically eliminate most, if not all, minority venirepersons through the use of both per-

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6 See Valerie P. Hans & Neil Vidmar, Judging the Jury 245-47 (1986) (arguing that increased representativeness of jury limits impact of bias in jury verdicts); Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 Mich. L. Rev. 63, 77 (1993) (arguing that studies confirm that juror race affects jury decisions in at least some cases).

7 See Kenneth J. Melilli, *Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges, 71 Notre Dame L. Rev. 447, 460 (1996) (documenting number of challenges to use of peremptory strikes for racial reasons); Hans Zeisel & Shari Seidman Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 Stan. L. Rev. 491, 491 (1978) (conducting study on effectiveness of attorneys' use of peremptory challenges). Race is far from the only characteristic used in selecting juries, but it is certainly the most contentious.

8 Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (holding unconstitutional statute which denied "colored people" right to participate in juries because of their color).

9 See Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 28-35 (1977) (reporting that "[n]onwhites are underrepresented on juries in the vast majority of courts in this country").

10 See, e.g., Hiroshi Fukurai et al., Race and the Jury: Racial Disenfranchisement and the Search for Justice 39-80 (1993) (presenting overview of jury selection procedures).

11 See Van Dyke, supra note 9, at 28-35.

12 See Fukurai et al., supra note 10, at ch. 3 (providing detailed description of causes of underrepresentation in each stage of jury selection).

13 See Van Dyke, supra note 9, at 30 (explaining that juror lists lose many black names because blacks move more frequently than whites); see also Fukurai et al., supra note 10, at 17-26 (discussing factors that reduce number of minorities identified for jury pool).

14 See Van Dyke, supra note 9, at 120 (noting that minority groups are often part of lower income bracket excused for economic hardship); see also Fukurai et al., supra note 10, at 51-68 (discussing disproportionate percentage of minorities who remove themselves from jury selection system before selection begins).

emptory and for cause strikes.[15] Although intended to remedy the striking of minority venirepersons for racial reasons, the Supreme Court's holding in *Batson v. Kentucky*[16] has failed to deter the practice effectively.[17]

Central to the ineffectiveness of *Batson*'s protections is the nature of jury selection.[18] Juries are chosen through a process of negative selection intended to eliminate partial individuals.[19] After a brief round of questioning and the elimination of jurors with clear bias, attorneys can strike a certain number of jurors for unspoken reasons.[20] Attorneys rely on instinct and experience—as well as the wisdom of jury selection manuals[21]—to determine which jurors to strike. *Batson* prohibits the striking of jurors based on race but allows the use of peremptory challenges with a "race neutral" explanation.[22]

Given the long pedigree of the peremptory challenge[23] and its recognized centrality to the American notion of an impartial jury and

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[15] See Van Dyke, supra note 9, at 155-56 (listing cases where attorneys used peremptory challenges to eliminate blacks from juries). In many cases, the number of peremptory strikes available to a litigant is greater than the number of minorities on the venire. Consequently, a litigant can exercise his or her peremptory challenges to eliminate all minority venirepersons before the jury is seated. See id. at 154.

[16] 476 U.S. 79, 85-88 (1986) (holding that peremptory strike based on race is unconstitutional when striking venireperson of defendant's race).

[17] See Jere W. Morehead, When a Peremptory Challenge Is No Longer Peremptory: *Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection, 43 DePaul L. Rev. 625, 632-37 (1994) (noting inability of *Batson* to eliminate discrimination in exercise of peremptory challenges and disproportionate cost imposed on judicial economy).

[18] See discussion infra Parts I.B. and I.D. (discussing selection of petit jury and *Batson* in practice, respectively).

[19] Removal of individuals perceived to be partial is an attempt to satisfy the Sixth Amendment right to trial by an impartial jury. Acting with the assumption that an impartial group must be composed of impartial individuals, striking partiality from the jury seems reasonable. However, the jury selection process cannot identify and root out all partiality and attorneys must rely extensively on perception, instinct, and often their own biases.

[20] See infra Part I (discussing jury selection process).

[21] A large body of work purports to direct which characteristics are good and bad for certain cases and positions. These manuals are written by judges, attorneys, and social psychologists who claim to know what constitutes a "good" juror. See, e.g., Jody George et al., Handbook on Jury Use in the Federal District Courts (Federal Judicial Center 1989) (describing administrative procedures with which jury staff should be familiar and explaining jury staff's, judge's, and clerk's roles in administration of juries); Robert A. Wenke, The Art of Selecting a Jury (2d ed. 1989) (discussing generally accepted rules and principles to be used in selecting a jury).

[22] See Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[23] The "arbitrary and capricious" nature of the peremptory challenge, and its centrality to a fair trial, was noted by Blackstone. See 4 Blackstone Commentaries *354. As early as 1305, English courts sought to place some limit on the Crown's right to freely exercise the challenge, but in practice the limit was inconsequential. See Swain v. Alabama, 380 U.S. 202, 212-13 (1965) (discussing history of peremptory challenges).

a fair trial,[24] it is no wonder that many attorneys consider any interference with its exercise an infringement on the right to a fair trial.[25]

Batson, however, came in response to a genuine and long standing problem—the broad exclusion of minorities from juries. Strangely, extensions of *Batson* ultimately could make the striking of whites unconstitutional,[26] eliminating the sometimes effective method minority litigants have used to place *any* minorities on juries.[27]

Without a more fundamental structural change, the jury selection system will remain effectively the same as before *Batson*. The system will continue to impanel juries that neither the litigants nor the public reasonably can be expected to view as impartial. *Batson*'s ineffectiveness can be attributed substantially to the inability of voir dire to provide an accurate depiction of the biases of potential jurors.[28] Faced with making exclusionary decisions on the basis of limited information, attorneys naturally rely on group stereotypes, assisted by personal experience, lawyering tradition, and an extensive body of instructional material. Decisionmaking based on stereotypes, while not necessarily invalid and frequently the most efficient course of action,[29] undermines the public perception of legitimacy.[30]

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24 See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (noting that peremptory strikes remain "a fundamental part of the process of selecting impartial juries"); Georgia v. McCollum, 505 U.S. 42, 70 (1992) (Scalia, J., dissenting) (noting that some are trying to "use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair"); *Swain*, 380 U.S. at 218-22 (discussing function and need for peremptory challenges).

25 See, e.g., William F. Fahey, Peremptory Challenges, 43 Fed. Law. 29, 34 (1996) (concluding that limitations placed on peremptories cause justice system to suffer).

26 Following the standard of equal protection review set forth in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), the extension of *Batson* to race-based strikes of whites seems inevitable. The *Croson* Court established a colorblind principle under the Equal Protection Clause, writing that "the standard of review . . . is not dependent on the race of those burdened or benefited by a particular classification." Id. at 494.

27 See *McCollum*, 505 U.S. at 60 (Thomas, J., concurring) ("[B]lack criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.").

28 Voir dire by its nature has a limited power to describe the potential biases of a particular juror. See, e.g., Norbert L. Kerr et al., On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study, 40 Am. U. L. Rev. 665, 699 (1991) (reporting empirical study indicating limited effectiveness of voir dire to uncover juror bias due to jurors' imperfect awareness of and unwillingness to report bias, limited scope of questioning, and limited number of available challenges).

29 Cf. Richard Posner, Economic Analysis of Law 109-10 (4th ed. 1992) (discussing economic benefits of decisionmaking based on imperfect information resulting from extreme costs of obtaining better information).

30 Consequences of the reliance on stereotypes can have a more substantial impact on public perception than does their actual use. As noted after the Rodney King trial, the lack of blacks on the state trial jury and the consequent lack of reflection of the community created an atmosphere where doubt in the system as a whole could exist. See, e.g., Nancy

The recent release of an instructional videotape produced by the Philadelphia District Attorney's office[31] partially reveals the dimensions of the potential problem with public perception. The training video, which included a lecture given by then-assistant district attorney Jack McMahon, advised prosecutors that their job is to win convictions[32] and that any prosecutor who did not "aggressively try to get a . . . jury that's favorable to [his or her] side . . . [is] a fool."[33] McMahon now says that he is "strongly in favor" of multiracial juries because they "eliminate biases and prejudice in the deliberation room."[34] His taped advice, however, relied heavily on the striking of blacks[35] and he admitted that it "may appear . . . racist or what not," but that "the other side's doing the same thing."[36]

There are opinions on all sides of the issue. As McMahon said in his own defense, the advice is no more than "'what any good jury consultant would charge hundreds of thousands of dollars to tell you.'"[37] Others see it as a blatant violation of *Batson*, focusing on racial identification in clear violation of the Supreme Court ruling.[38] Despite the apparent clarity of the preclusion of race as a factor, most in the legal community recognize that reliance on stereotypes is a common—though not necessarily desired—practice. Underlying these views is the knowledge that the open recognition of the practice

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E. Roman, Jury System Put Under Close Study After King Verdict, Wash. Times, Aug. 7, 1992, at A6 (quoting civil rights expert Barbara Arnwine saying that if juries do not reflect racial makeup of community, confidence in system will erode).

31 See Michael Janofsky, Under Siege, Philadelphia's Criminal Justice System Suffers Another Blow, N.Y. Times, Apr. 10, 1997, at A14.

32 Joseph R. Daughen, Campaign Tactic Adds Race to District Attorney Race, Pittsburgh Post-Gazette, Apr. 6, 1997 (Five Star Ed.), at B3, available in LEXIS, NEWS Library, PSTGAZ file (reporting on content of videotaped lecture given in 1986 by then-Philadelphia assistant district attorney Jack McMahon).

33 This Morning: Candidate for Philadelphia District Attorney Under Fire for Training Tape He Made that Promotes Racism (CBS television broadcast, Apr. 4, 1997) (quoting McMahon from videotape).

34 Today: Philadelphia Attorney Jack McMahon and Defense Attorney Roy Black Discuss Videotape Made by McMahon 11 Years Ago in Which He Appears to Advocate Using Race as a Basis for Selecting Jury Members (NBC television broadcast, Apr. 4, 1997).

35 The tape advised that blacks from low income areas are less likely to convict, that "young black women are very bad . . . because they're downtrodden on [sic] two respects," that prosecutors do not want "the real educated ones," and that if they are "going to take blacks, you want older blacks." Id.

36 Id.

37 Prosecutor's Tape on Juries Results in Mistrial, N.Y. Times, Apr. 4, 1997, at A24 (quoting McMahon).

38 See, e.g., Richard Grossman, Jury Selection Myths Die Hard, Post-Standard (Syracuse, N.Y.), Apr. 14, 1997, at A8, available in 1997 WL 5732594. But see Scott Bekker, Assoc. Press Pol. News Service, Apr. 2, 1997, available in 1997 WL 2513181 (quoting Geoffrey Hazard as saying that *Batson* does not prohibit race from being factor, just not sole factor in rejecting juror, and that "[t]here's so much pious baloney about this").

damages the credibility of the system by exposing "racist" attitudes that exclude individuals from the process of justice.

De facto exclusion of group members produces a twofold problem. First, it denies members of minority groups the opportunity to be part of the legal process[39] and consequently helps foster societal mistrust of the system.[40] Race is merely the most inflammatory example of the negative impact of discriminatory selection practices. Even a total elimination of race-based discrimination still permits discrimination on the basis of other characteristics.[41] The current jury selection system denies the extent of the problem while feebly attempting to eliminate the most obvious discrimination. *Any* failure of representation, however, is a problem in "one of our most democratic institutions."[42]

Second, it denies litigants an opportunity to be judged by an impartial jury by removing a set of filters from the fact-finding process, which interferes with the legal system's search for truth[43] and further undermines the integrity of the results.[44] A jury composed of the least objectionable individuals in a jury pool does not have the diversity

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[39] See Edmondson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (holding that exclusion on racial grounds violates prospective jurors' equal protection rights); U.S. Commission on Civil Rights, 1961 Report: Justice 89 (1961) (stating that "jury service is the only avenue of direct participation in the administration of justice open to the ordinary citizen").

[40] See McCray v. New York, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of cert.) (arguing societal injury arising from case where prosecutor exercised peremptory challenges to exclude all blacks and one Hispanic from prospective juror pool resulting in subsequent conviction of black defendant by all-white jury); Ballard v. United States, 329 U.S. 187, 195 (1946) ("The injury [suffered as result of racial, social, or economically-based exclusion] is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.").

[41] This sort of discrimination will continue unless the Court develops limitations on peremptory challenges supported by a rationale other than equal protection. The current limits are based on equal protection principles which restrict the extent to which they can be expanded. Justice Marshall noted how this undermines the potency of *Batson*, stating that restricting peremptory challenges only when used against a distinctive group leaves the system "almost entirely untouched." Holland v. Illinois, 493 U.S. 474, 502 (1990) (Marshall, J., dissenting). He went on to note the unlikeliness of the Court recognizing additional groups as distinctive under Fourteenth Amendment jurisprudence. See id.

[42] Fukurai et al., supra note 10, at 3; see also id. at 3-4 (arguing that inequities in jury selection have undermined ideal of representative juries and fair trial by peers); Van Dyke, supra note 9, at 32-33 (arguing that underrepresentation of blacks on juries affects strength of jury system and criminal justice system overall).

[43] See Burt Neuborne, Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques, 67 N.Y.U. L. Rev. 419, 443 (1992) (espousing theory that "the experiences and background of a juror actually may shape the 'reality' that a juror perceives").

[44] See Van Dyke, supra note 9, at 32-33 (stating that racial imbalance harms integrity of jury system).

necessary to construct a legitimately impartial petit jury. Reliance on the impartiality of individuals denies reality and leads to the exclusion of too large a segment of the public from jury service.

Preserving the legitimacy of the justice system becomes the consistent issue in assessing juries.[45] It is less than clear whether the racial, ethnic, gender, or other demographics of a jury actually effect a change in verdicts. Despite long held beliefs, jury demographics may well have no influence on the verdicts rendered. The nature of fact-finding in a criminal trial, however, is an inexact exercise in which jurors necessarily process information through individual filters.[46] Given the generally different experiences of persons of different races with the criminal justice system,[47] it should not be particularly surprising that persons of different races often evaluate evidence by different criteria. Because of this psychological reality, the systematic exclusion of one race and its unique set of experiences from the jury process raises serious concerns.[48] Since persons of different races often process the same information in different ways, often to different conclusions, the exclusion of any race or other group results in a sort of unconstitutional partiality.

What becomes apparent in evaluating juries is the impact of jury demographics on the public's acceptance of verdicts and the public's perception of justice. Public acceptance of verdicts rendered by juries has often split along racial lines. The split became an event unto itself during the recent Simpson criminal and civil trials.

The criminal trial jurors had their own reasons for acquittal having nothing in particular to do with the race of the defendant or the

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[45] See id.

[46] See Robert K. Merton, Social Theory and Social Structure 457-60 (Enlarged ed., Free Press 1968) (1949) (relating perception of factual reality to experience); Neuborne, supra note 43, at 443 (noting that conscientious jurors of different backgrounds can reach different factual conclusions); see also Paul M. Lisnek, Lessons From L.A., Importance of Voir Dire, Chi. Daily L. Bull., Oct. 16, 1995, at 6 (noting that "we all use filters through which all information must flow").

[47] A study by the Center on Juvenile and Criminal Justice, a nonprofit center based in San Francisco, concluded that in California, African American men in their twenties were imprisoned at nearly eight times the rate of white men of the same age. See Vincent Schiraldi et. al, Young African Americans and the Criminal Justice System in California: Five Years Later 3 tbl.1 (1996). See also Justice Isn't Colorblind, Report Claims, The Press-Enterprise (Riverside, Cal.), Feb. 13, 1996, A1, available in LEXIS, NEWS Library, PRSENT File. While not necessarily indicative of disparate treatment of African American men by the justice system, a particular African American juror is much more likely to have a relative in prison. African Americans are thus more likely to have the type of personal knowledge of the justice system which can affect individual perception.

[48] See Neuborne, supra note 43, at 443 (stating that "the systematic exclusion of a particular point of view from the jury box through the exclusion of minority jurors implicates the very reality that jurors are called upon to certify").

victims. Asked why they acquitted Simpson in the face of a "mountain of evidence,"[49] at least two jurors from the criminal trial pointed to their mistrust of the police, especially detective Mark Fuhrman.[50] Presented with evidence of Fuhrman's racist history[51] and the presence of EDTA in some of the blood found at the murder scene,[52] the mostly African American jury[53] had little trouble doubting the prosecution's case. This doubt may have arisen from a belief in the defense contention that members of the Los Angeles Police Department could have planted some of the blood evidence that incriminated Simpson.[54] The jurors' willingness to believe the inference may have been related to their individual experiences with police and a resulting mistrust, shared by many racial minorities, for law enforcement.[55]

Whatever the reasoning behind the verdict, the public reacted along racial lines. While many of the jurors may not have rendered their verdict based on a mistrust of the police, the specter of the Los Angeles Police Department that beat Rodney King tainted the public's perception. While most white Americans stood on the proverbial "mountain of evidence," for many African American observers, that

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49 Linda Deutsch, Prosecutors Move to Wrap Up Case, Baltimore Sun, June 21, 1995, at 10A (quoting deputy district attorney Christopher Darden as stating that "[w]e're ready to rest with a mountain of evidence against this guy").

50 See Simpson Jurors Speak Up For Their Decision; Weaknesses in Prosecution Case Swayed Them, Two Say, Minneapolis Star Tribune, Oct. 5, 1995, at 6A [hereinafter Simpson Jurors] (publishing quotes of two jurors shortly after verdict).

51 See Linda Deutsch, Fuhrman Takes the Fifth; Was Asked if He Planted Evidence, Record (Bergen, N.J.), Sep. 7, 1995, at A1, available in 1995 WL 3478682 (discussing Fuhrman's use of word "nigger" and willingness to plant evidence against African American suspects).

52 Part of the evidence offered by the defense was the presence of EDTA (ethylenediamine tetraacetic acid) in some of the blood found at the murder scene. A laboratory preservative, EDTA would suggest that the blood, which matched O.J. Simpson's DNA, could have been at the police laboratory before it was placed at the scene. See generally Haya El Nasser, What Jury Will Face Behind Closed Doors, USA Today, Oct. 2, 1995, at A1 (stating that Simpson jury had to consider whether there was enough EDTA in blood sample to conclude it came from sample already in police possession).

53 The jury consisted of eight African American women, one African American man, two white women, and one Hispanic man. See Nasser, supra note 52, at A1.

54 See Simpson Jurors, supra note 50 (quoting jurors on their reasons for acquitting Simpson).

55 Following the verdict, lawyer and author Scott Turow wrote: "The jurors were impaneled knowing from the start that this was business as usual in Los Angeles. Nothing the prosecutors could do could convince them that this case was not corrupted by the police department's world-renowned racial hostility." Scott Turow, Arrogant Blunders Doomed O.J. Prosecution From Start, Minneapolis Star-Tribune, Oct. 6, 1995, at 19A; see also Schiraldi et. al, supra note 47, at 1-2 (stating that whites fare better than African Americans in criminal justice system and that this leads to different perceptions of African Americans and whites about fairness of criminal justice system); Seth Mydans, The Courts on Trial, N.Y. Times, Apr. 8, 1993, at A7 (stating that it is widely held belief "by members of minorities in inner cities that they live in the shadow of a racially biased justice system").

same evidence strongly suggested that the Los Angeles Police Department might have planted evidence against Simpson.[56] Most white Americans have not had the same negative experiences with the police that many African Americans have come to consider ordinary.[57] Therefore they were less willing to accept the defense's contention that members of the Los Angeles police force conspired to plant evidence against a famous football star[58] and network broadcaster[59] who happened to be an African American. Most white Americans focused on the uncontaminated blood at the scene, and consequently felt the jury's verdict was incorrect.

Although African Americans and whites considered the same evidence, the majority of each group reached different conclusions.[60] Based on their experiences, African Americans easily could accept the

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[56] See Lisnek, supra note 46, at 6 (suggesting that prosecutors lost O.J. Simpson case during jury selection). Lisnek notes the effect of the District Attorney's decision to try the case in downtown Los Angeles and comments on the extent to which jurors' disparate perspectives and experiences can result in different trial outcomes:

> [The Los Angeles District Attorney's Office] had the option of holding the trial elsewhere, where juror's life experiences would be quite different, where police conspiracy is fiction, where the offering of a conflicting alibi ("I was golfing . . . make that sleeping") is bothersome, and where DNA matches that effectively eliminate everyone on earth except for the defendant is a telling point. In fact, Simpson's neighbors would be a starting place for people who think this way. But this case was placed where people have different and very negative experiences with the law and where police conduct is viewed with the highest of skepticism.

Id.

[57] See, e.g., Minimizing Racism in Jury Trials: The Voir Dire Conducted By Charles R. Garry in *People of California v. Huey P. Newton* 10 (Ann Fagan Ginger ed., 1969) (stating that negative contact with police is "the chief complaint of all black communities, and resonant with overtones of brutality. This chief component of black experience, the white American, whether racist or not, does not and cannot share."); Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism, 42 U. Miami L. Rev. 127, 156 & n.89 (1987) (stating "I know few blacks who have not had some encounter with police intimidation" and recounting personal childhood experience in which highway patrolmen in Georgia stopped her family apparently for no reason and pointed loaded shotgun at her and sister); George J. Church, The Fire This Time, Time, May 11, 1992, at 18, 22 (stating that poll conducted after first verdict in Rodney King case showed 23% of whites, compared to 48% of blacks "felt that in an everyday encounter with police they ran a risk of being treated unfairly"); Henry L. Gates, Thirteen Ways of Looking at a Black Man, New Yorker, Oct. 23, 1996, at 56, 58 ("Blacks—in particular black men—swap their [negative] experiences like war stories, and there are few who don't have more than one story to tell.").

[58] O.J. Simpson won the Heisman Trophy in 1968, an award given to the best college football player in the country. Simpson is a member of the Pro Football Hall of Fame and formerly held the record for most yards rushing gained in a season and most yards rushing gained in a game. See 2 Who's Who in America 4007 (1998).

[59] Simpson first worked as an NFL analyst for ABC-TV and later was employed by NBC Sports. See id.

[60] See supra note 4.

contention that police officers would plant evidence.[61] After all, many of them had experienced such police conduct, if not personally, then through their community.[62] Based on their much different experiences, the majority community could not easily accept such a concept. In their experience, police officers would not do such a thing. Problems arise when public perception diverges from jury decisions and the racial composition of the jury draws the blame. While the racial makeup of the jury may not influence the verdict,[63] it has a definite impact on public perception of the correctness of the verdict. The public increasingly has come to question the validity of verdicts.

Although public perception should not determine the propriety of any one verdict,[64] lingering doubts can have a detrimental effect on the legitimacy of the system as a whole. While problems persist throughout the selection system, the most significant concern the use of peremptory challenges. Court rulings and legislative action have eliminated most of the systematic discrimination in other parts of the selection process.[65] These changes have been primarily structural, directed toward eliminating mechanisms of exclusion. Judicial modifications have attempted to limit the use of peremptory challenges but have preserved the mechanism of exclusion. While the restrictions have controlled the most blatant misuse of the peremptory challenge,

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[61] See Lisnek, supra note 46, at 6 (stating that jury's "conclusions should come as no surprise when one's life experiences include police officers who set up people and hassle others").

[62] A controversial case decided by a federal district judge in New York in 1996 illustrates the varied experiences different communities have with police. See United States v. Bayless, 913 F. Supp. 232, 239-43 (S.D.N.Y. 1996) [hereinafter *Bayless I*] (holding that police in Washington Heights neighborhood did not have sufficient reason to believe that defendant was involved in criminal activity to stop defendant's vehicle). Although he later reversed his decision, see United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996), Judge Baer acknowledged that members of predominantly low income minority communities like Washington Heights often have negative views of the police. See *Bayless I*, 913 F. Supp. at 242; see also Don Van Natta, Jr., Not Suspicious To Flee Police, Judge Declares, N.Y. Times, Jan. 25, 1996, at B1 ("Judge Harold Baer Jr. said the act of running away from the police—which an officer said he had found suspicious enough to pull over the woman's car and search it—is considered reasonable behavior in Washington Heights, a neighborhood racked by police brutality and corruption scandals.")

[63] But see Benjamin A. Holden et al., Does Race Affect Juries? Injustice With Verdicts, Chicago Sun-Times, Oct. 8, 1995, at 28 (describing debate over role of race in juror's perception and jury verdicts).

[64] See Lisnek, supra note 46, at 6 (stating that "[t]he verdict is proper because it is what the jury found"). Consider, however, the federal prosecution of the police officers in the Rodney King case. While the second trial does not directly impugn the result of the original trial, it probably would not have been pursued without the initial "not guilty."

[65] These changes have not been entirely effective for a number of reasons. See, e.g., Fukurai et al., supra note 10, at 76-78 (summarizing legal and extralegal factors affecting racial composition of juries).

the secondary effects of partiality and illegitimacy remain. We offer a possible solution through a new method for impaneling juries.

This Article argues that the current petit jury selection system based on peremptory strikes fails to provide impartial juries, as required by the Constitution,[66] by failing to ensure full societal representation. Accordingly, the current system should be replaced by an altogether new system based on a modified cumulative voting model. Part I outlines the history of jury selection jurisprudence and the current conditions placed on selection of jury pools, jury venires, and sitting juries. Part II briefly discusses some alternative methods proposed to ensure minority representation on juries. Part III outlines the rationale behind cumulative voting in the corporate and political contexts. Lastly, Part IV argues that a derivative of cumulative voting in the jury selection process can better enable selection of impartial panels and increase the level of minority participation on petit juries, thereby assuring more accurate and acceptable fact-finding results.

I
THE JURY SELECTION PROCESS AND JUDICIAL EFFORTS TO DECREASE DISCRIMINATION

The United States Constitution guarantees litigants, both criminal[67] and civil,[68] the right to trial by jury.[69] In addition, the Supreme Court has held that the Constitution mandates that juries be "truly

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66 See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .").

67 "The trial of all Crimes . . . shall be by Jury. . . ." U.S. Const. art. III, § 2, cl. 3.

68 "In Suits at common law . . . the right of a trial by jury shall be preserved, ..." U.S. Const. amend. VII. The Seventh Amendment is one of the few provisions of the Bill of Rights not incorporated to the states. See, e.g., Eric Grant, A Revolutionary View of the Seventh Amendment and the Just Compensation Clause, 91 Nw. U. L. Rev. 144, 241 (1996) ("That is, of all the guarantees of the Bill of Rights, the Seventh Amendment shares the ignominy of non-incorporation only with the 'embarrassing' Second Amendment . . . and the inconvenient Grand Jury Clause of the Fifth Amendment . . . .") (citations omitted).

69 As Justice Brennan noted:

> What Blackstone described as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" was crucial in the eyes of those who founded this country. . . . "In fact, '[t]he right to trial by jury was probably the only one universally secured by the first American constitutions.'" . . . Fear of a Federal Government that had not guaranteed jury trial in civil cases . . . was the concern that precipitated the maelstrom over the need for a bill of rights. . . . This Court has long recognized the caliber of [the jury trial] right.

Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 580 (1990) (Brennan, J., concurring in part) (quoting 3 William Blackstone, Commentaries *379 and Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 655 (1973) (quoting Leonard W. Levy, Legacy of Suppression 281 (1960))).

representative of the community."[70] Selection methods purposely excluding groups of potential jurors on the basis of race, therefore, violate the Fourteenth Amendment rights[71] of both litigants and excluded jurors[72] and the Sixth Amendment rights of criminal defendants.[73] Still, the Constitution does not require the petit jury itself to be representative, merely "impartial."[74] Despite these protections, minorities, particularly racial minorities, continue to be underrepresented in jury pools, jury venires, and petit juries.[75] The following examination of discrimination in the jury selection process and the accompanying constitutional jurisprudence allowing such negative bias to proliferate, especially at the sitting jury stage, illustrates the scope of the problem and the inability of current limitations to solve the problem. The continuation of discrimination degrades the public legitimacy of the jury and allows constitutionally impermissible partial juries to be impaneled.

The process of jury selection consists of two stages: the assembly of the jury pool outside the courthouse and the selection of the jury to be impaneled in the courtroom.[76] The first step—the construction of the jury pool and resulting master list—requires the identification of eligible members of the community. Once these individuals are identified and brought into the courthouse, their selection for a specific trial jury begins.

A. Assembly of the Jury Pool and Venire

Theoretically, the jury pool should include all citizens.[77] In practice, however, only citizens that the state or federal government can

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[70] Smith v. Texas, 311 U.S. 128, 130 (1940) (holding that exclusion of African Americans from grand jury on account of race violated Fourteenth Amendment).

[71] "No State shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[72] See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618 (1991) (noting that "a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service").

[73] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ..." U.S. Const. amend. VI. See Taylor v. Louisiana, 419 U.S. 522, 527 (1974) (reiterating that systematic exclusion of African Americans as jurors violated Equal Protection Clause of Fourteenth Amendment); Glasser v. United States, 315 U.S. 60, 85-86 (1942) (holding same).

[74] See Holland v. Illinois, 493 U.S. 474, 480 (1989) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury . . . but an *impartial* one.").

[75] Van Dyke, supra note 9, at 311-30.

[76] See Fukurai et al., supra note 10, at 40 (summarizing jury selection procedures).

[77] See Van Dyke, supra note 9, at 85 (stating that selection of prospective jurors "must be designed to produce as complete a list as possible").

identify and contact through a summons procedure are included.[78] The methods chosen to identify and contact these persons create the jury pool, and historically these methods have generated groups with a lower percentage of racial minorities than the population at large.[79]

Before the emancipation and civil rights amendments, some state statutes specifically excluded African Americans and other racial minorities from jury pools.[80] After passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, and a federal statute outlawing racial discrimination in state jury selection,[81] the Supreme Court, in *Strauder v. West Virginia*,[82] held that such statutes violated the Equal Protection Clause.[83] While significant, the holding was limited in two ways, which produced a serious effect on efforts to diversify juries. First, *Strauder* protected racial minorities only from purposeful exclusion. Thus it still allowed neutral selection methods which in practice excluded many racial minorities from jury pools.[84] Second, the hold-

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78 See generally Fukurai et al., supra note 10, at 18-26 (noting procedural anomalies and demographic factors which influence participation in jury service).

79 See Van Dyke, supra note 9, at 28-35.

80 See, e.g., Strauder v. West Virginia, 100 U.S. 303, 310-12 (1879) (striking down West Virginia statute excluding minorities from jury pools). Other states excluded African Americans from panels without support of statutory prohibitions. See Virginia v. Rives, 100 U.S. 313 (1879) (upholding verdict of jury selected through subjectively discriminatory process). The *Rives* Court held that even if a black had *never* served on a jury in the county, that fact would "fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race." Id. at 322. The Court did allow that a discriminatory administration of a neutral statute would be a violation. See id.; cf. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding city ordinance that gave supervisors power arbitrarily to withhold business permits and was used to force Chinese businesses to close violated Fourteenth Amendment Equal Protection Clause).

81 Federal Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336-37 (codified as amended at 18 U.S.C. § 243 (1988)).

82 100 U.S. 303 (1879).

83 See id. at 310.

84 Facially neutral methods that typically discriminate based on race include those relying on voter registration, an area where minorities are underrepresented. See Van Dyke, supra note 9, at 30. The Supreme Court has held that disproportionate impact is not evidence of discrimination if the criteria are facially neutral. See Washington v. Davis, 426 U.S. 229, 242 (1976) ("We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."). Further, the Supreme Court has been reluctant to hold state or federal jury pool selection methods unconstitutional. See generally Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring) (explaining failure of Court to prevent blacks from being struck peremptorily from juries); Charles J. Ogletree, Just Say No!, 31 Am. Crim. L. Rev. 1099 (1994) (explaining how trial judges' acceptance of facially neutral reasons for peremptory strikes have undermined *Batson*). The *Batson* decision applied only to racial minorities of the same race as the defendant in a criminal trial.

ing prohibited exclusion from the jury *pool* and *venire* only.[85] It did not "demand[ ] inclusion to guarantee a jury representative of one's peers."[86] This second limitation potentially could prevent the adoption of any affirmative participation guarantees for the petit jury.[87] The application of *Strauder* to actual selection practices was quite quickly and effectively limited.[88] In the next reported opinion, the Court held that, in the absence of a statute making an express statement, even the total exclusion of African Americans from juries did not prove conclusively the intentional discrimination necessary to invoke constitutional protection.[89] On this reasoning, the Court regularly rejected claims of discrimination in jury selection until the claims stopped coming for an extended period.[90]

The *Strauder* protections remained basically without enforcement until 1935, when the Court allowed a prima facie case of discrimination to be based on "long-continued, unvarying, and wholesale exclusion" of members of the defendant's race.[91] In the absence of an

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[85] See *Batson*, 476 U.S. at 85-86 (discussing holding in *Strauder*).

[86] Brand, supra note 2, at 542. The Court in *Strauder* did not reach the issue of whether a defendant has the right to a "petit jury composed in whole or in part of persons of his own race." *Strauder*, 100 U.S. at 305. The difference between exclusion from venires and actual juries was articulated by the Fifth Circuit: "To suggest that a particular race is unfit to judge in any case necessarily is *racially insulting*. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." United States v. Leslie, 783 F.2d 541, 554 (5th Cir. 1986).

[87] Under current equal protection jurisprudence, a government administered affirmative action program is constitutional only if it is necessary to advance a compelling governmental interest. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Because a litigant does not have a constitutional right to a representative jury, it is unlikely the Supreme Court would find the necessary compelling interest to uphold an affirmative selection of minority jurors.

This does not end the discussion, however. Because studies have shown that a person's race affects the way that person assimilates evidence and reaches a factual conclusion, it can be argued that in the context of jury selection, the necessity of considering a person's race places it outside the normal parameters of equal protection jurisprudence. See Albert W. Alschuler, Racial Quotas and the Jury, 44 Duke L.J. 704, 717-23 (1995) (arguing that courts should employ different equal protection jurisprudence when scrutinizing affirmative jury selection methods).

[88] See Virginia v. Rives, 100 U.S. 313, 323 (1880) (holding that while juror cannot be excluded because of race, "[a] mixed jury . . . is not essential to the equal protection of the laws, and the right to it is not given . . . by any Federal statute. It is not . . . guaranteed by the Fourteenth Amendment . . . .").

[89] See id. at 322 ("The assertion[ ] . . . that [African Americans] had never been allowed to serve as jurors in the county . . . fall[s] short of showing that any civil right was denied.").

[90] See Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 108 (1994) (noting that after thirty years of Supreme Court reliance on *Rives* to reject claims, "cases simply stopped coming the Court's way" for another generation).

[91] Norris v. Alabama, 294 U.S. 587, 597 (1935).

articulated standard,[92] the frequent subsequent challenges[93] met the standard of proof only with the presentation of an "egregious pattern[ ] of fact."[94] Still, the cases established the basis for the next step in preventing exclusion from juries—the constitutional requirement of a fair cross section.

Starting in 1940 with *Smith v. Texas*,[95] the Supreme Court began to provide substantive protections for minority representation in jury pools and venires. That is, instead of merely holding that minorities could not be excluded by statute (the holding of *Strauder*), it found that de facto exclusion, as allowed by *Virginia v. Rives*,[96] also violated the Constitution. Relying upon the same equal protection jurisprudence used in *Strauder*, the Court stated that juries are "instruments of public justice" and therefore must be bodies "truly representative of the community."[97] Two years later, in *Glasser v. United States*,[98] the Court for the first time linked the notion of a representative jury to the defendant's Sixth Amendment rights to an impartial jury.[99] Unlike the Court's application of the equal protection right, which merely precluded exclusion of groups of potential jurors based on race, the interpretation of the Sixth Amendment right to an impartial jury mandated that sitting juries be drawn from pools representative of the community.[100] This right, since codified by Congress[101] and most state legislatures,[102] is referred to as the "fair cross-section" doctrine, and requires that "petit juries must be drawn from a source

92 See Alexander v. Louisiana, 405 U.S. 625, 630 (1972) (stating that there are no "mathematical standards for the demonstration of 'systematic' exclusion," but rather case by case "factual inquiry").

93 From 1935 to 1975 the Supreme Court heard an average of one case per year on the issue. See Van Dyke, supra note 9, at 54.

94 Abramson, supra note 90, at 109; cf. McCleskey v. Kemp, 481 U.S. 279, 292-97 (1987) (rejecting quantitative attack on death sentence in Georgia).

95 311 U.S. 128 (1940).

96 100 U.S. 313 (1879).

97 Smith, 311 U.S. at 130; see also Mitchell S. Zuklie, Comment, Rethinking the Fair Cross Section Requirement, 84 Cal. L. Rev. 101, 107-08 (1996) (discussing origins of fair cross section requirement).

98 315 U.S. 60 (1942).

99 See id. at 83-86.

100 See *Smith*, 311 U.S. at 130.

101 See Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861-69, 71 (1994)). This provision guarantees litigants in federal courts "the right to grand and petit juries selected at random from a fair cross section of the community" and grants "all citizens . . . the opportunity to be considered for service on grand and petit juries." 28 U.S.C. § 1861 (1994).

102 See Van Dyke, supra note 9, at 86 ("Most state courts have in recent years made changes similar to the 1968 federal statute and now randomly select jurors from some standard list, such as the list of voters.")

fairly representative of the community."[103] This doctrine places on both state and federal judicial systems a duty to develop representative jury pools and venires. Consequently, affirmative-action-type efforts to increase the percentage of minorities contacted for jury service are in many cases constitutionally permissible.[104] Such methods include: (1) statutes mandating any venue change be to a jurisdiction that has a racial makeup similar to the original jurisdiction;[105] (2) efforts to target jury summonses to predominantly minority neighborhoods to ensure an overall response rate proportional to a minority's numbers in the jurisdiction's population;[106] and (3) the creation of jury pool subsets based on racial classification within a jurisdiction to make sure a representative number of jurors in each venire come from each minority group.[107]

These methods increase minority representation in pools and venires, and protect jurisdictions from legal exposure based on Sixth Amendment claims. Without such methods, petitioners could establish a prima facie case asserting that a jury pool does not represent a fair cross-section of the community by demonstrating: (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to a systematic exclusion of the group in the jury selection process.[108]

Like the jury pool, the jury venire must meet the requirements of the fair cross-section doctrine.[109] The group of persons responding to

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[103] Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (stating that sources "from which juries are drawn must not systematically exclude distinctive groups in the community").

[104] See Alschuler, supra note 87, at 712 ("Seeking racial balance in the wheels and boxes from which petit and grand jurors are drawn appears to be less controversial than seeking racial balance in juries themselves.").

[105] See Mark Cammack, Diversity in the Jury Box; Let Defendants Empanel Members of Own Race, L.A. Daily J., June 19, 1992, at 6 (discussing amendment to California Senate bill added in wake of verdict in Rodney King case).

[106] See Jeff Barge, Reformers Target Jury Lists: Seeking Diversity, Jurisdictions May Call Benefit Recipients, A.B.A. J., Jan. 1995, at 26-27 (discussing state plans to use welfare and unemployment rolls in assembling jury pools).

[107] See id. (discussing Arizona plan to divide juror lists into subsets by race and randomly to select jurors within those subsets).

[108] See Lockhart v. McCree, 476 U.S. 162, 174-75 (1986) (discussing "fair cross section" claim of systematic exclusion of "distinctive group").

[109] See Duren v. Missouri, 439 U.S. 357, 364-70 (1979) (holding law making automatic exemption available to women violates fair cross section requirement as applied to jury venires).

jury summonses and reaching the courthouse must fairly represent the community in which the litigants reside.[110]

The group of persons receiving and responding to jury summonses becomes the jury venire.[111] From this group, petit juries who will actually hear trials are selected.[112] As the Supreme Court first stated in *Strauder*, the Constitution does not guarantee that the selected jury will actually represent the community in which the litigants reside.[113] The Court later explained, "'[t]he number of our races and nationalities stands in the way of evolution of such a conception' of . . . equal protection."[114] Similarly, the Court stated:

> [Although] the Sixth Amendment guarantees that the petit jury will be selected from a *pool* of names representing a cross section of the community, we have never held that the Sixth Amendment requires that "petit juries *actually chosen* must mirror the community and reflect the various distinctive groups in the population."[115]

Neither the protections afforded by the Fourteenth Amendment's Equal Protection Clause nor those provided by the Sixth Amendment's right to an impartial jury ensure that a litigant—even a minority litigant living in a largely minority community—will have a jury that includes even one minority.[116]

B. Selection of the Petit Jury

Even with these protections in place, the system still allowed for the near total exclusion of minorities from sitting juries.[117] Partially, this resulted from the inability to remedy fully the underrepresentation of minorities in the initial stages of the selection process. Even providing for full representation in the venire, however, could not overcome an attorney practicing uncontrolled discrimination in the

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110 See id. at 363-64.

111 See Fukurai et al., supra note 10, at 63-68.

112 See Van Dyke, supra note 9, at 85-97.

113 See Strauder v. West Virginia, 100 U.S. 303, 305 (1879).

114 Batson v. Kentucky, 476 U.S. 79, 85 (1986) (quoting Akins v. Texas, 325 U.S. 398, 403 (1945)).

115 Id. at 85 n.6 (emphasis added) (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

116 One widely cited comment on this phenomenon comes from Albert Alschuler. "[W]ere the luck of the draw to yield a jury, a jury panel, or even five consecutive jury panels composed entirely of wealthy Republican women golfers, their selection probably would not violate the Constitution." Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 185 n.127 (1989).

117 See Abramson, supra note 90, at 105-12 (noting that juries continued to be almost entirely white).

exercise of peremptory challenges.[118] Although each jurisdiction employs somewhat different methods and criteria, litigants generally select petit jurors through a system of strikes. Actually, it is a misnomer to say that litigants select jurors. Litigants merely have the power to eliminate those jurors who have proven themselves to be biased, through "for cause" strikes, or those whom the litigants feel are in some way undesirable, through peremptory strikes. After receiving an opportunity to question the venirepersons during voir dire,[119] both the litigants and the court are allowed to strike venirepersons perceived to have some sort of clear incompetence or bias relevant to the case.[120] These strikes are called "for cause" and generally are unlimited.[121] In addition, every United States jurisdiction, state and federal, gives litigants a limited number of peremptory strikes.[122] Unlike for cause strikes, peremptory strikes require no showing by the striking party of bias or incompetence in the venireperson.[123] Instead, these strikes allow litigants to eliminate potential jurors who, for some unspoken reason, are considered detrimental to the litigant.[124] Although no constitutional right to the peremptory strike exists, the Supreme Court has noted the peremptory challenge's longstanding importance to the American judicial system's notion of impartiality and fair-

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118 See id.

119 Loosely translated as "to speak the truth," voir dire is the process of questioning venirepersons to gain the information necessary to exercise "for cause" strikes and peremptory challenges. The process usually takes place in one of two types of procedures: sequential or struck selection. In sequential selection, a number of venirepersons equal to the size of the jury are brought into the courtroom and questioned. After each individual is questioned, attorneys may either register a challenge for cause or exercise a peremptory challenge against the venireperson. This continues until both sides are out of peremptory challenges or express their satisfaction with the jury. In struck selection, the group brought in for questioning equals the total of the size of the jury and the aggregate number of peremptory challenges each side has available.

Federal judges have near complete discretion in the procedure followed during voir dire. See Fed. R. Crim. P. 24(a) and Fed. R. Civ. P. 47(a). State courts generally set more specific requirements. See, e.g., Minn. R. Crim. P. 26.02 (1997). Direct questioning by the attorneys, though rarely permitted in federal court, is common in state courts. For more detailed discussion, see generally Alschuler, supra note 116, at 157-63; Barbara Allen Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545 (1975).

120 See generally Van Dyke, supra note 9, at 139-75.

121 See id. at 140. Instances where a potential juror would be struck for cause include where that individual has a felony conviction, is a potential witness in the defendant's trial, or knows the defendant or victim. See Karen M. Bray, Reading the Final Chapter in the Story of Peremptory Challenges, 40 UCLA L. Rev. 517, 519 (1992).

122 See Van Dyke, supra note 9, at 145-51 (defining peremptory challenges and explaining how they historically have been used).

123 See id. at 146.

124 See William Forsyth, History of Trial by Jury 175-76 (1852).

ness.[125] Until 1965, the Supreme Court placed no restrictions on its use.[126] The Court's first move toward expanding equal protection to include limits on peremptory challenges came that year with *Swain v. Alabama*.[127]

In *Swain*, the Supreme Court held that use of peremptory strikes systematically to eliminate African American jurors on the basis of their race violated the equal protection rights of both the eliminated juror and the criminal defendant.[128] The Court strictly limited its holding by stating that it was not a violation of equal protection to eliminate jurors on the basis of race for a particular case.[129] As the Court wrote: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged."[130]

The high standard created by this decision did little to provide relief.[131] While it allowed challenges for consistent discrimination, the litigants' ability to place minorities on juries changed little.

The next significant decision related to peremptory challenges came in *Batson v. Kentucky*.[132] As the Supreme Court stated in *Batson,* the Equal Protection Clause guarantees that a jury's members "are selected pursuant to nondiscriminatory criteria."[133] In doing so, the Court explicitly prohibited a prosecutor from using a peremptory strike for the purpose of removing a juror solely because he or she was African American.[134] *Batson* overruled *Swain* with regard to the burden of proof for showing discriminatory use of peremptory strikes. Defendants were no longer required to show systematic discriminatory use of peremptories, as *Swain* demanded; under *Batson*, litigants

125 See, e.g., Batson v. Kentucky, 476 U.S. 79, 120-21 (1986) (Burger, C.J., dissenting) ("Peremptory challenges have a venerable tradition in this country . . . [and have] long been regarded as a means to strengthen our jury system"); Swain v. Alabama, 380 U.S. 202, 214-20 (1965) (recounting history of peremptory challenges and noting "long and widely-held belief that peremptory challenge is a necessary part of trial by jury").

126 See *Swain*, 380 U.S. at 219 ("The denial or *impairment* of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice.") (emphasis added) (citations omitted).

127 380 U.S. 202 (1965).

128 See id. at 223-28.

129 See id. at 222.

130 Id. at 223.

131 See Abramson, supra note 90, at 134 ("In the two decades following *Swain*, not a single federal court found use of peremptory challenges to violate the *Swain* standards.").

132 476 U.S. 79 (1986).

133 Id. at 85-86.

134 See id. at 89.

only were required to show discriminatory use in their particular case.[135] As the Court noted in *Batson*:

> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.[136]

C. *Expansion of* Batson

Since that decision, the Supreme Court has extended the *Batson* restriction to civil litigants[137] and criminal defendants.[138] The Court also has said that whites, as well as African Americans, have standing to bring *Batson* challenges[139] and that peremptory challenges based upon gender are unconstitutional as well.[140] Given this expansion, several commentators believe that peremptory challenges based on other distinctive classes receiving heightened equal protection scrutiny, such as those defined by national origin and religion, also will be ruled unconstitutional.[141] The Court in *Batson* stated that peremptory strikes of African American jurors harm the equal protection interests of both the excluded juror and the litigant.[142] As the Court has expanded *Batson*, it has placed the interest of a particular juror to participate in the judicial system ahead of the interest of litigants to secure "the most favorable juries possible."[143] This shift, from the equal protection rights of the litigants to the equal protection rights of

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135 See id. at 92-93.

136 Id. at 89 (quoting United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976)).

137 See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

138 See Georgia v. McCollum, 505 U.S. 42 (1992).

139 See Powers v. Ohio, 499 U.S. 400 (1991). But see Holland v. Illinois, 493 U.S. 474, 487-88 (1990) (holding that white defendant's Sixth Amendment right to trial by impartial jury was not violated by prosecutor's allegedly discriminatory use of peremptory challenges).

140 See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

141 This is because the *Batson* line of cases is based on typical equal protection jurisprudence. That is, any state action relying on a suspect classification is afforded heightened scrutiny and typically rendered illegitimate. See, e.g., Melilli, supra note 7, at 455 n.61; Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum. L. Rev. 725, 764-66 & nn.172-79 (1992).

142 Batson v. Kentucky, 476 U.S. 79, 85-87 (1986).

143 See Melilli, supra note 7, at 499. This is somewhat deceptive as the only constitutional right is to an impartial jury. See *Holland*, 493 U.S. at 480 (emphasizing that defendant was not entitled to representative jury but to impartial jury). Of course, the constitutional rights of the individuals serving on the jury will be placed above the litigants' legitimate, but not constitutionally mandated, interests in securing a favorable jury in the particular case.

the juror,[144] will likely lead the Supreme Court to invalidate the use of peremptory challenges by racial minorities to strike whites from juries.[145] Because racial minorities can employ this tool to ensure some minority representation on their juries,[146] this expansion most worries those concerned with ensuring some measure of racial diversity on jury panels:

> Indeed, in the next case before the Court, it likely will rob the African American defendant of his or her only tool to increase minority participation on a jury: the exercise of peremptory challenges to take race into account. Thus, the harm caused by the color-blind logic may already have devoured any benefit perceived by its well-intentioned theorists.[147]

As Justice Thomas noted in his concurring opinion in the case expanding *Batson* restrictions to criminal defendants: "[B]lack criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes."[148]

D. Batson *in Practice*

Despite its noble effort to eradicate racism from the jury pro-

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[144] See Melilli, supra note 7, at 455 ("The extension of *Batson* to gender is consistent with the premise that it is the right of potential jurors which has assumed prominence in the *Batson* analysis.").

[145] In his dissent in Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), Justice Scalia predicted that:

> The effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the *defendant* [from exercising race-based challenges]—so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible.

Id. at 644 (Scalia, J., dissenting). Cf. Government of the Virgin Islands v. Forte, 865 F.2d 59, 64 (3d Cir. 1989) (holding that white defendant may raise *Batson* objection to peremptory challenges against white jurors); Echlin v. LeCureux, 800 F. Supp. 515, 524 (E.D. Mich. 1992) (finding *Batson* violation where prosecutor challenged white jurors in case involving white defendants' attempted murder of African American victim), rev'd on other grounds, 995 F.2d 1344 (6th Cir. 1993).

[146] See Brand, supra note 2, at 616 (stating that elimination of peremptory strikes based on race "diminishes the effectiveness of the few tools minorities have to guarantee their presence on juries"). In her dissent in Georgia v. McCollum, 505 U.S. 42 (1992), Justice O'Connor wrote: "Using peremptory challenges to secure minority representation on the jury may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury." Id. at 68 (O'Connor, J., dissenting).

[147] Brand, supra note 2, at 619.

[148] *McCollum*, 505 U.S. at 60 (Thomas, J., concurring).

cess,[149] *Batson* largely has failed in its mission.[150] The failure first results from the narrow focus of the protection. By addressing only the final step of jury selection, *Batson* concentrates too much attention on the most subjective stage of a complex process. Unlike earlier parts of the selection process, peremptory challenges and petit jury selection focus on individuals and their relative merits. Separating discrimination from legitimate differentiation is rather simple when groups are excluded wholesale. The same separation becomes quite difficult when the choice made is among individuals.

The problem is exacerbated by the choice of remedy. Establishing a *Batson* violation results in the inclusion of the challenged venireperson on the jury (if the violation is enforced in the trial court) or by the granting of a new trial (if the violation is enforced by an appellate court). These penalties do not adequately discourage the discriminatory use of peremptory challenges. The costs of a *Batson* violation do not accumulate against the discriminating litigant, but rather diffuse over the justice system and the general public. In contrast, the benefits of a *Batson* violation, whether perceived or real, accrue very directly to the discriminator through a more "beneficial" jury.

The failure also manifests itself through the complex and inefficient procedure necessary to challenge the use of peremptory challenges. The requirements to petition for a *Batson* challenge, and the broad allowance for rebuttal, come close to creating a presumption that the peremptory was exercised properly. Courts require petitioners to establish a prima facie case of purposeful discrimination by showing that the other party's pattern of strikes against a group of potential jurors was sufficient to show purposeful discrimination.[151] Once a prima facie case is established, courts then allow the challenged party to defeat the claim by offering "permissible racially neutral selection criteria."[152] Trial courts have significant latitude in

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149 Justice Marshall called the decision a "historic step toward eliminating the shameful practice of racial discrimination in the selection of juries." Batson v. Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring).

150 See, e.g., Melilli, supra note 7, at 503 (concluding that *Batson* "is almost surely a failure").

151 See *Batson*, 476 U.S. at 93-97.

152 Id. at 94. Cf. Hernandez v. New York, 500 U.S. 352, 372 (1991) (upholding peremptory strikes of Latinos in case involving in-court Spanish interpreter where prosecutor was concerned that jurors might substitute their own translations of key witness testimony for that of interpreter). As the Court later noted, the standard "is not a reason that makes sense, but a reason that does not deny equal protection." Purkett v. Elem, 514 U.S. 765, 769 (1995). This leaves room for the acceptance of a whole range of explanations that, while not violating equal protection, are little more than clever masks for discrimination. See Felice Banker, Eliminating a Safe Haven for Discrimination: Why New York Must

accepting any proffered explanation. Determination of what constitutes an acceptable explanation is entitled to "great deference."[153] Attorneys take advantage of this, presenting a wide range of justifications.[154] A state appeals court recently wondered "if the reasons can be given without a smile."[155]

The general lack of success by parties seeking to invalidate the exercise of peremptory challenges further illustrates the permissiveness of the neutral criteria standard. In an exhaustive study of every published decision relating to a *Batson* challenge in federal and state courts from April 30, 1986 (the date of the *Batson* decision) through the end of 1993, Professor Kenneth Melilli discovered that only 17.59% of the parties making *Batson* challenges had been successful.[156] Melilli discovered that while *Batson* challengers were able to establish a prima facie case 62.23% of the time,[157] courts accepted the responding party's neutral explanation nearly 78% of the time.[158]

While not conclusive, these numbers begin to demonstrate the "futility of simultaneously attempting to preserve the essential character of the peremptory challenge" while "prohibit[ing] the exercise of peremptory challenges on the basis of certain group stereotypes."[159] *Batson* has failed to eradicate the use of race-based peremptory

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Ban Peremptory Challenges from Jury Selection, 3 J. L. & Pol'y 605, 622-23 (1995) (suggesting that attorneys can satisfy *Batson* requirement by substituting race-neutral explanations for discriminatory ones).

153 *Hernandez*, 500 U.S. at 369.

154 One court has presented a list of explanations that have been accepted as neutral in Illinois:

> [T]oo old, too young, divorced, "long, unkempt hair," free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye contact with defendant, "lived in an area consisting predominantly of apartment complexes," single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same "age bracket" as defendant, deceased father, and prospective juror's aunt receiving psychiatric care.

People v. Randall, 671 N.E. 2d 60, 65-66 (Ill. App. Ct. 1996) (citations omitted).

155 Id. at 65.

156 See Melilli, supra note 7, at 459 tbl.B-1. In addition, Melilli discovered that 10.07% of the complainants were successful in federal court, while 18.78% were successful in state court. Id. at 466 tbl.F-2.

157 Id. at 460 tbl.C-1. Melilli concluded that "it is relatively easy for a *Batson* complainant to establish a prima facie case, but that it is much more difficult ultimately to prevail on a *Batson* challenge." Id. at 460.

158 Id. at 461 tbl.D-1. See Brand, supra note 2, at 584 (stating that "federal courts rarely find *Batson* violations and overwhelmingly accept proffered 'neutral reasons'").

159 Melilli, supra note 7, at 503.

strikes to eliminate minorities.[160] As Justice Marshall accurately predicted, *Batson* "will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[161]

II
PROPOSED CHANGES TO JURY SELECTION METHODS

Despite not being a constitutionally guaranteed right, the peremptory challenge has been viewed as a necessary part of impartiality:

> The function of the challenge is not only to eliminate the extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way" justice must satisfy the appearance of justice.[162]

The peremptory challenge has an impressive pedigree as a perceived necessity to a fair trial.[163] When and if this system of peremptory challenges is replaced, as many commentators have suggested it should be,[164] it must be replaced in a fashion that ensures that litigants believe their trial is fair. With this goal in mind, commentators have offered the following proposals to replace or supplement the litigants' right to peremptory strike.

The proposed methods include two broad categories: affirmative inclusion and affirmative selection. The affirmative inclusion methods guarantee minority representation in various ways. They resemble traditional affirmative action methods in other areas by requiring specific levels of participation by nonmajority citizens. By making race the paramount consideration in jury assembly, affirmative inclusion

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160 See Morehead, supra note 17, at 633 ("Despite the *Batson* rule's noble purpose, it cannot prevent clever lawyers from using peremptory challenges to strike potential jurors based upon impermissible rationales so long as they pretend to use other, permissible bases.").

161 Batson v. Kentucky, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring). But see Andrew G. Gordon, Note, Beyond *Batson v. Kentucky*: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection, 62 Fordham L. Rev. 685, 713 (1993) (proposing that American Bar Association formulate ethical rule prohibiting discrimination during jury selection without proposing that peremptory challenges be eliminated entirely).

162 Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting In re Murchison, 349 U.S. 133, 136 (1955)); see also Lewis v. United States, 146 U.S. 370, 376 (1892) ("The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury.").

163 See *Swain*, 380 U.S. at 221 ("This Court has held that the fairness of trial by jury requires no less.").

164 See, e.g., Brand, supra note 2; Melilli, supra note 7.

methods became constitutionally suspect after *Adarand Constructors v. Pena*[165] and *Bush v. Vera*.[166]

The affirmative selection methods are variants on peremptory challenges. Their proponents believe that, by choosing rather than striking jurors, the problems of the selection system can be mitigated. An unmodified system of affirmative selection, however, precludes any removal.

A third camp of commentators has suggested the elimination of litigant participation after challenges for cause. By restricting selection to for cause strikes, the jury becomes as representative as randomness allows.

A. Racial Matching

Under this system, every African American, Native American, and Hispanic American defendant would be entitled to the inclusion of three "racially similar" jurors on the sitting jury.[167] This system's main strength is an assurance of minority representation. The basic weaknesses of the protection offered are twofold. First, its protections are too narrow because it provides minority representation only when the defendant is a minority. Consequently, this system does not guarantee minority representation where a majority defendant is accused of committing a crime against a minority.[168] Second, it would be difficult for courts to determine membership in a protected group and what constitutes a group entitled to similar protection.[169] Additionally, the reliance on race raises constitutional issues.

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165 515 U.S. 200 (1995) (holding that all governmental race classifications must be analyzed under strict scrutiny).

166 517 U.S. 952 (1996) (holding that race-conscious redistricting must be analyzed under strict scrutiny). Even assuming, as Professor Alschuler argues, that "juries are different," Alschuler, supra note 87, at 717, affirmative inclusion supports defining the citizenry by their differences rather than commonalties. This raises the issue of jurors seeing themselves as representing their defined group rather than society as a whole.

167 See Sheri L. Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1698-99 (1985). A more radical proposal, cited by Johnson, suggested the use of all-black juries to try black defendants. See, Harry A. McDougal III, Note, The Case for Black Juries, 79 Yale L.J. 531, 548 (1970) (arguing for reorganizing jury districts or instituting proportionality requirement to guarantee black majority juries in some areas). The requirement of racially homogenous juries would only multiply the problems created by less broad inclusion methods.

168 See Alschuler, supra note 87, at 731 (noting that most troublesome verdicts in our nation's history have occurred when defendant is white).

169 Not only does this require determination of the defendant's class membership, but it allows for challenge of the selected jurors. What outcome when the jurors are of "mixed" heritage? Must a defendant with an African father and half-Cherokee mother have three jurors of similar background? Or is any American Indian tribal affiliation sufficient? Or do we rely on the defendant's judgment? The answers to these questions are not readily apparent.

The Supreme Court's holdings in the recent Congressional districting cases[170] make racial matching particularly unsound. The similarities between voting and jury service are numerous and relevant to individual rights in both areas.[171] Reliance on race as the determinative (or even principal) factor in forming voting districts has been struck down.[172] Similarly, using race as a determinative factor in who will sit on a jury becomes at least highly suspect.[173]

B. One-Half Representation

Historically referred to as the jury of *de medietate linguae*, this jury "of the half tongue" assures a defendant that half of the sitting jury will be persons of the same minority background as the defendant.[174] This ancient method dates back to the 12th century, when

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The determination also raises issues with nonracial classifications. For example, is a deaf defendant entitled to a jury that includes members conversant in American Sign Language when most of the witnesses are also deaf and the mannerisms speak a great deal to individual credibility? One court has said no. See Mike Kataoka, No Special Jury for Deaf; Judge: Rape Case Panel Needn't Know Signing, Press-Enterprise (Riverside, Calif.) Oct. 16, 1996, at A1, available in 1996 WL 12702539 (discussing unpublished Riverside Superior Court case in which judge ruled that rape trial in which victim, defendant, and key witnesses were deaf would not be heard by jury fluent in American Sign Language).

170 See *Bush*, 517 U.S. at 952 (invalidating majority-minority congressional districts designed to satisfy Voting Rights Act); Miller v. Johnson, 515 U.S. 900 (1995) (same); Shaw v. Reno, 509 U.S. 630 (1993) (same); see also Shaw v. Hunt, 517 U.S. 899 (1996) (finding districting plan not narrowly tailored to serve compelling state interest and in violation of Equal Protection Clause); Louisiana v. Hays, 515 U.S. 737 (1995) (holding that citizens who do not live in district that was primary focus of racial gerrymandering claim lacked standing).

171 As the two forums through which the public has direct influence on the shape of governance, the protections offered each by the Constitution can be seen as substantially coextensive. See, e.g., Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1172-73 (1995) [hereinafter Amar, Reinventing Juries] (arguing that jury idea was central to concept of popular self-government embodied in Bill of Rights and Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments); Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 218-20 (1995) (noting references to importance of jury service to democracy contained in writings of De Tocqueville and Jefferson and in Anti-Federalist papers).

172 See *Miller*, 515 U.S. at 900 (holding that use of race as "predominant factor" in shaping districts violates equal protection); *Shaw*, 509 U.S. at 630 (holding redistricting based on race violates equal protection).

173 This suspicion is no less significant even if one follows Professor Alschuler's suggestion to allow more latitude in the assembly of a jury. Professor Alschuler argues that the special position of the jury in our governance structure places affirmative demands on the state to provide for as full participation as possible. See Alschuler, supra note 87, at 717-23. Cf. Amar, Reinventing Juries, supra note 171, at 1178-81 (suggesting, among other reforms, implementation of annual mandatory jury service for all citizens).

174 See Lewis H. LaRue, A Jury of One's Peers, 33 Wash. & Lee L. Rev. 841, 848-51 (1976) (describing historical use of mixed juries in English commercial and criminal cases involving Jews and alien merchants, and in early American cases involving immigrants); Deborah A. Ramirez, The Mixed Jury and the Ancient Custom of *de Medietate Linguae*:

English charters promised Jews that disputes between Jews and English subjects would be resolved by juries of half Jews and half Englishmen.[175] This method was used later to assure representation by Indians on jury trials in American courts.[176] *De medietate linguae* is still used in Canadian courts to guarantee a jury with members who speak the defendant's language. Despite its historic roots, this method suffers from the same shortcomings as racial matching. That is, it does not assure minority representation on juries where the defendant is white, nor does it give courts a workable definition of "distinctive" groups. Further, it is no more constitutionally defensible than other methods of racial matching.[177]

C. Hennepin County Grand Jury Method

This experimental method is being used in a Minnesota county to ensure minority representation on its twenty-three member grand juries. This method operates on an ad hoc basis whereby the court asks potential jurors for enough information on the jury summons to determine the juror's race and then, after randomly selecting twenty-one grand jurors from a pool of fifty-five, examines how many of the chosen jurors are minorities. If one or none of the selected jurors is a minority, the two final grand jurors will be selected from a pool of minority-only jurors. If two or more members of the original twenty-one selected jurors are minorities, then the final two are selected randomly.[178]

The strengths of this system are its flexibility and across-the-board assurance of minority representation regardless of the defendant's race. However, given the smaller numbers of jurors at the trial court level, and the accompanying interests of the adversaries, this

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A History and a Proposal for Change, 74 B.U. L. Rev. 777, 783-85 (1994) (discussing ancient application of *de medietate linguae* in medieval England to Jews, who were considered "aliens in race, religion, and culture," and to Italian and German merchants); Daniel W. Van Ness, Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases, 28 J. Marshall L. Rev. 1, 35-37 (1994) (describing use of juries *de medietate linguae* for civil and criminal matters involving Jews, burgesses, university scholars, and clergymen); see also Peter J. Nelligan & Harry V. Ball, Ethnic Juries in Hawaii, 1825-1850, 34 Soc. Process in Hawaii 113 (1992) (describing use of mixed juries to resolve disputes between natives and foreigners in 19th century Hawaii).

175 See Alschuler, supra note 87, at 713-14.

176 See, e.g., United States v. Cartacho, 25 F. Cas. 312, 312-13 (D. Va. 1823) (No. 14,738).

177 See supra notes 168-73 and accompanying text. For discussion of racial matching in adoption and child custody, see R. Richard Banks, The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action, 107 Yale L.J. 875, 896-913 (1998); Jim Chen, Unloving, 80 Iowa L. Rev. 145, 163-72 (1994); Jim Chen, Untenured but Unrepentant, 81 Iowa L. Rev. 1609, 1612-13 (1996).

178 See Alschuler, supra note 87, at 707-11.

method is less likely to be workable. This method, like the two above, also suffers from the stigma of quotas and implicates the same constitutional problems as the previous methods.[179]

D. Affirmative Selection and Peremptory Inclusion

Commentators have proposed allowing litigants affirmatively to select members of the jury, as contrasted with the existing methods of striking potential members, although questions remain as to the constitutionality of such methods. Affirmative selection methods are based upon both parties, following voir dire, submitting a list of preferred jurors.[180] The names that appear on the lists of both litigants will be included on the jury, with subsequent jurors being selected alternately from both lists.[181] This method gives both parties increased input into the makeup of juries,[182] but eliminates the flexibility of striking particularly nettlesome jurors from the panel.[183] This is probably the most significant weakness of the approach. Eliminating the power to strike other than for cause may jeopardize the litigants' faith in the legitimacy of the jury.[184]

Another variation of affirmative selection allows litigants to choose a portion of the venire.[185] The proposal permits both litigants to select a number, equal to the opposition's number of peremptory challenges, of preferred venirepersons out of the jury pool at large. Random selection from the same jury pool would fill out the venire.

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179 This is, however, Professor Alschuler's preferred method for realizing the participation of minority groups and providing defendants fair trials. See id. at 712-13.

180 See Tanya E. Coke, Note, Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries, 69 N.Y.U. L. Rev. 327, 379-86 (1994) (explaining process of affirmative selection and advocating its use as alternative means of jury selection). Ms. Coke is the most recent proponent of the affirmative selection system first proposed by Tracey Altman. See Tracey L. Altman, Affirmative Selection: A New Response to Peremptory Challenge Abuse, 38 Stan. L. Rev. 781, 806-08 (1986). Professor Hans Zeisel applied the system to capital cases. See Hans Zeisel, Affirmative Peremptory Juror Selection, 39 Stan. L. Rev. 1165, 1170-71 (1987). Professor Zeisel's proposal combines use of peremptory challenges with affirmative selection.

181 See Coke, supra note 180, at 379. Coke also presents some hybrid methods that allow both peremptory strikes and affirmative selection. See id. at 384.

182 See Cammack, supra note 105 ("The only way to ensure that minority perspectives are heard within the legal system is to give minority participants the affirmative power to seat jurors whose culture and experience are similar to theirs.").

183 But see Coke, supra note 180, at 382 ("[T]he current system [of peremptory strikes] almost certainly exaggerate[s] lawyers' abilit[ies] to spot 'ringers,' and overinvest[s] in the notion of a perfectly impartial juror.").

184 Akhil Amar challenges the validity of this concern. While recognizing attorneys' assertion that the peremptory challenge is a necessity, Professor Amar contends that lawyers and judges use it primarily as a power tool. See Amar, Reinventing Juries, supra note 171, at 1183.

185 See Ramirez, supra note 174, at 805-06.

From that point, selection would proceed exactly as under the current system using a struck jury model. While retaining the familiar peremptory challenge structure, the proposal permits individual definition of the importance of juror characteristics. Retention of the familiar structure also retains the familiar problems. Although it would likely increase minority participation by increasing the number of minority venirepersons, the proposal does nothing new to control discriminatory practices in petit jury selection. Continued reliance on the inefficient regulation of *Batson* is necessary to realize any effect.

Also proposed is a hybrid of peremptory challenges with limited affirmative selection for the defendant.[186] Called peremptory inclusion, the method allows a criminal defendant to select a limited number of jurors without the prosecutor having the power to strike them. Essentially a restricted version of affirmative selection, the proposal suffers from the same shortcomings as ordinary affirmative selection. Additionally, peremptory inclusion creates a strong bias in favor of the defendant. By permitting the defendant to select a number of jurors before the prosecution can exercise any peremptory strikes, the defense effectively eliminates a significant portion of the prosecution's power to strike.

E. Expansion of Voir Dire and Challenges for Cause

A number of commentators have called for the replacement of the peremptory with an expanded voir dire and "for cause" challenge system.[187] The intent is to remove the discriminatory aspects of the peremptory challenge while expanding the identification and removal of truly biased individuals from the jury.[188] The proposals generally include attorney conducted questioning and a more liberal construction of "cause."[189] While this system increases representation by eliminating strikes which are based on race but have a reason sufficient to

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186 See Donna J. Meyer, A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection, 45 Case W. Res. L. Rev. 251, 280-81 (1994).

187 See Brent J. Gurney, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 Harv. C.R.-C.L. L. Rev. 227, 257 (1986). Mr. Gurney advocates a system that eliminates peremptory challenges but grants the presiding judge substantial latitude in determining what constitutes adequate cause. The result is essentially a stronger version of the *Batson* protection with justification offered pre- rather than post-strike. In contrast, Professor Amar has recently called for the elimination of peremptory challenges and a significant *tightening* of the requirements of a cause strike. Like Mr. Gurney, Professor Amar feels that the closer the selection process resembles complete random selection, the better for society's interests. See Amar, Reinventing Juries, supra note 171, at 1182-83.

188 See Gurney, supra note 187, at 244-46 (arguing that peremptory challenges allow lawyers to distort representation of community's attitudes regarding conviction or acquittal of defendants in discriminatory fashion).

189 See id. at 257, 268-74.

pass the *Batson* test, it fails to address the concern of having a jury that the litigants believe to be fair. It also still fails to provide an effective method of inclusion, the principal goal of most reform efforts. Without presenting a uniform standard for judges to apply, the method further risks an expansion of the cause challenge to the point where justification is little more than that required to rebut a *Batson* challenge.[190] Developing a rather strict standard for the use of the challenge risks a collapse of the legitimacy of the jury in the eyes of the litigants and the public.

III
CUMULATIVE VOTING

In light of the difficulty traditional jurisprudence and current proposals have with dealing with discrimination in jury selection, we propose a substantial change in approach. The most negative outcome of discriminatory practices is the erosion of the belief in the justness of the whole system. Drawing on the affirmative jury selection concept and borrowing from corporate law, we suggest the adoption of a modified system of cumulative voting for jury selection. An introduction to the concept of cumulative voting and a brief discussion of cumulative voting's application to politics precedes our proposal.

A. Cumulative Voting in the Corporate Context

Cumulative voting in the corporate context provides minority shareholders with an opportunity to elect at least a portion of an entity's directors.[191] Ordinary straight line voting, on the other hand, permits majority shareholders to elect all of the corporation's directors.[192] The differences between the two methods can be summarized as follows:

> Under straight voting each shareholder votes the number of shares he owns for as many candidates as may be elected. If two directors are to be elected, the shareholder may vote the number of shares he owns for each of the two candidates. Under this procedure, the man who owns a majority of the shares can elect the entire board of directors. Under cumulative voting, which is a procedure designed

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190 Choosing a standard establishing who can be challenged for cause is at least as muddled as determining what *Batson* explanations are pretextual. Both necessarily rely on subjective judgments based heavily on the courtroom demeanor of the venireperson.

191 See, e.g., Roanoke Agency, Inc. v. Edgar, 461 N.E.2d 1365, 1367 (Ill. 1984) ("[C]umulative voting was designed to enable minority stockholders of a corporation to gain representation on its board of directors in proportion to their voting strength.").

192 See, e.g., Givens v. Spencer, 209 S.E.2d 157, 157-58 (Ga. 1974) (allowing shareholder to cast his shares of voting stock for each corporate director to be elected, thereby electing all directors of corporation).

> to give some control to minority shareholders, each shareholder gets a block of votes equal to the number of shares he owns multiplied by the number of directors to be elected. The shareholder may then cast his entire block for one candidate or may distribute his votes among any number of candidates in whatever proportion he desires.[193]

To demonstrate, consider a corporation with five outstanding shares of stock. Shareholder A owns three shares and Shareholder B owns two. A five-member board of directors is to be elected. Under the straight line method, Shareholder A would get three votes on each of the five board positions while Shareholder B would get just two. Obviously, Shareholder A would be able to elect each member of the board. Under cumulative voting, however, Shareholder A would get fifteen total votes (three shares multiplied by five board positions), while Shareholder B would get ten total votes (two shares multiplied by five board positions). Although minority representation is not assured, Shareholder B has the ability to select one or more board members if she votes intelligently. If B places all 10 of her votes on one board member, it would force Shareholder A to place 11 of her 15 votes on that seat. Although this would leave Shareholder A with enough votes (four) to select the remaining seats, it is an unlikely occurrence given that A will not know how B is planning to use her votes.[194] Consequently, it is unlikely that A will place 11 votes on one seat as it would open the door for B to elect four of the five board members.[195]

B. Cumulative Voting in the Political Process

Best known today as a method for electing corporate directors, cumulative voting actually originated in the political process. Joseph Medill, the editor of the Chicago Tribune, grew concerned that Republicans were the majority in most of the Illinois legislative districts in the north, and that Democrats were the majority in most of the Illinois legislative districts in the south.[196] As a delegate to the

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193 Id. at 157.

194 For an excellent explanation of cumulative voting, see Richard S. Dalebout, Cumulative Voting for Corporation Directors: Majority Shareholders in the Role of a Fox Guarding a Hen House, 1989 BYU L. Rev. 1199.

195 Well-known formulas inform the minority (and the majority) how to allocate votes for maximum effect. The greater the number of directors to be elected, the smaller the minority block necessary to elect one director. See, e.g., Edward R. Aranow & Herbert A. Einhorn, Proxy Contests for Corporate Control 331-33 (2d ed. 1968).

196 See Dalebout, supra note 194, at 1203-04; Jeffrey N. Gordon, Institutions as Relational Investors: A New Look at Cumulative Voting, 94 Colum. L. Rev. 124, 142 n.44 (1994) (presenting brief history of cumulative voting in United States).

state's constitutional convention, Medill, attempting to prevent an exclusion of minority party participation in particular districts, proposed a measure employing cumulative voting in three member districts.[197] The controversial measure was adopted on a popular ballot by a relatively narrow margin in 1870.[198] The Illinois legislature was subsequently elected by cumulative voting for over a century. Commonly referred to as bullet voting,[199] the process responded well to Medill's concerns about minority party representation. Most districts sent two members of the majority party and one member of the minority to the state legislature. This allowed for a nearly proportional party representation in the legislature.[200]

Flaws did emerge. In many districts, the voters were left without any real choice. In as many as half the districts, the two parties would only nominate a total of three candidates.[201] Although reaffirmed by the electorate no less than twice,[202] cumulative voting was eventually repealed by popular vote in 1980. The initiative to eliminate cumulative voting was paired with a one-third decrease in the size of the state assembly.[203]

Apart from Illinois, cumulative voting has, until recently, been used almost exclusively in the corporate setting.[204] The Supreme Court decisions limiting the ability of governments to draw districts for the express purpose of ensuring minority representation in legisla-

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197 See Gordon, supra note 196, at 142 n.44. Medill's inspiration came from Charles Buckalew, a United States Senator from Pennsylvania. Buckalew had a short success with the process in his home state. For a number of years, municipal elections could be run by the cumulative process. Buckalew argued for a much more extensive use of cumulative voting (which he called "free voting"—for the voters' freedom to exercise the votes as they wished) from his position as the chairman of the Senate Select Committee on Representative Reform. See generally George H. Hallett, Jr. & Clarence G. Hoag, Proportional Representation 161 (1940) (calling urgently for political reform and describing proportional representation as key to all democratic institutions).

198 See Gordon, supra note 196, at 142 n.44.

199 So named for the ability to exercise all three votes—a so called "bullet"—for one candidate.

200 See David H. Everson, The Effect of the "Cutback" on the Representation of Women and Minorities in the Illinois General Assembly, in United States Electoral Systems: Their Impact on Women and Minorities 111, 112 (Wilma Rule & Joseph F. Zimmerman eds., 1992).

201 See id.

202 Illinois voters once rejected a repeal of cumulative voting as part of a proposed new state constitution in 1920 and specifically retained cumulative voting as part of an approved new state constitution in 1970. See id.

203 A legislative pay increase may have been the real object of voter disfavor. See id.

204 In fact, Illinois incorporated within its constitution a provision making cumulative voting of corporate directors mandatory. See Wolfson v. Avery, 126 N.E.2d 701, 708-10 (Ill. 1955).

tive bodies,[205] however, has renewed interest in the use of cumulative voting beyond the boardroom. Certain commentators have proposed cumulative voting as a substitute for the current, constitutionally suspect system of race-based districting.[206] Although the current system may not violate the Equal Protection Clause, those commentators have argued that cumulative voting is a better method for assuring minority representation in the political process.[207] The effectiveness of the system depends primarily on the strength of a group's interest in choosing a particular representative.[208]

Even before the Court's recent districting decisions, some jurisdictions began to employ cumulative voting for municipal and county elections.[209] Perhaps the most extensive use has been in Alabama. As a settlement of federal lawsuits against a number of local governance units, a district court in Alabama issued a consent decree establishing cumulative voting or limited voting plans.[210] The plans were imple-

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205 See, e.g., Shaw v. Reno, 509 U.S. 630, 649 (1993) (invalidating Congressional redistricting plan in North Carolina seeking to create majority black district, thereby calling into question use of majority-minority districts to satisfy Voting Rights Act requirements).

206 See, e.g., Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy 119-56 (1994). Professor Guinier devotes an entire chapter to the issue of cumulative voting and how it could replace race-based districting. Variants have also been proposed, including cumulative voting within less than state-wide districts. See Samuel Issacharoff & Richard H. Pildes, All for One, New Republic, Nov. 18, 1996, at 10 (discussing proposal by Center on Voting and Democracy for dividing North Carolina into three districts for cumulative voting).

207 See Guinier, supra note 206, at 119 (noting that cumulative voting "embodies one-person, one-vote, one-value in a way that districting systems do not").

208 See id. at 149. Professor Guinier writes:

> Under a modified at-large system, each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences. Depending on the exclusion threshold, politically cohesive minority groups are assured representation if they vote strategically.

Id. The exclusion threshold is the minimum number of minority group members required to guarantee representation in a cumulative voting system. See id. at 277-78 nn.75-76.

209 For an analysis of cumulative voting in one municipal election see Richard L. Engstrom et al., Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico, 5 J.L. & Pol. 469, 480-95 (1989). Alamogordo, New Mexico adopted cumulative voting to settle a vote dilution suit challenging the use of at-large elections. See id. at 480. The order is recorded in Vega v. City of Alamogordo, Civ. No. 86-0061-C (N.M. Dist. Ct. Mar. 2, 1987). See Engstrom et al., supra, at 480 n.44.

210 See Dillard v. Chilton Bd. of Educ., 699 F. Supp. 870, 876 (M.D. Ala. 1988) (finding cumulative voting schemes an acceptable remedy for violations of the Voting Rights Act); Dillard v. Town of Cuba, 708 F. Supp. 1244, 1245 (M.D. Ala. 1988) (upholding use of two "limited voting" schemes to redress violations of Act). Limited voting is a procedure where each voter has a number of votes less than the number of seats to be filled. Limited voting, like cumulative voting, lowers the "threshold of exclusion." To assure election of a representative in cumulative voting, a minority voting bloc must consist of a percentage of the electorate exceeding the ratio 1/(1+R) where R is the total number of representatives to be elected.

mented to mitigate the problems of vote dilution in the "black belt" region of Alabama. Vote dilution in the political context[211] is essentially the same problem faced by minority shareholders in the corporate context. The election of at-large boards and commissions under a straight line voting system excludes all minority representation.[212] The traditional solution has been to create majority-minority districts.[213] For the black belt areas of Alabama, districting is not a viable option as the large minority population is too diffuse and geographically intertwined with the majority population[214] to create contiguous majority-minority districts.[215]

Much like the Supreme Court's jurisprudence regarding jury selection,[216] the Supreme Court's jurisprudence regarding elections has centered on process rather than results. In other words, the Court has not looked at the bottom line. As long as it has considered the *process* to be fair, it has not concerned itself with the fact that minority

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For limited voting, the threshold can be manipulated to a greater degree. Depending on the number of open seats and the number of votes per elector, the threshold percentage can range from the same as under majoritarian voting (if each elector has one vote) to virtually the same as under ordinary cumulative voting (if the number of seats is large and each elector has one less vote than the number of open seats). The formula for determining the exclusion threshold under limited voting is V/(V+R) where V is the number of votes given to each elector and R is the number of representatives to be elected.

211 See Thornburg v. Gingles, 478 U.S. 30, 46-51 (1986) (discussing vote dilution).

212 This assumes that the majority consistently votes the party line—the problem Medill sought to resolve in Illinois.

213 In his concurring opinion in *Holder v. Hall*, Justice Thomas notes that "we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success." 512 U.S. 874, 892 (1994) (Thomas, J., concurring). He argues further that although still "placed beyond question, . . . geographic districting and other aspects of electoral systems . . . are merely political choices." Id. at 911. He then discusses cumulative voting and other proportional representation proposals, concluding they are "simply more efficient and straight-forward mechanisms for achieving . . . [the tacit goals of the Voting Rights Act]." Id. at 912; see also Cane v. Worchester County, 847 F. Supp. 369 (D. Md.), rev'd in part, 35 F.3d 921 (4th Cir. 1994). The district court in *Cane* imposed cumulative voting as a remedy for a Voting Rights Act violation. See id. at 372. The judge selected cumulative voting despite the fact that both parties sought change through traditional districting approaches. See id. at 370. The Fourth Circuit reversed the decision, saying that the adoption of the cumulative voting system was an abuse of discretion. See Cane v. Worchester County, 35 F.3d. 921, 923 (4th Cir. 1994). The opinion laid out a standard for lower courts to apply. See id. at 928. In deciding on an appropriate remedial scheme, a court "must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme or the . . . remedy offered by the legislative body." Id.

214 This was precisely the demographic problem that led to the unconstitutional snake-shaped district in Shaw v. Reno, 509 U.S. 630, 635 (1993).

215 See Richard H. Pildes & Kristen A. Donoghue, Cumulative Voting in the United States, 1995 U. Chi. Legal F. 241, 260.

216 See supra Part I.

groups are underrepresented either in Congress or on a sitting jury.[217] One commentator has argued persuasively that fairness cannot be defined as mere procedural regularity and equal access, but must come from an "active assertion of self-defined interests."[218] Likewise, a litigant's right to an impartial jury cannot be defined by the mere opportunity to draw a jury from an impartial pool, it must come from that "active assertion of self-defined interests." It is to that point that this discussion now turns.

IV
CUMULATIVE VOTING AS AN ALTERNATIVE METHOD OF JURY SELECTION

Thus far, this Article has reviewed the current system of impaneling juries through the use of peremptory strikes. It has examined the inadequacies of existing safeguards, imposed by *Batson v. Kentucky*,[219] against the discriminatory use of peremptory strikes, and the shortcomings of several alternative proposals for jury selection. The next section presents a new method for impaneling juries which is free of the pitfalls that plague the current system and other alternative proposals.

The jury has a venerable reputation as an institution necessary to our democracy.[220] If we are to preserve the democratic ideal of the jury, the greatest challenge is to vest both the litigants and the public with the belief that the jury's verdict is fair.[221] This belief requires that we maintain faith in the ability of ordinary people to transcend

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217 The Court has applied this concept in other contexts. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (holding that as long as procedures are fair, fact of racially discriminatory impact in capital sentencing does not constitute constitutional harm); Washington v. Davis, 426 U.S. 229, 245-48 (1976) (finding neutral police civil service test constitutional despite disproportionate minority failure rate).

218 Guinier, supra note 206, at 140.

219 476 U.S. 79 (1986).

220 It has been noted that Jefferson felt the jury was more necessary than the franchise to democracy. See, e.g., Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 927 (1994); see also Alexis de Tocqueville, 1 Democracy in America 283 (Phillips Bradley & Francis Brown eds. & Henry Reeve trans., Alfed A. Knopf 1946) (1835) ("The jury system as . . . understood in America seems to me as direct and extreme a consequence of the dogma of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority."); Essays by a Farmer (IV), reprinted in 5 The Complete Anti-Federalist 36, 38 (Herbert V. Storing ed., 1981) ("The trial by jury is . . . more necessary than representatives in the legislature . . . .").

221 See Nancy J. King, The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle, 31 Am. Crim. L. Rev. 1177, 1182 (1994) (arguing that "reforming jury composition in particular cases can improve overall perceptions of the fairness of the jury proceedings").

individual prejudices and render fair judgments based on the facts and law of the case.[222] Without a method of impaneling juries that creates public confidence, the validity of the judgments rendered by juries may well decrease.

While not constitutionally required like impartiality, public trust and overall fairness create the basis for the proper functioning of the criminal justice system.[223] As such, they remain important considerations in the establishment of jury selection procedures. As stakeholders in the criminal justice system, the public's impression of the relevance of representation on juries becomes a legitimate consideration. Litigant investment in the selection system and public perception of fairness contribute substantially to actual fairness. The disproportionately African American jury of the Simpson trial[224] demonstrates litigant sensitivity to public perception and the correspondent influence on jury selection decisions. Preservation of the jury as a decisionmaking body demands a selection system both constitutionally and publicly legitimate. Recognizing the extent to which public perception influences selection invites a new system that allows the jury to retain its public legitimacy.

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[222] Some commentators have noted a developing potential for a crisis of confidence in the jury's legitimacy. In supporting the need for reform, one commentator wrote that "preserving the *appearance* of fairness is an important ingredient of public confidence and legal justice." Coke, supra note 180, at 351. Ms. Coke later notes: "[C]onfidence in the criminal justice system rests as much on the *appearance* of fairness as on the delivery of 'accurate' results." Id. at 362. This equal standing is asserted to be "incontrovertible." Id. See also Nancy J. King, Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection, 68 N.Y.U. L. Rev. 707, 711, 762 (1993) (arguing that maximizing "confidence in the fairness of criminal jury proceedings" is compelling government interest).

[223] See Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in the administration of criminal law . . . is [ ] critical to public confidence in the fairness of the criminal justice system."); Kenneth B. Nunn, When Juries Meet the Press: Rethinking the Jury's Representative Function in Highly Publicized Cases, 22 Hastings Const. L.Q. 405, 414 (1995) (noting jury's representative function confers legitimacy on criminal justice system).

[224] See supra note 53 for the actual jury makeup. Unlike the jury, Los Angeles County is nowhere near two-thirds African American, with only 11.2% being reported as African American in the 1990 census (992,974 of 8,863,164 persons). See United States Bureau of the Census, Los Angles County, California, (visited Apr. 10, 1998) <http://www.census.gov/cgi-bin/datamap/cnty?06=037>. The civil jury, drawn from the pool of a different court district (predominately white Santa Monica) with a less indulgent judge, was initially composed of eight whites, three blacks, one Hispanic and one mixed race nonwhite. See Linda Deutsch, Black Jurors' Dismissals Spur Charges of Bias in Simpson Case, Orange County Register, Oct. 17, 1996, at A19. Neither side used all eight of the peremptory challenges allowed, but both did exercise them on strictly racial lines. Id. A *Batson* challenge was filed, but the judge accepted the plaintiff's justifications. Id.

A. A Framework for Developing a New System

Recent peremptory challenge cases in the Supreme Court[225] demonstrate the widespread discriminatory use of peremptory strikes. Despite continuing questions about the fairness of peremptory challenges, the Court has chosen to regulate rather than eliminate them.[226] Current limitations demand only that the exercise of peremptory challenges not be based on discriminatory criteria.[227] A side effect of the restrictions is a change in the basic nature of peremptory challenges. No longer permitted to exercise peremptory strikes without the need for an explanation, attorneys now may be called upon to offer a neutral explanation for the strike.[228] Situations potentially requiring an explanation have slowly expanded and seem likely to reach more situations in the future.[229] This approach defeats the basic nature of peremptory challenges: allowing the elimination of jurors perceived as partial to the other side but not biased enough to justify for cause removal. Instead of further expansion of the limitations, a new system responsive to the problems of contemporary jury selection should be considered. The new system should preserve the basic power of the peremptory challenge while employing a structural counter to discriminatory usage.

Justifying a new system requires reaching beyond the reasoning used in formulating the current restrictions on the exercise of peremptory challenges. The Court's emphasis on the equal protection rights of venirepersons has overtaken the defendant's rights to a jury trial.[230]

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225 See supra Part I.C. (discussing expansion of *Batson*).

226 See supra Parts I.B. and I.C. (discussing Supreme Court's development of restrictions on exercise of peremptory challenges).

227 See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994) (noting that exclusion "solely because of race or gender" violates equal protection); Georgia v. McCollum, 505 U.S. 42, 59 (1992) ("[T]he Constitution prohibits . . . purposeful discrimination on the ground of race in the exercise of peremptory challenges.").

228 See supra Part I.C. (discussing expansion of *Batson*).

229 See supra Part I.C. Some have suggested that *Batson* protections may soon extend to religion and to disabilities. See Gary C. Furst, Will the Religious Freedom Restoration Act Be Strike Three Against Peremptory Challenges?, 30 Val. U. L. Rev. 701, 705 (1996) (asserting that Religious Freedom Restoration Act creates cause of action that could be used to preclude religion-based use of peremptory challenges); Mary A. Lynch, The Application of Equal Protection to Prospective Jurors with Disabilities: Will *Batson* Cover Disability-Based Strikes?, 57 Alb. L. Rev. 289, 362 (1993) (arguing for extension of *Batson* to secure right to serve on juries for people with disabilities); Angela J. Mason, Discrimination Based on Religious Affiliation: Another Nail in the Peremptory Challenge's Coffin?, 29 Ga. L. Rev. 493, 495-96 (1995) (suggesting that *Batson* protection will soon be extended to prohibit strikes based on religion). But see State v. Davis, 504 N.W.2d 767, 771 (Minn. 1993) (holding that using religious beliefs as basis for striking venireperson allowable under *Batson*).

230 See Melilli, supra note 7, at 455 (noting that extension of *Batson* to gender based strikes corresponds to shift toward protecting jurors' rights). One commentator has specif-

In light of the protections granted defendants by the Constitution, any new system should primarily advance the criminal defendant's right to impartial juries.[231] Still, strict adherence to impartiality ignores the public's valid concern with juries' legitimacy and fairness and the Court's obvious concern with the rights of venirepersons.

Responding to these concerns is critical. Without approval from both the public and the courts, any change is doomed. Satisfying both groups involves meeting separate, but related demands. As events in Los Angeles demonstrated after the Rodney King trial, the public will rarely consider an unrepresentative jury legitimate, particularly in such high profile cases. Denying the public's concern damages the entire system, for as one commentator put it, "the perception of justice is absolutely critical if the justice system is to do its job of separating the guilty from the innocent."[232] Providing for representation facilitates satisfaction of courts' concern for the rights of potential jurors. Implementing an inclusive system would, over time, lead to fuller participation.[233] Public scrutiny of the system adds an additional layer of protection for jurors' rights by placing an external sanction on abuse.

Meeting the needs of the litigants and the public simultaneously creates problems. Attaining impartiality often will be directly at odds with maintaining representation. In the absence of a method of affirmative selection applied to venire assembly,[234] impaneling a representative jury will not always be possible even without considering

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ically argued that jurors' rights cannot be allowed to overpower litigants' rights. See Barbara L. Horwitz, The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?, 61 U. Cin. L. Rev. 1391, 1436-37 (1993) ("[The rights of potential jurors] . . . cannot be justified as being of greater importance than the rights of a private party . . . .").

231 This is in no way to downplay or dismiss legitimate equal protection concerns. However, these concerns inhere much more to regulation of peremptory challenges than to jury selection. Using equal protection was necessary if the Court wanted to limit peremptory challenges without establishing a fair cross section requirement for the petit jury. Applying fair cross section to the petit jury would mark the death of the jury. Cf. M. A. Widder, Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection, 67 Tul. L. Rev. 2311, 2317 (1993) (proposing that equal protection should not be paramount concern).

232 Lee S. Weinberg & Richard E. Vatz, Race, Jury Selection and Public Confusion, Pittsburgh Post-Gazette, Dec. 15, 1996, at B1.

233 The Court said in *Batson* that jurors have the right not to be excluded on the basis of a suspect classification. See Batson v. Kentucky, 476 U.S. 79, 89 (1986). The proposal does not respond directly to this problem, but does diminish the likelihood of exclusion and balances it with a probable inclusion for the same reason.

234 See Ramirez, supra note 174, at 806-08 (proposing preselection of portion of venire by litigants).

impartiality.[235] Further difficulty comes from judging impartiality individually, rather than across the whole jury.

How can we construct a jury both representative and impartial? The first problem is the basic concern creating the need for peremptory challenges, the elimination of bias. However, the expectation that any juror, much less twelve, will ever be truly without bias borders on fantasy.[236] The impossibility of eliminating all forms of personal bias from a jury urges a change from the idea of impartiality attained by negative selection alone.[237] When exercising peremptory challenges, opposing parties will inevitably strike the venirepersons perceived to be the most beneficial to their opponent. While attorneys' perceptions may be wrong as often as right,[238] the result is still a jury composed of individuals who "don't read the paper."[239]

"[A]n impartial jury arises from its partial parts."[240] Considering a jury impartial by virtue of a balancing of biases would ease the selec-

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235 A venire panel could consist of a homogenous group even in a multiethnic community. This in itself does not defeat representation. Insisting on inclusion of minorities on every jury—or even every jury judging a minority—runs counter to basic principles of representative democracy.

236 See Widder, supra note 231, at 2324 ("An impartial jury, of course, is not actually composed of 'impartial' individuals.").

237 Removing relatively extreme bias does not eliminate bias, nor does it even guarantee the least possible bias. This proposition has been demonstrated fairly conclusively by Steven J. Brams & Morton D. Davis in Optimal Jury Selection: A Game-Theoretic Model for the Exercise of Peremptory Challenges, Operations Res., Nov.-Dec. 1978, at 966. Professors Brams and Davis developed a recursive algorithm providing each litigant a strategy for exercising challenges. The outcome is the most preferential jury based on the venirepersons' expected probabilities of voting for conviction. However, the model "offers no guarantee that the most extreme veniremen . . . will be rejected . . . even when both sides play optimally." Id. at 989.

238 See Zeisel & Diamond, supra note 7, at 516-17. Professors Zeisel and Diamond conducted an extensive survey of jury selection in federal courts. Using struck venirepersons as shadow juries, they found that fairly often, attorneys struck individuals who would have helped their case had they been impaneled. See id. at 498-500, 516-17.

239 The problem of juries composed of the deliberately uninformed has almost as substantial a pedigree as the jury itself. Despite the long standing use of the "key man" system, jury commissioners could find themselves pressed for eligible warm bodies if the attorneys choose to exercise their challenges. As one perceptive observer of the American way of life noted:

> When the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore they had neither heard, read, talked about, nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sage-brush, and the stones in the street were cognizant of! . . . The jury system puts a bar upon intelligence and honesty and a premium upon ignorance, stupidity, and perjury.

Mark Twain, Roughing It 57 (1871). This is a rather colorful caricature, but still indicative of the long standing nature of the problem of impaneling impartial juries in America.

240 Gurney, supra note 188, at 248. Following this construction of the jury, Gurney asserts that "eliminating jurors *because they have biases* destroys the very impartiality which the peremptory challenge is thought to preserve." Id.

tion of juries that are both impartial and representative. Under the current method, impartiality is achieved by removal of those venirepersons perceived to be the most biased in favor of the opponent. While some question the idea of impartiality created by a group of partial individuals,[241] impartiality in the American jury depends on the inclusion of diverse opinions.[242] Focusing on absolute impartiality ignores the true purpose of the jury system, the administration of justice and the determination of facts by a body composed of the citizenry. Richard Posner, a prominent judge and scholar, has recognized that juries made up of people of diverse backgrounds are "more efficient fact finders" and that any diversification in the composition of the jury reduces the risk of extreme outcomes.[243]

No representation requirement applies directly to the petit jury, yet the impartiality and validity of the jury and its verdicts depend on some degree of representation.[244] Likewise, while Supreme Court decisions have not created a requirement of individual participation, they have implied that inclusion *sometimes* is a desirable outcome.[245] Despite the absence of the right to sit on a particular jury, a member

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241 See Abramson, supra note 90, at 125. Abramson expresses his distaste rather subtly, writing "Justice, alas, is reached by miring the jury in representing [individual biases]." Id.

242 See id. at 101. Abramson describes the prevailing view: "Deliberations are considered impartial . . . when group differences are not eliminated but rather invited, embraced, and fairly represented," and "[i]f the jury is balanced to accomplish . . . representati[on] . . . then as a whole it will be impartial, even though no one juror is." Id.

243 Posner, supra note 29, at 583. Judge Posner's argument for diversification focuses on the size of the jury. However, he notes that size does not matter unless the selection method approaches randomness. Randomness functions to provide an increase in the "variety of experience and ability" that provide the reduction in error costs. Id.

244 One commentator even suggests that jury impartiality is synonymous with representation. Raymond J. Broderick, Why the Peremptory Challenge Should Be Abolished, 65 Temple L. Rev. 369, 408-09 (1992).

245 Although the idea that a juror has no right to inclusion on a particular jury is clear, the Court also has said that potential jurors have the right not to be excluded from any jury on the basis of group membership. See Powers v. Ohio, 499 U.S. 400, 409 (1991). This right not be to excluded, combined with the *McCollum* Court's emphasis on public confidence in juries, see McCollum v. Georgia, 505 U.S. 42 (1992), indicates a belief in the importance of some representation.

Cumulative voting runs into a slight problem here. The determination that the allocation of votes has no basis in race or sex or another suspect classification is virtually impossible to demonstrate. However, any particular juror will likely serve on a jury very shortly *because* of group status. This does not rectify the potential violation of the general principle of *Batson*, but it does substantially mitigate the outcome. Focusing on the preferable outcome fits within the framework of the Court's analysis of voting cases.

The largest problem with evaluating potential cumulative voting discrimination in the equal protection realm is the knowledge that exclusion was based on race rather than other, legitimate considerations. Cumulative voting does not eliminate possible perceived or real group based exclusion. It does diminish the potential benefit of discrimination and therefore reduces the motivation to discriminate.

of a particular group should sit on some jury; less than this would defeat the democratic function of the system.

The peremptory challenge method of selection makes it virtually impossible to realize these goals, even with the protection established by *Batson* and its progeny. We should consider a new process as an alternative to the increasingly maligned and suspect system of peremptory challenges. The system should preserve the ability to strike in some real way, extend litigant participation, and create a real opportunity for inclusion of minority voices. Any proposal must also respect the requirements of impartiality, representation, and participation. With these considerations in mind, we propose a modified method of cumulative voting.

B. Operation of the Cumulative Voting Proposal

The proposed jury selection system does not use the exact process of corporate cumulative voting.[246] An idiomatic translation is necessary because of the substantially different nature of the voters, candidates, and desired outcome. First, neither party in court is a minority in the selection process. A subset of the venire is the relevant minority group rather than the voters, as in both corporate and political cumulative voting. Second, rather than a panel representative of the voter's interests and partial to them, the jury should be representative of societal mores and strictly impartial to the parties who selected them. Still, the need to establish a panel considered legitimate by both parties to the litigation as well as the public at large requires some input from the litigants. Third, instead of participation in governance through representation, cumulative jury selection attempts to provide for impartiality, representation, and participation.

A strong similarity to corporate cumulative voting remains because the proposal allows any litigant the opportunity to influence jury composition to her liking through an educated exercise of her

246 A direct application of cumulative voting to jury selection would not serve much purpose. Cumulative voting, as applied in other contexts, provides an opportunity for the seating of representatives preferred by a minority electoral group that would, in a straight voting situation, inevitably be unable to elect a candidate undesirable to the majority. In jury selection, neither litigant is actually a minority electoral group. Neither litigant has power to dictate the composition of the seated petit jury. Yet the current system of peremptory strikes allows for one litigant to remove all potential jurors that are demographically desirable to the opposition. This task is especially easy in the case of nonwhite potential jurors who remain chronically underrepresented in jury pools, despite affirmative efforts to include nonwhites in greater numbers. Still, the peremptory strike earns wide support as a tool to eliminate jurors perceived to be unfriendly to one's case. What is needed is a system that preserves the ability to remove potentially very adverse jurors while allowing the seating of nonwhite jurors when one litigant feels it necessary for fair adjudication.

votes. Cumulative jury selection integrates the benefits of current jury selection and many commentators' proposals. The proposal preserves the primary advantage of peremptory challenges, the power to exclude, and incorporates the most significant advantage of affirmative selection—the power to include.

1. How It Works

Like cumulative voting in other areas, the proposal is based on the accumulation of the votes of both litigants to determine which jurors are seated. The number of votes granted to each litigant corresponds to the size of the jury.[247] The parties submit ballots after voir dire, exercising their votes either positively (to seat a juror) or negatively (to strike a juror). There would be no limit to the number of votes either side could exercise positively or negatively for any venireperson. As in the corporate context, particular strategies would increase the probability of seating a highly preferred panel. Unlike corporate voting, the best strategy does not make itself readily apparent.

The proposed system would parallel current jury selection procedure until the completion of for cause challenges. The only notable departure would be in the number of potential jurors questioned during voir dire.[248] In order to present the litigants with some real choice in the jurors, the size of the panel would equal the total of current peremptory challenges, the number of jurors to be seated, and the number of alternates required.[249] The number of possible jurors would thus be quite small in a civil trial and rather large in a capital case. By relying on current numbers, the new system guarantees at least as broad a venire as is now available. After the exercise of for cause strikes and a refilling of the panel, each side would submit its

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247 The number of votes granted is not critical, although a small number affects a rather small change in practice. We suggest ten for simplicity and use ten for the present discussion.

248 This is not necessarily a change from current practice. Frequently referred to as the "struck jury" system, the method is an option in many states and the common practice in federal court. See David Hittner & Eric J. R. Nichols, Jury Selection in Federal Civil Litigation: General Procedures, New Rules, and the Arrival of *Batson*, 23 Tex. Tech L. Rev. 407, 451-54 (1992). The change is merely the universality of the practice. An additional difference would be, hopefully, more honest and open answers from the potential jurors. There no longer being a strong incentive to hide strong opinions, short of cause justifying ones, the venirepersons would feel more comfortable being candid.

249 Treatment of unusual situations, for example, multiple defendants, would parallel current practice. For an overview of current practice, see V. Hale Starr & Mark McCormick, Jury Selection: An Attorney's Guide to Jury Law and Methods 55 (2d ed. 1993). In most cases this would mean the absence of special consideration, although the trial judge would retain substantial discretion to permit variations.

voting list to the judge. The jurors with the highest vote totals would then become the jury, with ties being broken by some legitimately random method.[250]

The adversarial operation of the system, while a substantial departure from current practice, is by no means unique among proposals for change and roughly parallels affirmative selection.[251] Unlike affirmative selection, however, cumulative voting maintains a limited, although genuine, ability to strike venirepersons and thus encourages parties to consider their decisions more carefully. A party's reckless exercise of cumulative votes could easily lead to a jury composed entirely of the opposition's preferred jurors, where with affirmative selection voting, even a nonstrategic party will see, at minimum, a jury half composed of individuals on their list.

The structure of the cumulative voting scheme, which eliminates the "choosing up sides" element of traditional selection and several other proposals, takes into account concerns of fairness to jurors. That alternating exercise of challenges is reminiscent of elementary school playgrounds. By the execution of all strikes and selections at one time, many concerns about juror dignity and perceived discrimination disappear.[252] The excluded jurors cannot know whether both sides found them undesirable or simply not desirable enough. Because jurors are unaware which side chose them, the possibility that a particular juror perceives herself to be a representative of a group decreases.

2. *Game Theory Discussion*

The system can be analyzed through a simple discussion of principles of game theory. Peremptory challenge selection can be roughly represented as a prisoners' dilemma.[253] The problem is based on a situation where two suspected accomplices to a crime are held in sepa-

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250 The method would have to be legitimately random, essentially applying the randomness requirement for venire selection mandated in the Jury Selection and Service Act. "[A]ssignment to grand and petit jury panels" shall be through a "draw at random from the qualified jury wheel." 28 U.S.C. § 1866(a) (1994).

251 See supra Part II (discussing affirmative selection proposals).

252 The Court in Powers v. Ohio, 499 U.S. 400, 413 (1991) noted the "profound personal humiliation" caused by exclusion from jury service on account of race. The Court felt the humiliation is "heightened by its public character." Id. at 413-14. By conducting the tallying in private, the public character of the strike is removed. Furthermore, presumptions that race was the primary reason for not being selected are reduced by dismissing all the jurors at once.

253 The prisoners' dilemma is one of the basic models in game theory. Most important elements of the model are easily expressed in a bimatrix representation. The matrix displays the options available to each of the prisoners and the costs imposed by each distinct outcome. The first prisoner's choices are presented on the horizontal axis and the second

rate rooms. Both can be convicted of minor offenses at the moment of arrest. With the testimony of either, the prosecutor can convict the other of a much more serious crime. The prosecutor offers each a deal if he will testify against the other. Without the testimony of either, both will be convicted and serve a short sentence. With the testimony of one, the silent suspect will serve a much longer sentence and the testifying suspect will get off easier. If both offer testimony, then both will serve an intermediate length sentence. Being unable to communicate with each other, each suspect must rely on the other to remain silent. If either prisoner assumes the other will talk, it becomes in his or her best interest to talk also. The best solution for both suspects is total silence,[254] but the decisions of two self-interested game players produce two testifying witnesses. Game theory provides that each prisoner should confess because confessing is a dominant strategy.[255]

Discussion of cumulative jury selection in game theory terms requires a framework for allocating costs and benefits. Determining the actual cost allocation created in the jury process is prohibitively difficult. Speaking generally, the current system does not properly distribute the costs of discriminatory use of peremptory challenges. Especially when a *Batson* challenge is heard and upheld on appeal, the costs of the discrimination accrue not to the bad actor, but rather to others involved in the case. The juror suffers because, even though the claim was successful, he or she has forever lost the opportunity to serve on that particular jury. The nondiscriminating party suffers be-

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prisoner's on the vertical. Numbers representing the costs to each are presented with the horizontal axis player's costs listed first. A representative model can be shown thus:

	Don't Confess	Confess
Don't Confess	(-5, -5)	(-15, -2)
Confess	(-2, -15)	(-8, -8)

The number represents the length of the sentence for each prisoner. For further discussion and other applications, see generally Douglas G. Baird et al., Game Theory and the Law (1994); Peter C. Ordeshook, Game Theory and Political Theory: An Introduction (1986).

254 This is the Pareto optimal solution within the limited universe of the two prisoners. A solution is Pareto optimal "if there is no other combination of strategies in which one of the players is better off and the other players are no worse off." Baird, supra note 253, at 311 (emphasis omitted). A Pareto optimal solution may or may not correspond with the utility maximizing solution. The two will diverge when a solution provides one party with gains significantly larger than the other party's losses. In the absence of a transfer from the benefiting party, the suffering party's losses are unlikely to move away from Pareto optimality. Such transfers cannot take place within the prisoners' dilemma.

255 A dominant strategy is a course of action that is always as good as or better than alternative courses of action, regardless of what choice the other actor makes. If a strategy is always *better* than any other choice regardless of the choice made by other actors, it is a strictly dominant strategy. Baird, supra note 253, at 306. Confessing is a strictly dominant strategy for both prisoners. Each prisoner is better off confessing whether the other prisoner chooses to confess or not to confess. Therefore all rational prisoners would choose to confess.

cause he or she was forced to litigate the issue. Society suffers because court resources have been wasted and discrimination, which always has a negative impact, has occurred. Assuming that the discriminating litigant does not gain a specific or relative benefit from avoiding interaction with members of the challenged group,[256] there is a net negative effect on overall utility with little discernible allocation to the discriminating litigant. While litigant reliance on stereotypes may be individually efficient,[257] the societal impact is emphatically negative.

Cumulative jury selection creates a more recognizable and properly allocated cost for discriminating. Providing for an affirmative method to effectively counter simplistic discriminatory jury selection, cumulative jury selection restricts the power of bad actors to benefit from discrimination. A litigant discriminating in the exercise of his or her votes is unlikely to succeed in the total exclusion of any group and simultaneously sacrifices a significant portion of his or her ability to seat preferred jurors. This allows the nondiscriminating litigant to benefit, just as a nondiscriminating individual reaps benefits in a discriminatory environment.[258] While not fully remedying the misallocation of costs, the proposal does eliminate the noticeable failure of *Batson* restrictions to deter adequately discriminatory exercise of peremptory challenges.

Jury selection can be analyzed when considered as a whole process, rather than as a set of choices about individual jurors. As with the prisoners' dilemma, using peremptory challenges to discriminate gives the striking party an edge in seating a preferred jury.[259] While

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256 See Posner supra note 29, at 651-53 (suggesting that some individuals incur substantial nonpecuniary costs from racial interaction).

257 Judge Posner writes: "To the extent that race or some other attribute . . . is positively correlated with the possession of undesired characteristics . . . it is rational for people to use the attribute as a proxy for the underlying characteristic with which it is correlated." Id. at 661. This is a rational decision process because the assumed "opportunity cost may be smaller than the information cost that more extensive sampling . . . would entail." Id. This is decidedly true with peremptory challenges where the foregone opportunity is generally insignificant.

258 See id. at 651 n.1 ("[Some of] those who are not prejudiced . . . will have higher incomes than they would if other[s] . . . were not prejudiced.").

259 This assumes that the party exercising the strike does not suffer an economic loss by discriminating. This is not necessarily an easy assumption to make, but solving for the indifferent litigant disposes of the problem. Assuming that no benefits or costs external to the number of preferred jurors accrue, a relatively simple model of peremptory challenge selection can be made. By assigning a cost to the exclusion of preferred jurors and assuming that litigants remain indifferent to the general pool, the outcome can be described thus:

	Don't Discriminate	Discriminate
Don't Discriminate	(0, 0)	(-1, 0)
Discriminate	(0, -1)	(0, 0)

this advantage may not correspond to a preferred outcome, the perception is that stereotypes are representative and therefore reliance on them serves the end of eliminating negative jurors.[260] The discriminating litigant improves his or her chances of seating a jury "favorable" to her case regardless of the approach taken by the opposition. This causes the rational litigant to discriminate when exercising her peremptory strikes, for discrimination is a dominant strategy.[261] As the costs of discriminating in the exercise of peremptory challenges are nominal,[262] each litigant should assume the other will discriminate. As in the prisoners' dilemma model, when both parties discriminate, the individual advantage gained by discriminating is negated, and their overall utility suffers. Combining the interests of both parties militates against a strict reliance on discriminatory stereotypes. A rational, nondiscriminatory use of peremptory challenges should produce a jury that is reasonably representative, as impartial as any other

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While not a strictly dominant strategy, discrimination is a dominant strategy. If the costs of obtaining more reliable information are included, discrimination becomes strictly dominant. See supra note 255.

	Don't Discriminate	Discriminate
Don't Discriminate	(-.1, -.1)	(-1.1, 0)
Discriminate	(0, -1.1)	(0, 0)

The costs of the information gathering need not be significant, although they may in fact be quite large. The strict dominance of discrimination is reinforced if we assume that exercising peremptory challenges increases the odds of seating preferred jurors. Cf. supra notes 134-50 and accompanying text (expressing concern that extension of *Batson* will lead to elimination of minority defendants striking whites to increase chance of minority jurors). If discrimination would increase the probability of seating preferred jurors, the discrimination would provide a benefit for the discriminating party. Therefore:

	Don't Discriminate	Discriminate
Don't Discriminate	(-.1, -.1)	(-1.1, .1)
Discriminate	(.1, -1.1)	(.1, .1)

As with information costs, benefits from increased probability of seating preferred jurors need not be large to reinforce substantially the rationality of exercising challenges discriminatorily.

Restrictions on discrimination realized through *Batson* do little to combat this outcome. Costs imposed by *Batson* do not overcome the rational incentives to discriminate because the costs accrue externally on society or on the legitimacy of the justice system rather than on the individual litigant. See supra Part I.D (describing how *Batson* violators stand to benefit from discrimination but costs are diffused through society); supra text accompanying note 255.

260 See Zeisel & Diamond, supra note 7, at 518-19 (noting that while benefit may be illusory, attorneys continue to believe in their ability to root out negative venirepersons).

261 The level of self interest will usually overcome any hesitancy to discriminate, unless the litigant incurs greater costs by discriminating. See Posner, supra note 29, at 651-62.

262 The sanctions available only result in a new trial. See, e.g., United States v. Huey, 76 F.3d 638, 639 (5th Cir. 1996) (finding *Batson* violation and remanding for new trial). In addition the costs of a new trial are not distributed to the parties adequately or proportionally. See supra Part I.D. Increasingly, the overcrowding of the courts means that with an overturned conviction, a defendant has, at least, a strong bargaining position in negotiating. In some cases there will not even be a second trial.

which could be drawn from the given venire, and acceptable to the public as fair. Unfortunately, since not discriminating is not a dominant strategy, the rational litigant will still discriminate.

The cumulative voting proposal mitigates the incentive to discriminate. No longer will voting one's discriminatory preferences be a strictly dominant strategy.[263] Whenever a single recognizable group's presence on the jury is seen as determinative, one party will try to seat jurors while, at the same time, the opponent will try to strike the same jurors.[264] The outcome in that case would be a panel mostly, if not entirely, selected randomly from the venire.[265] This results from the opposing votes canceling each other out because of the small focus of the votes. Either party can improve his or her position by choosing to move beyond simple stereotyping. With at least a partial reliance on judging the venirepersons only on their perceived impartiality and overall fitness for the case, the litigants can find a jury with more

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263 With the proposal, discrimination may lend an advantage, but effective determination of when it does is virtually impossible. The negative outcome of discrimination will be easier for individual litigants to identify when their voting preferences are not realized on the impaneled jury. Starting again with the simplest assumptions, the matrix is:

	Don't Discriminate	Discriminate
Don't Discriminate	(0, 0)	(?, 0)
Discriminate	(0, ?)	(?, ?)

Pursuit of a discriminatory strategy cannot produce certain exclusion. A discriminatory strategy could produce a panel dominated by an opponent's preferred jurors. When a litigant chooses to discriminate, he pursues a predictable voting strategy, focused on an identifiable subsection of the venire. Using an obvious strategy permits an opposing, nondiscriminating litigant to easily counter the discrimination and reach, at worst, a fully random selection. If a litigant chooses to oppose directly a discriminatory strategy, the outcome would impose costs on the discriminating party in the form of lost opportunity to affirmatively seat jurors. The nondiscriminating litigant would return to the neutral position of random selection. Thus:

	Don't Discriminate	Discriminate
Don't Discriminate	(0, 0)	(0, -.1)
Discriminate	(-.1, 0)	(?, ?)

The outcome when both parties discriminate is still not clear. In some cases, discriminatory exercise of votes may present such a clear advantage that both parties adopt it. Still in the same case, if one party chooses not to discriminate, it seems that the nondiscriminator gains an edge. Consideration of the opportunity cost presents an incentive not to discriminate.

264 The rationale is clear in the context of a minority criminal defendant seeking minority jurors. The defendant "wins" if he or she can seat one juror who will definitely vote not guilty. Using votes positively offers a better chance of seating that juror. The prosecutor "loses" unless all the selected jurors vote guilty. Using votes negatively increases the likelihood of elimination. Of course the determinative minority group could be pro-prosecution, which potentially reverses the strategies.

265 Random selection of the petit jury has been mentioned as an alternative to peremptory challenges. See Amar, Reinventing Juries, supra note 171, at 1182-83 (arguing in favor of random selection of jurors). The problem with random selection is the absence of litigant input and the corresponding loss of validity. The random selection result in cumulative voting only arises *after* litigants have their opportunity for input.

members to their liking. Even faced with an opponent adhering strictly to a discriminatory plan, more preferred jurors can likely be seated by not discriminating.

The advantages of cumulative voting are especially clear when society's interests are included in the consideration of outcomes. Allowing discrimination to continue has a negative impact on society's belief in the system. Viewing the public as a stakeholder in the process permits the inclusion of its costs or benefits in the determination of total benefits.[266] Any outcome including discrimination is a negative to society's interests.

With peremptory challenges, all rational outcomes for the individual litigants include discrimination. The costs of obtaining other, more precise, information about the inclinations of the jurors are prohibitively high. Accuracy of prejudicial strikes is suspect, but the individual litigant perceives a benefit. *Batson* limitations placed on discriminatory peremptory strikes do not impose large enough costs to outweigh the benefits of discriminatory strikes. The existence of the limitations also adds to public perceptions of discrimination and the presence of unsupported excuses. The cumulative voting proposal reduces the prevalence of discrimination by reducing the benefits of discriminatory strikes.

While not readily numerically demonstrable, the proposed process should deny litigants the power of total exclusion. Only a litigant completely indifferent to the remaining members of the venire can benefit from exclusively discriminatory voting. Assuming voir dire provides a general idea of the likely leanings of the venirepersons, the better approach is to vote without discriminating.

3. *Examples*

Cumulative jury selection can be demonstrated by considering a felony trial in federal court. Under current federal law, the prosecutor has six peremptory challenges and the defendant has ten.[267] The maximum number of venirepersons the parties can choose from, after for

[266] Both parties have an interest in society's validation of the verdict. The prosecution definitely has a larger stake, but defendants found not guilty by a jury perceived as illegitimate also suffer consequences. Consider the situation of O.J. Simpson. It seems unlikely that Mr. Simpson will ever be seen generally as not guilty. Certainly some part of the lingering doubt stems from a feeling that the trial jury was not legitimate. The cost incurred by Mr. Simpson from a mistrust of the jury's ability to judge is very real. Additionally, everyone suffers with the perpetuation of discrimination. Continuation of a system that provides little incentive to not discriminate is wrong. The peremptory challenge system is unlikely to overcome its stigma as a vehicle for discrimination. This stigmatization imposes costs even on those who do not discriminate.

[267] See Fed. R. Crim. P. 24(b).

cause exclusions, is twenty-eight.[268] To demonstrate the advantages of cumulative jury selection, we will assume a minority defendant in a jurisdiction where the defendant's group would be substantially underrepresented in the venire.[269] For the defendant to ensure himself or herself one juror of his or her same ethnicity, at least seven group members must be on that venire panel of twenty-eight. While the need for seven venirepersons assumes the prosecutor will use all of his or her strikes against venirepersons of the defendant's ethnicity, and can proffer acceptable neutral explanations,[270] the difficulty in realizing a jury the defendant considers fair is clear. Relatively few jurisdictions have minority populations exceeding twenty-five percent. Even those few jurisdictions where minority participation exceeds twenty-five percent continue to experience problems in representation on venires.[271]

Cumulative jury selection provides defendants with a very real opportunity to seat a like-grouped juror, regardless of how few like-grouped jurors are in the venire. Unlike the current selection system, in cumulative jury selection the prosecution and the defendant would always have equal voting power. While seemingly diminishing the defendant's power to compose the jury in certain situations, the ability to actually seat jurors overwhelms any such criticism. The litigants would still have the maximum sized venire panel from which to choose.

Beginning the cumulative selection process, each party would need to consider which venirepersons are desired and which are unacceptable. Lacking experience with voting strategies in cumulative selection, each litigant is likely initially to presume that the other will

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268 Under common voir dire practices, the judge retains discretion and there could be a larger pool available. Twenty-eight is the total of the twelve members of the petit jury plus the maximum of six struck by the prosecutor and ten struck by the defendant.

269 This is, quite probably, the most difficult situation under peremptory challenges. Either party could strike all minority group members for legitimate reasons and be faced with a challenge to their strikes.

270 This is not an especially difficult standard and is imposed only when the defendant challenges the state's exercise of peremptories. Also, an attorney striking venirepersons on the basis of race need not offer a reasonable explanation, merely any justification not relying on an exclusive trait of the group in question. The test amounts to whether the trial judge is disposed to believe the explanation. No reasonable attorney today would use race or sex as a justification for a challenge. Further, the determination is almost entirely in the hands of the trial judge. Review of the judge's acceptance of the justification is extremely deferential. See supra notes 152-55 and accompanying text. A prosecutor wanting to strike a venireperson for prohibited reasons often can find some neutral justification sufficient to defeat any extension of *Batson*. See supra notes 152-55 (giving examples of justifications accepted by courts).

271 See Fukurai et al., supra note 10, at 13-78 (documenting endemic underrepresentation of minorities in the jury pools and venires for Los Angeles County).

exercise their votes in a manner consistent with established procedures for exercising peremptory challenges, that is, discriminatorily. Unlike peremptory challenges, however, strictly negative voting cannot guarantee the elimination of undesirable venirepersons.

Following the simple logic of prejudicial exercise for our example, the prosecutor would vote equally and negatively against any venirepersons of the defendant's ethnicity. The defendant would vote to defeat this strategy by dividing his or her votes between the same group members and exercising them positively.[272] If both parties follow a strictly discriminatory pattern, they face the probability that a significant portion of the jury would be randomly selected. Random selection would arise when both litigants either expend all their votes on a few seats or when their votes cancel each other out; if less than a full jury has positive vote cumulations, venirepersons receiving no votes at all would be seated ahead of any with negative totals. A more advantageous approach for both sides would be to discount substantially simple stereotypes in the voting process.[273] By moving beyond simple prejudices, litigants increase their opportunity to impanel a jury of their liking.[274]

A second example draws on an actual case[275] and shows how cumulative jury selection can mitigate concerns about venue changes

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[272] For example, assume each party is allowed 100 votes, and there are four venirepersons of the defendant's ethnicity. The simplest strategy is for the defendant to divide the votes equally, giving each venireperson twenty-five positive votes. To counter this, the prosecutor only need place twenty-five negative votes for each of those venirepersons. Variations on this baseline will happen in every case, with individual litigant strategies resulting in different quality outcomes.

[273] No method of selection other than a truly random process can eliminate completely the use of stereotypes. Even reliance on for cause strikes allows for the use of stereotyping. Whether a judge believes the cause justification depends on her perception of the venireperson. To some degree, we must rely on stereotypes to survive everyday life. Few of us would stop to inquire about the background of a hooded individual approaching out of the dark. What we seek to accomplish is a decreased reliance on simple stereotyping and a corresponding increase in minority jury service.

[274] A fully nondiscriminatory approach would have a fairly similar outcome to affirmative selection. Anyone receiving positive votes from both litigants will, almost always, be seated. Along with those preferred by both, venirepersons strongly preferred by either litigant are likely to be seated. The exception is when a strong positive preference is countered with strong disfavor.

[275] The example roughly parallels the case of Miami police officer William Lozano. The account here relies on the summary of the case presented in Abramson, supra note 90, at 242-45.

In January 1989, Mr. Lozano, a Latino, shot and killed a black motorcyclist he had been pursuing. A passenger on the motorcycle also died as a result of the ensuing crash. In response to the shooting, and indicative of the tense ethnic situation in Miami, rioting broke out in much of the city. In December 1989, Mr. Lozano was found guilty of two counts of manslaughter. An appeals court reversed the convictions in 1991, determining

and relative underrepresentation in the jury pool.[276] A Latino is accused in the murder of an African American in County A, with a population that is half Latino, two-tenths African American and three-tenths white. Because of pre-trial publicity and the county's history of violence after similar racially charged trials, a venue change is requested. However, no other county in the state has a similar racial makeup. Faced with no legitimate, demographically similar alternative jurisdiction, two counties are proposed: County B which is two-tenths Latino, one-tenth African American and seven-tenths white; or County C which is one-thirtieth Latino, three-tenths African American and two-thirds white. The victim's family and their community are vocal in their quest for "justice." They insist it will not be served unless there are blacks on the jury and demand that County C be the new venue. The defense counters that although neither county is adequate, County C severely distorts the relationship between the Latino and African American populations.

As a potential capital case, each side currently could exercise twenty peremptory challenges.[277] Ignoring the number of alternates

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that the verdict may have been influenced by fear of more rioting and that the judge erred in refusing the request for change of venue.

After the reversal, the new presiding judge had to contend with black community leaders insisting on a venue with a black population similar to Dade County, which was about twenty percent African American. On the other side, Mr. Lozano's attorneys insisted that, because their client was a Colombian immigrant, the new venue should reflect the Latino population of Dade County—about fifty percent. The judge initially ordered the trial moved to Orange County, which is predominantly white. Then came the rioting following the first Rodney King verdict. Responding to the potential for similar violence in South Florida, the judge countermanded himself and switched the trial to Leon County which, like Dade County, was about twenty percent black.

After jurisdiction was transferred to Leon County, the judge there ordered the trial back to Orange County. The trial then returned to Leon and was finally bounced back to Orange. The final transfer came after the prosecution joined the defense in requesting the change. The prosecution's concern was that the small percentage of Latinos in Leon County—less than three percent—would render any conviction obtained there vulnerable to a reversal. Even after the acquiescence of the prosecution, the victims' families sought to return the trial to Leon County. The request was denied and Mr. Lozano was found not guilty.

The transfers of the case achieved a net ethnicity change of one juror. The original trial jury consisted of three whites, two blacks and one Latino. The Orange County jury had three whites, one black and two Latinos. Finding a venue acceptable to all parties was complicated significantly by the unique ethnic composition of Miami and the size of the jury. No jurisdiction in Florida comes especially close to Dade County's demographics and having a six member panel makes ethnic balancing on the panel difficult to achieve.

276 For this example, assume that the venire mirrors the demographics of the community.

277 See Fed. R. Crim. P. 24(b). Here again we rely on the federal rules for the example. The number of challenges provided in state criminal cases varies.

to be chosen,[278] the maximum number of venirepersons available to the litigants is fifty-two.[279] In both alternate counties each party can eliminate the other's racially preferred venirepersons with ease under a peremptory-strike system, even assuming the presence of a number of other undesirable venirepersons. Even in County A, there is no guarantee that any possible racial representation could satisfy the victim's community. The large number of peremptory challenges available—particularly in the most charged cases—creates a system that complicates attempts to seat a jury that satisfies concerns of racial balance.[280]

Cumulative voting virtually eliminates the problem of a demographically appropriate venue. Each side can virtually guarantee some group representation in any of the counties with the use of an adequate voting strategy. Even assuming both parties will use the most racially motivated strategy possible, there can be no guarantee of absolute exclusion with cumulative jury selection. As each litigant desires both to guarantee inclusion of his or her preferred jurors and to exclude as many of his or her opponent's preferences as possible, each likely would split his or her votes. Such an effort would fail to control the composition of the jury.[281] An alternate strategy of at-

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278 The proposal could be used similarly to select the alternates. Either the whole process could be repeated or the number of alternates could be added to the initial venire. Adding the alternates to the initial venire would not affect the process other than possibly creating the need to grant each side more votes.

279 The venire pool in County A breaks down: 26 Latino, 10 African American, 16 White; County B: 11 Latino, 5 African American, 36 White; County C: 3 Latino, 15 African American, 34 White.

280 In the real case, described supra note 275, the possibility of striking all African Americans from the jury panel raised serious problems. The level of publicity and racial tension in County A (Dade County) prevented any semblance of a fair trial. The case bounced between County B (Orange County) and County C (Leon County) for a long time primarily because of the competing concerns of the defendant and the victim's family about adequate representation on the jury.

281 With a voting pattern resembling equal distribution, the gambit would fail to seat a majority. Taking County B as an example, assume the prosecution seeks to seat all five African American venirepersons and the defense seeks to seat all eleven Latinos. Granting each party 100 votes, the prosecution could place ten positive votes on each African American and four or five negative votes on every Latino. The defense could exercise its votes identically and oppositely. The result would be almost full random selection.

Variations in the distribution of the votes among the members of the favored and disfavored classes would have little impact. If either one or both of the parties attempted to "outsmart" the other by varying the vote distribution, the result would be inclusion of some of each group and exclusion of some others. The remainder of the jury would be selected at random from those with vote totals of zero. To demonstrate, the defense, still seeking to seat as many Latinos as possible, would exercise all of its votes affirmatively and equally for each of the Latino venirepersons. This would guarantee the seating of all the black venirepersons if the prosecution merely follows the basic model. This happens because each Latino venireperson would have nine or ten positive votes and four or five

tempting to exclude one group and rely on random selection, while not easily countered, would not necessarily lead to complete exclusion.[282] These assertions would also hold true in more diverse jurisdictions where there are significant minority populations. In a situation where the minority group does not have much representation on the venire, other issues might arise.

Consider County C, the most racially unbalanced of the three counties. The ease of the potential exclusion cannot be dismissed. Although not necessarily clear in all cases, the prosecutor would presumably not expend a significant number of votes attempting to exclude Latinos. This is a case where public pressure comes into play. Additionally, the concern remains that Latinos will be excluded if random selection is necessary. Were a random selection to take place among the full, unmodified venire, Latinos could well be excluded from the group of twelve. This is a problem that inheres to any sort of selection system when a small minority is included. While a potentially serious problem, it is a problem that exists in the assembly of venires as well. Cumulative voting does nothing to exacerbate the pre-existing problem.

Under the peremptory challenge system, the mutual concern with racial representation creates additional problems. Cumulative voting actually functions *better* when both sides have distinct preferences for a small subsection of the venire. By having a group of singly preferred venirepersons among whom to divide the vote, neither side has as much ability to strike the other's preferred venirepersons. County C still creates a potential problem because, in the case of random selection resulting from offsetting voting, probability dictates that no Latinos would reach the petit jury. This problem is no greater than under a purely random selection procedure and is still a marked improve-

negative votes for totals of four to six votes. Each black venireperson would have ten positive votes, thus guaranteeing a jury with all the blacks on the venire and completed by some set of the Latinos.

[282] The underlying strategy would be for one party to expend most or all of its votes striking members of the disfavored group. Consider a situation where the defense feels it is more important to eliminate African Americans than to seat Latinos. To realize exclusion of all the African Americans, the defense attorney exercises all his votes negatively against the five African American venirepersons. If the prosecution follows the basic strategy, the petit jury would be composed entirely of whites—all of the African American and Latino venirepersons would have negative vote totals. This outcome parallels the outcome in peremptory challenges.

An informed prosecutor could counter substantially the defense's exclusionary strategy by exercising all of his or her votes positively in favor of the five African American venirepersons. While this strategy would not guarantee the composition of the jury to any extent, it would result in random selection. Extensive random selection does preserve the greater opportunity for neutral selection and likely impartiality, although it is less than optimal for either side.

ment over peremptory challenges because it ensures that each side selected at least some of the jurors, regardless of their race. Cumulative voting provides a more responsive system than peremptory challenges.

C. *How the Proposal Mitigates Existing Structural Problems and Those Inherent in the Other Proposals*

Judging the relative effectiveness of the cumulative voting selection system requires reference to the jury selection goals enunciated by the courts. Supreme Court decisions have indicated three general goals for the assembly of juries: citizen participation on juries, representation of the community in which the trial is held, and impartiality of the jury panel. [283]

The three goals are wound together: Reducing citizen participation causes problems with realizing representation which has the collateral effect of making real impartiality difficult to obtain. Unfortunately, the Court's opinions do not offer a workable calculus for assessing the relative importance of each of the three goals. As noted above, the *Batson* line of cases seems to make citizen participation the cornerstone of a proper jury. However, preserving the jury as a legitimate decisionmaker remains the desired outcome. The perception of justice is almost as important as the reality. Without an improved selection system, public faith is likely to erode further. All of the Court's goals must be met using a system that vests the litigants and the public with a belief that the jury is fair. Cumulative jury selection provides a framework to achieve more fully these goals than other existing or proposed methods of jury selection.

Cumulative voting extends a genuine opportunity for a petit jury representing a cross section of the community without relying on judicially enforceable guarantees. By facilitating representation, cumulative jury selection increases participation in the process by individuals who otherwise would have been excluded. Increasing community participation and overall representation reinforces the validity of the jury system as a whole.

1. *Cumulative Voting Versus Peremptory Challenges*

The current peremptory challenge based system of jury selection has had serious difficulties satisfying the Supreme Court's goals. Peremptory challenges allow the trammeling of venirepersons' rights (through strikes relying on gross stereotypes), fail to provide a realistic opportunity for representation (through strikes focusing on partic-

283 See supra Part I.

ular groups), and impanel juries that are not impartial (through strikes eliminating individuals who appear to be partial).[284] Limits currently imposed on peremptory challenges do not substantially control any of these problems.[285] As discussed above, *Batson* restrictions do not have a consistent power to limit the discriminatory use of peremptory challenges.

Even with a thorough application of *Batson*, peremptory challenges permit exclusion of a significant portion of diverse viewpoints represented in the venire. An attorney exercising a peremptory challenge will use it to strike the venireperson deemed most adverse to the client's interest. When both parties in a trial follow this method, what remains of the venire after exhaustion of strikes is an inoffensive group of the tepidly mediocre. While such a jury may present the image of impartiality, it has a limited likelihood of actually being impartial because of its lack of broad representation. Inclusion of diverse viewpoints improves the decisionmaking process and is at the heart of impartiality. Cumulative voting increases the chances of a diverse jury by diminishing the power to readily remove venirepersons. Increasing the diversity of the jury aids the impartiality as well as the representativeness of the petit jury.

Even if a panel produced by peremptory challenges may be impartial, such impartiality comes at the expense of the jury's legitimacy. Peremptory challenges eliminate much of the diversity which may be present in a given venire. In many cases, the public will not deem an unrepresentative jury legitimate. Cumulative voting selection does not eliminate the potential for the impaneling of an unrepresentative jury. However, the problems of legitimacy may be mitigated through effective application of cumulative selection. Reasonably informed litigants will be able to impanel a number of desired venirepersons on the petit jury.

Over multiple trials, the cumulative voting proposal will allow for a more representative cross section of the community on petit juries than is possible under peremptory challenges. Under an alternative jury selection system, protection of individual group representation cannot be assumed and indeed has not been required by the Court.[286]

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284 Any particular small group could be stereotyped out of the system and never noticed because a member so rarely makes her way onto a venire. Alternately, the striking of one individual for a reason a judge determines to be pretext for discrimination could earn a new trial for an undeserving defendant.

285 The protections provided by *Batson* serve to protect relatively large minority groups. Any individual venireperson remains unprotected. An attorney can too easily justify one discriminatory strike in isolation.

286 See Holland v. Illinois, 493 U.S. 474, 480 (1990) (ruling that Sixth Amendment does not assure representative jury, but only impartial one).

Such rejection of petit jury cross sectionalism does not rule out a measure of protection against purposeful discrimination: There is little doubt that a total exclusion of a significant local minority group from petit juries over time would raise concerns.[287] However, under a cumulative voting regime reliance on protections after the fact are not necessary. The ability effectively to counter predictable voting strategies diminishes the effectiveness of long term discriminatory practices.[288]

The adoption of cumulative voting will gradually increase the breadth of participation on petit juries. As litigants valuing the judgment of certain groups have their day in court, members of those groups will serve. Judicially defined group membership of litigants and potential jurors becomes irrelevant with cumulative jury selection. Litigants desiring a jury composed of members of their community resolve individually what "representative" means. Under the peremptory challenge system, the evaluation of the relative importance of group affiliation remains far too static.

Continuing with the current peremptory challenge system fails to recognize the extensive diversity of today's society. The current jurisprudence relies primarily on the idea of a black and white society of litigants and jurors.[289] While this dichotomy undoubtedly continues to be the most contentious situation, the increasing ethnic diversity of the nation evinces a potential for greater problems in the future. The expansion of *Batson* protections is itself an indication of the growing need to expand protections to other minority groups.

Cumulative jury selection eliminates the question of which group requires protection and reduces judicial supervision.[290] Unlike *Batson* protections (which serve "protected classes"), cumulative voting offers

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287 Any such prolonged and total exclusion would most likely constitute a violation of the *Swain* standard. See supra Part I.B.

288 If a prosecutor were to follow a consistent discriminatory voting pattern, defense counsel would be able readily to place most of the venirepersons on the jury. Any discernible voting strategy can be negated by reversing the votes. Consistent discrimination has a very predictable pattern and is perhaps the easiest to counter.

289 But see Hernandez v. New York, 500 U.S. 352, 359-63 (1991) (accepting language based justification for the striking of Spanish speaking jurors). The prosecutor's explanation in *Hernandez*—accepted by the judge—probably constituted a cause challenge if legitimate.

290 *Batson* was a very limited decision. It granted review only when a criminal defendant challenged the striking of venirepersons because of their race. See Batson v. Kentucky, 476 U.S. 79, 100 (1986). Later cases expanded the scope of challenges. See supra Part I.C. The question recently has become how far the protection will reach. See supra note 169. This proposal would answer the question by granting all litigants the same power to influence jury composition.

the same degree of protection for everyone.[291] Instead of relying on external protections, all litigants are provided the power to protect themselves through intelligent exercise of their votes. A cumulative voting system would minimize state action which could resolve the equal protection issues regarding the venirepersons.

Jury selection through cumulative voting would allow the parties to see their relative juror preferences more fully enacted than possible through the use of peremptory challenges. Still, litigant preferences should not be the principal focus of the selection system. However, cumulative jury selection not only allows, but actually encourages, differentiated valuation of preferences. Peremptory challenges rely on the use of simple stereotypes and do not allow litigants to diminish the impact of stereotypes. Cumulative selection, which requires differentiation, minimizes the value of stereotypes in the selection process. The proposal, while not guaranteeing participation by nonwhites (particularly in jurisdictions with small nonwhite populations) does provide an affirmative opportunity for participation. This opportunity is of particular importance in a trial where race is considered a factor by all relevant parties, as benefits arise out of the collateral effects of the implementation of litigant preferences and accrue to the justice system as a whole.

Cumulative voting would have a beneficial effect on judicial economy by eliminating the numerous appeals based on discriminatory use of peremptory challenges. Increased litigant responsibility for the composition of the jury would temper the complaints of unfairness. *Batson* challenges would disappear entirely and the number of challenges based on general jury selection procedures would likely decrease.[292]

Also, cumulative voting encourages more truthful answers in voir dire. Venirepersons will realize that expressing strong opinions does not necessarily lead to dismissal. This opportunity to reply truthfully and still serve on the jury will likely lead to greater candor in the venirepersons' responses to questioning during voir dire. Along with better information for litigants to use in voting for jurors, the more

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291 Thus it avoids potential conflict with the requirements of City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). See supra note 26 & 87. Limitations on peremptories may constitute the sort of race conscious government action prohibited to the states by *Croson* and to the federal government by *Adarand*.

292 Reconsideration of the element of state action in seating jurors might come out of the change. The presence of state action in the selection process is only questionable in civil trials and for criminal defendants. See Georgia v. McCollum, 505 U.S. 42, 50-55 (1992) (finding state action when criminal defendant exercises peremptory challenge).

truthful answers would provide more complete information to judges granting for cause challenges.

2. *Cumulative Selection Versus Other Proposed Jury Selection Systems*

The cumulative voting method improves on proposed affirmative inclusion and affirmative selection methods that rely heavily on increasingly suspect principles of traditional affirmative action.[293] Several of these proposals are premised on defining groups based on stereotypes and on finding jurors presumed to represent the litigants' interests.[294] These proposals institutionalize a form of discrimination not far removed from the type they seek to remedy. Cumulative selection offers similar results without the pernicious, paternalistic oversight these proposals require.

Affirmative inclusion essentially relies on the idea that race or sex is a proxy for community attitudes that needs to be included in an impartial jury. Assembling a jury that is perceived as fair and legitimate by the public and the litigants is the soul of affirmative inclusion. Adopting such an inclusive selection process might seem to lay the foundation for both representation and impartiality. However, affirmative inclusion in fact reduces the likelihood of genuine impartiality and representation by using a rigid, biased process of head counting.

Cumulative voting maintains a perception of inclusiveness, but places the determination of who need be included in the hands of the litigants. Rather than enacting a quota, the proposal provides litigants the tools needed to realize broad participation. Affirmative inclusion requires a great deal of government intervention in determining when inclusion is warranted and who should be included. This involvement contradicts a principal purpose of the citizen jury, protection from government tyranny. While modern concerns about a tyrannical government may not be the same as two centuries ago, government determination of who constitutes a proper jury remains inappropriate. Cumulative selection places the decision where it should be: with the litigants.

Affirmative selection proposals encourage litigants to seek the most partial venirepersons and do nothing to reduce reliance on stere-

293 Essentially, the use of affirmative inclusion suffers from the stigma of quotas. Not only are quota devices politically difficult, they are impermissible when used by the government. See supra Part II (discussing current congressional redistricting cases and attempts to remedy Voting Rights Act violations without also violating other constitutional provisions).

294 See supra Part II.

otyping.[295] Affirmative selection promotes the use of extremes of partiality, even when combined with some peremptory challenges. In basic affirmative selection, each party is guaranteed selection of a minimum of half of the jury. Because of this level of control, there is little incentive to go beyond stereotypes, particularly from the defendant's side. The reality of current criminal practice is that a hung jury amounts to a virtual acquittal, or at the very least provides a dominant position for plea bargaining.

Cumulative voting grants equal influence to each party in all types of litigation. The proposal still allows the potential to exclude venirepersons perceived to be problems. Such power to exclude is limited by the opposition's power to include and has the side effect of a decreased power to include preferred venirepersons. The balancing of interests thus required causes a rational litigant to consider the relevance of stereotypes before voting.

Cumulative voting has inherent penalties for ignoring the opposition's thinking. By trying to exclude any venirepersons, a party loses much of its power to seat jurors. If a party relies strictly on stereotyping, there is a real possibility that none of its preferred jurors will be seated. A predictable strategy, such as racism or sexism, allows the other side to counter and can easily lead to a jury wholly of the opponent's choosing.

The order chosen for exercising the power of affirmative selection can impact the composition of the panel, arbitrarily granting one party an advantage. The cumulative selection proposal eliminates the issue of timing in the selection process by having all votes "exercised" concurrently, thus eliminating any opportunity for strategic timing.[296] The advantage gained through strategic timing of strikes is not crucial in the current system,[297] but would rise to importance in any sort of affirmative selection system.[298] This situation exemplifies the problem of the "take-it-or-lose-it" nature of peremptory challenges and affirmative selection. A particular juror considered important by the de-

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295 See supra Part II.D.

296 For a very complex discussion of timing in peremptory challenge based jury selection, see Brams & Davis, supra note 237, at 969-90. A non-numeric discussion of their research appears in Steven J. Brams & Morton D. Davis, A Game-Theory Approach to Jury Selection, Trial, Dec. 1976, at 47.

297 See id.

298 This is especially important if the system includes any power to strike. See, e.g., Meyer, supra note 186, at 265. Whoever goes first can strike the one juror the other party really wanted to seat or seat the only juror on the other's strike list. No method can adequately mitigate this problem. The problem even exists in a pure affirmative selection scheme. If an odd number of jurors appear on both lists, one party will have an additional preferred juror on the panel.

fense can be struck by the prosecution for far less strong reasons. Any affirmative system that preserves any strikes allows the neutralization of an opponent strike by selection and neutralization of a selection by a strike.

Cumulative voting adopts the most positive aspects of the affirmative proposals—the investment in the process by the litigants, the reduction of broad group exclusion, and the ability to include jurors from a particular group—and disposes of the rest.

3. *Potential Shortcomings of Cumulative Voting Jury Selection*

Implementation of cumulative jury selection alone will not resolve all the extant problems. A necessary element to achieving the constitutional goals enunciated by the Court is a continued effort to reach a larger portion of the eligible population. In order to facilitate the jury's democratic function, as close to all the citizenry as possible must have the opportunity to serve on a jury. Cumulative selection does not in itself remedy this problem.

Increases in the number of hung juries is a problem that inheres to the nature of the juries impaneled through cumulative selection. While this problem may be overstated, recently more attention has been focused on the use of jury nullification.[299] Cumulative selection creates a real possibility that more juries might include more individuals with affinity for the plight of defendants. This perhaps can be dealt with through the adoption of nonunanimous jury verdicts. Although traditionally thought of as necessary to prevent the conviction of innocent defendants, unanimous verdicts have recently been assailed as possibly increasing the number of wrongful convictions and acquittals.[300] If the analysis is correct, by adopting nonunanimous verdicts along with cumulative selection, the decisionmaking process of the criminal justice system can be markedly improved. The ultimate wisdom of nonunanimous verdicts is, of course, beyond the scope of this article.

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[299] Traditionally, jury nullification involves the judgment by the jury that, although the defendant violated the law, the law violated was unfair or unfairly applied. The use of modern "jury nullification" has had a major impact on conviction rates in some major cities. See Jeffrey Rosen, One Angry Woman: Why are Hung Juries on the Rise?, New Yorker, Feb. 24 & Mar. 3, 1997, at 55.

[300] See Timothy Fedderson & Wolfgang Pesendorfer, Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts Under Strategic Voting, 92 Am. Pol. Sci. Rev. 23, 31 (1998).

CONCLUSION

The current system of jury selection based on peremptory challenges remains profoundly flawed. No restrictions of the type currently imposed under *Batson* can be expected to remedy the inability of the system to consistently provide juries which are both impartial and legitimate in the eyes of the public. A more basic change in the form of selection is needed.

Cumulative voting creates a neutral selection method that allows for inclusion, representation, and impartiality. The proposal does not eliminate all of the problems of finding an impartial jury but does diminish the impact of the most critical problems of the current system. While not eliminating the possibility of discrimination, the proposal provides an internal sanction penalizing discriminatory selection patterns.

Cumulative jury selection cannot of itself eliminate the use of stereotypes in selecting jurors. Overcoming the inertia of the system requires changing the jury selection process. However, the proposal incorporates a potential reward for litigants who expand their thinking beyond basic stereotypes.

Cumulative voting creates a likelihood of jurors preferred by neither party being seated on the jury. This is especially likely if both parties focus their votes on jurors perceived to be especially beneficial or damaging. A substantial number of the venirepersons are likely to end up with negative totals and the ignored jurors in the middle of the preference range will find a seat on the jury along with the jurors most sought after by each side. Unlike almost any jury obtained under peremptory challenges, a cumulative voting jury is fairly certain to represent the broadest cross section possible from any given venire.