LOOKING WITH AN HISTORICAL EYE: THE TIME HAS COME TO ELIMINATE THE PEREMPTORY CHALLENGE

BY

ROBERT F. SHAW, JR.

EXPENSIVELY KEPT, ECONOMICALLY UNSOUND,

A SPURIOUS AND USELESS POLITICAL ASSET IN ELECTION CAMPAIGNS,

RACISM IS AS HEALTHY TODAY AS IT WAS DURING THE ENLIGHTENMENT.

IT SEEMS IT HAS A UTILITY FAR BEYOND ECONOMY, BEYOND THE

SEQUESTERING OF CLASSES FROM ONE ANOTHER, AND HAS ASSUMED A

METAPHORICAL LIFE SO COMPLETELY EMBEDDED IN DAILY DISCOURSE

THAT IT IS PERHAPS ...MORE ON DISPLAY

THAT EVER BEFORE.

--TONI MORRISON

PLAYING IN THE DARK

I. INTRODUCTION

Central to the American system of criminal justice is the fundamental right to trial by jury. Preserved and protected by Article III and the Sixth Amendment of our Constitution, the jury acts as a vital check against the wrongful exercise of power and the harm caused by prejudicial judgment.[1] In Batson v. Kentucky, the United States Supreme Court confronted the widespread misuse of the peremptory challenge as a tool to exclude African-Americans from our jury system.[2] In his concurring opinion, Justice Thurgood Marshall pointed out that today, as throughout this country's history, racial discrimination in the administration of justice remains a fact of life.[3] And as a necessary predicate to achieving the values of equality and fairness reflected in our Constitution, Justice Marshall stated that it will be necessary to eliminate the peremptory challenge altogether.[4]

Despite its long history, it has been readily acknowledged that the right of peremptory challenge is not of constitutional magnitude and may be withheld without impairing the guarantee of an impartial and fair trial.[5] This paper suggests that in light of Batson's failure and the history of discrimination which it serves to perpetuate, it is time to eliminate the peremptory challenge. Part I provides an overview of the origin and evolution of the peremptory challenge in England and the United States. Part II provides a historical overview of African-American exclusion from the criminal justice system; this is a necessary prerequisite to understanding the peremptory's present function as the primary means of continuing a de jure and de facto tradition of racism and exclusion of African-Americans from the criminal jury system. Part III summarizes Batson and its progeny. And finally, part IV argues that in light of Batson's failure to eliminate

discriminatory use of the peremptory challenge in criminal jury trials, the time has come to acknowledge that the harm associated with retaining it far outweighs any of its benefits.

II. THE PEREMPTORY CHALLENGE: A HISTORICAL OVERVIEW

The peremptory challenge has played a central and controversial role in the history of trial by jury. It has its origin in early English common law where it was used by the English Crown to strike undesirable jurors without limitation.[6] In addition to selecting the citizens to be included on the jury list, the Crown's lawyers were simply required to assert "quid non bons sunt pro rege" to exercise their peremptory challenges.[7]

The Crown continued to utilize the peremptory as a means of seating favorable juries until 1305 when English legislators concluded that the prosecutor's use of the peremptory challenge was generating biased juries.[8] The legislature determined that the prosecutors' utilization of peremptory strikes was "mischievous to the subject tending to infinite....danger," and should be replaced with an opportunity to remove prospective jurors if the prosecution could demonstrate a "cause certain."

Parliament's new design was soon to be circumvented by the judiciary which developed the practice of "standing jurors aside." This practice permitted the prosecution to exercise challenges for cause, without explanation, against those it suspected of prejudice. Jurors asked to stand aside would remain without reach of the jury box unless a twelve member panel could not be seated. Thus, in the vast majority of cases, jurors were dismissed without inquiry as to their capacity to carry out their civic duty impartially.[9]

Although the defendants' exercise of peremptory strikes was drastically reduced over the centuries, Parliament refused to do away with it in 1305. This prompted Sir William Blackstone to characterize the peremptory challenge as a defendant's privilege and describe it as "a provision full of that tenderness and humanity to prisoners for which our laws are justly famous."[10] This humane and tender privilege originally afforded a defendant thirty five peremptory challenges, but was reduced to twenty, unless charged with treason, by 1530. Eventually this was decreased to seven and then, under the Criminal Justice Act, to three.[11] In 1988, Parliament came to the same conclusion it reached in 1305 and eliminated the peremptory challenge completely due to concern that its use resulted in partial, unrepresentative juries.[12]

Colonial courts accepted the defendant's authority to exercise peremptory challenges as part of the common law. Subsequently, in 1790--just three years after the Constitution was approved--Congress statutorily granted federal defendants 35 peremptory challenges in cases involving treason and 20 when tried for other crimes punishable by death.[13] Some colonies, such as Pennsylvania and Georgia, permitted the prosecution to utilize the "stand aside" procedure, but many others, including New York and Virginia, rejected the practice.[14] Because the 1790 statute did not grant the Government authority to use peremptory challenges and did not address the "stand aside" procedure, the judiciary would determine whether either was permissible in federal court. In 1856, the United States Supreme Court directed district courts to follow the rule of the state in which they sat.[15] Nine years later, Congress nullified the Supreme Court's

directive by statutorily granting the government five peremptory challenges in capital and treason cases and two for non-capital felony cases. The same statute reduced the number of peremptory strikes available to defendants accused of capital crimes or treason from 35 to 20, while those charged with non-capital felonies were granted 10.[16] Shortly thereafter, in 1872, Congress extended a defendants right in all non-capital felony cases to 10 challenges and allowed the government three.[17]

Evolution of the peremptory challenge in state courts paralleled the federal system. Most colonial courts tracked English common law in the number of peremptory challenges granted to defendants.[18] By 1870, the majority of states had enacted statutes granting the government a formidable number of challenges, frequently equaling the number granted to defendants.[19]

African-Americans were not the initial targets of the peremptory challenge because, by law or custom, they were excluded from serving as jurors without exception.[20] And although many states abolished slavery, disassembled de jure impediments and repealed statutes which denied African-Americans a participatory role in the legal system, de facto discrimination prevented African-Americans from sitting on juries until 1860.[21]

III. A TRADITION OF EXCLUSION

A. The Thirteenth Amendment

Supporters of the Thirteenth Amendment, adopted in 1865, emphasized that slavery was at variance with the concept of justice. Some lawmakers, such as Pennsylvania

Congressman William Kelley, addressed the failure of our legal system by criticizing juries that acquitted white men who, by their own admission, intentionally killed blacks.[22] Congressman Kelley noted that it was virtually impossible for an accused black to get a fair trial: "Where will they find an unprejudiced judge and an impartial jury to vindicate their innocence when falsely accused....?"[23]

Passage of the Thirteenth Amendment was surrounded by waves of southern violence which sought to preserve white dominance over the African-American. This included the lynching of black men, women, and children; unmerciful beatings that resembled those imposed upon slaves by their owners; and calculated murders and assaults for "insubordination."[24] Officials for the most part passively allowed the violence to occur for fear that resistance would be unpopular and lead to loss of office. For many officials, inaction was simply a manifestation of their belief that those with black skin had no right of protection from white violence. In addition, because violence was viewed as an acceptable means of labor and race control, white magistrates, judges, and jurors most often chose not to hold whites accountable for their violent acts.[25]

This was clearly reflected in Texas between 1865 and 1866 when whites were indicted and charged with 500 murders of blacks. In the 500 subsequent trials, juries without a hint of black skin acquitted every one of the defendants charged.[26] In 1865, the Freedman Bureau officials reported that in states that allowed African-Americans to testify, such testimony was negligible in the face of an all white jury. Bureau agents also reported that it was common for state prosecutors to urge white jurors to discount the

testimony of blacks due to their "childlike nature and propensity to lie [which] made them unreliable witnesses."[27]

B. The Civil Rights Act of 1866

In an attempt to give life and meaning to the Thirteenth Amendment, the Civil Rights Act of 1866 was introduced by Senator Lyman Trumball.[28] The Act's purpose was to secure equal rights to all citizens of the United States, whether black or white. The bill's first sentence declared that all persons born in the United States were United States citizens and were entitled to those fundamental rights that all free citizens possess.[29] The bill then enumerated many of these specific rights, including the right to sue, give evidence, and receive the full and equal benefit of the law as was enjoyed by white citizens. In an attempt to ensure that these rights would receive federal protection, section three of the act provided for federal removal "of all causes.....affecting persons who are denied or cannot enforce in the state courts....any of the rights secured to them by the first section of this act."

When the Civil Rights Act of 1866 reached President Johnson's desk, he vetoed it. President Johnson remarked that the bill represented "an absorption and assumption of power by the General Government which....must.....destroy our federative system [and] foment discord between the two races..... Can it be reasonably supposed that [blacks] possess the requisite qualifications to entitle them to all of the privileges and immunities of the United States?"[30]

In April of 1866 Congress overrode President Johnson's veto. Judicial interpretation of the Act took place within months of its passage. In United States v. Rhodes,[31] Supreme Court Justice Noah Swayne, sitting as a designated Circuit Court Justice, heard a case in which the United States Attorney in Kentucky indicted three white men for burglarizing the home of a black family. The United States argued that blacks who suffered racial violence were unable to enforce their rights in state courts due to state laws that continued to disqualify them from testifying against whites. Justice Swayne rejected the defendant's claim that the civil rights statute was an unconstitutional usurpation of state authority and concluded that the main object of the legislation was to avoid perpetuating a denial of justice against African-Americans.[32]

Although the Act did not specifically address the white dominated jury system, its guarantee that each person receive the full and equal benefit of the laws brought about significant changes. African-American's began to participate as jurors in many southern states, and by 1870, the integrated jury was becoming a common sight.[33] This was reflected in the fact that between 1870 and 1873, the Justice Department's successful prosecution of white supremacists increased twelve fold from 43 cases in 1870 to over 500 cases in 1872.[34] The African-American voice was being heard and evaluated by black as well as white jurors.[35]

Unfortunately, it wasn't long before the United States Supreme Court's decision in Bylew v. United States[36] rendered the Civil Rights Act of 1866 a broken weapon. While the Court upheld the Act's constitutionality, it rejected the Act's premise that a black

crime victim needed federal protection when state rules precluded African-American's from testifying in court.[37] This ruling was followed by the Slaughterhouse cases in 1873 which returned the task of enforcing civil rights to the states. This return of power was accompanied by a significant increase in white mob violence and white juries that refused to convict those responsible.[38]

C. The Civil Rights Act of 1875

In 1875, the Republican Congress responded by introducing legislation modeled after the Civil Rights Act of 1866.[39] This Jury Anti-Discrimination Statute subjected public officials to misdemeanor charges for disqualifying any citizen from serving as grand or petit jurors on account of race, color or previous condition of servitude.[40]

Between 1880 and 1881 the United States Supreme Court handed down four cases that would ultimately determine whether the Jury Anti-Discrimination Statute would provide a basis for fighting discrimination. In Strauder v. West Virginia,[41] the defendant argued that West Virginia law, which permitted the Courts to systematically exclude black jurors, violated the 1875 Anti Discrimination Act.[42] The state trial court disagreed with the defendant, denied his application, and permitted an all-white jury to hear the case. The defendant was subsequently convicted of murder. The Supreme Court reversed the defendant's conviction and concluded that the West Virginia Statute violated black citizens' Fourteenth Amendment equal protection right to "exemption from legal discriminations, implying inferiority in civil society, lessening the security of their

enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."[43]

In Ex Parte Virginia,[44] decided on the same day, the United States Supreme Court again upheld the constitutionality of the Anti-Discrimination Act. This time the Supreme Court affirmed the federal conviction of a Virginia state judge who had been indicted for violating the 1875 Act by failing to select qualified black citizens as jurors. The Court stated that the civil rights statute was necessary to reverse those conditions which existed prior to the Thirteenth Amendment when African-Americans were not even entitled to a trial by jury.[45]

Strauder and Ex Parte Virginia were followed by Virginia v. Rives[46] and Neal v. Delaware[47]--two cases that would render the 1875 Act futile. In Rives, the defendant petitioned for removal to federal court on the ground that no black person had ever served on a criminal or civil jury in Patrick County, Virginia. The petition was granted by Judge Rives, a federal circuit judge, following the defendant's conviction by an all-white jury. The United States Supreme Court reversed and stated:

> [W]hen a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, ... it can hardly be said that he is denied, or cannot enforce, in the judicial tribunals of the State, the rights which belong to him. In such a case it ought to be presumed [that the state] court will redress the wrong.[48]

In addition to seeking removal in Rives, the defendant sought the guarantee that blacks would comprise at least one-third of the federal jury selected. The Supreme Court rejected the notion that an African-American defendant had a "right to have the jury composed in part of colored men," and stated that a mixed jury "is not essential to the equal protection of the laws."[49]

The Rives decision gave state officials considerable freedom to continue practices that excluded African-Americans from sitting on juries. For most of the next century the United States Supreme Court would refuse to find violations of statutes that would require removal under the Rives standard, regardless of how severely African Americans were excluded from serving on juries.[50]

Approximately one year later, the Supreme Court decided Neal v. Delaware[51] and further limited any prospect of federal relief for African-Americans. In Neal, like Rives, the defendant presented evidence that no African-American had ever served as a juror in Delaware.[52] While the Supreme Court reversed the defendant's conviction, it established an insurmountable burden of proof for the defense. The Court held that in order to succeed, the defense was required to show uncontroverted evidence that African-Americans had been completely excluded from the jury box over a substantial period of time.[53]

Buttressed by Rives and Neal, legislatures turned to gerrymandering, reapportionment, and confusing election schemes as the means to disenfranchise blacks.[54]

For example, the legislature in Mississippi amended the state constitution so that voting and jury duty were limited to citizens who could pay a poll tax, who had never been convicted of any larceny-related offense, who could read and write, and who understood all sections of the state constitution. Legislatures also passed laws vesting a small number of state officials with the discretion to choose jurors based on their "good intelligence, sound judgment, and fair character."[55]

In 1896, two defendants challenged the constitutionality of the all white juries chosen pursuant to these laws in removal petitions which were denied by the United States Supreme Court.[56] The Court reasserted the Strauder-Rives doctrine and held that in the absence of state law denying blacks the right to serve as jurors, the defendant's remedy was confined to review by state courts.[57] The Court would subsequently uphold the constitutionality of discretionary selection statutes and voting requirements even though their affect was to exclude the vast majority of eligible African-Americans from serving on juries.[58] The Court also rejected the defendants' arguments that their equal protection rights were violated when tried and convicted by an all-white jury pursuant to these laws. The Court reasoned that there wasn't an equal protection violation because the constitutional requirements also applied to "weak and vicious white people."[59] In response to the argument that Mississippi had administered the discretionary criteria of "good intelligence, sound judgment and fair character" in an invidious manner, the Court concluded that this standard was constitutional because "it had not been shown that their actual administration was evil, only that evil was possible under them."[60]

Discretionary juror selection statutes in combination with strict requirements for voting eligibility eradicated African-American participation in the American legal system.[61] In 1900, fewer than five percent of the 130,000 African-Americans once registered to vote were eligible.[62] Likewise, in Alabama, only 3000 of the once 181,000 eligible African-Americans remained eligible.[63] These patterns were prevalent throughout the segregated south.[64]

During the first decade of the 20th century, a survey focused on counties where African-Americans constituted one-half or more of the population in 1900.[65] In Alabama, three responding counties said that no African-Americans had ever sat as jurors. In an Arkansas county, African-Americans did not serve as jurors despite their outnumbering whites by 8 to 1. In Georgia's eleven counties, officials could not remember even a single African-American in the jury box. Findings similar to these were indicated in Mississippi, Missouri, North Carolina, South Carolina, Virginia and Florida.[66]

It wasn't until 1935 that African-Americans had any chance of successfully challenging their exclusion from jury service. In that year, the United States Supreme Court provided a basis for challenging the prevalent strategic exclusion of blacks in Norris v. Alabama.[67] The Norris case arose out of the Scottsboro trial in which nine black men were wrongly accused, tried and subsequently condemned to die for raping two white women. The case was a national spectacle and later described as a "legal lynching."[68]

Pretrial hearings in the Alabama courts included the testimony of several state officials indicating that there had never been a black juror "on any grand or petite.... jury within the memory of witnesses who had lived there all of their lives."[69] A jury commissioner testified that no African-American had participated as a juror in the counties entire history.[70] Despite this evidence, the Alabama courts denied the defendant's equal protection argument that discrimination was the source of blacks' exclusion and concluded that no African-Americans in the counties were qualified to discharge the duties of a juror.[71]

The Supreme Court found it "impossible to accept such a sweeping characterization" and rejected it as a "violent presumption."[72] The opinion indicated that the Court would no longer defer to state officials' denial that racial discrimination had caused the exclusion. This paved the way for successful future challenges to all-white jury convictions of African-American defendants.[73] In the subsequent twelve years, the United States Supreme Court would reverse all-white jury convictions in which black defendants were sentenced to death in Oklahoma, Kentucky, Louisiana, Texas and Mississippi.[74] In each of these reversals, defendants established a prima-facie case of discrimination by presenting statistical evidence of protracted exclusion from the jury box.

Unfortunately, by 1945 the Court approved the seating of one token African-American on each grand jury as a means of "complying" with its prior rulings.[75] As a result, racist jury selection procedures were protected from constitutional scrutiny and the all-white jury remained securely entrenched in the American courtroom.[76] Including an

African-American on the grand jury and a few on the trial panel would satisfy the Norris equal protection standard. Excluding African-Americans from actually sitting through trial would be assured by relying on the prosecutors' peremptory challenge.[77]

IV. THE PEREMPTORY CHALLENGE: A NEW TOOL OF EXCLUSION

The Court's decision in Norris forced states to resort to a much more subtle means of excluding African-Americans from the jury box. A southern attorney was quoted in the New York Times as saying "There are enough legal loopholes and human ingenuities on hand to keep them excluded....for a long time to come."[78] The peremptory challenge would serve this purpose. From 1930 until 1965, and thereafter, convincing evidence demonstrates that litigants began to use the peremptory challenge with remarkable speed as a means to continue the tradition of African-American exclusion.[79] Only seven months after the Supreme Court decided Norris v. Alabama, a newspaper reporter observed that "Negroes are just about as successfully and consistently excluded from jury duty in the deep south today as they were before."[80] The peremptory challenge would simply replace the jury commissioner's discriminatory disqualification of African-Americans and become the primary means of continuing a tradition of inequality and injustice. The Supreme Court would not address this subtle means of exclusion until 1965 when it handed down Swain v. Alabama.[81] In the meantime, the Court would deny certiorari in seven cases involving discriminatory use of the peremptory challenge.[82]

A. Swain v. Alabama

In Swain, a nineteen year old black defendant was convicted by an all-white jury of raping a seventeen year old white girl.[83] Eight blacks were on the petit jury venire, but none actually served--two were exempt and the remaining six were peremptorily struck by the prosecutor.[84] The defendant argued that no black had served as a juror in a civil or criminal trial in Talledega county for fifteen years because prosecutors sytematically prevented blacks from serving on the jury itself.[85] Despite the fact that 26% of the people eligible to serve on the jury were black, and that none of them had actually participated as a juror in the past 15 years, the Supreme Court found that the defendant had failed to establish a prima facie case of discrimination.[86] The Swain Court required proof of "repeated striking of blacks over a number of cases" and evidence that the prosecutor was responsible for the exclusion.[87] This ruling required the defendant to investigate a formidable number of cases in an attempt to determine the race of defendants, the racial composition of both the venire and petite jury, and the manner in which both parties utilized their peremptory challenges.[88] This would turn out to be an insurmountable burden, especially in jurisdictions where court records lacked any indication of jurors race. In addition, as pointed out in Justice Goldberg's dissent, the Court turned established legal priorities upside-down by exalting the peremptory challenge above equal protection and fair cross section principles.[89] Particularly, because the Court required "systematic exclusion," a defendant's ability to assert his constitutional rights turned on the fortuity of whether he was excluded first or last in a series of discriminatory peremptory strikes.[90]

B. Batson v Kentucky

Swain would remain good law until 1986 when the Supreme Court decided Batson v. Kentucky.[91] Batson involved the trial of a black man who was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods.[92] After jurors were excused for cause, the prosecutor turned to the peremptory challenge to strike the four remaining African-Americans on the venire.[93] The defendant was subsequently convicted on both counts by an all-white jury.[94]

The petitioner challenged the state's use of the peremptory challenge under both the Sixth Amendment's cross section requirement as well as the Fourteenth Amendment's Equal Protection Clause.[95] Justice Powell, writing for the Court, relied on the equal protection clause and disavowed Swain's "crippling" evidentiary burden by holding that even one case of discriminatory exclusion was enough to violate the equal protection clause.[96] The Court stated that purposeful racial discrimination in selecting jurors

> violated the defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. 'The very idea of a jury is a body...composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.[97]

The defendant could now "establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on the evidence of the prosecutor's exercise of peremptory challenges at the defendant's trial."[98]

Although the Court declined "to formulate particular procedures"[99] for proving discriminatory purpose, it established a three step process for identifying when the

peremptory was being use in discriminatory manner. The first step placed the burden on the criminal defendant and required a showing that the defendant was the member of a cognizable group capable of being singled out for differential treatment, and that the defendant had been subjected to “purposeful discrimination.”[100] The Court stated that purposeful discrimination required a showing that “the totality of relevant facts give rise to an inference of discriminatory purpose.”[101] The Court defined relevant facts as including proof of disparate impact, in addition to evidence that the defendant’s race had not been summoned for jury service over an extended period of time.[102]

If the defendant succeeded in establishing a prima facie case, the burden shifted to the state to adequately explain the reason behind the exclusion. Justice Powell stated that the State could not “meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties.”[103] Rather, the State would be required to demonstrate that “permissible racially neutral selection criteria and procedures have produced the monochromatic result.”[104] In addition, the Court stated that the proffered race-neutral explanation must be “related to the particular case to be tried.”[105] The third stage required the trial court to determine whether the defendant had established purposeful discrimination in light of the state’s explanation.[106]

C. Batson’s Progeny

Batson’s progeny consists of five Supreme Court decisions: Powers v. Ohio,[107] Edmonson v. Leesville Concrete Co.,[108] Hernandez v. New York, Georgia v. McCollum,[109] and Purkett v. Elem.[110] In Powers, the Supreme Court considered whether

a white criminal defendant had standing to object to the exclusion of prospective African-American jurors. The Court expanded the second stage of the Batson process by holding that all defendants, regardless of whether the defendant and the juror are of similar racial background, have standing to object to racially motivated use of the peremptory challenge. The Court emphasized that the excluded jurors and the community have an interest in eliminating discrimination during jury selection:

> Batson recognized that a prosecutor's discriminatory use of the peremptory challenge harms the excluded jurors and the community at large. The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principle justifications for retaining the jury system...... Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people.[111]

In addition, the Court reaffirmed the degree to which discriminatory use of the peremptory challenge causes a criminal defendant injury:

> The jury acts as a vital check against wrongful exercise of power by the State and prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and appearance of the guarantee. 'Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethical, racial, or political prejudice, or predisposition about the defendant's culpability.'[112]

In Edmonson, Batson was extended to peremptory challenges in a civil context. To justify Batson's application to private litigants represented by private attorneys, the Court held that the "state action" requirement was satisfied when private parties became "a government actor for the limited purpose of using peremptories during jury selection."[113] The Court stated that "the selection of jurors represents a unique

governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race."[114]

In Hernandez, the Court determined that a prosecutor's peremptory challenges are not discriminatory simply because they might have a disproportionate impact on a racial group.[115] The Court observed that "[e]qual protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race-neutrality."[116] In addressing the sufficiency of the prosecutor's excuse, the Court stated:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.[117]

In 1992 the Court cut back the peremptory challenge further in Georgia v. McCullom. In McCullom, the Court held that a criminal defendant's discriminatory use of the peremptory challenge also violated the Fourteenth Amendment's Equal Protection Clause. The Court, following its analysis in Edmonson, found that: 1) the criminal defendant's discriminatory action harmed the juror and the publics confidence in the jury system; 2) the defendant's exercise of a peremptory challenge constituted state action for purposes of the Equal Protection Clause; and 3) the state had third-party standing to challenge the defendant's action.[118] McCullom was followed by J.E.B. v. Alabama ex rel.

T.B., in which the Supreme Court placed further constraints on the peremptory challenge by holding that gender based challenges violate the Equal Protection Clause. The Court reasoned that gender stereotypes, like racial stereotypes, are not an accurate justification for removing jurors.[119]

And finally, in Purkett v. Elem, the Supreme Court held that the prosecutor's race neutral explanation does not have to be persuasive or plausible, and will be considered race neutral so long as discriminatory intent is not inherent in the explanation.[120] Purkett arose out of a trial in which an African-American was charged with second-degree robbery.[121] The defendant asserted a Batson objection to the prosecutors utilization of peremptory challenges to exclude two of three African-Americans from a venire totaling twenty five.[122] In explaining his strikes, the prosecutor stated:

> I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee-type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don' t like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.[123]

The state trial court, without explanation, overruled the defendant's objection and impaneled the jury.[124] On direct appeal, the defendant renewed his Batson claim and the Missouri

Court of Appeals affirmed, finding that the "state's explanation constituted a legitimate 'hunch' " and that "[t]he circumstances fail[ed] to raise the necessary inference of racial discrimination."[125]

The defendant filed a petition for habeas corpus. The District Court concluding that the Missouri courts' determinations that there had been no purposeful discrimination was a factual finding entitled to a presumption of correctness.[126] The Court of Appeals for the Eighth Circuit reversed and remanded with instructions to grant the writ of habeas corpus.[127] The court stated that

> [W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing that those factors will somehow affect the person's ability to perform his or her duties as a juror.[128]

The Supreme Court, in a per curiam opinion, reversed the Court of Appeals for the Eighth Circuit. In doing so, the Court stated that "the Court of Appeals appears to have seized on our admonition that to rebut a prima facie case, the proponent of a strike must give a 'clear and reasonably specific explanation of his legitimate reasons for exercising challenges."[129] The Court went on to state that this warning was only meant to refute the notion that a prosecutor could satisfy his burden by merely denying discriminatory motive or affirming his good faith. What is meant by "legitimate reason," the Court pointed out, " is not a reason that makes sense, but a reason that does not deny equal protection."[130] After Purkett, proponents of a peremptory strike need not respond to a challenge with an explanation that is "persuasive or even plausible."[131]

In dissent, Justice Stevens, accompanied by Justice Breyer, referred to the majority opinion as “a law changing decision:”[132]

> The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in Batson.”[133]

V. THE PEREMPTORY CHALLENGE SHOULD BE ELIMINATED

“You don’t stick a knife in a man’s back nine inches
and then pull it out six inches and say you’re
making progress.”

--Malcom X[134]

A. Batson and its Progeny Have Failed

Evidence suggests that the Supreme Court’s solution to discriminatory use of the peremptory challenge has failed. In fact, it is arguable that the Court has created a system which insulates discrimination and provides the means by which exclusionary practices can continue unabated.

1. The Prima Facie Case

Much of the difficulty in eliminating discriminatory use of the peremptory challenge rests in the nature of the peremptory itself. The peremptory’s value lies in the litigant’s freedom to exercise it without explanation. The reasons for utilizing the peremptory challenges rest in the minds of the litigants themselves. There is no external

circumstantial justification which a litigant must point to in order to exercise her challenge. As a result, it becomes an ineffective and near impossible task to utilize tangible, external circumstances as the means of identifying whether the peremptory challenge has been exercised in a permissible manner. Justice Marshall recognized this in his Batson concurrence when he stated that "prosecutors are left free to discriminate against blacks in jury selection provided they hold that discrimination to an acceptable level."[135] An "acceptable level" indicates the level at which a litigant's discrimination falls short of reflecting itself in an identifiable change of circumstances.

This difficulty of utilizing external circumstances to identify subjective discriminatory purpose is evident in the varied and ineffective standards established by courts to define what constitutes a prima facie case of discrimination. For example, some courts determine whether a defendant has established a prima facie case by checking to see whether the prosecution has peremptorily challenged all members of the defendant's race.[136] This standard has even been applied when only one person of the defendant's race is present as a potential juror.[137] This is ineffective and problematic because it creates the incentive to leave one minority token juror and offers litigants the means by which an "acceptable level of discrimination" can be clearly defined and completely insulated.

Another inquiry used by courts consists of determining whether any of the defendant's race served on the final jury panel.[138] Under this standard, as long as one person of the defendant's race remains on the jury, a prima facie case of discrimination cannot be shown. Again, this has the obvious effect of creating the incentive to leave one

token juror and goes a long way toward insulating, not identifying, discriminatory behavior.[139] It differs from the above standard only in that it focuses on the final jury panel rather the prosecution's strikes. And with any standard limited to numbers analysis, it overlooks the conduct of attorneys and jurors during voire dire--the very subject Batson and the peremptory challenge are supposed to address.

And still another method for determining a prima facie case consists of looking for broad patterns which reveal discrimination--evidence the Court indicated might be helpful.[140] This method has the obvious problem of creating more ambiguities that are difficult to resolve such as where a "pattern" begins. Some courts have turned to statistical data in which judges look for a disproportionate number of peremptory strikes against minorities. This requires that a litigant provide evidence that a certain minority comprises a certain percentage of the venire and that a much higher percentage has been struck.[141] Other courts examine prosecutorial conduct both in the case at bar and in the past, the nature of questions during voire dire, or some combination thereof.[142] Whatever the method, the problem remains that the presence of identifiable patterns will never reflect subjective discriminatory purpose with precision. The result is that there will always remain an opportunity to discriminate.

Courts' inability to identify discrimination effectively renders Batson an inherently unworkable framework. It could only be reasonable to embrace this inherently ineffective framework if it were safe to assume that discrimination was the exception, not the rule.

Such an assumption contradicts history and the very circumstances which gave birth to Batson in the first place.

2. Neutral Explanations and the Problem of Pre-Text

Justice Marshall recognized that Batson's framework guaranteed frequent circumvention of its holding: "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second guess those reasons."[143] Justice Marshall was right. "Ineffective scrutiny of ....[neutral] explanations is the single greatest problem hindering the effective implementation of Batson."[144] Chief Justice Nix of the Pennsylvania Supreme Court, in advocating the elimination of the peremptory challenge, stated that

> "[despite] the facile lip-service generally paid to .... [equal protection] principles, they are effectively nullified by evidentiary requirements that virtually insulate a prosecutor's use of the peremptory challenge to exclude jurors.....Even if the defendant succeeds in establishing a prima facie case of such discrimination, the prosecutor can defeat the claim if the hearing court accepts his 'neutral explanation' for excluding jurors of the defendant's race....The arbitrary nature of the concept of peremptory challenges renders it impossible to effectively prevent its use as a discriminatory tool."[145]

One commentator conducted a study which reveals that lower federal courts rarely find Batson violations and overwhelmingly accept proffered neutral explanations.[146] The study found that of 341 cases in district and circuit courts, Batson violations were found in only 5.6% of the cases.[147] Another survey of seventy six cases in federal circuits found only three in which the attorney's proffered reasons were deemed unacceptable.[148]

Individual cases demonstrating the ease with which litigants can sidestep Batson with acceptable "racially neutral" explanations seem limitless. In United States v. Sandoval, the Eighth Circuit upheld a prosecutor's explanation for striking one of the two black jurors because she was a cosmetologist, very youthful and did not appear to have a high level of education.[149] In ruling on the Batson challenge the trial court interpreted Batson to permit race as a factor in utilizing peremptory challenges as long as race was not the predominate reason.[150] In United States v. Davis, the prosecution successfully explained his strikes of African-American jurors by offering general considerations, including marital status, type of job, failure to answer questions on voire dire and place of residence.[151] The prosecutor stated that he did not like single persons and preferred jurors with jobs that demand independent thinking.[152] The circuit court affirmed the district court's conclusion that such explanations were race neutral. In United States v. Lorenzo, the last potential juror with a Hawaiian surname from a case arising out of Hawaii was peremptorily struck because the juror had "long, unkept" hair, a "long" beard, and appearance generally associated with the counterculture beliefs of "hippies."[153] In the Fifth Circuit, black jurors were single, young and without a substantial stake in the community;[154] in the Fourth Circuit the black juror was effeminate;[155] in the Ninth Circuit the minority juror was a "loner."[156]

Often, rebuttal explanations based on jurors mannerisms have been accepted by courts.[157] These explanations, like those on appearance, create the unique problem that they are almost completely insulated from appellate review because transcripts do not

reflect non verbal facts. In addition, problems arise from the fact that judges will rarely, if ever, track such details.[158]

In addition to explanations like those portrayed above, which offer litigants almost free reign to exclude particular jurors, lower court implementation of Batson has allowed for "legitimate" race neutral explanations which serve as a proxy for race and eliminate large sections of the minority population without regard to the particular personal characteristics of a juror.[159] Frequently used explanations that are facially neutral but offer an effective proxy for race include area of residence, unemployment, insufficient education, lack of income, and relatives with criminal records. All of these explanation risk excluding huge segments of the black population since, as is well established and accepted, black neighborhoods in cities around the country are much more likely to lack employment opportunities, have a high rate of poverty, have inferior schools and facilities, and are subjected to much higher rates of criminal activity.[160] One commentator has noted that in many cities, over eighty percent of the black population lives in all-black neighborhoods.[161] Given these realities, the "facially neutral" standard set out by the Supreme Court will remain a wholly inadequate means of extinguishing discriminatory use of the peremptory challenge. This will remain true for as long as the incentive to discriminate remains. The presence of the peremptory challenge gives life and opportunity to this incentive.

3. Appellate Review

The degree to which meaningful appellate review can take place is yet another problem that solidifies those outlined above. One judge has stated that "it has become virtually impossible for appellate courts or trial courts to discern proper gradation and variations to provide meaningful procedural guidance guaranteeing some measure of consistent application."[162] Trial records simply do not afford appellate judges the opportunity to evaluate conduct at issue when peremptory challenges are appealed. The result is that even when legitimate appeals are made, they will deprive the appellant of adequate inquiry and err on the side of deferring to the trial judge.[163] Furthermore, when appellate courts establish factors for trial courts to consider in assessing proffered race neutral explanations, which will in turn improve appellate review, such factors become a road map for litigants on how to further insulate their peremptory strikes from the reach of Batson challenges.[164]

4. Reality in the Courtroom

In his Batson concurrence, Justice Marshall seemed to take note of the societal reality upon which our justice system unfolds. He recognized the degree to which racism in the courtroom is society's illness--an illness demanding much more than courtroom procedure to remedy: "Even if all parties approach [Batson's] mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels--a challenge I doubt all of them can meet."[165]

Perhaps the greatest single flaw in the Court's attempt to extinguish discriminatory use of the peremptory challenge rests in its assumption that the integrity of

litigants can be relied on, notwithstanding the problem of unconscious racism. Batson's remedy assumes that the explanations given by counsel can and should be relied on at face value. If discrimination is to be found, it must be found inherent in the explanation itself.[166] The Court seems to have overlooked the competitive, adversarial nature of our system and the responsibility attorneys have in representing their clients zealously. Our adversarial system, comprised of so many diverse and varying factors, depending at every turn on persuading judge or jury, itself creates the incentive to push the envelope as far as possible in an attempt to establish a greater degree of certainty. The Court has underestimated the all or nothing environment of the courtroom and the degree to which litigant's are willing to further their interest by excluding potential jurors, even if that means doing so in a discriminatory manner.

Batson and its progeny makes the mistake of saddling litigants with the burden of weighing their immediate personal and professional interests against the interests of jurors, the community and notions of fairness. Even if a litigant is willing to acknowledge these interests, to take note of where integrity ends and discrimination begins, and to walk that line, it is unreasonable to expect precision in the attempt. Because the essence of the peremptory challenge is itself the opportunity to exclude without reason or explanation, the only way to extinguish discrimination from our courtrooms is to extinguish the opportunity to engage in it. The litigant's themselves cannot be relied on to identify and forgo the opportunity when it is present, especially when they believe in what they are fighting for and believe it is all at risk.

B. The Justifications and Their Rebuttal

For those who oppose eliminating peremptory challenges, the four most commonly offered justifications as to why they should remain a part of our justice system are as follows: 1) their extensive history as an inherent aspect of trial by jury; 2) their role in establishing the perception of fairness and impartiality in both the community and litigants; 3) their function as a necessary supplement to challenges for cause; and 4) their value as a tool for achieving impartial juries. These arguments, neither individually nor collectively, warrant retaining the peremptory challenge; the grievous harm it causes by giving life and opportunity to the racism which has stained our system of justice for far too long, is simply too great a price to pay.

1. History

One justification for the peremptory challenge is the fact that it is a well established procedure that has played an important role in shaping the Anglo-American Jury system. In Swain, Justice White stated that the peremptory's history and persistence are evidence that it is "a necessary part of trial by jury."[167]

While the peremptory's "very old credentials"[168] may be important for history's sake, they are an insufficient justification for its continued use. To set one's eyes on history and overlook the manner in which the peremptory challenge is used in our courtrooms today verges on being irrational. The focus should remain on the affect the peremptory challenge has on the administration of justice today. Its true definition and

value is bound to the manner in which it serves our judicial system; that is the basis upon which it should be preserved or eliminated.

Moreover, to suggest that weight should be given to the peremptory's "very old credentials" overlooks the role it has played both in England and in this country. The peremptory challenge has been eliminated in England precisely because it was used as a means to seat unrepresentative juries. After the United States Supreme Court decided Norris v. Alabama in 1935, the peremptory challenge became the primary tool to continue excluding African-Americans from sitting on juries. Today, it remains the sole means by which African-Americans continue to be affirmatively excluded from the jury box. And today, as in 1935, our country remains in a state of conflict over race relations and struggles to find resolve.

If history is to offer us anything that is valuable in our analysis of the peremptory challenge, it offers us a context from which we can observe where we have been and where we should go. History reveals that we are still a country evolving out of a history of discrimination and exclusion. Eliminating the peremptory challenge from our criminal justice system will assist us in that regard.

2. Perceptions of Fairness and Impartiality

Another justification for the peremptory challenge is based on its reputation for establishing the perception of fairness and impartiality.[169] For the defendant, and through him the community, the peremptory is said to ensure confidence that the jury is an

appropriate and just mode for resolving conflicts.[170] While it is certainly important that the defendant feel positive about the jurors who will decide his fate, this justification cannot carry much weight for several reasons. First, the perception of fairness and impartiality is valuable, but must be measured by the reality in the courtroom and not by theory alone. As so many contemporary cases illustrate, the peremptory challenge appears to allow for the infusion of racism into the courtroom. It is the means by which African-Americans and other minorities continue to be excluded from the jury box even after the days of black codes and the like have past. Evidence suggests that the peremptory challenge actually creates the appearance of bias, if not increasing it. For the minority defendant, the minority juror who is excluded, and the community which is touched by them, there is every reason to believe that the peremptory challenge is a source of injury which casts doubt on the jury process and the democratic ideal which has given rise to it.

Second, to the extent that there will be dissatisfaction in the absence of peremptory strikes, there is no reason this cannot be cured by some alternative means such as expanding challenges for cause (addressed below). If there still remains dissatisfaction in the midst of all viable alternatives, it should be recognized that perhaps this is a small price to pay in our struggle for racial equality.[171] Equality in the process is itself the primary goal and, if achieved to a greater degree, will likely outweigh concern and doubt which has its source in appearances. Batson's failed legacy reveals that if the peremptory challenge remains, discrimination in the courtroom will remain. Appearances offer little justification for preserving the peremptory challenge when the potential for serious harm from discrimination persists.

3. Achieving Impartial Juries

Perhaps the most common justification for retaining the peremptory challenge is its value as a tool for achieving impartial juries.[172] As pointed out by Professor Ogletree of Harvard Law School, this is the only justification of those commonly asserted which addresses the jury's function.[173] Other justifications, like those discussed above, focus on the perception and appearance of justice, not the effectiveness of the jury. The argument that peremptory challenges are essential for seating impartial juries generally falls into two areas. First, it is said that the peremptory challenge is a necessary supplement to challenges for cause. Second, the peremptory challenge is thought to achieve, as its general purpose, eliminating partiality-- notwithstanding challenges for cause.

a. A Necessary Supplement to the Challenge for Cause

Those who oppose eliminating the peremptory challenge argue that challenges for cause are simply too narrow to identify and eliminate anything but the most extreme bias.[174] This raises the concern that hidden bias will persist due to evasion by prospective jurors, both deliberately and unconsciously, in an attempt to preserve a place on the jury.[175] The problem of hidden bias becomes compounded by the judges role as an authority figure since prospective jurors are extremely self aware and often hesitant to say or do anything that might displease the judge.[176] Thus, it is argued that the peremptory challenge supplements for cause challenges by removing jurors who are partial but have not exhibited the extent of their bias.[177]

The first question which arises in response to this justification is why should problems with for cause challenges lead to the conclusion that peremptory challenges are necessary? Why should our justice system turn to the peremptory challenge, which has a confirmed history of invidious abuse that despite the Supreme Court's best efforts, remains unresolved? A more reasonable course of action is to address the problem where the problem exists and attempt to resolve the weaknesses inherent in the way for cause challenges are exercised.

For cause challenges could be expanded by permitting the litigants sufficient latitude to probe suspicions through questioning.[178] The bases upon which bias is established could be expanded beyond obvious connections to the case or parties to include any basis upon which a reasonable attorney believes that a juror cannot be impartial.[179] As Professor Ogletree has explained:

> the judge need not, as now, share [the attorney's] belief, but he does have to find it reasonable rather than based on pure hunch, guesswork, or the desire to eliminate a large swath of society from the jury rather than a specific affiliation which might influence a juror unduly. Taxicab drivers, for example, could be struck from a case involving a taxicab driver, but jurors over forty, or jurors who owned automobiles, or jurors who frowned when asked about automobiles, could not be struck for those reasons.[180]

In addition, for cause challenges could be supplemented with a requirement that attorneys' provide judges with documentation describing the case and their concerns about bias. This would provide judges with necessary background to make intelligent rulings on where disqualification is appropriate. Further, this documentation could be preserved and thereby increase the effectiveness of appellate review.

It is also argued that questioning during voire dire often antagonizes or alienates a juror in the absence of establishing a basis for disqualification. It is therefore argued that without the peremptory strike, an attorney will be unable to engage an adequate search for cause disqualification for fear of being stuck with angered or alienated jurors.[181] However, this concern can be minimized to a great extent by having judges instruct potential jurors as to voire dire's purpose; attorney's can take care not to be overly aggressive or demeaning; and challenges can be made outside of the jury's presence so that resentment does not develop against the challenger.[182] Furthermore, post trial interviews suggest that most people respect a lawyer who pursues voire dire questioning intensely, as long as bullying does not take place.[183]

b. A Tool to Eliminate Partiality

I am not an idealist, nor a cynic, but merely unafraid of contradictions.
I have seen men face each other when both were right, yet each was determined to kill the other, which was wrong. What each man saw was an image of the other, made by someone else. That is what we are prisoners of.

--Donald Hogan

The notion that the peremptory challenge can be used to achieve impartiality rests on two fundamental assumptions. The first is that attorneys are actually capable of identifying impartiality through the voire dire process. The second is that the state of "impartiality" that jurors are capable of possessing is one "which ...leaves the mind perfectly open to conviction"[184] and "is influenced only by legal and competent evidence produced during trial."[185] With regard to the first assumption, it is admitted, even by those who support their use, that peremptory challenges are most often based on "seat of

the pants instincts" consisting of crude "stereotypes" that are often "hopelessly mistaken."[186] Available empirical evidence supports this. According to an English study, conviction rates actually increased by seven percent when defense attorneys exercised their peremptory strikes.[187] Professors Zeisel and Diamond conducted another study in which they analyzed twelve criminal cases tried in federal court.[188] Among their findings, they determined that, generally, the prosecutors' positions were not improved by using peremptories. In addition, they found that attorneys' effective use of the peremptory was "highly erratic."[189]

The second assumption, that impartiality is a state in which jurors are a blank slate, free from the bounds of their subjective conceptual frameworks,[190] is like many of the justifications surrounding the peremptory challenge: it is theory. It is theory which--like the peremptory challenge--should no longer remain as an unexamined facet of our judicial system.

Justification for the peremptory challenge as a tool to achieve impartiality, depends upon an acceptance of the understanding of human perception that is rooted in long rejected eighteenth century empiricist thought. This understanding equates partial vantage points with prejudice. It assumes that the "truth" we seek in the courtroom is objective, accessible, singular, and self existent.[191] It measures the adequacy of judicial inquiry by the extent to which the inquiry accurately receives this reality through minds that are "impartial" enough to see it as it really is.[192]

But the intellectual disciplines of our time have raised doubts about the unproblematic accessibility of the external world and the unproblematic relation between the external reality and the representations by which it is understood.[193] "The mental mirrors onto which reality is reflected have come to be seen as social artifacts, a product of their time and place. ....[T]he mind has come to be seen not as a mirror reflecting exact images of reality, but as a lens through which external reality is refracted."[194]

Acknowledging that a juror's perception of evidence is mediated by personal knowledge structures, assumptions, and interests that filter and co-create the evidence as it is perceived, has startling consequences for our view of impartiality and the manner in which the peremptory challenge is used to influence it. This is especially true in light of the well established and accepted understanding that jurors do much more than simply determine the contour of facts in a given case. Much more than determining the facts at issue, jurors provide quasi-legal standards such as "reasonableness,"[195] and are asked to determine intangible facts such as "intent." The fact that such determinations are in dispute and require resolution is itself evidence that the physical events at issue in trial are themselves inadequate indicators in making such determinations. By definition, the juror's determination of intent and what is "reasonable" must rest on her own foundation--a foundation of personal life experience which has no presence as "evidence" in the courtroom. The juror must search the depths of her own understanding of people and events--an understanding inseparable from the one who has acquired it. Thus, the administration of justice, the law, necessarily consists of factors such as wealth, education, age and race which contribute to juror identity.

Our justice system's negative definition of impartiality fails to take account of a shocking truth:

> [B]ecause all perception is dependent on the interpretive apparatus of the juror, "truth" is invariably relative to a community that shares the same conventions of interpretation. No perspective can claim priority on the basis of privileged access to the "truth." The only ground on which to say any point of view can assert priority is on the basis that it commands the greatest agreement.[196]

Litigants, unlike our judicial system, operate in accordance with this understanding. This is reflected in the well established belief among trial lawyers that a case is won or lost at the jury selection stage; not because an impartial panel is an essential requirement for a fair and accurate trial, but because the correct slant of partiality is thought to be essential.[197] During voire dire, attorneys do everything they can to identify and seat jurors who hold beliefs that will lead them to accept and prefer the attorney's version of events.[198] Indeed, excessive amounts of money are spent and an entire industry of jury consultation has developed to provide the most efficient and effective means of doing so.[199]

Rather than defining impartiality in the negative, impartiality should be conceived of as necessarily including varying partial perspectives. Rather than believing that only those who know close to nothing about the issues implicated in a case can be impartial, our system should recognize that those who know absolutely nothing about the issues are equally susceptible to an inability to judge--equally partial in their vantage point.[200] Our system should recognize that we risk bias by having a total absence of the experience or

knowledge that is relevant to the issues and evidence; that sufficient knowledge of a witness world is required if the witness' statements are to be understood in context;"[201] that the ability to truly judge and decide the fate of a human being requires some degree of commonality.[202]

The peremptory challenge is used by litigants as a strategy to create favorable, partial "truths." As such, it eliminates the diversity and representativeness of our communities. Eliminating the peremptory challenge will raise the value of diversity above the strategic interests of litigants. It will ensure that our system embraces, and makes available, a means of resolving conflict which truly has the community's voice as its authority.

VI. CONCLUSION

Whether through the word of law or our courtroom procedure, when we allow our system to deprive our society of its true voice, we diminish the value of our democracy and our ability to administer what is just. In recognizing this, we should ensure that the exclusion of life experience perpetuated by the peremptory challenge is eliminated once and for all so that we can ensure that our "truths" are not themselves a source of harm.

[1] Duncan v. Loisiana, 391 U.S. 145, 146-48 (1968).
[2] Batson v. Kentucky, 476 U.S. 79 (1986).
[3] Id. at 106 (Marshall, J., concurring).
[4] See Id.
[5] Id. at 108 (Marshall, J., concurring).
[6] Lloyd E. Moore, The Jury 37 (2d ed. 1988).
[7] Id.
[8] Jon M. Van Dyke, *Jury Selction Procedures: Our Uncertain Commitment to Representative Panels* 147 (1977).
[9] Van Dyke, supra note 8, at 148.
[10] James J. Gobert, *The Peremptory Challange--An Obituary*, 1989 CRIM. L. REV. 528, 529 (1989).
[11] Id. at 529.
[12] Id.
[13] Swain v. Alabama, 380 U.S. 202, 214 (1965) (citing the act of April 30, 1790, ch. 9, s 32, 1 Stat. 119).
[14] Van Dyke, supra note 8, at 148-149.
[15] United States v. Shackleford, 59 U.S. (How.) 590 (1856).
[16] Swain, 380 U.S. at 215.
[17] Swain, 380 U.S. at 215.
[18] Id. at 215.
[19] Id. at 216.
[20] Richard Kluger, *Simple Justice* 27 (1975).
[21] Kluger, supra note 20, at 38.
[22] Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challanges*, 76 CORNELL L. REV. 1, 38 (1990).
[23] Id.
[24] Eric Foner, *Reconstruction: America's Unfinished Revolution* 64, 76 (1988).
[25] Id. at 205.
[26] Colbert, supra note 22, at 205.
[27] Id. at 43.
[28] Id. at 44.
[29] Id. at 45 (citing Cong. Globe, 39th Cong., 1st Sess. 42 (1865)).
[30] Id. at 50 (citing Cong. Globe, 39th Cong., 1st Sess. 1681, 1679 (Johnson's Veto Message)).
[31] 27 F. Cas. 785 (C.C.D. Ky. 1866).
[32] Id. at 787.
[33] Foner, supra note 24, at 372.
[34] Colbert, supra note 22, at 43.
[35] Foner, supra note 24, at 355-58.
[36] Bylew v. United States, 80 U.S. 13 (Wall.) 581 (1872).
[37] Colbert, supra note 22, at 57.
[38] Id. at 59-61.
[39] Act of March 1, 1875, Ch. 114, §4, 18 Stat. 335.
[40] Id.
[41] Strauder v. West Virginia, 100 U.S. 339 (1880).
[42] Id. at 304.
[43] Id. at 306.
[44] Ex Parte Virginia, 100 U.S. 339 (1880).
[45] Id. at 344.
[46] Virginia v. Rives, 100 U.S. 313 (1880).
[47] Neal v. Delaware,100 U.S. 370 (1880).
[48] Id. at 321.

[49] Id. at 323.
[50] Colbert, supra note 22, at 69.
[51] Neal v. Delaware, 100 U.S. 370 (1880).
[52] Id. at 393-94.
[53] Id.
[54] Colbert, supra note 22, at 75.
[55] Id. at 76; Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challange of 1965--And Beyond*, 57 MISS. L. J. 690 (1987).
[56] Gibson v. Missippi, 162 U.S. 565, 589 (1896); Smith v. Missippi, 162 U.S. 593 (1896).
[57] Id.
[58] Williams v. Missippi, 170 U.S. 213 (1898).
[59] Id. at 222.
[60] Id. at 225.
[61] Colbert, supra note 22, at 77.
[62] Giles v. Harris, 189 U.S. 475 (1903).
[63] Id.
[64] Colbert, supra note 22, at 77.
[65] Id. at 77 (citing Gilbert Thomas Stephenson: *Race Distinctions in American Law* 210 (1910).
[66] Id.
[67] 294 U.S. 587 (1935).
[68] Colbert, supra note 22 at 82.
[69] Norris, 294 U.S. at 591.
[70] Id.
[71] Id. at 598-99.
[72] Id. at 598.
[73] Id.
[74] Colbert, supra note 22, at 85 (citing Hollins v. Oklahoma, 295 U.S. 394, 395 (1935); Hale v. Kentucky, 303 U.S. 613, 614-15 (1938); Pierre v. Loisiana, 306 U.S. 354, 359 (1938); Hill v. Texas, 316 U.S. 359 (1939); Patton v. Missippi, 332 U.S. 463, 466 (1947)).
[75] Akins v. Texas, 325 U.S. 463, 466 (1945).
[76] Colbert, supra note 22, at 85.
[77] Id.
[78] Id.
[79] See Batson, 476 U.S. at 103-104 (Marshall, J. Concurring); Van Dyke, supra note 8, at 154-157; Frederick L. Brown, Frank T. McGuire, and Mary S. Winters, *Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 206-09 (1978); Honorable George Bundy Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOW. L.J. 1571, 1582-84 (1984).
[80] John Temple Graver, Alabama Seeks End of Scottsboro Case, N.Y. TIMES, Nov. 17, 1935. s 4, at 7.
[81] Swain v. Alabama, 380 U.S. 202 (1965).
[82] People v. Dukes, 169 N.E.2d 84 (Ill. 1960), cert. denied, 365 U.S. 830 (1961); People v. Harris, 161 N.E.2d 809 (Ill. 1959), cert. denied, 362 U.S. 928 (1960); People v. Roxborough, 12 N.W.2d 466 (Mich. 1943), cert. denied, 323 U.S. 749, reh'g denied, 323 U.S. 815 (1944); Commonwealth v. Raymond, 194 A.2d 150 (Pa. 1963), cert. denied, 377 U.S. 999, reh'g denied, 379 U.S. 873 (1964); Commonwealth v. Banmiller, 137 A.2d 236 (Pa.), cert. denied, 356 U.S. 945 (1958).
[83] Swain, 380 U.S. at 231 (Goldberg, J., dissenting)
[84] Id. at 205.
[85] Id. at 231-32 (Goldberg, J., dissenting).
[86] Id. at 226.
[87] Id. at 224.
[88] See United States v. Pearson, 448 F.2d 1207, 1217 (1971).
[89] Swain, 380 U.S. at 243-44 (Goldberg, J. dissenting); Toni M. Massaro, *Peremptories or Peers?-Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 509 (1986).

[90] See, e.g., McCray v. Abrams, 576 F. Supp. 1244, 1247 (E.D.N.Y. 1983) (Swain precludes any remedy for first victim of discrimination), aff'd in part, vacated in part, 750 F.2d 1113 (2d Cir. 1984), and vacated on other grounds, 478 U.S. 1001 (1986); People v. Wheeler, 583 P.2d 748, 767 (Cal. 1978) (same); People v. Crespin, 612 P.2d 716, 717 (N.M. Ct. App. 1980) (same).
[91] Batson v. Kentucky, 476 U.S. 79 (1986).
[92] Batson, supra note 23, at 83.
[93] Id.
[94] Id.
[95] Id.
[96] Batson v. Kentucky, 476 U.S. 79 (1986).
[97] Id. at 86 (quoting Strauder, 100 U.S. at 308).
[98] Id. at 96.
[99] Id. at 99.
[100] Id. at 93 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).
[101] Id. at 94.
[102] Id. at 93-94.
[103] Id. at 94.
[104] Id. (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Washington v. Davis, 426 U.S. 229, 241 (1976)).
[105] Id. at 98.
[106] Id.
[107] Powers v. Ohio, 499 U.S. 400 (1991).
[108] Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1991).
[109] Georgia v. McCollum, 112 S.Ct. 2348 (1992).
[110] Purkett v. Elem, 115 S.Ct. 1769 (1995).
[111] Powers, 499 U.S. at 406-08.
[112] Id. at 411.
[113] Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077, 2080 (1991).
[114] Id.
[115] Hernandez v. New York, 111 S.Ct. 1859, 1867 (1991).
[116] Id.
[117] Id. at 1866.
[118] Id. at 2354-57.
[119] J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419, 1426-27 (1994).
[120] Purkett v. Elem, 115 S.Ct. 1769, 1771 (1995).
[121] Id. at 1770.
[122] Id.
[123] Id. at 1770.
[124] Id.
[125] Id.
[126] Id.
[127] Id.
[128] Id.
[129] Id. at 1771.
[130] Id.
[131] Id. at 1771.
[132] Id. at 1772.
[133] Id. at 1775-76.
[134] Quoted in Cornell West, *Race Matters* 53 (1994).
[135] Id. (Marshall, J., concurring).
[136] Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1106 (1994).

[137] United States v. Chalan, 812 F.2d 1302 (8th Cir. 1987), cert. denied, 488 U.S. 983 (1988).
[138] Ogltree, supra note 136, at 1106.
[139] See United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987); Gamble v. State, 357 S.E. 2d 792, 794 (Ga 1987).
[140] Batson, 476 U.S. at 96-97.
[141] See Montgomery, 819 F.2d 847 (8th Cir. 1987); Fleming v. Kemp, 794 F.2d 1478, 1484 (11th Cir. 1986).
[142] Ogletree, supra note 136, at 1106.
[143] Id. at 106 (Marshall, J. concurring).
[144] See Theodore McMillan, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 365 (1990).
[145] Pennsylvania v. Hardcastle, 546 A.2d 1101, 1113 (Pa. 1988)(Nix, C.J., dissenting).
[146] Jeffrey S. Brand, The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters, 1994 WIS. L. REV. 511, 585 (1994).
[147] Id.
[148] Joshua E. Swift, *Batson's Invidious Legacy: Discriminatpry Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 Cornell L. Rev. 336 (1993).
[149] United States v. Sandoval, 997 F.2d 491 (8th Cir. 1993).
[150] Id. at 492.
[151] United States v. Davis, 871 F.2d 71, 72 (8th Cir. 1989).
[152] Id.
[153] United States v. Lorenzo, 995 F.2d 1448, 1454 (9th Cir. 1993).
[154] United States v. Lance, 853 F.2d 1177 (5th Cir. 1988).
[155] Goodman v. Lands End Homeowners Ass'n, No. 91-2542, 1992 WL 918901 (4th Cir. May 6, 1992).
[156] United States v. Daly, 974 F.2d 1215, 1219 (9th Cir. 1992).
[157] See Ogletree, supra note 136, at 1107; , *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 812 (1988).
[158] Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of Delicate Balance*, 79 CRIM. L. & CRIMINOLOGY 1, 27 (1988).
[159] See Deborah A. Ramirez, *Excluding Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 789 (1993).
[160] Michael F. Potter, *Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a Raciall Inclisionary Ordinance*", 63 S. CAL. L. REV. 1151, 1154 (1990).
[161] Richard H. Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 N.W. U. L. REV. 874, 875 (1988).
[162] Bolling, 591 N.E.2d at 1144 (Bellacosa, J., Concurring).
[163] See Batson, 476 U.S. at 98 n.21 ("Since the trial judge's findings....largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference"); Ogletree, supra note 56, at 1108-09.
[164] Serr & Maney, supra note 158, at 60.
[165] Batson, 476 U.S. at 106.
[166] Hernandez, 500 U.S. at 360.
[167] Swain, 380 U.S. at 219.
[168] Id. at 212.
[169] Ogletree, supra note 136 , at 1136.
[170] Barbara A. Babcock, *Voire Dire: Preserving "Its Wonderful Power*," 27 STAN. L. REV. 545, 554-55 (1975).
[171] Jonathan B. Mintz, *Batson v. Kentucky: A Half Step in the Right Direction*, 72 CORNELL L. REV. 1026, 1035 (1987).
[172] See Holland v. Illinois, 493 U.S. 474, 478 (1990); Swain, 380 U.S. at 212; Lewis v. United States, 146 U.S. 370, 376 (1892).
[173] Ogletree, supra note 136, at 1136.

[174] See Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challanges and the Clash Between impartiality and Group Representation*, 41 MD. L. REV. 337, 339 (1982).
[175] Babcock, supra note 170, at 554.
[176] Saltzburg & Powers, supra note 174, at 340.
[177] David. D. Hopper, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 832-36 (1988).
[178] Jonathan B. Mintz, supra note 171, at 1035
[179] Ogletree, supra note 136 at 1134-35.
[180] Ogletree, Supra note 136, at 1134-35.
[181] Babcock, supra note 170 , at 554-55.
[182] Mintz, supra note 171, at 1043-46.
[183] Id.
[184] Black's Law Dictionary, 6th ed. 162 (1990).
[185] Id. at 752.
[186] Batson, 476 U.S. at 138 (Reqnquist, J., dissenting).
[187] Gobert, supra note 10, at 529.
[188] Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challanges on Jury and Verdict: An Experiment in Federal District Court*, 30 Stan. L. Rev. 491 (1978).
[189] Id. at 513-518.
[190] See Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 422 (1995).
[191] Id. at 414.
[192] Id.
[193] Id.
[194] Id. at 416.
[195] Id. at 427-28.
[196] Cammack, supra note 190, at 420-21.
[197] See id. at 424-27; Judith H. Germano*, Preserving Peremptories: A Practitioner's Perogative*, 10 St. John's J. Legal Comment 431, 437 (1995).
[198] Cammack, supra note 190, at 25-27.
[199] Id.
[200] Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1205 (1992).
[201] Id.
[202] Id.