Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw

Rodger L. Hochman

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Abstract

In Batson v. Kentucky, the 1986 Supreme Court decision that made it unconstitutional to use the peremptory challenge to reject jurors on the basis of race, Justice Thurgood Marshall applauded the majority for its holding.

KEYWORDS: peremptory, rebutting, challenge
XIV. CONCLUSION

The past eighteen months of Florida criminal appellate procedure has seen a constant adherence to basic principles of individual rights. While the direction of federal appellate decisions might be travelling on a clearly restrictive path, the Florida courts appear dedicated to utilizing their independent judgment and tools, including the Florida Constitution, to promote justice. Practitioners must realize that Florida appellate courts will provide significant safeguards to protect the rights and interests of criminal defendants.

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"One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness . . . ."*  

I. INTRODUCTION

In *Batson v. Kentucky*, the 1986 Supreme Court decision that made it unconstitutional to use the peremptory challenge to reject jurors on the basis of race, Justice Thurgood Marshall applauded the majority for its holding. In his concurrence, however, he expressed fear that without totally eliminating the peremptory challenge, discrimination would continue to pervade the jury selection process, albeit through pretextual guises. Since *Batson*, state and federal courts have grappled with over 700 cases applying the standards it established.

The echoes of Justice Marshall’s opinion can still be heard resounding through recent state court decisions in New York and Florida. Significant are concurring opinions in both cases which recognize both the constitutional anomaly that the peremptory challenge represents and its undermining effects on the ideals of a democratic, representational and impartial trial system. Both opinions call for the elimination of the peremptory challenge.

This note will examine the peremptory challenge and its inherent conflict between the constitutional guarantees of equal protection and an impartial jury. It will discuss how attempts of the judiciary to reconcile these opposing forces have been inadequate, undermining public confidence in the trial system and creating far more confusion and inconsistency than they sought to relieve. This note will argue that the peremptory challenge should be abolished as incompatible with both the Equal Protection Clause of the Fourteenth Amendment as well as the cross section requirement implicit in the Sixth Amendment guarantee to an impartial jury. Furthermore, this note will illustrate that the peremptory challenge injures rather than protects impartiality and the democratic ideals and perceptions of fairness in the American trial system. Finally, this note will suggest an alternative which balances the concerns of constitutionality and discrimination as well as the expectations and mechanics of fairness which jury trials must represent.

II. BACKGROUND

A. The Jury

Any discussion about the peremptory challenge must necessarily begin with the concept of the jury as well as the individual members that comprise it. In his commentary on American institutions, de Tocqueville saw the jury as a political institution which protected individuals from arbitrary state power, allowed citizens to participate directly in decisions regarding property and punishment, enabled them to judge and create standards of conduct for private and public agencies alike, conferred legitimacy on

8. See id. at 1086-91 (Hubbard, J., concurring); Bolling, 591 N.E.2d at 1142-46 (Bellacosa, J., concurring).

9. See *Bolling*, 591 N.E.2d at 1142 (Bellacosa, J., concurring); *Alem*, 596 So. 2d at 1086 (Hubbard, J., concurring).

10. *See U.S. Const. amend VI* (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .); *U.S. Const. amend XIV, 1* (No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.);

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institutions of law and political justice, and elevated public consciousness of popular rights and responsibilities. In essence, the jury represents the legal conscience of the community and acts as a barometer for accepted standards of social conduct. "It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." Arguably, the most critical of the constitutional rights pertaining to the jury is that which guarantees an impartial jury. 16

It is common sense that impartiality is a paramount virtue for the jury to accomplish its function. As a legal institution, the jury is designed to render verdicts based upon the evidence presented, exclusive of the personal and social characteristics of the litigants and exclusive of such characteristics on the part of jurors. 17 Realistically, however, given the personal experiences and individual biases every person brings to the courtroom, this ideal is unattainable. 18 Much evidence suggests that "many potential jurors enter the courtroom with views that may undermine their ability to be fair." 19 That is why jury selection is an important stage of the trial process. The

14. U.S. Const. amend. VI. The jury has also been described as the "skein of protection for the criminal defendant since jurors acquit 35% of defendants while bench trials acquit only 17% of trials. Harold Kallvet, Jr. & Hans Zedier, The American Jury 30 (Univ. of Chic, 1973) (1966).
16. See, e.g., Jon M. Van Dyke, Jury Selection Procedures: One Unconscious Commitment to Representative Panel xi at Introduction (1977) ("The individual jury usually serves as an individual unit objective; all people have their own personal views and experiences. That is why the decision of a group of twelve is considered more reliable . . . than that of one person, even a person who was well-instructed in the law."))
17. See I. NATIONAL JURY PROJECT, JURY WORK: SYSTEMATIC TECHNIQUES §104[2] (Elissa Kruis & Beth Breslin gen. eds., 2d ed. 1992) (discussing that the majority surveyed in national polls believed defendants should have the right to introduce evidence and the defendants should be required to testify on their own behalf) [see hereafter KEYWORD, or also Douglas L. Cobert, Challenging the Challenge: Thirteen Amendments as Prakticks Against the Racial Use of Peremptory Challenge, 78 CORNELL L. REV. 1, 121 (1983)] (citing a National Jury Project and National Lawyers Guild study finding that 80% of prospective jurors were unable to follow court instructions that a defendant is presumed innocent and that the prosecution, not the defense, has the burden of proof (in a criminal case); Sherr Lynne Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1031 (1985) (arguing that "people who are non-privileged defendants are largely unprotected from persistent bias which influences jury decisionmaking.")

Supreme Court has stated that "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice or predisposition about the defendant's culpability." 20

The term "jury selection" is actually a misnomer. 21 No party gets to select a jury. Instead, parties "deseselect" prospective jurors who they feel are predisposed to siding with the opposing party. 22 In this search for an impartial jury, the peremptory challenge has been characterized as one of the attorney’s most valuable tools. 23 Its purpose is to eliminate prospective jurors who may have hidden biases about the defendant, the prosecution, or the case itself, and who thus might threaten the jury's impartiality. 24 It permits the removal of a juror whose partiality is suspected but not conclusively established. 25

B. Origins and Use of the Peremptory Challenge

As originated in English law, the peremptory challenge was seen as a right of the criminal defendant. 26 It allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all. 27 The United States subsequently adopted this right under both statutory and common law, making it available to both prosecution and defense. 28 Although the peremptory challenge is not
institutions of law and political justice, and elevated public consciousness of popular rights and responsibilities. In essence, the jury represents the legal conscience of the community and acts as a barometer for accepted standards of social conduct. "It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." Arguably, the most critical of the constitutional rights pertaining to the jury is that which guarantees an impartial jury.

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13. Taylor, 419 U.S. at 529 n.7 (citing H.R. REP. NO. 1076, 90th Cong., 2d Sess. 8 (1968)).

14. U.S. CONST. amend. VI. The jury has also been described as the bulwark of protection for the criminal defendant since juries acquit 33% of defendants while bench trials acquit only 17% of trials. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 58 (Univ. of Chic. 1971) (1966).


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17. See 1 NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES § 2.04[d][i] (Elissa Kraus & Beth Bonora gen. eds., 2d ed. 1992) (discussing that the majority of those surveyed in national polls believed defendants should have to prove their innocence and that defendants should be required to testify on their own behalf) [hereinafter JURYWORK]; see also Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 CORNELL L. REV. 1, 121 n.533 (1990) (citing a National Jury Project and National Lawyers Guild study "finding that 60% of prospective jurors were unable to follow court instructions that a defendant is presumed innocent and that the prosecution, not the defense, has the burden of proof in a criminal case"); Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1661 (1985) (arguing that minority defendants are largely unprotected from persistent racial bias which infiltrates jury decisionmaking).

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20. Id.

21. See, e.g., Swain v. Alabama, 380 U.S. 202, 212 (1965) (The peremptory challenge "affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Id. at 219; Bateson, 476 U.S. at 91 ("those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.").

22. See Swain, 380 U.S. at 219 ("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 . . . will decide on the basis of the evidence placed before them, and not otherwise.").


24. See VAN DYKE, supra note 16, at 147 (discussing the historical background of the peremptory challenge). The prosecutor's right to exercise the peremptory challenge is of more recent origin. Id. at 147-50.

25. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 353 (G. Shaw repub. ed. 1859).

26. See Swain, 380 U.S. at 214-18; see also FED. R. CRIM. P. 24(b); FLA. STAT. § 913.08 (1991).
required by the Constitution, throughout American history it has been forcefully protected and its "very old credentials" are acknowledged in the most recent of Supreme Court decisions. Thus, it may be viewed as a routine and fundamental part of the trial landscape.

Ordinarily, attorneys base their challenges on information garnered during voir dire. Since voir dire elicits less than perfect information about predispositions and hidden biases of prospective jurors, trial attorneys tend to rely on their own perceptions, if not their own prejudices, in deciding whether a juror with a given race, sex, age, religion, ethnic background, occupation or socio-economic status will act impartially in a particular trial. Some attorneys even employ jury consultants to assist them in identifying a juror's likely predispositions. Any number of characteristics

27. Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges ... The number of challenges is left to be regulated by the common law or the enactments of Congress.").

28. See, e.g., Pointer v. United States, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused ... Any system for the expunging of a jury that prejudices or embarrasses the full, unrestricted exercise by the accused of that right must be condemned."); Lewis v. United States, 146 U.S. 370, 376 (1892) ("The right of challenge ... has always been held essential to the fairness of trial by jury.").


30. In ordinary practice, peremptory challenges are exercised at the final stage of jury selection. There are several stages in the selection process, including assembling jury "pools," randomly selecting "venires" from those pools for service during a particular court term, and finally, selecting from the venire the jury "panel" to be seated for a particular trial. See Stephen A. Salzburg & Mary Ellen Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L. Rev. 337, 339 (1982).

31. Salzburg & Powers, supra note 30, at 342. Attorneys look at these qualifications not only to identify jurors who may favor the opposing side but to identify jurors who will favor their own position.

32. Some number of characteristics which uniquely identifies a particular prospective juror can become the basis for deciding who to challenge. For these reasons, peremptory challenges may at best be called educated guesses. At worst, they are unfounded hunches based on prejudice and unsupported stereotypes.

Even so, the Supreme Court has historically portrayed the peremptory challenge as a near sacred means for assuring a fair trial. However, acknowledging that this privilege has been used unconstitutionally, the Supreme Court in Batson v. Kentucky, employing the Equal Protection Clause, took its first significant step to curbing racially discriminatory jury selection practices. Similarly, a number of states, including Florida, have attempted to eradicate the discriminatory use of peremptory challenges in criminal trials, instead relying on their own state constitutional requirements for an impartial jury. Regrettably, neither approach adequately resolves the problem since the goals of ensuring impartiality and representativeness, as well as attempts to eliminate racial discrimination, directly collide with the exercise of the peremptory challenge. Furthermore, under the Equal Protection Clause, both federal and state approaches ought to be extended


33. See supra notes 21, 28 and accompanying text.

34. 476 U.S. 79 (1986).

35. Id. at 99 ("The reality of practice amply reflected ... shows that the challenge may be, and unfortunately at times has been, used to discriminate ... "). "The Equal Protection Clause forbids prosecutors to challenge potential jurors solely on account of their race...."


State approaches based on state constitutional impartial jury requirements are in direct opposition to the Supreme Court's own Sixth Amendment approach. Compare Holland v. Illinois, 493 U.S. 474 (1990) (holding that use of the peremptory challenge to eliminate jurors who are members of distinct groups does not violate the cross section of the community requirement implicit in the impartial jury guarantee of the Sixth Amendment), e.g., State v. Neil, 457 So 2d 481 (Fla. 1984) (holding that the peremptory challenge was not to be used unreasonably upon the state's constitutional guarantee of an impartial jury); see also infra discussion in Sections V and VI.
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beyond their original "racial" applications to prohibit exclusion of jurors from any distinct group that may be subject to discriminatory treatment in jury selection. Such extension is necessary to eliminate the peremptory challenge altogether as a device "uniquely suited to masking discriminatory motives," whether racially or non-racially based.37

III. DISCRIMINATION AND THE JURY

A. Pre-Batson

The Supreme Court first attempted to eliminate unconstitutional discrimination in the assembly of juries over a hundred years ago in Strader v. West Virginia.38 In Strader, the Court struck down, as a violation of the Equal Protection Clause, a West Virginia state statute which allowed only white men to serve on juries.39 Although Strader prohibited the exclusion of blacks from jury pools, it did nothing to prevent them from being discriminatorily excused from the jury panel through peremptory challenge.

It wasn't until the civil rights movement in the 1960's that the United States Supreme Court, in Swain v. Alabama,40 finally reached the issue of discriminatory use of the peremptory challenge. In Swain, after the prosecutor peremptorily struck all six black jurors remaining on the venire, an all-white jury in Talladega County, Alabama convicted a black man of raping a white woman and sentenced him to death.41 The Supreme Court rejected Swain's claim that the prosecutor's use of peremptory strikes constituted an equal protection violation, holding that the peremptory challenge was not subject to the strictures of the Equal Protection Clause and that the prosecutor's use of peremptory challenges must be given a presumption of validity unless the defendant could show the prosecutor "consistently and systematically" removed black jurors so as to prevent blacks from ever serving on juries.42 The presumption is not overcome even if every black

43. Swain, 380 U.S. at 222.
45. Research has revealed only two cases where defendants were able to mount the requisite showing to establish discriminatory practices by the prosecutor. See State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979).
46. See McMillan, supra note 44, at 365 & n.31. In fact, a number of states, as well as two federal courts, circumvented the Court's holding by applying constitutional guarantees to an impartial jury to control racial discrimination in jury selection. See cases cited supra note 36; see also Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated and remanded sub nom. Michigan v. Booker, 478 U.S. 1001, aff'd on remand, 801 F.2d 871 (6th Cir. 1986); cert. denied, 479 U.S. 1046 (1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated, 478 U.S. 1001 (1986).
47. 476 U.S. 79 (1986).
48. Id. at 89.
49. Id. at 92-93.
50. Id. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
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ventrperson is excluded.43 Unfortunately, with this presumption, the Court exacerbated the problem of racial discrimination and legitimized the discriminatory assumption that a black cannot impartially try the case of a black defendant.44 It also created an evidentiary burden that was virtually impossible for the defendant to carry and undermined any advances in civil rights made by Strauder. As such, the discriminatory use of the peremptory challenge went virtually unimpeded until 1986.45

B. Batson v. Kentucky

The Swain decision was condemned by nearly all commentators.46 Thus, sensing a need to readress the Swain decision, the Supreme Court revisited the peremptory challenge system in Batson v. Kentucky.47 In Batson, the Supreme Court held the Equal Protection Clause forbids the prosecutor from challenging prospective 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."48 The Court, rejecting Swain because it "placed on defendants a crippling burden of proof" thereby allowing the prosecutor's challenge to be "largely immune from constitutional scrutiny,"49 observed that the peremptory challenge constitutes a jury selection practice which permits "those to discriminate who are of a mind to discriminate."50 In order to eradicate discriminatory use of the peremptory challenge the Court fashioned a new test which lowered the threshold of proof required by the defendant and shifted the

38. 100 U.S. 303 (1879).
39. Id. at 310. The Court's holding reflected the recently ratified Fourteenth Amendment. Id. at 306, 307.
41. Id. at 205.
42. Id. at 223. No black had survived voir dire challenges in any trial since 1950, although black men over 21 constituted 26% of the males in the county. Id. at 205.
43. Swain, 380 U.S. at 222.
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47. 477 U.S. 1001 (1986).
48. Id. at 89.
49. Id. at 92-93.
50. Id. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
burden to the prosecutor to show he had race-neutral reasons for excluding jurors.\(^{51}\)

The Court was by no means unified in reversing its holding of Swain. Chief Justice Burger, in a dissenting opinion, argued that the peremptory challenge should remain unmodified.\(^{52}\) Noting past decisions had invalidated classifications based on gender, religious or political affiliation, mental capacity, number of children, living arrangements, and employment or profession, he feared the present decision would also be extended to these equal protection classifications, thereby subjecting every peremptory challenge to Fourteenth Amendment scrutiny.\(^{53}\) Consequently, he argued, the majority’s requirement of an explanation would in effect collapse the peremptory challenge into a challenge for cause.\(^{54}\)

Chief Justice Burger also argued that because the peremptory challenge could not survive the application of basic equal protection standards, it should be exempted from conventional equal protection analysis.\(^{55}\) He felt nothing should reduce the function and application of the peremptory challenge.

That the peremptory challenge does not survive basic equal protection analysis itself should have guided the Court further in its application. In essence, under the Equal Protection Clause, arbitrary classifications by government which treat similarly situated individuals differently are forbidden without some overriding rational purpose.\(^{56}\) However, as an

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51. See supra note 5. In essence, Batson was a reversal of Swain in the same sense that the Court recognized that the peremptory challenge constitutes a practice which "permits [the] prosecutor to discriminate who are of a mind to discriminate." Batson, 476 U.S. at 96 (quoting Avery v. AW, 345 U.S. at 562). Thus, since the peremptory challenge requires no explanation, a defendant opposing its discriminatory use is entitled to rely on this assumption in establishing prima facie proof of discrimination by the prosecutor exercising the peremptory privilege.

52. Id. at 133 (Burger, C.J., dissenting) (It is "a part of the fabric of our jury system [that] should not be casually cast aside").

53. Id. at 124. The authors see no reason why Batson should not have such wide application.

54. Id. at 127.

55. Id. at 123 ("[I]ndiscriminate equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A rule that requires a defendant to prove a "rationality" in government actions has no application to an "arbitrary and capricious right" (quoting Swain, 380 U.S. at 319).

56. See, e.g., id. at 127 ("Analytically, there is no middle ground: A challenge either has to be explained or it does not.").

57. Traditionally, where equal protection issues are concerned, the Court identifies particular level of scrutiny that it will apply in its analysis, depending on the type of discrimination involved. Equal protection issues dealing with invidious racial discrimination

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burden to the prosecutor to show he had race-neutral reasons for excluding jurors.56

The Court was by no means uniform in reversing its holding of Swain. Chief Justice Burger, in a dissenting opinion, argued that the peremptory challenge should remain unmodified.57 Noting past decisions had invalidated classifications based on gender, religious or political affiliation, mental capacity, number of children, living arrangements, and employment or profession, he feared the present decision would also be extended to these equal protection classifications, thereby eroding every peremptory challenge to Fourteenth Amendment scrutiny.58 Consequently, he argued, the majority's requirement of an explanation would in effect collapse the peremptory challenge into a challenge for cause.59

Chief Justice Burger also argued that because the peremptory challenge could not survive the application of basic equal protection standards, it should be exempted from conventional equal protection analysis.60 He felt nothing should reduce the function and application of the peremptory challenge.61 That the peremptory challenge does not survive basic equal protection analysis itself should have guided the Court further in its application. In essence, under the Equal Protection Clause, arbitrary classifications by government which treat similarly situated individuals differently are forbidden without some overriding rational purpose.62 However, as an

51. See supra note 5. In essence, Batson was a reversal of Swain in the sense that the Court recognized that the peremptory challenge constitutes a practice which "permits those to discriminate who are of a mind to discriminate." Batson, 476 U.S. at 96 (quoting Avery, 345 U.S. at 562). Thus, since the peremptory challenge requires no explanation, a defendant objecting to its discriminatory use is entitled to rely on this assumption in establishing prima facie proof of discrimination by the prosecutor exercising the peremptory privilege.

52. Id. at 133 (Burger, C.J., dissenting) ("lt is a part of the fabric of our jurv system [that] should not be casually cast aside.").

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"arbitrary and capricious right" often based on "seat of the pants instincts" and "unaccountable prejudices," the peremptory challenge, as authorized by the state, would not appear rationally related to the goal of empaneling an impartial jury.66 Thus, it could not pass lower level, let alone strict scrutiny of equal protection analysis. Applying the Equal Protection Clause to the jury selection process in the same way the Court has applied it to other government activities would eliminate the peremptory challenge altogether, just as Chief Justice Burger recognized. Such a result, however, was avoided by the Batson majority. Rather, the peremptory challenge was seen, and still is seen, as a necessary tool in the trial system.67

Contrary to Chief Justice Burger's reasoning, Justice Marshall found the Court did not go far enough in its holding.68 To him, merely allowing the defendant an opportunity to challenge racially discriminatory use of peremptory challenges was insufficient to prevent its illegitimate use.69 Racially discriminatory jury selection was forbidden, he argued, thus the remedy of the majority left prosecutors free to discriminate so long as it remained at an "acceptable level."70 Furthermore, once the defendant establishes the prima facie case, prosecutors could easily proffer facially neutral reasons, which the inquiring court would be ill-equipped to second-guess.71 To Marshall, the protection by the Court would be illusory unless the peremptory challenge was eliminated entirely.72

are subject to the highest (strict) scrutiny, where discriminatory government action will only be permitted if it is necessary to fulfilling a compelling interest. See Wygant v. Jackson Bd of Educ., 476 U.S. 267, 273-74 (1986). Under the lowest level of scrutiny, usually applied to discrimination which is a result of government attempts at social or economic reform, the government action will be permitted if it is rationally related to a legitimate goal. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

58. But see People v. Furman, 404 N.W.2d 246, 255 (Mich. App. 1987); Odom v. State, 355 So. 2d 1381, 1383 (Miss. 1978). Both cases noted that voir dire gives counsel a "rational basis" for exercising peremptory challenges.

59. Batson, 476 U.S. at 98 ("[T]he peremptory challenge occupies an important position in our trial procedures . . . ").

60. Id. at 102-03 (Marshall, J., concurring) ("The decision today 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.").

61. Id. at 105.

62. Id.

63. Id. at 105-06.

64. Batson, 476 U.S. at 106.
IV. IMPLEMENTATION BY LOWER COURTS

The *Batson* majority's compromise, while easing the defendant's burden of proving discrimination, left a maze of conflicting interpretation and unresolved questions for lower courts to unravel.65 By declining to formulate for lower courts particular implementation of the *Batson* test,66 the Court, in effect, assured nearly as many interpretations as there were courts faced with its application. Each aspect of the *Batson* inquiry—cognizable group, prima facie case, and the race-neutral explanation—has been subject to speculation and varying interpretation by lower courts.67 Moreover, each aspect of the test reveals the shortcomings and constitutional inadequacies of the *Batson* framework. Thus, it is not difficult to understand why one commentator remarked that "[i]f one wanted to understand how the American trial system for criminal cases came to be the most expensive and time consuming in the world, it would be difficult to find a better starting place than *Batson*."68

A. Cognizable Groups

*Batson* required the defendant and the excluded jurors to be members of the same cognizable racial group.69 Clarifying this scope of *Batson* has become an ongoing practice since lower courts have pointedly disagreed upon the proper standard to apply in determining cognizability and have struggled in deciding whether a particular group satisfies the standard.70

Cognizability presents a troubling aspect since the Court has only

65. For example, the Court did not state whether *Batson* applied to criminal defendants’ use of peremptories or whether it applied to civil litigants. Nor did it formulate particular procedures for implementation of the test it established.

66. *Id.* at 89-100 ("We decline, however, to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.") ([We make no attempt to instruct [state and federal trial] courts how best to implement our holding today." *Id.* at 100 n.24.).

67. Many commentators cited herein have addressed the varying interpretations of each part of the *Batson* inquiry. For a concise overview of these problems see McMillan, supra note 44.


69. *Batson*, 476 U.S. at 96. In Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991), the Court held that only the excluded juror need be a member of a cognizable racial group in order for the defendant to allege misuse of the peremptory challenge.


established cognizable class standards for analysis of violations of the Sixth Amendment impartial jury requirement,71 not cognizable racial group standards for Fourteenth Amendment purposes. Thus, lower courts have no directly applicable or uniform standard.

One federal circuit borrowed "distinct group" guidelines for Sixth Amendment analysis and applied them as cognizability standards for *Batson* purposes.72 Under this test, cognizability of the group exists when the group: 1) can be defined and limited by some clearly identifiable factor; 2) has a common thread of attitudes, ideas or experiences running through it; and 3) there exists a community of interests among the members such that the group’s interests cannot be adequately represented if the group is excluded from the jury selection process.73

Under this application, many other groups, racial and non-racial alike, including the ones enumerated by Chief Justice Burger, would qualify for *Batson* protection. More importantly, there is no reason why the standard should not include non-racial "cognizable groups." Members of non-racial groups with distinctive characteristics are just as injured by discriminatory stereotypes when they are excluded from juries solely on the basis of perceived group bias as blacks are when they are excluded from juries based solely on their race. For example, Democrats arguably represent a cognizable group under the above standard. To challenge a juror who is a Democrat based on the idea that Democrats will be more liberal toward defendants or toward a Democratic defendant is to assign a stereotyped notion of group bias that is unrelated to the juror’s individual ability to be impartial. Thus, attorneys who systematically exclude a juror based on such an unfounded notion of group bias just as surely violate equal protection as when they exclude blacks based on their race. The injury occurs whether the group is described by racial qualities or otherwise. Therefore, in

71. See Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (where the Court stated that the concept of a "cognizable class" includes at least "economic, social, religious, racial, political, and geographical groups of the community").

72. United States v. Sgro, 816 F.2d 30 (1st Cir. 1987), cert. denied, 484 U.S. 1063 (1988); see also Marchisano v. United States, 926 F.2d 50 (1st Cir. 1991) (following Sgro).

73. Sgro, 816 F.2d at 33. In Sgro the defendant claimed Italian-Americans, who were excluded from the jury, were a cognizable group. *Id.* The court did not deny that Italian-Americans were a cognizable group, but held the defendant had failed to supply evidence, other than conclusory allegations, that they were.

*Id.; see also Marchisano, 926 F.2d at 54-55 (where the court made a similar conclusion with respect to Irish-Americans after adopting the above standard, stating also "[t]he important consideration for equal protection purposes is not whether a number of people see themselves as forming a separate group, but whether others, by treating those people unequally, put them in a distinct group") (citations omitted).
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keeping with the protective nature of the Constitution and the expansive scope of the Equal Protection Clause, *Batson*’s reference to "racial" discrimination should not foreclose a wider application of its essential premise: That factors involving a person’s affiliation with a distinct cognizable group are not, in and of themselves, legitimate reasons for excluding them from juries.

In practice, however, while attempts to extend *Batson* to non-racial areas have been made, courts have rarely found cognizability outside narrow ethnic or racial areas. Some courts have found, for example, that Mexican-Americans and Spanish-surnamed jurors constitute a cognizable group, while others have denied comparable claims for Italian- and Irish-surnamed Americans. Strangely, the Supreme Court has recognized that "Hispanics" represent a cognizable group, although arguably, Hispanics constitute a group of multi-national origin rather than a racial group. Thus, even within these "racial" areas, cognizability has been inconsistently recognized. Such inconsistencies demonstrate that the cognizability requirement inexplicably excludes certain groups while it includes others. Moreover, problems of proving the existence of a cognizable group creates further obstacles which further defeat the *Batson* goal of eliminating juror discrimination.

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76. See Fields v. People, 732 P.2d 1145, 1153 (Colo. 1987) (en banc) (where excluded Spanish-surnamed jurors constituted a cognizable group under both Fourteenth Amendment and state constitution impartial jury requirements).

77. See cases cited supra note 75; see also Hanratty, Note, supra note 74, at 228 n.208 (listing cases where Puerto Ricans, whites, Alaskan natives, and persons with French surnames have alleged peremptory abuse, with varying success).


79. Additionally, still unresolved is whether *Batson* applies to gender-based discrimination, as three state appellate courts and the Ninth Circuit have held recently. See Goldberg, supra note 5, at 84 (citings cases finding that gender was a cognizable group). For an extensive survey of court opinions addressing gender-based discrimination in jury selection, see S. Alexander Joa, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 Pac. L.J. 1305 (1991). Furthermore, courts are split whether groups described by economic or social status, religious or political belief, or age constitute "cognizable classes," for purposes of Sixth Amendment analysis. See *JURYWORK*, supra note 17, at 92-97 (1979) (listing a number of cases where non-racial groups have been found to be "cognizable groups").

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80. Note, supra note 70, at 1020.

81. *Batson*, 476 U.S. at 96. With the Supreme Court’s recent decision in Georgia v. McCollum, 112 S. Ct. 2348 (1992), the prosecution may also assert peremptory abuses exercised by the defendant. Generally, states applying their own constitutional guarantees to impartial jury similarly require the complaining party to raise an inference of discrimination before the burden shifts to the offending party. See, e.g., State v. Neill, 457 So. 2d 481, 486-87 (Fla. 1984).

82. Justice Powell provided two examples of relevant circumstances which would allow such an inference: 1) that a "pattern" of strikes against black jurors had occurred, or 2) that a prosecutor’s voir dire examination of certain jurors who were later eliminated peremptorily focused on racial issues. *Batson*, 476 U.S. at 97.


84. Id. at 27-28. Clearly, discrepancies between actual and expected rates of exclusion, while often significant indicators, are not necessarily conclusive.

85. Craig v. Boren, 429 U.S. 190, 204 (1976) ("[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.").

86. In Florida, the complaining party must show there is a "strong likelihood" that the
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76. See Fields v. People, 732 P.2d 145, 1153 (Colo. 1987) (on banc) (where excluded Spanish surnamed jurors constituted a cognizable group under both Fourteenth Amendment and state constitution important jury requirements).
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B. The Prima Facie Case

Under the Batson standard, before the burden shifts to the prosecutor the defendant must first show that all the facts and circumstances raise an inference that the challenges are based on racial considerations. Embodied is this requirement is the Court's attempt to accommodate the interests of eliminating racial discrimination while deliberately protecting the peremptory challenge. Again, the Court provided little more than vague and ambiguous guidance, leaving the task to the discretion of the trial judges.

In applying the Supreme Court's vague framework, trial courts have adopted a variety of numbers for deciding whether a prima facie case has been shown. These games essentially focus on how many members of the defendant's race remain on the jury after all peremptory challenges, how many members of the defendant's race were removed through prosecutor's peremptories, or whether the ratio of peremptories against members of the relevant racial group was proportionate to their total population on the venire.

Sheer numbers analysis, though, is inadequate since it overlooks the very conduct of the attorney or juror during voir dire as well as the underlying reasons for the peremptory challenge. Furthermore, the Supreme Court itself has opposed statistical analysis as a litmus test or bright-line indicator. Thus, lower courts are still left with little guidance.

A number of Florida cases aptly illustrate conflicting application by state trial courts. In one case the trial court found an inference of

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discrimination when the only black member of the venire was excluded. 87 In another case, however, no inference was found when the state eliminated all blacks from the venire. 88 The inconsistency is acknowledged by the Florida Supreme Court which stated: "One of the most frequently litigated issues in both federal and state courts is the burden of proof, its nature and who must bear it." 89

Federal trial courts have been similarly inconsistent. Some found no inference of discrimination because the prosecutor did not exclude all black members from the venire when he could have. 90 Other courts, including the Ninth Circuit, have been unwilling to find that striking a small number of minority jurors itself exhibits enough of a "pattern" to establish a prima facie case of discrimination. 91 Conversely, some courts, including the Eighth and Tenth Circuits, have found a violation when as few as one or two minority venire members were excluded. 92 Still other courts made no finding whether sufficient proof was raised, assuming, for the sake of argument, that the defendant raised the relevant inference. 93 Through these

challenged individuals were excused because of their race. 94 Neil, 457 So. 2d at 486. Such a standard begs the question of what is a "strong likelihood." Florida's Supreme Court seems to have resolved the question by clarifying the "Neil-inquiry" with its recent decision in State v. Johns, 18 Fla. L. Weekly 124 (Fla. Feb. 18, 1993). In Johns, the court held that trial judges are required to conduct an inquiry into the legitimacy of a peremptory challenge anytime an objection is raised that the challenge is being used in a racially discriminatory manner. Id. at 125. This would seem to place an additional burden on already overworked trial courts.

87. Parrish v. State, 540 So. 2d 870 (Fla. 3d Dist. Ct. App.), review denied, 549 So. 2d 1014 (Fla. 1989).
88. Pearson v. State, 514 So. 2d 374 (Fla. 2d Dist. Ct. App. 1987), review dismissed, 525 So. 2d 881 (Fla. 1988) (remanded on appeal). Both Pearson and Parrish were subject to Florida's version of the Batson inquiry established in Neil. 94
89. State v. Slappy, 522 So. 2d 18, 21 (Fla.), cert. denied, 487 U.S. 1219 (1988). Compare id. (where the court stated that number alone is not dispositive of misuse of peremptory challenges) with Reynolds v. State, 576 So. 2d 1300 (Fla. 1991) (where the court found that striking the sole black venireman created a "strong likelihood" of discriminatory use of peremptory challenges). As previously noted, Johns seems to have resolved this problem. 18 Fla. L. Weekly at 125.
90. United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987); United States v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986).
91. See McMillan, supra note 44, at 369 (citing United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1986), cert. denied, 484 U.S. 914 (1987)).
92. See Serr & Maney, supra note 83, at 369 n.65.
93. See, e.g., United States v. Woods, 812 F.2d 1483, 1485 (4th Cir. 1987) (where the trial judge found the defendant had failed to raise an inference, yet "allowed" the government to peremptorily challenge black jurors).
95. Id. at 42.
96. Id. at 36.

examples, it is evident that both federal and state courts have inconsistently interpreted and applied, if not completely ignored, Batson's prima facie requirement.

An even greater problem emerges when trial judges are tempted to inquire sua sponte into the prosecutor's motives. 98 While this exercise would certainly aide in the elimination of discrimination in jury selection, it has far reaching implications. In effect, it would require a prosecutor to explain every peremptory challenge should the judge so require. 99 Thus, it obliterates the protection accorded to peremptories through Batson's prima facie case requirement, reducing the peremptory challenge to a challenge for cause. This result would not be objectionable if not for the inference it conveys: Such heightened awareness highlights the aspects of the juror that are inherent to his cognizable group, possibly raising the specter that group affiliation somehow relates to the ability to be impartial and thereby undermining Batson's goal of making the courtroom "colorblind."

Unfortunately, without any bright-line standard, lower courts will continue to yield inconsistent results. Yet, any bright-line standard would enable either side to insulate itself by staying under the proscribed "trigger" levels. 100 The result is that Batson's inherently unworkable framework produces inconsistent judicial interpretation thereby enabling some defendants to raise objections to discriminatory jury selection while preventing other meritorious claims from being heard. Thus, the prima facie case requirement's dual goal of casing the defendant's burden of proof and preserving the peremptory challenge serves neither intended objective adequately nor the goal of eliminating racist jury selection. Eliminating the peremptory challenge would remove this problem altogether. It would also remove discrimination that the prima facie case procedures do not recognize.

C. Rebutting the Inference and Pretext

Regrettably, Batson was "also ambiguous as to how much the prosecutor's rebuttal explanations should be scrutinized."
101 Ineffective scrutiny of ... [neutral] explanations is the single greatest problem

prosecutor's reasons under Batson, and we may leave for another day the question of whether the defendant made out a prima facie case." Id. at 1487. The reviewing court upheld the trial judge's ultimate finding that the defendant had not proved intentional discrimination. Id.
103. Id. at 42.
104. Id. at 36.
discrimination when the only black member of the venire was excluded. In another case, however, no inference was found when the state eliminated all blacks from the venire. The inconsistency is acknowledged by the Florida Supreme Court which stated: "[O]ne of the most frequently litigated issues in both federal and state courts is the burden of proof, its nature and who must bear it." 

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hinding the effective implementation of Batson* as well as state constitutional counterparts. Justice Marshall predicted, courts are constantly struggling to distinguish between legitimate reasons for the use of peremptory challenges and mere excuses or pretexts for discrimination. Moreover, since any offered explanation is likely to be treated in return with skepticism by the complaining party, appellate proceedings and retrials have become the rule rather than the exception.\textsuperscript{100} Simply, race-neutral reasons may be pretexts for racially based motives.

The term "race-neutral explanation" has such a formless and indefinite meaning that there are a number of ways attorneys can circumvent this Batson procedural hurdle. For example, when subjective explanations like a juror's poor attitude or indifference during voir dire are offered, it is virtually impossible for a judge to determine whether other jurors acting similarly have been challenged, nor is it likely that the judge will keep track of such minute details.\textsuperscript{101} While one court accepted a prosecutor's explanation that a prospective black juror failed to maintain eye contact,\textsuperscript{102} another court allowed the explanation that the juror maintained too much eye contact.\textsuperscript{103} Courts rarely reject explanations like these absent obvious uneven application to black and white jurors no matter how tenuous the relationship between the given explanation and the case at trial.\textsuperscript{104}

Inevitably, it enables attorneys to mask racially motivated challenges by offering racially neutral explanations. Just as Justice Marshall observed, "a jury prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."\textsuperscript{105}

A race-neutral explanation may also be used unconsciously as a surrogate or proxy for race. While several courts have upheld peremptory challenges of minorities who live in the same neighborhood as, or one similar to, the defendant, or have educational or employment backgrounds similar to the defendant,\textsuperscript{106} such rulings may overlook that in a city where the burden of unemployment, low income, poor education, or substandard housing is likely to fall disproportionately upon minorities, a race-neutral reason based upon these characteristics can merely be a cover for racial discrimination, whether the attorney is conscious of this relationship or not.\textsuperscript{107} That is exactly the conclusion of the Ninth Circuit in United States v. Bishop\textsuperscript{108} as well as the Eighth Circuit in Garrett v. Morris.\textsuperscript{109}

\begin{thebibliography}{99}
\bibitem{Note} Joshua E. Swift, Note, Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge, 78 CORNELL L. REV. 356, 357-58 & nn. 185-89 (1993). The lawyers' stated reasons in these cases focused on such qualities as body language, appearance, employment, education, and residence, among others.\textsuperscript{102}
\bibitem{101} Even when uneven application appears to exist, appellate courts tend to defer to trial court findings. See, e.g., Files v. State, 586 So. 2d 352 (Fla. 1st Dist. Ct. App. 1991), aff'd, 17 Fla. L. Weekly 742 (Fla. Dec. 10, 1992) (where both the district and supreme court affirmed the trial judge's finding that the prosecutor's challenge of an unemployed, black divorcée with five children was not racially motivated, even though white jurors, who were either unemployed or divorced, but not both, were not challenged). In what appears to be form over substance, the supreme court, in seeming approval, echoed the district court's explanation that the prosecutor offered only divorce or unemployment, instead of both, there may have been abuse of discretion by the trial judge in accepting the reason as non- pretextual. Files, 17 Fla. L. Weekly at 742-43 (citing Files, 586 So. 2d at 356-57).

98.\textit{Id.} at 369.
99.\textit{Id.}\textsuperscript{100} See, e.g., Bolling, 391 N.E.2d at 1142 (Bellosa, J., concurring) ("the proliferation and permutation of problems in the appellate pipeline point inexorably to the need for a broader remedy . . . ."). See, e.g., Bolling, supra note 83, at 59.
102. See McMillan, supra note 83, at 370 (citing United States v. Cartilage, 808 F.2d 1064, 1070-71 (5th Cir. 1987)).
103. See McMillan, supra note 83, at 371 (citing United States v. Mathews, 803 F.2d 325, 331 (7th Cir. 1986) (where the venireman stared at the prosecutor throughout voir dire). Serr & Maney, supra note 83, at 58. A recent survey of seventy-six federal appellate decisions, which reviewed district court judges' evaluations of proffered race-neutral reasons, revealed only three cases that were reversed because the reasons offered were found to be pretextual. Joshua E. Swift, Note, Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge, 78 CORNELL L. REV. 356, 357-58 & nn. 185-89 (1993). The lawyers' stated reasons in these cases focused on such qualities as body language, appearance, employment, education, and residence, among others.\textsuperscript{102}
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106. McMillan, supra note 83, at 53-54. Justice Marshall's concerns that protections erected by Batson "may be illusory" was not directed simply at dishonesty on the part of a prosecutor, but at "unconscious racism" as well. Batson, 476 U.S. at 106. This may be the most subtle if not most violent type of discrimination since it represents a type people may not be aware or admit they have. See Barbara Allen Babcock, You Don't Preserve "It's Wonderful Power," 27 STAN. L. REV. 545, 554 (1975). Professor Babcock states that "juries are simply not aware of their prejudices or underestimate their biases . . . ." Id. Logically, there is no reason to believe the same cannot be said for attorneys and judges. Thus, unconscious prejudice could be the attorney's underlying motivation for exercising a peremptory challenge despite the availability of "race neutral" reasons. These same unconscious biases may also influence the decision of the inquiring judge. Batson, 476 U.S. at 106.
109. 959 F.2d 820 (9th Cir. 1992) (where court concluded that the reason offered, that the juror lived in a high crime area plagued by unruly police relations, was really a proxy for race). See, e.g., Bolling, supra note 83, at 53-54. Justice Marshall's concerns that protections erected by Batson "may be illusory" was not directed simply at dishonesty on the part of a prosecutor, but at "unconscious racism" as well. Batson, 476 U.S. at 106. This may be the most subtle if not most violent type of discrimination since it represents a type people may not be aware or admit they have. See Barbara Allen Babcock, You Don't Preserve "It's Wonderful Power," 27 STAN. L. REV. 545, 554 (1975). Professor Babcock states that "juries are simply not aware of their prejudices or underestimate their biases . . . ." Id. Logically, there is no reason to believe the same cannot be said for attorneys and judges. Thus, unconscious prejudice could be the attorney's underlying motivation for exercising a peremptory challenge despite the availability of "race neutral" reasons. These same unconscious biases may also influence the decision of the inquiring judge. Batson, 476 U.S. at 106.
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hindering the effective implementation of Batson* as well as state constitutional counterparts.106 As Justice Marshall predicted, courts are constantly struggling to distinguish between legitimate reasons for the use of peremptory challenges and mere excuses or pretext for discrimination.107 Moreover, since any offered explanation is likely to be treated in return with skepticism by the complaining party, appellate proceedings and retrials have become the rule rather than the exception.108 Simply, race-neutral reasons may be pretext for racially based motives.

The term "race-neutral explanation" has such a formless and indefinite meaning that there are a number of ways attorneys can circumvent his Batson procedural hurdle. For example, when subjective explanations like a juror's poor attitude or indifference during voir dire are offered, it is virtually impossible for a judge to determine whether other jurors acting similarly have been challenged, or if it is likely that the judge will keep track of such minute details.109 While one court accepted a prosecutor's explanation that a prospective black juror failed to maintain eye contact,110 another court allowed the explanation that the juror maintained too much eye contact.111 Courts rarely reject explanations like these absent obvious uneven application to black and white jurors no matter how tenuous the relationship between the given explanation and the case at trial.112

Irrevocably, it enables attorneys to mask racially motivated challenges by offering racially neutral explanations. Just as Justice Marshall observed, "Every prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."113 A race-neutral explanation may also be used unconsciously as a surrogate or proxy for race. While several courts have uphold peremptory challenges of minorities who live in the same neighborhood as, or one similar to, the defendant, or have educational or employment backgrounds similar to the defendant,114 such rulings may overlook that in a city where the burden of unemployment, low income, poor education, or substantial housing is likely to fall disproportionately upon minorities, a race-neutral reason based upon these characteristics can merely be a cover for racial discrimination, whether the attorney is conscious of this relationship or not.115 That is exactly the conclusion of the Ninth Circuit in United States v. Bishop116 as well as the Eighth Circuit in Garrett v. Morris.117

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*To be sure over the substance, the supreme court, in seeking approval, echoed the district court's explanation that had the prosecutor offered only divorce or unemployment, instead of both, then may have been abuse of discretion by the trial judge in accepting the reason as nondiscriminatory. Fina, 17 F.3d at 742-43 (citing Fina, 386 So. 2d at 356-57). But see United States v. Chinchilla, 874 F.2d 695, 698-99 (9th Cir. 1989) (where the court held that the prosecutor's "race-neutral" reason was pretextual because he failed to strike non-Hispanic jurors with the same traits as Hispanic jurors who were peremptorily struck). Baxton, 476 U.S. at 106. McMillan, supra note 44, at 370. Baxton, 476 U.S. at 106.

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these cases, residency and educational characteristics shared by the defendant and challenged jurors was deemed tantamount to racial discrimination.\textsuperscript{110}

In contrast, the Supreme Court rejected the argument that ability to speak Spanish was used as a proxy for race in \textit{Hernandez v. New York};\textsuperscript{111} although it admitted that had the prosecutor explained that he did not want Spanish speaking jurors, it might raise an issue of racial discrimination.\textsuperscript{112} Strangely, the Court saw no need to delve into the prosecutor's underlying motivation, stating that "[u]nless the intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral."\textsuperscript{113} The Court's last application of \textit{Batson} would seem to produce exactly what Marshall had feared: it would seem to encourage pretextual explanations so long as discriminatory intent was not apparently inherent in them. Thus, the Court's rhetoric actually dilutes \textit{Batson}'s objective since attorneys "with a mind to discriminate" could more easily do so knowing courts may not look beyond facially neutral explanations.\textsuperscript{114} Ultimately, this application neither eliminates nor fully accounts for discriminatory practices in jury selection.

D. Standard of Review

An even more troubling problem is the standard of review to be given a trial judge's findings. "It has become virtually impossible for appellate..."

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\textsuperscript{110} See \textit{supra} notes 108, 109. One commentator has proposed eliminating all use of "soft data" reasons like body language, appearance and demeanor since they can mask overt and covert discrimination. \textit{Swift, Note, supra note 104, at 361-62.} This remedy, he argues, would force prosecutors to offer more objective, articulable "hard data" reasons like residence and education which have a verifiable "substantial nexus" to the case. \textit{Id.} at 363-64. However, such an approach fails to account for the possibility that "hard-data" reasons are themselves proxies for race.

\textsuperscript{111} 111 S. Ct. 1859 (1991).

\textsuperscript{112} \textit{Id.} at 1872-73 ("We would face quite a different issue if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish speaking jurors. It may well be ... that proficiency in a particular language ... should be treated as a surrogate for race under equal protection analysis."). For a thorough discussion of this issue see Ronni Savor, \textit{Comment, Hernandez v. New York: Applying Batson to Peremptory Strikes of Bilinguals—Should Language Ability Be a Surrogate for Race?}, 16 NOVA L. REV. 1567 (1992).

\textsuperscript{113} \textit{Hernandez}, 111 S. Ct. at 1866 (emphasis added). While the Court stated that disparate impact should be a factor in considering whether an explanation is race-neutral, it is not conclusive. \textit{Id.} at 1875. The unfortunate reality is that when jurors are excluded under these circumstances, the defendant is effectively penalized for the effects of discrimination.

\textsuperscript{114} See \textit{Batson}, 476 U.S. at 96.

\textsuperscript{115} \textit{Bolling}, 591 N.E.2d at 1144 (Bellacosa, J., concurring).

\textsuperscript{116} See \textit{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."); see also \textit{People v. Clay}, 200 Cal. Rptr. 269, 279 (Cl. App. 1984) ("We must rely on the good judgment of the trial courts to distinguish bona fide reasons ... from sham excuses ... ") (quoting \textit{Wheeler}, 583 P.2d at 765); \textit{Fotopoulos v. State}, 608 So. 2d 784, 788 (Fla. 1992) ("[A] trial court is vested with broad discretion in determining whether peremptory challenges are racially motivated."). The Florida Supreme Court, though, has delineated five factors that trial courts should consider as weighing against the legitimacy of a race-neutral explanation:

1. the alleged group bias is not shared by the juror in question; 2) failure to examine the juror or perfunctory examination ... 3) singling the juror out for special questioning to evoke a certain response, 4) the prosecutor's reason is unrelated to the facts of the case, and 5) a challenge based on reasons equally applicable to jurors who were not challenged.

\textsuperscript{117} \textit{Serr & Maney, supra note 83, at 60.}
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defendant and challenged jurors was deemed tantamount to racial discrimi-
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114. See Batson, 476 U.S. at 96.
V. THE SIXTH AMENDMENT AND THE CROSS-SECTION OF THE COMMUNITY

This note also suggests that the peremptory challenge is incompatible with the impartial jury guarantee of the Sixth Amendment. Additionally, the Court's interpretations of the impartial jury guarantee reveal contradictory reasoning which belies its attempts to portray the Sixth Amendment as truly meaningful. The Court's decision in *Taylor v. Louisiana* provides a starting place. In *Taylor*, the Supreme Court attempted to insure the Sixth Amendment guarantee of jury impartiality by requiring that the jury reflect a cross section of the community. The Court recommended that "[t]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Arguably, the Court's views on "diffused impartiality" may also be based on the perception that unbalanced representation can significantly affect trial outcomes. This perception may have led the Court to require in *Taylor* that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.")

*Taylor*, while confined to the issue of omission of women from jury pools, represents the courts' broadly painted assertion that a fair cross section of the community is an implicit requirement to maintaining the impartial jury guarantee of the Sixth Amendment. *Taylor* intimated that the exclusion of women from jury pools in turn produces jury venires and ultimately jury panels with a "slanted view of the community they are supposed to represent." By insisting that women as a distinct group, offer a unique quality unshared by men, the Court in *Taylor* seemed to indicate that: 1) a jury composed of one gender is less impartial than a jury comprising both genders, 2) men and women, as isolated groups, possess a perspective unique to and universal among their respective members, and 3) those perspectives counterbalance bias inherent within the other gender, thus forming a more impartial jury. Evidently, the Court felt that because women are distinctly different from men, their omission from juries depletes representativeness and thus harms impartiality. If this inference is correct, it would seem the Court's reasoning was based on the idea that group bias, which is inherent in groups as distinct as each gender, requires balance. Ironically, the Court would seem to adopt completely opposite reasoning when confronted with the argument that the same impartial jury guarantee is violated when the peremptory challenge is used.

VI. THE SIXTH AMENDMENT AND THE PEREMPTORY CHALLENGE

In *Holland v. Illinois*, the Court first addressed the peremptory challenge in the context of the Sixth Amendment. The Court refused to apply the cross section requirement to the peremptory challenge, stating: "A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment . . . and would undermine rather than further the constitutional guarantee of an impartial jury." Instead, narrowly interpreting the cross section require-
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In Taylor, the Supreme Court attempted to insure the Sixth Amendment guarantee of jury impartiality by requiring that the jury reflect a cross section of the community. The Court recommended that "[t]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." Arguably, the Court's views on "diffused impartiality" may also be based on the perception that unbalanced representation can significantly affect trial outcomes. This perception may have led it to require in Taylor that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

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ment as applying only to the venire but not to the jury panel, the Court, in seeming contradiction to its holding in Taylor, inexplicably asserted that a cross section requirement need only assure an impartial jury, not a representative one. 130

In Holland, the Court stated that impartiality only required a cross section of the venire, insisting there was no constitutional requirement that the jury actually chosen must "mirror the community and reflect the various distinctive groups in the population." 131 Essentially, as long as the venire was drawn from a cross section of the community, litigants were free to diminish the representativeness of the jury panel through the use of Batson, the Court would seem to be saying that attorneys are free to discriminate in jury selection as long as it is not racially based. In effect, by limiting the role of the Sixth Amendment, the Court has seemingly placed constitutional provisions in gratuitous conflict: the Sixth Amendment allows what the Fourteenth Amendment forbids. 132

The Holland decision seems to contradict both Batson and Taylor and reveals the Court's struggle to avoid capture by its own rhetoric. 133 In Holland, the Court's logic seems to say: 1) jurors are selected individually for their impartiality regardless of their group affiliation, and 2) it follows that this individual impartiality will assure an overall impartial jury, regardless of the exclusion of any particular distinct segment of the community. However, such logic ignores previous acknowledgments by the Court. First, attorneys often select jurors based upon stereotyped notions of their ability to be impartial. As Batson recognized, attorneys often excuse jurors based solely on race (if not other characteristics representative of a distinct group). Second, by allowing the representative nature of the venire to be diminished by peremptory challenges, the Court abandons the virtue of representativeness that were so important to it in Taylor: When any large and identifiable segment of the community is excluded

wrong constitutional language, a matter the Court could have easily corrected. 130. Id. at 400.
131. Id. at 403. Apparently, the Court seems to have overlooked that the Sixth Amendment guarantees an impartial jury not an impartial venire. 132. See id. at 408 ("the fair cross section requirement") has never included the notion that . . . representative venirees cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests—which is precisely how the traditional peremptory challenge system operates.").
134. Hurtig, Note, supra note 122, at 1067.

The internal conflict is obvious. In Taylor, the Court seems to be saying that representativeness is important since it provides impartiality through balance and perspective, while in Holland, it seems to be saying that the elimination of these qualities through the peremptory challenge does not injure impartiality.

Arguably, if the Court's true motivation for requiring community representativeness is in the democratic underpinnings of trial by jury, such a motivation should extend all the way to the jury panel itself and not be limited to the venire. It should reflect the full range of the community, and incorporate a prohibition on exclusion of any representative member of the community who is qualified to sit as a juror. It should necessarily reject the peremptory challenge as a device whose design enables the jury's representativeness and impartiality to be manipulated based on unsupported perceptions that impartiality is defined as a function of one's group affiliation.

In Justice Marshall's strong dissenting words: "A defendant's interest in obtaining the 'common sense judgment of the community' is impaired by the exclusion from his jury of a significant segment of the community; whether the exclusion is accomplished in the selection of the venire or by peremptory challenge is immaterial." 136

Justice Marshall recognized that the jury system exists to bind the court to reality. Although each juror as an individual is not automatically a representative of an ethnic, racial or other distinct segment of the community, that juror necessarily brings to the jury experiences and perspectives that do in part depend on such factors as socioeconomic status, age, and ethnic

130. Taylor 419 U.S. at 532 n.12 (citing Peters v. Kiff, 407 U.S. 493 (1972)). The Court's reasoning in Holland also seems to contradict its portrayal of the jury as having evolved from democratic and representative government and in being a body truly representative of the community. See, e.g., Glasse v. United States, 315 U.S. 40, 45 (1942) ("Our notions of what a proper jury is have developed in harmony with our basic concepts of democratic society and a representative government. For it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."). (citation omitted).
ment as applying only to the venire but not to the jury panel, the Court, in seeming contradiction to its holding in Taylor, inexplicably asserted that a cross section requirement need only assure an impartial jury, not a representative one. In Holland, the Court stated that impartiality only required a cross section of the venire, insisting there was no constitutional requirement that the jury actually chosen must "mirror the community and reflect the various distinctive groups in the population." Essentially, as long as the venire was drawn from a cross section of the community, litigants were free to diminish the representativeness of the jury panel through the use of peremptory challenges. In Taylor, the Court would seem to be saying that attorneys are free to discriminate in jury selection as long as it is not racially based. In effect, by limiting the role of the Sixth Amendment, the Court has seemingly placed constitutional provisions in gratuitous conflict: the Sixth Amendment allows what the Fourteenth Amendment forbids.

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background. To ignore these differences is to deny the diversity of society as well as the fundamental character of the community whose voice is to be represented by the jury. To allow the peremptory challenge to diminish the representativeness of the jury is to undermine the essence of diffused impartiality and the jury's democratic foundation.

With the Holland decision, though, the Court seems to be sawing off the very branch on which it is sitting. The Court preserves the peremptory challenge by claiming that an unrepresentative jury nevertheless affords impartiality while simultaneously ignoring that community perception of impartiality is governed more by the appearance of impartiality than by overt discriminatory behavior. The Court itself once commented that "justice must satisfy the appearance of justice." Holland, though, seems to ignore this very idea by limiting the Sixth Amendment protections and subjecting the peremptory challenge to the inadequate limitations set for it in Batson. As a result, the jury panel, the defendant, and the community all are denied the same democratic and representative qualities that are required of the venire and which are seen as the foundation of our legal and political institutions. Even more troublesome is that this interpretation of the Sixth Amendment directly conflicts with state supreme court interpretations of impartial jury guarantees contained in state constitutions.

137. VAN DYKE, supra note 16, Introduction at iv.

138. Id.

139. See Toni Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images & Procedures, 64 N.C.L. REV. 501, 517 (1986) ("[A] jury's fairness is determined not only by its verdict but also by its visual appearance . . . .").

140. Batson, 476 U.S. at 1736 (Burger, C.J., dissenting) (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

141. Florida's interpretation of the impartial jury guarantee in its state constitution illustrates the contrast. In State v. Neil, 457 So. 2d 481, 486 (Fla. 1984), the court stated: The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended . . . [to] be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended . . . [to] be used to encroach upon the constitutional guarantee of an impartial jury. However, Florida's "impartial jury" approach to eliminating discriminatory use of the peremptory challenge is equally flawed since it relies on the same requirements of a cognizable racial group, prima facie case, and race-neutral explanation, as Batson does. See id. at 486-87. Furthermore, the impartial jury foundation laid by Neil seems to be ending with a recent case recognizing Hispanics as a cognizable group. See All v. Slum, 596 So. 2d: 1083 (Fla. 3d Dist. Ct. App. 1992). In Alioto, concurrence Judge Phillip Hubert characterized the extension of the death penalty for the peremptory challenge on race, by reasoning over the line to give protection to an ethnic group rather than a racial one, the court would have no principled basis for refusing to extend the same rule to peremptories concerned on the basis of ethnic origin, nationality, gender, religion, wealth, or age—all groups subject to invidious discrimination. Id. at 1086-88. The same argument could be made of the Supreme Court's recognition of Hispanics as a cognizable racial group for Batson purposes.

On appeal, the Florida Supreme Court affirmed the District Court of Appeal, stating: "The time has now come in Florida to extend Neil to protect potential jurors from being excluded from the jury solely on the basis of ethnicity." State v. Alioto, 18 Fla. L. Weekly 223, 223 (Fla. Apr. 8, 1993). While acknowledging that neither the United States Supreme Court nor Florida law provides any precise definition of a cognizable class, the court was by no means any more specific, stating merely that cognizability inherently demands "that the group be objectively discernible from the rest of the community" and adopting a cognizability standard similar to the one advanced in Sgro. Id. at 224 (citations omitted) ("First, the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesion of attitudes, ideas, or experiences that may not be adequately represented by other segments of society."). Even more revealing is the court's instruction that gender constitutes a cognizable class, which has not yet been established by Florida caselaw for peremptory purposes. Id. ("When identifying traits is a physically visible characteristic such as race or gender, the process of defining a class is comparably less arduous . . . ."). The court, however, did not address the premise raised by Judge Hubert. Thus, given the court's cognizability standard, its holding regarding ethnicity and its dicta regarding gender, it appears that the peremptory challenge in Florida may yet be faced with the very case-by-case stratagium that Judge Hubert forewarned. In fact, the acting attorney general who argued the state's appeal, while agreeing philosophically with the court's holding, feared that extending protection to a juror's ethnicity could lead to objections on almost any peremptory challenge. See Hispanics Can't Be Barred from Jury, Court Rules, SUN-SENTINEL, Apr. 10, 1993, at A13.

142. USA TODAY, Aug. 1988, (Magazine), at 5.

143. Id.
background. To ignore these differences is to deny the diversity of society as well as the fundamental character of the community whose voice is to be represented by the jury. To allow the peremptory challenge to diminish the representativeness of the jury is to undermine the essence of diffused impartiality and the jury’s democratic foundation.

With the Holland decision, though, the Court seems to be sawing off the very branch on which it is sitting. The Court preserves the peremptory challenge by claiming that an unrepresentative jury nevertheless affords impartiality while simultaneously ignoring that community perception of impartiality is governed more by the appearance of impartiality than doctrinal remarks about it. The Court itself once commented that “justice must satisfy the appearance of justice.” Holland, though, seems to ignore this very idea by limiting the Sixth Amendment protections and subjecting the peremptory challenge to the inadequate limitations set for it in Batson. As a result, the jury panel, the defendant, and the community are denied the same democratic and representative qualities that are required of the venire and which are seen as the foundation of our legal and political institutions. Even more troublesome is that this interpretation of the Sixth Amendment directly conflicts with state supreme court interpretations of impartial jury guarantees contained in state constitutions.

137. VAN DYKE, supra note 16, Introduction at xiv.
138. Id.
139. See Toni Massaro, Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images & Procedures, 64 N.C. L. REV. 501, 517 (1986) (“[A] jury’s fairness is determined not only by its verdict but also by its visual appearance . . . .”).
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142. USA TODAY, Aug. 1988, (Magazine), at 5.
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representativeness is an even greater injury. Allowing attorneys to entertain their own unsupported perceptions of group bias through the peremptory challenge injures the excluded juror since it legitimizes the unfounded perception that somehow distinct group membership affects one’s ability to be impartial. Furthermore, it impacts on the community’s sense of justice.

VII. The Peremptory Challenge and the Community

In addition to the doctrinal argument for extending protection to any cognizable group which may be subject to discriminatory treatment, eliminating the peremptory challenge may also be seen as addressing community perception of fairness and impartiality. As so many contemporary cases have illustrated, whether exercised by the prosecutor or defense attorney, or condoned by the judge, the use of the peremptory challenge affects the community’s perception of the fairness of the verdict. That perception is shaped by the view that discrimination continues to haunt the judicial system and that the deck is stacked against minority interests. For example, in nearly every court in America, the judge, prosecutor, defense attorney, clerk, stenographer, bailiff and jurors are overwhelmingly white and the defendant is likely to be black or Hispanic. The presence of impartiality and equality in the judicial system seems further obscured in light of the Arthur McDuffie, Luis Alvarez, and William Lo-

144. See infra notes 145-48.
146. Arthur McDuffie, a black insurance executive, was beaten to death in 1980 by Miami Police officers after his arrest for a traffic violation. The officers were later acquitted by an all-white jury of manslaughter charges, touching off one of the worst racial riots in Miami history. The riots caused $200 million in property damage and fifteen people were killed. Approximately 3600 National guardsmen were called in to calm the outrage of the black community. The Florida Governors report on the disturbance specifically identified the exclusion of blacks from juries as a contributing cause of the riots and the reason for blacks in Dade County to distrust the criminal justice system. See generally Albert V. Alsobrooks, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153, 195-96 (1989); Pizzi, supra note 68, at 153; Andrews v. State, 438 So. 2d 480, 482 n.4 (Fla. 3d Dist. Ct. App. 1983).
147. In 1984, Luis Alvarez, an Hispanic Miami police officer, killed a black suspect while on patrol. After defense counsel removed both black veniremen, Alvarez was acquitted of manslaughter charges by an all-white jury which deliberated only three hours following a nine-week trial, again provoking public outrage and civil unrest. See generally Pizzi, supra note 68, at 153-54; Jury Finds Alvarez Not Guilty, MIAMI HERALD, Mar. 16, 1984, at Al.

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148. William Lozano, another Hispanic officer, killed a black motorcyclist and his passenger in 1989, sparking three days of rioting. Lozano was found guilty, yet on appeal, was granted a new trial. Ongoing issues involving a change of venue currently delay the resolution of this case, as the trial has been five times moved from Miami in efforts to ensure a jury uninfluenced by public reaction to a possible acquittal. From Miami to Orlando to Tallahassee, Tallahassee back to Orlando, Orlando back to Tallahassee, and finally back to Orlando. Defense counsel’s concern has been that Lozano may not receive a fair trial in a city where the population base is not closely representative of the population base of Miami. See generally Mark Hansen, Different Jury Different Verdict?, A.B.A. J., Aug. 1992, at 55; Darlene Ricket, Holding Out—Juries vs. Public Pressure, A.B.A. J., Aug. 1992, at 48, 51; Judge: Lozano retrial moves back to Orlando, SUN-SENTINEL, July 28, 1992, at A1; Rachel E. Swarms, Lozano trial moved again—to Orlando, MIAMI HERALD, Mar. 11, 1993, at A1, 15A, col. 1.
149. The acquittal by an all-white jury of officers accused of beating Los Angeles motorists Rodney King, a black man, touched off one of the most costly and widely reported riots in American history. The riot caused nearly $1 billion in property damage and left 53 dead. Ultimately, the officers were retired by the United States Department of Justice for violating Rodney King’s civil rights. In the federal trial, which took place almost a year to the day after the state trial and its resulting riots, two officers were convicted by a jury comprised of nine whites, two Blacks, and one Asian. Among the jurors, was a white man who said the omission of Blacks from the jury in the first trial may have been one of the causes of the riot. See generally Anxiety Evaporates with King Verdicts, Sun-Sentinel, Apr. 18, 1993, at A1; Linda Deutsch, The Rodney King Decision—Differences in Trials Related with Juries, SUN-SENTINEL, Apr. 18, 1993, at A7; Verdict in Trial of Police Officers Shows U.S. Justice System Works, SUN-SENTINEL, Apr. 19, 1993, at 10A.
151. Banton, 476 U.S. at 87.

https://nsuworks.nova.edu/nlr/vol17/iss4/15
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for cause are too narrow to eliminate all but the most blatantly biased jurors.\textsuperscript{152} Furthermore, prospective jurors will evade or misconstrue, unconsciously or deliberately, general \textit{voir dire} questions in order to avoid answering and possibly being struck,\textsuperscript{153} thus "hidden bias" may persist. The judge's role of authority figure tends to exacerbate this problem since many prospective jurors are afraid to say anything that might displeasure the judge let alone admit racist or prejudicial feelings in an open courtroom.\textsuperscript{154} Strategically, a peremptory challenge provides a "fallback" position.\textsuperscript{155}

In practice, however, the peremptory challenge fails to distinguish extreme "hidden bias" from that which merely forms the representative nature of the jury.\textsuperscript{156} While extreme bias may affect impartiality on juries, bias itself does not necessarily imply impartiality. Purging all hidden biases may eliminate jurors who, despite their personal outlooks and experiences will still be impartial. To the extent that some bias remains, the "harm" that may result is intrinsic to the jury system itself and is the essence of having individuals unschooled in the law serving as triers of fact. Those individual biases are exactly what comprises the "diffused impartiality" necessary for an impartial jury. It enables jurors to view the evidence from a variety of perspectives, gaining insights from others who may view the evidence differently, thereby enhancing the fact-finding goal.\textsuperscript{157} Most importantly, it will likely make the decision of the jury more rooted in the values represented by the cross section of the community.

At a more fundamental level, to argue that peremptory challenges are necessary to remove hidden bias presupposes that lawyers are capable of accurately identifying it. Since \textit{voir dire} provides only limited information, peremptory challenges are essentially hunches, based on intuition, conscious or unconscious prejudice, or simply "sudden impressions" based upon "bare looks and gestures of another."\textsuperscript{158} Inevitably, not only might such speculation be a facade for conscious or unconscious discrimination, it is likely a completely inaccurate assessment of a juror's ability to be impartial. Many of the common beliefs and stereotypes prevalent among trial attorneys are simply untrue as shown by studies on jury behavior.\textsuperscript{159}

One of the best known jury studies examined the effectiveness of the peremptory challenge in twelve federal criminal trials.\textsuperscript{160} The experiment compared the verdicts of tree different jury panels: the actual trial jury, another composed of challenged jurors, and a third comprised randomly.\textsuperscript{161} By comparing votes of the trial jurors with those whom a lawyer had excluded, the researchers were able to make some generalized observations. First, they found that prosecutors generally did not improve their position through the use of peremptory challenges.\textsuperscript{162} Second, attorneys performed erratically, sometimes using their challenges well and sometimes poorly.\textsuperscript{163} Third, when one side performed well and the other did not, the disparity "seriously affected, if not determined" the result.\textsuperscript{164}

This study, though far from conclusive because of its limited sample base, suggests that lawyers hunches are frequently incorrect. Furthermore, they are unable to accurately and consistently remove jurors with "hidden bias." The study also revealed that when one lawyer performs well and the other performs poorly, peremptories skewed the jury composition and verdict toward the side represented by the more accurate attorney.\textsuperscript{165}

\textsuperscript{152} Salsburg & Powers, supra note 30, at 340.
\textsuperscript{153} Babcock, supra note 107, at 547.
\textsuperscript{154} JURYWORK, supra note 17, \textsection 17.01[3].
\textsuperscript{155} Barbara D. Underwood, \textit{Ending Race Discrimination in Jury Selection: What Right is it Anyway?}, 92 COLUM. L. REV. 725, 771 (1992). However, the way that lawyers conduct \textit{voir dire} and exercise their challenges indicates they do not seek to employ "impartial" jurors, but instead try to eliminate those partial to their opponents, or even preserve those jurors partial to their particular interests. Abraham Brody, Selecting a Jury—Art or Blind Man's Buff [sic], 4 CRIM. L. REV. (New York) 67, 68 (1957). "Of course lawyers proclaim sanctimoniously that they only seek a fair and impartial jury, but get protestations aside, what they really want is a jury that will favor their side and help them win." Id.
\textsuperscript{157} See Minow & Cate, supra note 19, at 60.
\textsuperscript{158} Swain, 380 U.S. at 220 (citations omitted).
\textsuperscript{159} See VAN DYE, supra note 16, at 23-42 (listing a number of jury behavior studies).
\textsuperscript{160} Hans Zeisel & Shari Seidman Diamond, \textit{The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court}, 30 STAN. L. REV. 491 (1978).
\textsuperscript{161} Id. at 498.
\textsuperscript{162} See Alschuler, supra note 146, at 203 (commenting on Zeisel and Diamond's study). Prospective jurors whom prosecutors excluded were as likely to favor conviction as the jurors actually seated. Zeisel & Diamond, supra note 160, at 513-18. Defense attorneys were only somewhat more effective, but only marginally better than random guesses. Id. According to one English survey, however, conviction rates actually increased by seven percent when defense attorneys exercised their peremptory strikes as compared to trials where defense attorneys exercised no peremptory strikes. James J. Gobert, \textit{The Peremptory Challenge—An Obituary}, 1989 CRIM. L. REV. 528, 531 (1989).
\textsuperscript{163} Zeisel & Diamond, supra note 160, at 517.
\textsuperscript{164} See id. at 518-19. Such an outcome suggests not that an impartial jury had been selected, but that a one-sided jury had caused a miscarriage of justice. The study concluded that counsel's collective performance was "not impressive." Id. at 517.
\textsuperscript{165} Gurney, supra note 156, at 252. See also Salsburg & Powers, supra note 30, at 365 (discussing the opportunity costs of using peremptory challenges for the wrong reason).
for cause are too narrow to eliminate all but the most blatantly biased juror.152 Furthermore, prospective jurors will evade or misconstrue, unconsciously or deliberately, general voir dire questions in order to avoid answering and possibly being struck,153 thus "hidden bias" may persist. The judge's role of authority figure tends to exacerbate this problem since many prospective jurors are afraid to say anything that might displease the judge let alone admit racist or prejudicial feelings in an open courtroom.154 Strategically, a peremptory challenge provides a "fallback" position.155

In practice, however, the peremptory challenge fails to distinguish extreme "hidden bias" from that which merely forms the representative nature of the jury.156 While extreme bias may affect impartiality on joint bias itself does not necessarily imply impartiality. Purging all hidden bias may eliminate jurors who, despite their personal outlooks and experiences, will still be impartial. To the extent that some bias remains, the "hard" that may result is intrinsic to the jury system itself and is the essence of being individuals unschooled in the law serving as triers of fact. Those individual biases are exactly what comprises the "diffused impartiality" necessary for an impartial jury. It enables jurors to view the evidence from a variety of perspectives, gaining insights from other jurors who may view the evidence differently, thereby enhancing the fact-finding goal.157 Most importantly, it will likely make the decision of the jury more rooted in the values represented by the cross section of the community.

At a more fundamental level, to argue that peremptory challenges are necessary to remove hidden bias presupposes that lawyers are capable of accurately identifying it. Since voir dire provides only limited information, peremptory challenges are essentially hunches, based on intuition, consid
Thus, peremptories frustrate the law’s expectation that the adversary allocation of peremptory challenges will benefit each side equally. Rather, sometimes the peremptory pendulum swings in only one direction. By eliminating the peremptory challenge, however, the probability pendulum need not swing to unduly favor either side. Instead, impartiality would be left to the balancing effects of the cross section of the community.

Another argument offered for preserving the peremptory challenge is that it provides a shield for the exercise of the challenge for cause. Questioning during voir dire may have antagonized or alienated the juror so that, although the inquiring attorney has not established any basis for removal, he may find it necessary to strike the juror peremptorily. Without the peremptory challenge, it is argued, a party would be less able to search for cause challenges for fear of being "stuck" with jurors he has provoked.

However, post trial interviews suggest that most people respect a lawyer who pursues voir dire seriously, even if the questioning produces some tension in the courtroom. As long as a lawyer does not bully or badger the juror, most would accept the procedure as part of the normal course of affairs. Attorneys who use voir dire effectively not only enable more legitimate challenges for cause, but they perform a didactic function as well. Effective voir dire enables an attorney to strategically position the issues and curry favor with the jury before the actual trial proceeding begins. In fact, a number of studies show that attorneys use voir dire less to elicit bias than to prepare the jury about the issues to be decided and to endear themselves to the jury panel. Consequently, the argument that peremptories are essential as a shield or fallback is unpersuasive. Without the peremptory challenge, attorneys would be forced to adopt more efficient and effective approaches to their inquiries thereby improving the quality of voir dire, surely a benefit. At most, the argument that the peremptory challenge is a necessary shield seems better suited for expanding challenges for cause than resisting its elimination.

The contention that some biased jurors will end up on juries cannot be squelched. However, that occurrence is equally possible under the current challenge system. Without any magic formulas for jury selection, an attorney can just as easily "deselect" a "good" juror as he can bypass a "bad" juror. It is impossible to know which person will be a "good" or "bad" juror for any particular case. In fact, peremptories are admittedly based on "seat of the pants instincts" that may be "crudely stereotyped" and is many cases are "hopelessly mistaken." Therefore, the belief held by trial attorneys as well as the Supreme Court that the peremptory challenge is essential seems more based on an illusory perception than proven results.

Even if attorneys were accurate in exercising their challenges, demographic, sociological and psychological factors rarely predict how individual jurors will vote in specific cases. Every juror appraises testimony and evidence differently, from a distinctively different vantage point and life experience. The process of jury deliberation involves a complex combination of varied traits and attitudes and their interplay. An attorney’s hunch or the Gestalt psychology of jury consultants could never take into account the more statements were made by attorneys than by venirepersons and that the majority of questions were instructional rather than designed to elicit information. Id. 174. Gurney, supra note 156, at 253.

175. JURYWORK, supra note 17, § 18.02[a]. Senior Federal District Judge Raymond J. Broderick, of the Eastern District of Pennsylvania, incisively points out that the "objective" observations of social scientists tend to take the form of sweeping generalizations akin to the offensive stereotypes embraced by some trial attorneys. Raymond J. Broderick, Why the Peremptory Challenge Should Be Abolished, 65 TEMPLE L. REV. 369, 414 (1992). In addition, Judge Broderick argues that psychological or sociological portraits and empirical propositions that "certain classes of people statistically have predispositions" making them "bad" jurors is irrelevant to the legal and political structure of a pluralistic democracy and reinforces demeaning stereotypes. Id. at 415-16 (citations omitted).


177. JURYWORK, supra note 17, § 18.02[a]. In actuality, in all literature and caselaw, no proof has been set forth that peremptories effectively identify or eliminate bias. Furthermore, that attorneys and jury consultants claim to be accurate in their assessments is inherently unpersuasive since, outside the type of study conducted by Zeisel and Diamond, there is no way of knowing if such assessments led to an acquittal any more than they may have contributed to a conviction.
Thus, peremptories frustrate the law’s expectation that the adversary allocation of peremptory challenges will benefit each side equally. Rather, sometimes the peremptory pendulum swings in only one direction. By eliminating the peremptory challenge, however, the probability pendulum need not swing to unduly favor either side. Instead, impartiality would be left to the balancing effects of the cross section of the community.

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The contention that some biased jurors will end up on juries cannot be argued. However, that occurrence is equally possible under the current challenge system. Without any magic formulas for jury selection, an attorney can just as easily "deselect" a "good" juror as he can bypass a "bad" juror. It is impossible to know which person will be a "good" or "bad" juror for any particular case. In fact, peremptories are admittedly based on "seat of the pants instincts" that may be "crudely stereotyped" and many cases are "hopelessly mistaken." Therefore, the belief held by trial attorneys as well as the Supreme Court that the peremptory challenge is essential seems more based on an illusory perception than proven results.

Even if attorneys were accurate in exercising their challenges, demographic, sociological and psychological factors rarely predict how individual jurors will vote in specific cases. Every juror appraises testimony and evidence differently, from a distinctively different vantage point and life experience. The process of jury deliberation involves a complex combination of varied traits and attitudes and their interplay. An attorney’s hunch or the Gestalt psychology of juror consultants could never take into account that more statements were made by attorneys than by venirepersons and that the majority of questions were instructional rather than designed to elicit information. Id. at 233.

166. See Ziesel & Diamond, supra note 160, at 529. While many attorneys believe that trials can be won and lost through voir dire, a survey of trial judge’s reveals that this may be more based on perception than reality. When asked to specify aspects of trial performance likely to produce inequality, trial judges did not even mention voir dire practices. KALVEN & ZIESEL, supra note 14, at 362-72. Thus, it could be concluded that the judges surveyed believed that the differences in jury selection skills had little impact on trial outcomes compared to other advocacy skills.

167. Babcock, supra note 107, at 554.

168. Id. at 554-55.

169. Id. at 555.

170. JURY WORK, supra note 17, § 17.02.

171. Id. § 17.02.


173. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMA, THE AMERICAN JURY ON TRIAL 51 (1980). In an early study, researchers observed that lawyers only spent twenty percent of their time trying to differentiate prejudiced and unprejudiced jurors. Id. Another study revealed that more statements were made by attorneys than by venirepersons and that the majority of questions were instructional rather than designed to elicit information. Id. at 233.

174. Gurney, supra note 156, at 233.

175. JURY WORK, supra note 17, § 18.02[a]. Senior Federal District Judge Raymond J. Broderick of the Eastern District of Pennsylvania, incisively points out that the “objective” observations of social scientists tend to take the form of sweeping generalizations akin to the affective stereotypes embraced by some trial attorneys. Raymond J. Broderick, WHY THE PEREMPTORY CHALLENGE SHOULD BE ABOLISHED, 56 TEMP. L. REV. 369, 414 (1992). In addition, Judge Broderick argues that psychological or sociological portraits and empirical propositions that “certain classes of people statistically have predispositions” making them “bad” jurors is irrelevant to the legal and political structure of a pluralistic democracy and reinforces demeaning stereotypes. Id. at 415-16 (citations omitted).


177. JURY WORK, supra note 17, § 18.02[a]. In actuality, in all literature and caselaw, no proof has been set forth that peremptories effectively identify or eliminate bias. Furthermore, that attorneys and jury consultants claim to accurate in their assessments is inherently unprovable given that outside the type of study conducted by Ziesel and Diamond, there is no way of knowing if such assessments led to an acquittal any more than they may have contributed to a conviction.

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the overall reasoning process that occurs in the jury room.  

IX. BALANCING THE COSTS

The costs of eliminating the peremptory challenge are less than one might imagine. Supporters of the peremptory challenge argue that its absence will produce more unchecked bias possibly creating more deadlocked juries. In practice, only five percent of jury deliberations end in mistrial. When mistrials do occur, studies show that only seven percent were due to juror’s “sentiments about the defendant.” Rather, the majority of disagreement centers on evidentiary matters. Thus, deadlocks would appear unrelated to juror bias. Moreover, hung juries usually result from an initial “massive minority” of holdouts, most often favoring acquittal. Even if unchecked biases were to increase as a result of the elimination of the peremptory challenge, logically, it would still center around evidentiary matters and it would occur on both sides. Thus, the “massive minority” required to produce a hung jury would probably remain unaffected. Arguably, while a more diverse group might have greater difficulty reaching a consensus, this is hardly a burdensome cost compared to the injury to public confidence that occurs when peremptory challenges produce what is perceived to be unjust verdicts, to say nothing of the civil unrest that may result. In fact, the extra time spent in deliberation enhances the quality and thoroughness of the discussion, benefiting all parties and the trial system as a whole.  

Another concern is that increased judicial burden would result from increased challenges for cause. While an increase in the number of attempted challenges for cause would probably occur, they would be

178. JURYWORK, supra note 17, § 18.02[s]. For a behind the scenes view of the deliberating process, illustrating the complicated if not surprising interplay between jury members, see Gay Jerey, Charles Keating, Meet Your Peers, AM. LAW., Mar. 1992, at 100 (providing a day-by-day diary account of jury deliberations in Lincoln Savings & Loan Association head Charles Keating’s trial).  
179. Garvey, supra note 156, at 255.  
180. KALVEN & ZEISEL, supra note 14, at 453.  
182. Id. at 460-62.  
183. Garney supra, note 156, at 256.  
185. See United States v. Thompson, 827 F.2d 1254, 1263 (9th Cir. 1987) (Snead, J., dissenting) (where the dissenting judge opined that in light of the encumbrances of time-consuming Batson hearings, it might be far better to eliminate the peremptory challenge as “inferior to the costs elaborate Batson litigation will impose”).  
186. 556 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1992), aff’d, 18 Fla. L. Weekly 223 (Fla. Apr. 8, 1993).  
187. Id. at 1090.  
188. Id. at n.11.  
189. See, e.g., IND. CODE ANN. § 35-37-1-5(a)(11) (Burns 1992 Supp.) (“That the person is biased or prejudiced for or against the defendant.”); LA. CODE CIV. PROC. ANN. art 1765 Challenges for cause (2) (West 1990) (“When the juror has formed an opinion in the case it is not otherwise impartial . . . .”); MASS. ANN. LAWS ch. 234 § 28 (West 1988) (if a juror “has expressed or formed an opinion or is sensible of any bias or prejudice” another juror shall be called instead).
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Another concern is that increased judicial burden would result from increased challenges for cause.\textsuperscript{184} While an increase in the number of attempted challenges for cause would probably occur, they would be confined to defined limits and would be more easily adjudicated than current peremptory challenge applications under Batson and its progeny. Thus, whatever burden that might result would be more than offset by the elimination of Batson’s procedural and appellate albatross.\textsuperscript{185}

X. A DIFFERENT KIND OF CHALLENGE FOR CAUSE

In order to realistically serve the goal of removing true articulable bias, this note advocates adopting system of challenge for cause similar to the one proposed by Florida District Court of Appeal Judge Phillip Hubbell in Allen v. State.\textsuperscript{186} Under the plan proposed by Judge Hubbell, cause challenges would be expanded slightly to embrace a narrow, case related area of “sound, strategic, nondiscriminatory reason[s] why trial counsel might doubt a juror’s impartiality or capacity to perform as a juror.”\textsuperscript{187} This includes the juror’s: 1) inability to follow the law; 2) intellectual infirmity; 3) associations with persons involved with the case; 4) associations with law enforcement; 5) past criminal prosecution or involvement in conduct being tried; and 6) illness or physical impairment.\textsuperscript{188}

In addition, judges should be able to exercise a “catch-all” challenge which encompasses when a juror’s “state of mind” prevents him from acting impartially or without prejudice.\textsuperscript{189} Such an expansion could accommodate the attorney’s concern for impartiality as well as narrow the focus of jury selection to those specific areas that are directly tied to the case at hand. It would also banish invidious discrimination of any kind, providing a simpler, more predictable system free of disputes and less reliant on

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178. JURYWORK, supra note 17, § 18.02[1a]. For a behind the scenes view of the deliberating process, illustrating the complicated if not surprising interplay between jury members, see Gay Jervey, Charles Keating, Meet Your Peers, AM. LAW., Mar. 1992, at 100 (providing a day-by-day diary account of jury deliberations in Lincoln Savings & Loan Association head Charles Keating’s trial).
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186. 596 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1992), aff'd, 18 Fla. L. Weekly 223 (Fla. Apr. 8, 1993).
187. Id. at 1090.
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appellate resolution.\textsuperscript{190} It might even shorten \textit{voir dire} since the inquiry will only be focused on specific areas.\textsuperscript{191} Most importantly, it would address the constitutional collision between the peremptory challenge and the Sixth and Fourteenth Amendments.

\textbf{XI. AND THEN THERE WERE NONE}

A number of other solutions have been suggested including reducing the number of peremptory challenges,\textsuperscript{192} eliminating peremptory challenges for just the prosecution,\textsuperscript{193} instituting a plan of "peremptory holds,"\textsuperscript{194} even penalizing a party for the improper use of a peremptory challenge by "surcharging" him on remaining challenges.\textsuperscript{195} However, each of these proposals fails to address the underlying problem with the peremptory challenge: it enables discrimination of individuals based on unsupported perceptions of group bias which are wholly unrelated to the case or with the prospective juror’s ability to be impartial. By eliminating the peremptory challenge, jury selection will not be subject to needless manipulation, nor arbitrary, injurious discrimination.

This solution has already been attempted by at least one state legislature.\textsuperscript{196} In 1974, the Massachusetts House of Representatives defeated a bill that would have eliminated peremptory challenges in all civil and criminal trials.\textsuperscript{197} Although the legislation did not pass, the fact that it was considered would seem to foreshadow the emerging acceptance and recognition that peremptories have been perverted into tools of bias. In addition, when asked in 1984 if she would object to the abolition of the peremptory challenge, United States Attorney General Janet Reno, then Dade State Attorney, replied: "No, so long as the defense and state were treated equally."\textsuperscript{198} The proposal has also been supported by a number of judges and commentators cited herein\textsuperscript{199} and was adopted in England in 1989 by Act of Parliament.\textsuperscript{200}

\textbf{XII. CONCLUSION}

The peremptory challenge, once used as a tool to insure impartiality on juries, is probably the most significant means by which prejudice and bias are injected into the jury system.\textsuperscript{201} Instead of preserving impartiality, it distorts the representativeness of and thus the impartiality of the jury and

\textsuperscript{190} Alen, 596 So. 2d at 1091.

\textsuperscript{191} Id. Expanded \textit{voir dire} may be an illusory solution if jurors are still inclined to conceal their beliefs or are unaware of or underestimate their own biases. If \textit{voir dire} is good for anything, it can impress upon the prospective juror the importance of his civic duty to impartially consider the case before him.

\textsuperscript{192} See, e.g., Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 YALE L.J. 1715, 1740 (1977); James Jorgenson, \textit{Back to the Laboratory with Peremptory Challenges: A Florida Response}, 12 FLA. ST. U. L. REV. 559 (1984). The Dale County Bar Association Task Force on Jury Selection recommended the number of peremptory challenges be reduced for both sides in 1984. \textit{Id.} at 581 n.149. In addition, in 1976, the Supreme Court proposed an amendment to the Federal Rules of Criminal Procedure 24(b), to reduce the number of peremptory challenges. However, Congress opposed the amendment. See Gurney, supra note 156, at 282.

\textsuperscript{193} Massaro, supra note 139, at 560.

\textsuperscript{194} Richard Singer, \textit{Peremptory Holds: A Suggestion (Only Half Suggestive) of a Solution to the Discriminatory Use of Peremptory Challenges}, 62 U. DET. L. REV. 275, 277-88 (1985). In light of his observations that the peremptory challenge gives neither party what it really wants, the author advocates allowing each party to peremptorily "hold" certain jurors, making them immune to challenge by the opposing party and providing a jury composed of "quasi-advocates" for both sides.

\textsuperscript{195} See \textit{id.} at 287.

\textsuperscript{196} See Frederick L. Brown et al., \textit{The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse}, 14 NEW ENG. L. REV. 192, 234 (1978).

\textsuperscript{197} Id.

\textsuperscript{198} See Hampton, supra note 1. The office of the Dade State Attorney, while headed by Janet Reno, prosecuted the Luis Alvarez and William Lozano cases.


\textsuperscript{200} In a recent interview, just prior to his death, Justice Thurgood Marshall reiterated his opposition, stating: "I would not use them . . . I would be opposed to them. They are there, and I have used them, but I have talked to a hundred prominent, practicing lawyers who quietly will tell you they are willing to take the first 12." Gary A. Hengstler, \textit{Justice Thurgood Marshall: Looking Back—Reflections on a Life Well-Spent}, A.B.A. J., June 1992, at 57, 59.

\textsuperscript{201} Effective January 5, 1989, under the 1988 Criminal Justice Act, Parliament abolished the defendant’s use of peremptory challenges. Gobert, supra note 162, at 528, 530. The prosecutor’s use of peremptory challenges has not been permitted in England since 1825. See Gurney, supra note 156, at n.262 (citing Juries Act, 1825, § 29). Thus, the peremptory challenge, as originating in English Law, has come full circle.

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\textsuperscript{195} See id. at 287.
\textsuperscript{196} See Frederick L. Brown et al., The Peremptory Challenge as a Manipulative Device

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dilutes the goal of assembling a jury comprised of a spectrum of community experiences and perspectives. Moreover, the presumption that peremptory even aid in providing an impartial jury is founded more on perception and anecdotal evidence than any articulable proof. Rather, peremptory challenges would seem to be trial alchemy, pursued more out of the quest to manipulate the outcome than for the preservation of impartiality or the pursuit of justice. Abuse of the peremptory challenge puts the rights and expectations of defendants, lawyers and society in conflict and it is the cause of retrial and riot. To preserve it would seem anachronistic given the Supreme Court's declared dedication to eradicating discrimination and upholding representativeness. Thus, it is time for legal and legislative forces to admit that peremptory challenges cannot coexist with notions of equal protection or representativeness. As the Supreme Court stated in Palmore v. Sidoti: 203 “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” 203 To return to Cardozo’s words, the peremptory challenge not only savors of prejudice or arbitrary whim, it reeks of it. 204

Rodger L. Hochman

202. 466 U.S. 429 (1984) (where the Court found a child custody award based on the race of the remarried mother’s husband was a violation of the Equal Protection Clause).
203. Id. at 433.
204. See Hampton, supra note 1.

RED ALERT: The D’Oench Doctrine’s Expansion Can Cause Financial Ruin for Borrowers When Insured Lenders Become Insolvent

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I. INTRODUCTION

During the early 1930’s, legislation was passed which created the Federal Deposit Insurance Corporation (F.D.I.C.) and the Federal Savings and Loan Insurance Corporation (F.S.L.I.C.) to restore public confidence in the banking and thrift industries respectively. 1 Each year, financial


The F.D.I.C. and F.S.L.I.C. both can operate in three distinct capacities when a bank faces insolvency. Both can act as receiver, conservator, or in a corporate capacity. In a receiver or corporate capacity, both can sue and be sued.