



April 2014

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### Recommended Citation

Geoffrey Cockrell, *Batson Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 351 (1997).  
Available at: <http://scholarship.law.nd.edu/ndjlepp/vol11/iss1/16>

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# BATSON REFORM: A LOTTERY SYSTEM OF AFFIRMATIVE SELECTION

GEOFFREY COCKRELL\*

## I. INTRODUCTION

A tall banner hanging in the main reading room of the Notre Dame law library reads: "If you want peace, work for justice." Recent events in Los Angeles following the Rodney King verdict support the proposition embroidered on the banner that perceived injustice can carry a terrible price. In the context of jury selection, the Supreme Court has said that justice requires that prospective jurors not be struck from the jury solely because of their race<sup>1</sup> or sex.<sup>2</sup> Some commentators believe that a just verdict may require more affirmative steps to ensure representation of certain groups (i.e. racial minorities) on the jury.<sup>3</sup> Both the absence of a statute requiring mixed juries and the Court's often failing efforts to police against discrimination in the selection process<sup>4</sup> have prompted many commentators to propose both minor and extensive modifications to the current process, including some innovative new ways of conducting jury selection.

The ultimate purpose of this Note is to propose a new method of jury selection which balances the competing needs of impartial selection and fair representation. Toward that end, section II will briefly review the influence of race on the jury system and how the Supreme Court has endeavored (with only partial success) to address the tendency of attorneys to use race as a leading reason for exercising their peremptory challenges. Given the courts' limited success in policing racial use of peremptory challenges, section III in broad strokes portrays the landscape of alternatives which have been proposed to modify or replace the existing *Batson* system of peremptory challenges. In addition, section III will discuss the primary criticisms which have been leveled at the various proposals. Finally, section IV pro-

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1. *Batson v. Kentucky*, 476 U.S. 79 (1986).
2. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).
3. Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1640 (1985).
4. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 356 (1991).

poses a new method of jury selection replacing the negative peremptory power of attorneys with a combination of random forces and affirmative choice.

## II. THE PROBLEM

### A. *Color Makes a Difference in the Judicial System*

The reality is that race plays a significant role in the judicial process.<sup>5</sup> The effect is simple: racial bias tends to color both the way jurors see facts and how they perceive defendants,<sup>6</sup> ultimately affecting the probability of a given defendant being found guilty.<sup>7</sup> "It would appear that white [jurors] tend to assume less favorable characteristics about black defendants than white defendants and that such assumptions contribute to these [jurors'] greater tendency to find black defendants guilty."<sup>8</sup> Justice O'Connor acknowledged the effects of race, writing, "[C]onscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."<sup>9</sup>

What Justice O'Connor called "unconscious racism" could be more benignly explained in that "[w]hat may appear to white jurors as a black defendant's implausible story may ring true to black jurors with greater knowledge of the context and norms of black experience."<sup>10</sup> "Who a juror is and what she has exper-

5. Jerome Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 91 DUKE L.J. 39 (1991).

6. See, e.g., JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 241-301 (1987); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 99-117 (1988); see also Judge Stanley M. Weisberg, *Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King*, 106 HARV. L. REV. 705, 711 (1993).

7. See, e.g., Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 112-15 (1990).

8. Johnson, *supra* note 3, at 1640. Other commentators place the difference on social status rather than race. See James M. Gleason & Victor A. Harris, *Race, Socio-Economic Status and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 SOC. BEHAV. & PERSONALITY 175, 178 (1975); Mary V. McGuire & Gordon Bermant, *Individual and Group Decisions in Response to A Mock Trial: a Methodological Note*, 7 J. APPLIED SOC. PSYCHOL. 220, 224 (1977).

9. *Georgia v. McCollum*, 505 U.S. 42, (1992) (O'Connor, J., dissenting). See also *id.* at 2360 (Thomas, J., concurring). ("Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial.")

10. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 51 (1986). See also *Cassel v. Texas*, 339 U.S. 282, 301-02 (1950) (Jackson, J., dissenting) ("The trial jury hears the evidence of both sides and chooses what it will believe. In so

ienced almost certainly influences what she accepts as plausible 'fact.'"<sup>11</sup> This is not to say that any one perspective should control. Indeed, Justice Marshall characterized the absence of *any* voice in society as a terrible loss. He wrote:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case . . . .<sup>12</sup>

Justice Marshall did not overstate the power of diversity. Even a small minority presence on a jury can minimize the effects of race on jury deliberations.<sup>13</sup> While three or four minority members of a jury can easily stand against a larger group, the presence of even one minority member can affect the deliberations of the group.<sup>14</sup>

While a racially mixed jury could overcome many of the overt and covert effects of racism in the jury room, the unfortunate fact that race can affect jury outcomes is magnified by the consistent underrepresentation of minorities in every phase of the jury selection process.<sup>15</sup> From the drawing of jury districts to the formulation of juror source lists,<sup>16</sup> minorities never find their way into this process in numbers consistent with their percentage of the population.<sup>17</sup>

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deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh.”).

11. Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 431-32 (1992).

12. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

13. *Johnson*, *supra* note 3, at 1628.

14. *Id.* at 1698.

15. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (The protection of a jury trial is “not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.”).

16. See, e.g., U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1992, 269 (112th ed. 1992) (stating that smaller percentages of African-Americans vote and that jury selection based on voter lists underrepresents African Americans).

17. Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993). (In a leading article weighing the constitutional viability of various forms of affirmative action in jury selection, Professor King traces the consistent

Against this backdrop of minority underrepresentation enters the staggering power of peremptory challenges.<sup>18</sup> Unchecked racial use of peremptory challenges can easily wipe out any minority presence that was able to survive the discriminatory impact of the preceding phases of jury selection. With a venire already thin on minorities, few peremptories are needed to eliminate the remaining minority potential jurors and seat an all-white jury. One study goes so far as to say that "the discriminatory use of peremptory challenges is the single most significant means by which racial prejudice and bias are injected into the jury selection system."<sup>19</sup>

The result of an unchecked, racially charged jury selection process is that in some districts minorities would not sit on juries. Society pays a high price for the absence of minorities on juries.<sup>20</sup> Riots on the streets of Los Angeles after the King verdict illustrate the price of perceived injustice.<sup>21</sup> Beyond the dangers of perceived injustice the absence of minorities presents the risk of real injustice: that innocent black men might be convicted. A short survey of the Supreme Court's current response should be helpful to understand the need for new solutions to racial underrepresentation.

### B. *The Batson Solution*

The Supreme Court has found discriminatory use of peremptory challenges to be problematic on two constitutional

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underrepresentation of minorities at every phase of the jury selection process. Initially the discretion vested in prosecutors or trial judges to select between multiple venues present opportunity for discrimination.) See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 737-60 (2d ed. 1992). Source lists typically drawn from voter registration lists usually underrepresent minorities. *Id.* at n.15.

18. A peremptory challenge allows an attorney to remove a potential juror without justification.

19. Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 363 (1990). See also Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 724 (1995) ("When both sides have an equal number of challenges, an advocate seeking the exclusion of a minority group is more likely to achieve her objective than an advocate seeking the exclusion of the majority.") (Citations omitted).

20. Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 799 (1994) ("[T]he concept of a racially mixed jury creates a civic benefit: requiring jurors of different ethnic and racial backgrounds to work together as equals will debunk racial stereotypes.").

21. Paul Lieberman & Richard O'Reilly, *One Year After the Riots*, L.A. TIMES, May 2, 1993, at A1. See generally, G.W. Hoon, Commentary, 1982 CRIM. L. REV. 681 (1982).

grounds: the Sixth Amendment's guarantee of an impartial jury<sup>22</sup> and the Equal Protection Clause of the Fourteenth Amendment.<sup>23</sup> The Sixth Amendment, traditionally focusing on the rights of the defendant, was the basis of the Supreme Court's initial condemnation of racial use of peremptory challenges.<sup>24</sup> The Equal Protection Clause has been a more complicated vehicle for criticism of peremptory abuse. Initially, the Court used the Equal Protection Clause to focus on the rights of the defendant not to have potential jurors of the defendant's race struck solely because of their race.<sup>25</sup> More recently, the Court has used the Equal Protection Clause as a vehicle for protecting the rights of would-be jurors who are struck from the venire on the basis of race.<sup>26</sup> This shift toward focusing on protecting would-be jurors has unfortunately been coupled with a shift away from the argument that discrimination in jury selection affects trial outcomes. In the absence of legislative initiative, the evolution of Supreme Court logic has diminished the likelihood that jury selection procedures will yield racially proportional juries. To understand the need for reform, a brief tour of that evolution is necessary.

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22. See *infra* note 24.

23. See *infra* note 25.

24. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 696 (1975) ("Our inquiry is whether the presence of a fair cross section of the community on venires, panels, of lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial. . . ."). *Id.*

25. *Batson v. Kentucky*, 476 U.S. 79, 86-87 n.8 (1986) ("The Equal Protection Clause guarantees *the defendant* that the State will not exclude members of his race from the jury venire on account of race . . . . Purposeful racial discrimination in selection of the venire violates *a defendants'* right to equal protection because it denies *him* the protection that a trial by jury is intended to secure.") (emphasis added). See also *Louisiana v. Taylor*, 419 U.S. 522 (1975); Smith, *infra* note 32, at 891 ("The Sixth Amendment test generally mirrors that of equal protection" in requiring proof of discrimination, but "under the Sixth Amendment, the defendant need not establish inferences of purposeful discrimination.").

26. Three recent cases have shifted the Court's approach to protecting the rights of potential jurors not to be excluded from sitting on a jury because of their race. (*Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 500 U.S. 614 (1991); *Edmonson v. Leesville Concrete Co.*, 499 U.S. 400 (1991)). Many commentators agree that the Equal Protection Clause provides a more consistent platform for addressing jury makeup. See V. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204-9 (1995) (arguing that the shift toward Equal Protection Clause and paramount concern for rights of would-be jurors over concern for defendants comes from difficulty in using the 6th (defendant intensive) as a constitutional framework for jury selection issues). For an excellent comparison of a Sixth Amendment versus Equal Protection Clause framework for jury selection issues, see Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992)).

# 1. The First Attempt: *Swain v. Alabama*

The Court's first look at the problem of minority exclusion from juries came in 1880<sup>27</sup> when the Court held that purposeful<sup>28</sup> exclusion of members of the defendant's race from the jury constituted a denial of the defendant's equal protection under the Fourteenth Amendment.<sup>29</sup> This general pronouncement, however, provided no mechanism for challenging lopsided juries. Eighty-five years passed with little attention or development of the general *Strauder* rule against purposeful exclusion. Finally, in 1965, the Court, in *Swain v. Alabama*<sup>30</sup> articulated a process for determining if a prosecutor had purposefully removed jurors on the basis of race.<sup>31</sup>

Under *Swain*, to establish the prima facie case for purposeful racial exclusion, the defendant must show that the state's peremptory system itself violated the Equal Protection Clause and that the prosecutor, "whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries . . . ."<sup>32</sup>

*Swain's* "almost insurmountable burden"<sup>33</sup> met with immediate and consistent criticism because it imposed what later courts would describe as a "crippling burden of proof."<sup>34</sup> The burden

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27. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

28. Equal Protection Clause violations require showing of intent. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 256-66 (1977).

29. *Strauder*, 100 U.S. at 310 ("Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against Negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the State.").

30. 380 U.S. 202 (1965).

31. *Id.* at 223.

32. *Id.* The Court in *Castaneda v. Partida*, 430 U.S. 482 (1977), produced a three-part test for prima facie case of an Equal Protection Clause violation: first, the challenger of a state's system must show that a recognizable, distinct class has been singled out for different treatment under state law (written or applied); second, the challenger must show significant under-representation over a significant period of time differing from proportion in total population; finally, the challenger must show that the process is susceptible to abuse or is not racially neutral. See also Louis N. Smith, *Final Report of the Hennepin County Attorney's Task Force on Racial Composition of the Grand Jury*, 16 HAMLINE L. REV. 879, 889 (1993).

33. See Clara L. Meek, *The Use of Peremptory Challenges to Exclude Blacks from Petit Juries in Civil Actions, The Case for Striking Peremptory Strikes*, 4 REV. LITIG. 175, 182 (1994).

34. *Batson v. Kentucky*, 476 U.S. 79, 92 (1986).

of proving the consistent and intentional exclusion of minorities beyond the strikes in the defendant's own case was magnified by the fact that generally no records of a venire's racial makeup were kept.<sup>35</sup> Even in *Swain* itself, it was not enough that no blacks had been on any jury under that prosecutor for over ten years. The difficulty comes in that the defendant must show the absence was the result of intentional discrimination by the prosecutor alone. The difficulty of proving the prima facie case under *Swain* is best illustrated by these statistics: from 1966-1984 only two of seventy-five cases (both against the same prosecutor) met the *Swain* standard.<sup>36</sup> Moreover, the only success came when the prosecutor had admitted that he always struck all blacks from the jury.<sup>37</sup> Peremptory challenges against minorities were more or less freely exercised under the unworkable *Swain* system.

## 2. *Batson*

In 1986 the Supreme Court changed the rules, overruling *Swain* in *Batson v. Kentucky*.<sup>38</sup> *Batson* improved on *Swain* by "lower[ing] the burden of proof need[ed] to establish the discriminatory use of a peremptory challenge."<sup>39</sup> Under *Batson*, "a defendant may establish a prima facie case solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial,"<sup>40</sup> making the process for proving purposeful discrimination much friendlier to challengers.

Under *Batson*, a challenge goes through two stages. First, the challenger establishes the prima facie case by "rais[ing] the necessary inference of purposeful discrimination."<sup>41</sup> To do this the challenger must first show that the juror is a "member of a cognizable racial group."<sup>42</sup> Then, the challenger can use any rel-

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35. See Robert L. Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385, 405 (1985).

36. *State v. Washington*, 375 So.2d 1162 (La. 1979); *State v. Brown*, 371 So.2d 751 (La. 1979).

37. See Doyel, *supra* note 35, at 405.

38. *Batson*, 476 U.S. at 96-97.

39. Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1101 (1994).

40. *Batson*, 476 U.S. at 96.

41. *Id.*

42. *Id.* See Ogletree, *supra* note 39, at n.25 ("Since everyone is a member of some cognizable racial group, this must mean either that two or more struck jurors must be members of the same cognizable racial group, or that the struck juror must be a member of a cognizable racial group that is un-represented or under-represented on the jury.").



evant facts<sup>43</sup> to show that the prosecutor's strikes "raise an inference that the prosecutor used [her peremptories] to exclude the veniremen [of the defendant's race] from the petit jury on account of race."<sup>44</sup> Second, if the court, "consider[ing] all relevant circumstances,"<sup>45</sup> finds the challenger to have made a prima facie showing, "the burden shifts to the State to come forward with a neutral explanation for challenging the black jurors."<sup>46</sup> *Batson* lowers the standard of proof both by allowing the challenger to use evidence only from her own case to meet the prima facie case and by requiring that the evidence raise only an inference of racial peremptory use. *Batson* greatly improved the chances of minority representation on juries, but the prospects for proportional minority representation remain dim. Problems both inherent to *Batson* and caused by the evolution of *Batson* keep minority representation dangerously low.

a. *Problems with Batson*

Perhaps the strongest criticism of the *Batson* system is the ease with which a prosecutor can offer a pretextual, race-neutral explanation for what in reality are discriminatory strikes. In one case, for example, a prosecutor struck all Spanish speaking potential jurors claiming that he "felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be."<sup>47</sup> Commenting on the problem of pretext in this case, Justice Stevens wrote: "[T]o the extent that the Supreme Court allows any race-neutral explanation to rebut claims of discrimination, the *Batson* doctrine will allow litigants to eviscerate its principles by fabricating racially neutral explanations for excluding potential jurors on the basis of race."<sup>48</sup>

In *State v. McRae*,<sup>49</sup> the only African-American in the jury pool was struck after the following questions by the prosecutor:

[Prosecutor:] Did you also understand that there may be certain jurors who have certain feelings or attitudes about whatever . . . that they couldn't for example, find somebody guilty because they just don't think the system is fair  
. . . .

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43. Even relying "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Batson*, 476 U.S. at 96.

44. *Id.*

45. *Id.*

46. *Id.* at 97.

47. *Hernandez v. New York*, 500 U.S. 352, 356 (1991).

48. *Id.* at 378-79 (Stevens, J., dissenting).

49. 494 N.W.2d 252 (Minn. 1992).

[Potential juror:] I understand that.

[Prosecutor:] Okay. Knowing what you know about, you know, your belief that the system maybe isn't perfect, should I be concerned? Is it something where you don't think you could convict him if he's proven—

[Potential juror:] No, no, no.

[Prosecutor:] Okay.

[Potential juror:] I would base my judgment on the evidence.<sup>50</sup>

Following *Batson* procedure, the judge allowed the prosecutor to offer nondiscriminatory reasons for striking the potential juror. The prosecutor responded that the potential juror "had an attitude that where she thought that basically, the system is unfair to minorities, and the defendant's being black is—and her being black would overcompensate by basically letting this guy off."<sup>51</sup> Additionally, the prosecutor indicated that the potential juror "thinks the whole jury process is [a] fraud."<sup>52</sup> The judge accepted these explanations and allowed the peremptory strike.<sup>53</sup>

The temptation to use peremptory challenges to remove all potential jurors of the defendant's race should be readily apparent, unfortunately:

the Court in *Batson* and its progeny has consistently underestimated the interest litigants will have in attempting to evade *Batson* with pretexts . . . . Striking jurors on the basis of race or gender is not always an irrational act; it can sometimes be . . . in keeping with the litigant's goals, and would simply be part of effective advocacy were it not entirely repugnant to the values and standards of the Constitution, values that should and do override the litigant's interest in winning.<sup>54</sup>

To complicate the pretext problem, the Court has done little to guide lower courts in determining a lawyer's intent in the absence of an admission of misconduct, leaving lawyers to hold to the "tradition of arbitrary strikes and allow[ing] peremptory challenges in doubtful cases. *Batson* has become impotent in preventing discrimination."<sup>55</sup>

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50. *McRae*, 494 N.W.2d at 254-55.

51. *Id.* at 256.

52. *Id.*

53. *Id.*

54. Ogletree, *supra* note 39, at 1104.

55. *Id.* at 1105.

A second and less talked about deficiency in *Batson* is the harm done before a prima facie case can be made. A case for racial use of peremptories cannot be reasonably built on one or two minority strikes. The result is that a lawyer gets a few free strikes against minority jurors before the prima facie case is made.<sup>56</sup> These free strikes can in themselves remove a significant percentage of minorities from the jury selection pool.

*b. Post-Batson Evolution*

In the wake of *Batson*, three cases began to shift the focus of the Court's analysis to the right of potential jurors not to be excluded on the basis of race.<sup>57</sup> The most recent decision, *Georgia v. McCollum*,<sup>58</sup> makes clear the potential juror's right not to be struck on the basis of race.<sup>59</sup> This shift has spawned many extensions of the *Batson* principle. The defendant now need not be the same race as the excluded juror to receive *Batson* analysis of peremptory strikes.<sup>60</sup> Also, the distinction between the exclusion of jurors in a criminal and a civil proceeding has eroded,<sup>61</sup> and the *Batson* test has been extended to exclusions based on gender.<sup>62</sup> One commentator captured the new reach of the *Batson* rule:

[The Court in] *J.E.B.* made the limits of *Batson* nearly clear: peremptory challenges by any litigant in any proceeding can always be used to make any classification that is subject to a "rational basis" test, such as occupation, but they can never be used to strike jurors according to a "strict scrutiny" classification, like race or national origin, or a "heightened scrutiny" classification like gender.<sup>63</sup>

The *McCollum* decision also extended *Batson* protection by allowing the government to challenge peremptory strikes exercised by the defense.<sup>64</sup>

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56. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 173 (1989).

57. See generally *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991).

58. 505 U.S. 42 (1992).

59. *Id.* at 2357 (holding that even a defendant's racial use of peremptory challenges violates the Equal Protection Clause).

60. *Powers*, 499 U.S. at 402.

61. *Edmonson*, 500 U.S. 614.

62. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

63. Ogletree *supra* note 39, at 1103 (interpreting the Court in *J.E.B.*, 511 U.S. at 1429).

64. *Georgia v. McCollum*, 505 U.S. 42, 55 (1992).

The reasoning behind protecting the rights of excluded would-be jurors is sound. The effect, however, has been damaging to the ideal of a fairly representative jury. In *McCollum*, "[t]he Court's focus on race-neutrality and the right of jurors not to be excluded on the basis of their race leave the Court but a half-step from concluding that the Fourteenth Amendment prohibits a defendant from striking jurors because they are white, even in the interest of securing a racially mixed jury."<sup>65</sup> Allowing minority defendants to strike majority jurors "may be the only chance that a minority defendant has to ensure that some minority jurors are included on the jury."<sup>66</sup>

In the end, the road that initially headed toward strengthening the *Batson* doctrine and promoting fairly representational juries may have detoured. The new road may prove more constitutionally sound but sacrifices the already frail protection of minority representation. Conservative Justice Thomas oversimplified the effect of the Court's involvement in peremptory challenges by saying, "I am certain that black criminal defendants will rue the day that this court ventured down the road" of restricting peremptory challenges.<sup>67</sup> This simplification misses the severely disparate impact of racial peremptories on minorities and the continuing need to protect minorities from their dangerous power. While Justice Thomas may not be providing a good solution in recommending that the clock be rolled back to free use of peremptory challenges, the fact remains that, for many reasons, minority representation on juries remains dangerously low.<sup>68</sup> In response, commentators have proposed a variety of changes to the current system.

### III. A SURVEY OF ALTERNATIVES

The vast array of proposals can loosely be divided into those that favor remedial reforms within the *Batson* system and those that offer more radical deviations from current practice in search of the diverse jury. The critiques of the various reform proposals can also be loosely divided into two groups: critiques of a proposal's efficacy in attaining mixed juries and constitutional critiques

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65. Tanya Coke, *Lady Justice May Be Blind, But Is She a Soul Sister?*, 69 N.Y.U. L. REV. 327, 332 (1994).

66. Ramirez, *supra* note 20, at 804 (conceding that while allowing free minority peremptory strikes of majority jurors may produce more mixed juries, allowing these strikes is irreconcilable with a juror's right not to be excluded because of race).

67. *McCollum*, 505 U.S. at 2259 (Thomas, J., concurring).

68. King, *supra* note 17, at 712.

aimed specifically at proposals that favor race-conscious remedies.

### A. *Problems of Race-Conscious Remedies*

As the problems of *Batson* have become more clear, a whole host of solutions have cropped up that take race into account at various levels of the jury selection process in an attempt to produce proportional juries.<sup>69</sup> While these proposals promise racial representation, the overt use of racial classifications has prompted several criticisms which merit some analysis. First, perhaps race-conscious remedies are destructive, and as a matter of policy they should be avoided. Second, the trend in Supreme Court decisions raises serious doubts about the constitutional viability of race-conscious remedies in any setting absent a strong showing of necessity.<sup>70</sup>

#### 1. Policy Criticisms of Race-Conscious Remedies

The allure of race-conscious remedies is obvious. It is easy just to mandate that a certain percentage of every jury will be African-American every time an African-American defendant stands in a criminal trial and so on for Hispanics, Asiatics, women, etc. Racial underrepresentation immediately vanishes; race-conscious remedies, however, yield unintended side-effects.

First, race-conscious remedies require answering a difficult question: "What groups get this special protection?"<sup>71</sup> The Court itself has struggled with this question in the sense of beginning with protecting racial groups<sup>72</sup> and expanding to sex<sup>73</sup> yet remaining silent on religious groups.<sup>74</sup> Even within the idea of protecting against racially discriminatory peremptories, many difficult questions arise, chiefly: what is racial representation? Should all non-whites be treated collectively as minorities? This grouping leaves open strange possibilities of diversity. An all-white and Korean jury constituting a "mixed jury" for an African-American defendant would be "diverse" even though racial animosity could still cut against the defendant. Problems also arise

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69. See *infra* section III, subsections B and C for comprehensive representation of the landscape of proposals being offered.

70. See *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

71. Alschuler, *supra* note 19, at 733-34.

72. *Batson*, 476 U.S. at 86.

73. *J.E.B.*, 114 S.Ct. at 1429.

74. The Court refused to hear a case on peremptory challenges based on religious conviction. See *Davis v. Minnesota*, 114 S.Ct. 2120 (1994) (denying a petition for writ of certiorari).

when we discount other forms of discrimination beyond race. Many other groups "feel aggrieved when no members of their groups sit on the juries that resolve cases drawing their strong interest and concern."<sup>75</sup>

Second, while the intended effect of achieving racial representation is to broaden the perspective of the jury and achieve fairer verdicts, placing members of a group on a jury or jury list on the basis of race may present a different effect. Minority members may see their role as vindicating racial concerns. "If [an affirmative action plan for jury selection] encouraged minority-race jurors to view themselves not simply as independent citizens, but as representative of a race or a people, that effect would be regrettable."<sup>76</sup> Placing jurors on a jury as a representative of one's race may have the unintended effect of racially charging every jury.

Finally, "[a] program grounded on the perception that the members of different races have different viewpoints may make it more likely that racially distinctive viewpoints will persist."<sup>77</sup> The ultimate solution to racial underrepresentation is the erosion of the significance of race. We don't have this discussion about Irish underrepresentation because scarcely anyone in the United States cares whether someone is Irish or German. Race-conscious remedies, it is said, drive home racial differences and prolong the struggle for true equality. Additionally, race-conscious solutions beg the difficult question of who is black, Hispanic, etc.

## 2. Race-Conscious Remedies and the Supreme Court

As a starting point, it should be noted that nothing in the Constitution requires racially mixed juries.<sup>78</sup> The discussion will always be on the allowability of race-conscious remedies. The Court has made a gradual shift toward protecting the interest of excluded jurors with the same vigor that earlier courts protected minority defendants.<sup>79</sup> The effect of this shift has been in many instances to reduce the ability of the *Batson* system to produce racially mixed juries.

Race-conscious remedies do not appear to pose a direct violation of the Equal Protection Clause. Indeed, in this nation's not too distant past, some jurisdictions required mixed juries in

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75. Alschuler, *supra* note 19, at 735.

76. *Id.* at 737.

77. *Id.* at 741.

78. *Virginia v. Rives*, 100 U.S. 313, 423 (1879) (stating that African-Americans do not have "a right to have the jury composed in part of colored men.").

79. *See Powers v. Ohio*, 499 U.S. 400, 409 (1991).

certain circumstances.<sup>80</sup> The likely constitutional challenge is that race-conscious remedies might trigger the higher review standard of "strict scrutiny" under the Equal Protection Clause requiring both a demonstration of a compelling state interest and a showing that the remedy tailored poses the least burden possible.<sup>81</sup> The current arguments for avoiding strict scrutiny under the Equal Protection Clause have been 1) that these remedies "include" rather than "exclude" based on race and 2) that these remedies do not deprive whites of any opportunities they rightfully deserve.<sup>82</sup> The weight of these arguments rested squarely on a 1950 case, *Cassell v. Texas*<sup>83</sup> in which a plurality opinion failed to uphold a race-conscious jury selection process because it amounted to a "purposeful, systematic *non-inclusion* because of color."<sup>84</sup>

In *Cassell*, the Dallas county jury commissioner was placing exactly one African-American on every grand jury. Justice Frankfurter reasoned that when the commission limited the number of African-American jurors, the commission was practicing "non-inclusion" based on race and a violation the Equal Protection Clause.<sup>85</sup> The implication is that since race-conscious techniques "include" minorities rather than "exclude" whites, they pose no affront to the Fourteenth Amendment under *Cassell*.<sup>86</sup> The distinction between inclusion and non-inclusion becomes tenuous when dealing with a finite number of positions on a jury.<sup>87</sup> With twelve available spots, the inclusion of one person necessarily involves the "non-inclusion" of another; however, this argument seemed to carry the day.

The constitutional landscape has recently changed. The court in three recent cases<sup>88</sup> moved beyond the reasoning in *Cassell*. "[A]ny distinction the Court once may have made between racially inclusive and racially exclusive policies has vanished."<sup>89</sup> The Court in *Shaw* set down a new analysis in which strict scrutiny

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80. See Ramirez, *supra* note 20.

81. Shaw v. Reno, 509 U.S. 630, 643 (1993).

82. King, *supra* note 17, at 730.

83. 339 U.S. 282 (1950).

84. *Id.* at 291. (emphasis added).

85. *Id.*

86. King, *supra* note 17, at 731 (referring particularly to *Cassell v. Texas*, 339 U.S. 282 (1950) as interpreted by *Brooks v. Beto*, 366 F.2d 1, 8-9 (5th Cir. 1966) in which *Brooks* upheld the inclusion of two African-Americans to a list of 16 prospective grand jurors).

87. King, *supra* note 17, at 732.

88. City of Richmond v. Croson, 448 U.S. 469 (1989); Georgia v. McCollum, 505 U.S. 42 (1992); Shaw v. Reno, 509 U.S. 630 (1993).

89. King, *supra* note 17, at 736.

is triggered by the societal injury of government racial sorting regardless of whether the government action includes or excludes minorities.<sup>90</sup> These decisions firmly entrench the court in a posture of strict scrutiny for any government measure that appears not to be color-blind,<sup>91</sup> such that strict scrutiny applies even when racial classifications burden or benefit the races equally.<sup>92</sup> The idea is that in the absence of searching judicial inquiry, the court cannot distinguish between harmful and beneficial racial classifying.<sup>93</sup> The untested conclusion is that these cases indicate that all race-conscious remedies will be met with strict scrutiny, making race-conscious jury reform measures very difficult regardless of whether they prove benign or harmful.

Another recent case may keep the window open for race-conscious remedies. Gunther has long posited that subjecting a process to strict scrutiny essentially means the process will be found constitutionally wanting.<sup>94</sup> The Supreme Court in *Adarand* softened this definition of strict scrutiny, maintaining strict scrutiny need not be fatal in fact.<sup>95</sup> Additionally, jury selection may merit special treatment because "[j]uries are distinctive both because affirmative action in jury selection has special virtues and because it is likely to prove less costly to individuals and society than affirmative action in other contexts."<sup>96</sup> In meeting the rigors of strict scrutiny, states could provide strong evidence of "past or continuing intentional racial discrimination during

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90. *Id.* at 739 (referring to *Shaw*, 113 S.Ct. at 2824-28, which overlooked the benefits of proportional representation by congressional district racial gerrymandering instead focusing on the harms of reinforcing stereotypes and enflaming racial partisanship).

91. *Id.* at 741.

92. *Powers*, 499 U.S. at 410.

93. *Croson*, 488 U.S. at 493.

94. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (writing that heightened scrutiny is "'strict' in theory and fatal in fact").

95. *Adarand*, 115 S.Ct. at 2097.

96. Alschuler, *supra* note 19, at 718-22 (Demonstrating the peculiarity of jury selection affirmative action as opposed to other affirmative action settings, Alschuler notes the lack of harm imposed by affirmative action in jury selection in that losing a seat on a jury as a majority member is not nearly as painful as losing a job or some other merit based position. This argument seems to miss that this controversy initially erupted because minorities were being excluded not from jobs but from jury service. Alschuler goes on to demonstrate that jury selection programs would not engender the stigmatization that can often be the result of affirmative action in for example the workplace. No juror placed on a jury will feel inferior because of the mode of her arriving on the jury. Given the benefits of a mixed jury and the minimized harms of the jury selection setting, Alschuler concludes that the Court could approve affirmative steps in this setting even with strict scrutiny.).



the jury selection process."<sup>97</sup> The Court has consistently found the correction of this kind of abuse to constitute a compelling interest.<sup>98</sup> Another possible avenue is a claim that the goal of producing a fairly representational venire is a compelling interest.<sup>99</sup> The second requirement of strict scrutiny requiring that the remedy is reasonably necessary to achieve the compelling interest will probably require an exhaustion of any practically available race-neutral solutions.<sup>100</sup> Though difficult, strict scrutiny is not the death knell it was once thought to be.

### B. Reforms Within Batson

If the problem of racial underrepresentation on juries under the *Batson* system could be cured with a little "tinkering," such reforms would be safer than bold new plans striking out into uncharted territory. Reform within the *Batson* system could significantly affect the ultimate make-up of juries and temper the problem of minority underrepresentation. *Batson* proposals can loosely be separated into two groups: those that sidestep *Batson* issues either by moving the trial to more racially balanced areas and those that increase the representation of minorities in the venire, theoretically raising the probability of racial representation on the petit jury.

#### 1. Race-Conscious Change of Venue Statutes

The Rodney King case vividly illustrated the dangers of transferring a case from a racially mixed community to a primarily white community.<sup>101</sup> Statistically fewer minorities will be on the jury than if the trial had proceeded in the original jurisdiction. While this problem does not flow from racial use of peremptory challenges, the effect of reducing the minority percentage in the pool from which the venire is chosen does make the racial use of peremptories more potent. If fewer minorities are in the venire, they are easier to remove, especially considering that the prosecutor may get two free strikes before a *prima facie* case of a *Batson* violation can be made.

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97. King, *supra* note 17, at 745.

98. Croson, 488 U.S. at 498-507.

99. King, *supra* note 17, at 747 (King goes on to mention the abstract aims of fairness, appearance and broad participation in the jury process as potentially compelling interests). *Id.* at 751.

100. *Id.* at 753.

101. Thomas C. Palmer, Jr., *Amnesia on Victim's Rights, Did Moving the King Trial to Ventura County Harm the Accuser's Interests?*, BOSTON GLOBE, May 3, 1992. (writing of a rising "death toll" in the "spasms of violence that have trailed [King's] verdict").

In circumstances where a suspect class for equal protection analysis would probably suffer a significant reduction in representation in the venire because of the change in venue, the court should be obliged to make proportional racial presence a factor in evaluating the potential jurisdictions for the trial.<sup>102</sup>

## 2. Revised Jury Lists

Section II of this note highlighted the consistent underrepresentation of minorities at every stage of the jury selection process. If minorities were proportionally represented in a venire, they would have a better chance of surviving the voir dire process even as it stands today. First, if a prosecutor is dead set on using her peremptories to try to remove minorities, she will have a tougher time if more minorities are present in the venire. Second, even if the prosecutor does not use peremptories racially, the presence of more minorities will obviously raise the probability of proportional representation or at least some minority presence. Addressing the minority exclusion problem at this stage also offers several distinct benefits. "[T]he demographics of particular jurisdictions may make it easier to achieve racial balance in large groups than in small groups."<sup>103</sup> There is no way for a petit jury of twelve to reflect, for example, twenty distinct groups. Also, measures taken at the jury pool formation stage, even race-conscious measures, seem to generate less public concern than direct quotas on the makeup of juries.<sup>104</sup>

The strongest critique of measures which focus on the venire pool is that they do not assure proportional representation on petit juries. A commission aimed at achieving proportional representation of minorities in Hennepin County,

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102. M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1935-42 (1993) (Professor Gilbert concedes that the current test for equal protection violations requires showing of intentional discrimination, a task near impossible to prove against a trial court judge presiding over a change of venue motion. Conversely, the Sixth Amendment is read as requiring only a showing that the venire represent a "fair cross-section." Professor Gilbert proposes that courts split the difference between the hard burden of equal protection and the relatively soft burden of the fair cross-section requirement. Her proposal built either on federal legislation, a broader court reading of equal protection provisions or state legislation would strengthen appellate review of trial court's decisions in change of venue situations. The thrust of the change would be to treat a failure to take race into account in deciding change of venue as a rebuttable presumption of an equal protection violation.).

103. Alschuler, *supra* note 19, at 712.

104. *Id.* at 713.

Minnesota, ran into this problem. Hennepin County wanted to achieve proportional representation on their grand juries. Hennepin County officials ultimately concluded that protecting the venire does not ensure racial representation, finding for example that "[t]he random selection of 23 grand jurors from a large pool engineered to ensure 10% minority group membership would yield all-white grand juries 9% of the time."<sup>105</sup> This result would be magnified in trying to seat a proportional petit jury both in that the larger size of a grand jury lowers the odds of no minority representation<sup>106</sup> and in that the 10% minority presence in the jury pool would have to endure a racially-charged voir dire process.<sup>107</sup> The commission ultimately proposed a quota system which would ensure minority representation on every grand jury.<sup>108</sup> While proposals protecting racial presence in the venire would help the situation, their ultimate efficacy in producing mixed juries remains very much in doubt.

*a. Drawing from More Inclusive Sources*

Currently, the federal process for selecting the venire is governed by statutes providing that federal jury source lists be drawn from voter registration rolls unless they prove to substantially underrepresent certain groups, in which case the court can use other sources to correct the deficiency.<sup>109</sup> Accepting the conclusion that minorities are greatly underrepresented at this early stage,<sup>110</sup> correcting the problem of underrepresentative source lists is the easiest solution. If voter registration lists are inadequate, add food stamp lists or driver's license lists checking the lists from time to time to ensure racial proportionality.<sup>111</sup> These easy remedies would go a long way toward tempering the disproportionality of juries even if completely proportional lists would not cure the disease.<sup>112</sup> These easiest remedies should precede all others.

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105. *Id.* at 713 n.42.

106. By example, if the jury consisted of 1000 and were drawn from a pool that contained 10% minority, random drawing would almost never produce a jury containing no minorities.

107. The grand jury in Minnesota did not undergo extensive voir dire.

108. See Smith, *supra* note 32.

109. The Federal Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53, 28 U.S.C. secs. 1861-78 (1988).

110. See King, *supra* note 17, at 712.

111. Some jurisdictions are aggressively maintaining racially proportional jury lists; See generally, King, *supra* note 17, at nn.45-47.

112. *Id.* at 721-22.

b. *Affirmative Action in Jury Lists*

Other proposals take the stronger approach of affirmative steps to ensure proportional representation on jury lists. Each proposal is subject to the constitutional dangers mentioned above; however, "departures from the principle of color blindness may be less visible when they occur early in the jury selection process."<sup>113</sup> At any rate, each leaves nothing to chance in producing a representational mix of prospective jurors.

One way to ensure representation in the venire is to divide the general list into race-based groups. If, for example, 20% African-American representation is sought in a venire of thirty prospective jurors, twenty-four jurors would be drawn from the majority pool and six would be drawn from the African-American pool. A bar committee in Arizona has proposed just such a process.<sup>114</sup> Similarly, in DeKalb County, Georgia, a computer assists in the process by dividing the total jury pool into thirty-six demographic categories and drawing from these groups so that on balance every group is fairly represented.<sup>115</sup>

Another technique, oversampling, involves drawing more potential jurors from demographic areas that contain higher percentages of minorities. For example, African-Americans constitute 19% of the Detroit unit of the Eastern Federal District of Michigan, yet current jury selection techniques consistently yield venires of only 14% African-Americans. As a remedial measure the court sends more jury questionnaires to areas that are 65% or more African-American until the list reflects the numbers found in the community at large.<sup>116</sup> In yet another approach, some Arizona trial judges exercise veto power over juries that contain too few minority jurors.<sup>117</sup> Similar powers could be used over jury lists or venires that do not reflect the community.

Any of these proposals would effectively cure underrepresentation in the venire, but while these solutions might increase the probability of a proportional jury, "[t]here are stronger remedies available, directed more specifically at the discriminatory use of peremptory strikes, which could give *Batson* more practical effect."<sup>118</sup>

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113. Alschuler, *supra* note 19, at 712.

114. See Jeff Barge, *Reformers Target Jury Lists*, A.B.A. J., Jan., 1995, at 26.

115. Alschuler, *supra* note 19, at 711.

116. King, *supra* note 17, at 722-23.

117. Barge, *supra* note 114, at 26.

118. Ogletree, *supra* note 39, at 1116.

### 3. Giving More "Teeth" to *Batson*

Several commentators believe that the problem in the *Batson* system can be corrected by fine-tuning the *Batson* procedure. These remedies come in two varieties: 1) punitive measures for litigants who try to exercise improper challenges, and 2) preventive changes in the process designed to catch or thwart improper challenges.

Currently, the only remedy for a *Batson* violation is to call for a new jury.<sup>119</sup> The problem with this remedy is that the attorney is no worse off for having tried to exercise her peremptories improperly.<sup>120</sup> Several proposals have been made that would stiffen the penalty for parties who are found to have used their peremptories improperly. The idea is to make the racial use of peremptories more "costly" and thus a less attractive option to attorneys.

One option is to reseal the excluded juror.<sup>121</sup> The risk of having a juror whom the attorney just struck reseal when the attorney's misuse of peremptories is detected should provide enough disincentive to keep most attorneys from attempting improper use. The cost would be too high if the attorney gets caught. A milder form of disincentive would be to reduce attorney's peremptories as a penalty for improper strikes.<sup>122</sup> Similarly, the court could also use sanctions to punish habitual offenders.<sup>123</sup> When a *Batson* violation is detected, courts could dismiss the case and not allow it to be brought again.<sup>124</sup> Much as courts use the exclusionary rule as a prophylactic measure against police misconduct, the strong measure of dismissal with prejudice would make any attempt at racial use of peremptories

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119. *Id.*

120. *Id.*

121. *Id.* (This proposal was offered by Cynthia Richers-Rowland, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195, 1221 (1987)).

122. Ogletree, *supra* note 39, at 1116; for more thorough treatment see David Hopper, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 837 (1988).

123. Ogletree, *supra* note 39, at 1117; for a proposed ABA rule making discriminatory use of peremptory challenges and rules of ethics violation, see Andrew Gordon, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685 (1993).

124. *Id.* at 1117 (Professor Ogletree uses the rationale behind the exclusionary rule and dismissal for prosecutorial misconduct to claim the need for such a strong remedy, a remedy well within the appellate courts' supervisory power).

foolish. Alternatively, as a direct measure against the attorney involved, courts could impose disciplinary actions.<sup>125</sup>

Courts, however, are not hurrying to implement these suggestions. Perhaps the specter of releasing criminals because the prosecutor blundered makes these suggestions too extreme; however they do present novel methods of altering the calculus that attorneys, as rational economic actors, employ. Economically adjusting the inducements to racially use peremptories could go a long way toward achieving mixed juries; however, the problems associated with catching a *Batson* violation would persist.

#### 4. Changing the Process to Deter Racial Peremptories

Some suggest that the problem lies in the *Batson* procedure. Commentators have proposed both modest reforms aimed at tweaking the process and some more extensive changes. Legislators, for example, could impose statutory limits on the type of acceptable race-neutral explanations offered to defend a *Batson* challenge<sup>126</sup> or courts could grant closer scrutiny for certain types of reasons.<sup>127</sup> Similarly, expanded voir dire could help the process become more effective<sup>128</sup> in providing a more developed record necessary to point out when attorneys are using their peremptories improperly.<sup>129</sup> More dramatically, commentators have proposed various tests which could substitute for the current test imposed for *Batson* violations.<sup>130</sup>

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125. *Id.* at 1122 (mentioning several possibilities including contempt, censure or reprimand, removal from the courtroom, suspension of the right to practice in that court, referral to a disciplinary body, identification and admonition in published judicial opinions).

126. *Id.* at 1123-24 (For example, courts could disallow reasoning based on soft data such as demeanor, intuition, impressions, etc.; courts could also be sensitive to explanations that are proxies for race such as location of residence, etc.).

127. *Id.* at 1124 (According to Ogletree, this approach used in North Carolina applies closer scrutiny for 1) reasons that appear to be substitutes for racial hostility or apply more often to racial minorities, 2) reasons that apply equally to white jurors whom the prosecutor did not strike, and 3) vague or subjective reasons).

128. More information would reduce the tendency to rely on racial stereotypes.

129. Ogletree, *supra* note 39, at 1126; *see also* J.E.B. v. Alabama, 114 S.Ct. 1419, 1429 (1994).

130. Ogletree, *supra* note 39, at 1123-24; *see also* Brian J. Serr & Mak Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 64 (1988) (Serr and Maney propose a three part test. First, requiring a specific explanation, second, requiring that the prosecutor's explanation be rationally related to juror bias, third requiring the explanation be made in good faith.). *See also*, J. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the 'Intuitive' Peremptory*

### C. *Reforming Beyond Status Quo*

"While [race-conscious mechanisms for ensuring minority representation] address many of the factors in the jury selection system that contribute to the underrepresentation of minorities in jury venires, they fail to influence directly one of the most troublesome factors which affects underrepresentation in the petit jury — the use of peremptory strikes in a racially discriminatory manner . . . ." <sup>131</sup> The *Miranda* Court provided some justification for looking for new solutions to the underrepresentation problem when it wrote:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed. <sup>132</sup>

Perhaps this reasoning should apply to addressing the *Batson* problem as well.

#### 1. Dropping Peremptories Altogether

The easiest way to solve the problem of racial use of peremptories is to drop peremptories altogether. Abolishing peremptories is not a drastic step from where we are now. <sup>133</sup> We

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*Challenge*, 78 CORNELL L. REV. 336, 361-62 (1993) (another new three-part test requiring: 1) that courts applying *Batson* require hard data explanations, 2) explanations be based solely on juror's written or oral statements during voir dire, and 3) to strike one juror, the "attorneys should be required to strike all jurors with the same 'unacceptable' characteristic, regardless of race").

131. Ogletree, *supra* note 39, at 1115-16.

132. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

133. Ogletree, *supra* note 39, at 1131-32 (arguing that requiring an explanation of a peremptory challenge already destroys the purported function of a peremptory — "to allow parties to express hunches, intuitions, and admittedly arbitrary preferences").

currently require explanations for many peremptory challenges directed at minority defendants. Strictly speaking, the peremptory challenge is gone for those challenges. We essentially only allow for-cause removal of minority potential jurors. The Court in *J.E.B.*, however, flatly denies any intention to abolish peremptory challenges.<sup>134</sup> Supporters of peremptories praise the peremptory's ability to remove biased jurors, but question whether attorneys have enough information on jurors to identify the biased jurors. In the absence of useful information, attorneys must rely on mere prejudice or unsupported "gut feeling." The benefit of honoring unsubstantiated feelings is difficult to discern; however, commentators have indicated that in marginal cases the complete removal of peremptories might yield unjust convictions suggesting that while peremptories can be used to yield unfair results, their absence poses a serious risk as well.<sup>135</sup>

## 2. Strict Quotas and the *Jury De Medietate Linguae*

The most direct method of curing minority underrepresentation on the petit jury is to insist on a certain number of minority jurors on every jury. The specter of quotas triggers alarms for some, but "the use of quotas to select juries seems no more objectionable than the use of quotas to select jury pools."<sup>136</sup> While quotas are vulnerable to the constitutional attacks discussed above, their use is not new.

Before the Fourteenth century the British used a special jury called the *jury de medietate linguae* (or jury of the half tongue).<sup>137</sup> Special charters promised Jews that if they were drawn to court by an Englishman, their jury would be one-half Jewish and one-half English.<sup>138</sup> After the Jews were banished from England in

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134. *J.E.B.*, 114 S.Ct. at 1429 ("Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors whom they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review.").

135. See generally Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 529 (1978); Ogletree, *supra* note 39, at 1146.

136. Alschuler, *supra* note 19, at 713.

137. Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1, 5 n.18 (1994).

138. Ramirez, *supra* note 20, at 784.



the summer of 1290, the practice of the jury *de medietate linguae* was extended to alien merchants in their conflicts with Englishmen.<sup>139</sup> The value of the mixed jury to alien merchants is best illustrated by their response when the *jury de medietate linguae* was taken away in 1414. When foreign merchants responded by refusing to do business in England,<sup>140</sup> English courts promptly reinstituted the right to a mixed jury in 1429, and the right continued in England until 1554. The mixed jury lasted until 1951 in some of the British colonies serving to protect British citizens of European descent.<sup>141</sup>

In the United States the jury *de medietate linguae* was used both before and after independence,<sup>142</sup> although not uniformly,<sup>143</sup> and less frequently over time.<sup>144</sup> On a few occasions a quota system has been used to impanel African-Americans.<sup>145</sup> For example, in the treason trial of Jefferson Davis following the Civil War, a jury intentionally one-half African-American was impaneled but not used as the case was ultimately dismissed.<sup>146</sup> Furthermore, some states, such as South Carolina in the late 1800s, required proportional representation of African-Americans, but the practice dwindled.<sup>147</sup> Ultimately, U.S. courts deemed the jury *de medietate linguae* to be a right that no longer applied.<sup>148</sup>

#### a. Various Proposals

One plan proposes requiring three jurors "racially similar" to the defendant out of a jury of twelve.<sup>149</sup> The author of this plan notes that one dissenting juror virtually never succeeds against eleven opposing jurors.<sup>150</sup> "[A] race neutral verdict is achieved when at least three black jurors are selected to judge a

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139. *Id.* at 785.

140. *Id.* at 786.

141. *Id.* at 786-88.

142. Van Ness, *supra* note 137, at 42.

143. *Id.* at 42-43.

144. *Id.* at 43.

145. Alschuler, *supra* note 19, at n.49.

146. *Id.* at 715 (These were the first African-Americans to serve on any American jury prior to 1860).

147. *Id.*

148. See *United States v. Wood*, 299 U.S. 123 (1936) ("Although aliens are within the protection of the Sixth Amendment, the ancient rule under which an alien might have a trial by jury *de medietate linguae* . . . no longer obtains." *Id.* at 185).

149. Johnson, *supra* note 3, at 1698-99.

150. *Id.* at 1698 (for further research on the limited effect of one dissenting juror, see Johnson, *supra* note 3, at n.466).

criminal or civil case that involves the rights of a black person.”<sup>151</sup> Three of twelve “racially similar” jurors is the compromise between the harm of having one or no racially similar jurors and the impracticability of obtaining a jury evenly balanced along racial lines.<sup>152</sup>

Others would concede that fairness requires that affirmative efforts to protect both minority defendants and jurors should be bounded numerically by that group’s proportional representation in the community at large. Implementation of proportional representation could take various forms, including adjusting voir dire when seating another majority member would encroach on the proportional representation of the defendant’s race.<sup>153</sup> In England, from 1980-1989, judges could hold potential jurors as “stand-by” jurors to replace majority members creating a racially mixed jury.<sup>154</sup> This British stand-aside model could be implemented to assure proportional representation or whatever level of representation is deemed appropriate.

*b. Hennepin County Model*

One very aggressive program has been proposed by the county commission in Hennepin County, Minnesota. After a detailed analysis of the problem of minority underrepresentation in their county, they recommended among other things<sup>155</sup> a modification of their current grand jury selection process to ensure that minority representation on grand juries mirrors minority proportions in the county.<sup>156</sup> The process they proposed to seat a mixed twenty-three person grand jury has two phases. In the first phase, twenty-one jurors are randomly selected from the source list.<sup>157</sup> The second phase depends on the outcome of the first selection. If less than two of the twenty-one are minorities, selection continues down the list randomly

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151. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenge*, 76 CORNELL L. REV. 1, 124 (1990).

152. Johnson, *supra* note 3, at 1698-99. For a proposal to require a full 50% racially similar jurors, see DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 273-74 (1980).

153. See generally Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994).

154. Ramirez, *supra* note 20, at 802-03.

155. For example, more modest reforms such as expanded source lists to increase minority representation in the grand jury pool.

156. Louis N. Smith, *Final Report of the Hennepin County Attorney’s Task Force on Racial Composition of the Grand Jury*, 16 HAMLINE L. REV. 879, 909-15 (1993).

157. No voir dire accompanies the selection of grand juries.

until at least two of the twenty-three are minorities.<sup>158</sup> If two or more of the first twenty-one jurors are minorities, then the next two names on the list complete the twenty-three person grand jury. This process will always yield at least a 9% minority grand jury, mirroring the minority percentage in Hennepin County.

The commission cited a precedent for this program in Georgia where the proportion of minorities cannot differ from minority presence in the community by more than 5%.<sup>159</sup> This, however, is the first seriously contemplated program which would require exact proportionality on the jury. If implemented, constitutional challenges will probably accompany this plan, and passing strict scrutiny will prove no easy task. Also, instead of delving into the difficult question of which groups to protect, the commission instead merely lumped all minorities together, a choice that will certainly meet with considerable controversy. While as yet still unenacted, the Hennepin County model remains the strongest affirmative action plan being considered.

### 3. Half-and-Half Juries

The changing of venue from areas of high minority presence to areas of low minority presence is a major source of at least perceived discrimination.<sup>160</sup> The community voice aspect of the jury is important to maintain the perception of credibility<sup>161</sup> and a just outcome.<sup>162</sup> When a change of venue is required for a fair trial, the court is caught between the Sixth Amendment's impartial jury requirement and its requirement that the jury come from the district of the crime (the vicinage requirement).<sup>163</sup> Again tracking the historic *jury de medietate linguae*, one proposal allows the judge to require that the jury be made up of jurors one-half from new venue and one-half from the district where the crime occurred.<sup>164</sup> This proposal illustrates a modern application of the *jury de medietate linguae*.

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158. Smith, *supra* note 156, at 909.

159. JUDICIAL COUNCIL OF GEORGIA, ADMINISTRATIVE OFFICE OF THE COURTS, JURY COMMISSIONERS HANDBOOK 19 (June 19, 1990).

160. Van Ness, *supra* note 137, at 3 (citing the move to Simi Valley in the Rodney King beating case).

161. *Id.* at 47-49.

162. *Id.* at 49-53 (arguing that a higher degree of justice is produced by a group with an understanding of the community norms and practices).

163. *Id.* at 46.

164. *Id.* at 53-55. (demonstrating for a proposed amendment to Supreme Court Rule 3.240(k)).

#### 4. Affirmative Selection

The idea of affirmative selection was first proposed in a student note written in 1986<sup>165</sup> just before the Court swept through the *Batson* reforms. Following for-cause voir dire, both sides under this proposal would choose their ideal jury from the qualified venire and rank their choices. From these lists the judge would first select every potential juror who appeared on both lists. After that, the judge would start at the top of each list taking the first selection from each list then the second selection from each list until enough jurors were selected.<sup>166</sup>

The beauty of affirmative selection is that any party can protect whatever interest she deems to be important. If race is important to a party, then racial representation is easy to achieve. If religious representation is important to the party, then the attorney can make selections based on juror religious beliefs. Whatever is important to the party can become the basis of selection. Unlike race-conscious solutions, the state need never be drawn into the complicated question of whom to protect and why. Each party has the power to protect its own interests. Furthermore, this method, in not affording either side the power to exclude any venireperson, should reduce the equal protection concern over discriminatory exclusions of particular jurors<sup>167</sup> because no party could exclude anyone.

Several criticisms can be leveled against affirmative selection models. "[T]he parties' ability to strike jurors offended [by the attorney] during a probing voir dire" is lost.<sup>168</sup> An attorney may then be leery of asking probing questions because if she offends the prospective juror the other side may very well add that juror to their affirmative list.

The most serious criticism of affirmative selection is that it creates a tendency toward a polarized jury.<sup>169</sup> With perfect attorney knowledge, peremptory challenges would drop off the extreme members of a group. Unfortunately, with perfect knowledge, pure affirmative selection would select primarily the most biased individuals from the array. The result would likely be a dramatic increase in hung juries; however, negative peremptories might produce juries no less extreme. Attorneys lack a strong ability to spot idiosyncrasies in prospective jurors; so the polariz-

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165. Tracy Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781 (1986).

166. *Id.*

167. Coke, *supra*, note 65, at 380.

168. Altman, *supra* note 165, at 808.

169. *Id.* at 809.

ing tendency might not occur to any significant degree.<sup>170</sup> Even granting a higher probability of hung juries, this process of producing more diverse juries is more in line with the Sixth Amendment's right to a fair cross-section than current methods.<sup>171</sup>

Voir dire will remove most of the fringe elements for cause. If any attorney cannot demonstrate that a potential juror is biased, any opinion that the juror is biased must be an "unsubstantiated intuition of partiality" which has been shown to be a very inaccurate appraisal of potential jurors' extreme dispositions.<sup>172</sup> "Defenses of the current system almost certainly exaggerate lawyers' ability to spot 'ringers,' and overinvest in the notion of a perfectly impartial juror."<sup>173</sup> Furthermore, as *Batson* has been extended to other forms of discrimination, such as sex,<sup>174</sup> the use of peremptories as a means of removing biased jurors has steadily diminished.<sup>175</sup>

#### a. *Jury De Medietate Linguae*

One novel approach presents a strikingly new way to achieve a mixed jury.<sup>176</sup> This method "provide[s] each litigant with a certain number of affirmative peremptory choices, which litigants could use."<sup>177</sup> The process for selection runs through three phases.

In phase one the qualified venire is selected using traditional methods of jury lists.<sup>178</sup> In phase two the qualified venire is whittled down to a "relevant qualified venire" using traditional voir dire to remove for cause any unfit potential jurors. Then each party affirmatively selects a fixed number of jurors from the qualified venire. The number of selections equals their number of peremptory challenges (e.g. five). These selections can be for any reason including racial bias. In addition to the affirmative selections by each party, the court randomly selects jurors equal to the number to be seated. At this point there are twenty-two potential jurors (vis., five selections by each party and twelve random selections by the court). Neither the parties' choices nor the court's choices are disclosed. In phase three, both sides exer-

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170. *Id.* at 810.

171. *Id.*

172. Hans Ziesel, *Affirmative Peremptory Juror Selection*, 39 STAN. L.REV. 1165 (1987).

173. Coke, *supra* note 65, at 382.

174. See *J.E.B. v Alabama*, 511 U.S. 1419 (1994).

175. Coke, *supra* note 65, at 383.

176. Ramirez, *supra* note 20, at 783-97.

177. *Id.* at 806.

178. *Id.* at 807.

cise their peremptory challenges subject to *Batson* analysis reducing the pool down to the number needed for the jury.<sup>179</sup>

Under this process any party can significantly raise the probability of a mixed jury by affirmatively placing more of a given group on the relevant qualified venire. The final exercise of peremptories would still be shielded by *Batson* analysis precluding racial use of peremptories; a litigant could, however, use her affirmative selections to increase the likelihood of a mixed jury.<sup>180</sup>

This process should reduce both the possibility of a given juror feeling like a racial representative and the inducement to vote along racial lines because no juror would know whether she was seated as a result of affirmative selection or random forces.<sup>181</sup> Also reduced is the balkanization that accompanies race-conscious remedies. This balkanization comes in large measure from determining which groups can claim some prejudice and merit protection, a question never asked in this plan. Instead, litigants are allowed to consider race as only one of many criteria in forming a jury.<sup>182</sup>

This selection process also enhances appearance of fairness brought by the measure of litigant control introduced by this proposal,<sup>183</sup> yet it avoids criticism by excluded majority members in that the *Batson* process still applies<sup>184</sup> as opposed to pure quotas such as the Hennepin County model.

The shortcomings of this plan include a continued reliance on the *Batson* process to preclude racial peremptories even though the insertion of more minorities will theoretically raise the probability of mixed juries. A better application of the *jury de medietate linguae* would avoid such reliance on the ailing *Batson* process.

#### IV. A NEW SOLUTION

A great strength of our form of government is the opportunity to try different approaches to solving complicated problems. As Justice Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens

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179. *Id.*

180. *Id.* at 809.

181. *Id.* at 810.

182. *Id.* at 811-13.

183. *Id.* at 813.

184. *Id.* at 814.

choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>185</sup>

In that spirit of trying bold ideas, I propose a new method of selecting juries.

### A. *The Building Blocks of Reform*

The proposals on the table now, to varying degrees, could produce more representational juries. Most of the proposals encountered criticisms along fairly consistent lines. Affirmative action plans might prove constitutionally infirm or produce other unwanted side effects. Softer approaches fail to provide enough assurance of producing proportional juries. A better plan would avoid these pitfalls.

First, the several solutions focusing on the process before *voir dire* leave some gaping problems. While a procedure which underrepresents minorities in the venire will like yield disproportionately few minorities on juries, the discrimination that even a proportional venire will face in *voir dire* still leaves a specter of consistent underrepresentation. This is to say nothing of the statistical probabilities that, in the absence of discrimination in *voir dire*, a minority group still faces a fairly strong possibility of being completely excluded from any given jury.<sup>186</sup> "[P]roviding that only the initial pool need reflect [racial] balance would seem a hesitant and ineffective way of making juries more representative. Exorcising the specter of the all-white jury altogether would appear more sensible."<sup>187</sup> In formulating a proposal, I endeavor to do more than cure the evils of pre-*voir dire* selection.

Racial sorting is a second dangerous aspect which the race-conscious proposals embrace. Racial sorting carries several drawbacks. First any race-conscious plan immediately presents the question of what groups should be protected. The determination to protect one group such as racial minorities from discrimination and not to protect another group such as a religious groups involve drawing lines which are difficult to defend. Also, contrary to the goal of a color-blind society, racial sorting reaffirms the differences between racial groups and perhaps more significantly showcases the presence of racial stereotypes. Implicit in saying that a prosecutor cannot strike African-Ameri-

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185. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

186. Left purely to chance with no discrimination, a minority presence of 10% in a community will find themselves completely excluded from a jury of 12 on 28% of the juries produced by my process.

187. Alschuler, *supra* note 19, at 713.

cans without a good reason is the statement that she would if she could. Reaffirming racial distinctions is a hidden price of race-conscious remedies in general.

Beyond the societal toll of the affirmative action type plans, section II(A)(2) above discussed the possible constitutional difficulty many affirmative action plans could encounter. "For the Court, the societal injury created by the government's use of race to design juries — even without discernible effects on the opportunities of individuals or groups — is probably sufficient to trigger close scrutiny."<sup>188</sup> If a plan can be designed which would significantly promote racial representation without relying on racial sorting, such constitutional rigors could be avoided.

The last building block for this proposal draws on a concept very familiar to the jury selection process, yet one not greatly utilized or discussed, randomness. Unfortunately, relying on the fickle "gods of Fate, Luck, and Statistics"<sup>189</sup> can still yield grossly underrepresentative juries. This new proposal to some degree tames these gods in a way that allows them to produce fairness both actual and perceived yet tempers them from harsh, unacceptable outcomes.

#### B. *Modified Lottery: A Proposal*

The process for a modified lottery is essentially a form of cumulative voting. First, a qualified venire is selected using whatever source lists are appropriate. From this list the parties conduct for-cause voir dire removing any unsuitable candidates until a group of thirty-six potential jurors is reached.

From this group of thirty-six potential jurors, a twelve member jury will be selected by lottery. First, the court assigns a lottery "ticket" for every potential juror, ensuring that every potential juror who survives for-cause voir dire has an irremovable chance of sitting on the jury. In addition, each side receives twenty-four tickets which can be assigned in any manner, for whatever reason, such that a litigant can cast all twenty-four for one potential juror or spread them out in any manner desired. From this pool of eighty-four tickets (vis., 36+24+24), the judge randomly draws until twelve jurors are selected.

Each party will have the ammunition to protect whatever interest is important to that litigant, but at an "economic" price. If race is important to a litigant then she can cast her twenty-four votes for minorities and significantly raise the probability of their sitting on the jury. The price for casting all of the votes for say

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188. King, *supra* note 17, at 739.

189. Alschuler, *supra* note 19, at 714.



three potential jurors is to turn more of the control of the jury over to one's opponent, albeit tempered by the random force of the tickets cast for every potential juror by the court.

In carrying the various constitutional burdens, this plan should perform adequately. Potential jurors should not have any equal protection claims because no one can be excluded in the sense that every potential juror will always have at least a one in eighty-four chance of sitting on the jury. The Court's own test turned on racial sorting as the trigger for strict scrutiny,<sup>190</sup> and no racial sorting is done in this process. Furthermore, defendants should not be able to complain about underrepresentation of their particular group because they can raise the probability of that group's inclusion by casting their tickets for members of that group.

The whole basket of difficulties brought on by a process which segments of the public perceive to be unfair would be avoided. The element of chance adds to legitimacy<sup>191</sup> and the power that each party holds to manipulate chance affirmatively in their favor should remove any lingering doubts about unfairness in the process.

The strongest practical critique (as in all affirmative selection models) is the question of hung juries. The affirmative selection models listed above all encountered claims that their processes would yield more hung juries since the jury would contain more fringe elements. In response, each of the other affirmative selection models above saw the hung jury problem as overstated. If a prosecutor cannot convince a mixed jury then there should probably not be a conviction. To the extent there is a hung jury problem, it will be tempered by the fact that all of the potential jurors will have at least one ticket in the hat, raising the probability that the final jury will not be made up of the most extreme members of the pool.

### C. *A Model Statute*

The U.S. Code implements the current scheme of jury selection by making a general statement of jury selection policy in 28 U.S.C. §§1861-2 and instructing each district court to implement

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190. King, *supra* note 17, at 739 (referring to Shaw v. Reno, 113 S.Ct. at 2824-28, which overlooked the benefits of proportional representation by congressional district racial gerrymandering, focusing instead on the harms of reinforcing stereotypes and enflaming racial partisanship).

191. Just as no one feels slighted when their numbers are not picked in a lottery, the sting of exclusion is diminished by the random hand which sets some potential jurors aside and selects others.

these general policies in §1863. In addition to the general policies, §1870 lays out the general rules for peremptory and for-cause challenges. The following are model statutes articulating the policy of a lottery system of affirmative selection and model district court rules implementing the system.

**28 U.S.C. §1861. Declaration of policy**

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected using a process which combines random and affirmative selection from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

**28 U.S.C. §1862**

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.

**28 U.S.C. §1870 Challenges**

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

**U.S. District Court of Indiana Northern District Local Rules**

**L.R. 47.11 Original Voir Dire**

The court will conduct voir dire examination in all jury cases. If counsel desires any particular area of interrogation or questions on voir dire examination, such proposal shall be filed with the Clerk of the Court at least twenty-four (24) hours before commencement of trial, or at such other time as the court may order. The court will give counsel an opportunity at the completion of original voir dire to request that the court ask such further questions as counsel shall deem necessary and proper and which could not have been reasonably anticipated in advance of trial. Voir Dire will continue until thirty-six (36) potential jurors are seated in the qualified venire.

**L.R. 47.12 Lottery Ticket Assignment**

Each member of the qualified venire will be assigned one ticket by the court. Each party will be allotted twenty-four (24) tickets which may be assigned in any manner to members of the qualified venire.

**L.R. 47.13 Random Selection of the Petit Jury**

The court will randomly draw from the eighty-four (84) assigned tickets until twelve (12) jurors are chosen for the petit jury.

**V. CONCLUSION**

The lingering problems of *Batson* have not disappeared. Several of the proposals to improve *Batson* could be employed overnight and would make a difference without major overhaul. Beyond the fine-tuning, many commentators believe that *Batson* is fundamentally flawed and have provided several good alternative methods for selecting juries. Proposals for change have to combine many components which do not easily fit together—achieving mixed juries, appearing fair in process, using race-neutral methods, surviving constitutional attack, and overcoming the inertia of an established process. A modified lottery system uses random forces as a vehicle to combine those difficult aims into a working model.