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Racing Away from *Georgia v. McCollum*: The Case for an All-Black System of Criminal Justice*

Introduction

The United States Supreme Court has been tinkering with the process of jury selection, and its impact on African-American criminal defendants, for over one hundred years.[1] Not until 1986 did the Court acknowledge the persistent presence of racial bias in the prosecutorial use of peremptory challenges. At that time, *Batson v. Kentucky*[2] established a procedural system designed to preserve the function of the peremptory challenge, while also granting criminal defendants the means to contest prosecutorial bias. In a recent decision, *Georgia v. McCollum*,[3] the Supreme Court determined that the rule restraining prosecutors would restrain White criminal defendants as well. After *McCollum*, two substantial issues remain open: whether the *Batson* restrictions apply to African-American criminal defendants, and if so, whether they apply differently to African-American defendants than they do to White defendants. Although *McCollum* was laden with the language of colorblindness, the Court did not disclose whether it would require race-neutral peremptories or whether it would permit race-conscious ones.

The debate surrounding this question is the debate of American race relations; it is also the debate over racial justice in the criminal courtroom. *McCollum*, therefore, provides an ideal lens through which to view and evaluate the overall system of criminal justice. Close examination of the current criminal justice system reveals that the procedural protections afforded to African-American criminal defendants do not guarantee a guilt adjudication devoid of racial animus. Such a reality seriously vitiates the fairness, reliability, and moral force criminal verdicts and sentences profess to convey. This Note proceeds from the premise that the most effective remedy to the problem *McCollum* highlights is the establishment of a separate system of African-American courts, one administered and populated by African-Americans.

McCollum, then, is a case about far more than peremptory challenges. To appreciate this, one must first understand the nature, operation, and historical underpinnings of the peremptory device. It is to this end that Part I is devoted. Part II describes the Supreme Court's efforts to eliminate discrimination in the jury selection context, reviews the analysis introduced in *Batson*, and concludes that the Court's efforts have been only minimally successful in implementing antidiscrimination norms. Part III focuses upon *Edmonson v.*

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1. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880) (finding a statute that prohibited African Americans from serving on grand or petit juries to be a violation of the Equal Protection Clause).

2. 476 U.S. 79 (1986).

3. 112 S. Ct. 2348 (1992).

Leesville Concrete Co., a case that extended *Batson* to the civil context and provided the foundation for the finding of state action in *McCollum*. Part IV plunges into the *McCollum* decision by reporting the factual background, discussing the Justices' competing views of state action, and closely examining the manner in which the McCollums' racial identity influenced the *Batson* analysis. This examination reveals that both Justices Thomas and O'Connor realized that *McCollum* would have a unique impact upon African-American defendants. Part V explores the implications of this realization, and argues that race-conscious peremptory strikes would not only survive an equal protection challenge, but would also promote core values of the Thirteenth Amendment.

Part VI begins by demonstrating the extent to which racial considerations infect every aspect of the criminal justice system. After reviewing previous suggestions for reform, Part VI contends that each of these (including proposals for race-conscious peremptory strikes) provides inadequate protection to the African-American criminal defendant. Next, this Part relies upon the broad-based remedial measures embedded in the Reconstruction Amendments to supply the legal support for the establishment of an all-Black court structure. This separatist court structure not only empowers the African-American community with an institution that is sovereign as to acquittals, but it best serves to excise racial bias from the administration of criminal justice.

I. The Operation and Goals of the Peremptory Challenge

The jury selection process is a triple-tiered phenomenon. The first tier consists of creating a jury pool from a list of eligible jurors.[4] A venire for a particular case is then randomly selected. The second tier of the process removes jurors based on excuses such as "undue hardship or extreme inconvenience."[5] The third tier, which is grounded in the procedure known as voir dire, is composed of two parts: challenges for cause and peremptory challenges.

Challenges for cause "permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality."[6] Because the grounds for challenges based on cause are narrowly specified, any dismissal based on cause must be ruled upon and authorized by the trial judge. Either actual or implied bias will justify dismissing a prospective juror. Actual bias is defined by the juror's subjective state of mind and is notably more difficult to prove than implied bias.[7] The contours of implied bias are generally statutorily prescribed, and embody the law's presumption of bias "from the existence of certain relationships or interests of the prospective juror."[8] Challenges for cause are unlimited in number.

Peremptory challenges, on the other hand, are finite in number. Peremptory challenges are "exercised without a reason stated, without inquiry and

4. Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 148 (1990).

5. *Id.*

6. Swain v. Alabama, 380 U.S. 202, 220 (1965).

7. Goldman, *supra* note 4, at 149.

8. *Id.* at 149 n.10.

without being subject to the court's control."[9] The ostensible goal is the attainment of a jury that is impartial and unbiased. The peremptory purports "not only to eliminate extremes of partiality . . . but to assure the parties that the jurors before whom they try the case will decide on the basis of evidence placed before them, and not otherwise."[10]

Peremptory challenges may be justified as a means of eliminating bias that a challenge for cause would be unable to detect.[11] A litigant may perceive the existence of bias in a given juror, "but cannot prove it to the judge according to the guidelines set down for challenges for cause."[12] Because jurors are selected from a wide array of experiences and backgrounds, "[t]hey may possess a range . . . of . . . biases that do not rise to the level of justifying a challenge for cause."[13] Furthermore, a vast body of research reveals that "prospective jurors will tend to sympathize with parties who share a group identity."[14] The peremptory may thus narrow the range of possible biases while simultaneously creating the appearance of impartiality for the litigant.

More significantly, the peremptory challenge works both as a complement and a supplement to the challenge for cause. As a complement, the peremptory aids in "removing the fear of incurring a juror's hostility"[15] that may arise through rigorous questioning on voir dire or through a failed challenge for cause. If the procedures accompanying voir dire have turned an impartial juror into a partial one, the peremptory challenge provides the means for her dismissal. Without the guarantee of the peremptory, litigants could be so fearful of alienating a prospective juror that voir dire would become a charade and the challenge for cause meaningless. The effectiveness of the challenge for cause is thus dependent upon the availability of the peremptory challenge.

As a supplement to the challenge for cause, peremptory challenges serve to compensate for the deficiencies that would inhere in a purely challenge-for-cause system. The challenge for cause can misfire in several ways. For instance, because proving hidden or unconscious biases is no small task, a judge may err and fail to dismiss an extremely biased juror. A judge may also fail to dismiss a biased juror when the juror lies about his biases. In the particularly problematic area of racial prejudice—a prejudice widely known to be unbecoming in a courtroom, to say nothing of its suspect nature in polite society—the incentive to lie may be inordinately high. Jurors may refuse to acknowledge their own racial biases to themselves, "much less to strangers in open court."[16] Peremptory challenges may serve to eliminate such extremely

9. *Swain*, 380 U.S. at 220.

10. *Id.* at 219.

11. One Supreme Court Justice supports peremptory challenges as "a means of winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible." Powers v. Ohio, 111 S. Ct. 1364, 1378 (1991) (Scalia, J., dissenting). *See also* Holland v. Illinois, 110 S. Ct. 803, 807-09 (1990) (discussing the history of the peremptory challenge).

12. JON M. VAN DYKE, JURY SELECTION PROCEDURES 146 (1977).

13. Goldman, *supra* note 4, at 150.

14. *Id.* at 152 n.20.

15. *Swain*, 380 U.S. at 219.

16. Goldman, *supra* note 4, at 200 n.239. This reality indicates that potential deficiencies in the challenge-for-cause cannot be cured by expanding the breadth and depth of the questions allowed during voir dire. Even significant extensions of the time allowed for questioning could not guarantee

situated jurors.

The theoretical goals of the peremptory challenge fail, however, when prosecutors use them to reinforce their own stereotypes and prejudices. Because "[r]ace prejudice is the most obvious and prevalent bias in America,"[17] peremptory challenges can work to deny fairness to African-American criminal defendants and to prevent African Americans and other minority groups from serving on juries. The possibility of such abuse was condemned by the United States Supreme Court in 1965,[18] but the Court declined to effect any noticeable change in peremptory procedures until 1986. At that time, *Batson v. Kentucky*[19] subjected race-based peremptory challenges, by prosecutors, to a manageable standard of judicial review and attempted to alter the role they would play in the Nation's courtrooms.

II. THE EMERGENCE OF RACE-NEUTRALITY: *MCCOLLUM'S* PRECEDENTIAL PREDECESSORS

The racially discriminatory use of the peremptory challenge has primarily been addressed in the criminal context. It is there that a disproportionately large number of Blacks are prosecuted and sentenced.[20] Because the criminal justice system has a long history of abuse against Black defendants,[21] prosecutors have been primarily responsible for using peremptories in a discriminatory manner.[22] The Supreme Court has been quick to condemn the role of racial bias in the administration of justice, but slow to effect its abolition.

Strauder v. West Virginia[23] marked the first time the Fourteenth Amendment was used to combat racial exclusion in the selection of jurors. In *Strauder*, the Supreme Court struck down a state statute that prohibited Blacks from qualifying as jurors. The statute violated the Fourteenth Amendment's command that Blacks should enjoy "an exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy."[24] This central tenet of nondiscrimination extended to grand juries as well: "Whenever . . . all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied . . . ."[25]

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exposure of the wide array of conscious and unconscious biases inevitably present in any group of jurors.

17. VAN DYKE, *supra* note 12, at 144.

18. *Swain*, 380 U.S. at 202.

19. 476 U.S. 79 (1986).

20. *See, e.g.*, James S. Bowen, *Peremptory Challenge Discrimination Revisited: Do* Batson *and* McClesky *Relieve or Intensify the* Swain *Paradox?*, 11 NAT'L BLACK L.J. 291, 301-02 (1990); *see also infra* notes 247-49, 275-77 and accompanying text.

21. *See, e.g.*, *Developments in the Law-Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1275-93 (1988) [hereinafter *Developments*] (reviewing the law's capacity to accommodate the ideology and practice of racial subordination from slavery through the present); Bowen, *supra* note 20, at 301; *see also infra* notes 245-53, 257, 275-77 and accompanying text.

22. *See Batson*, 476 U.S. at 103-04 (Marshall, J., concurring) (reviewing data that depict the peremptory challenge as a device routinely employed by prosecutors to exclude African Americans from juries).

23. 100 U.S. 303 (1880).

24. *Id.* at 308.

25. Carter v. Texas, 177 U.S. 442, 447 (1900). Smith v. Texas, 311 U.S. 128 (1940), repeated the principle in emphatic terms: "For racial discrimination to result in the exclusion from jury service of

Although the precise rationale was less than clear, the Court's early pronouncements created the impression of a firm commitment toward protecting an African-American defendant's interest in being tried by a jury whose composition was not dictated by racism. This hopeful impression was short-lived. As it became apparent that minorities could be as effectively excluded at the challenge stage as at the initial selection stage, the Court continued to talk in egalitarian terms, but it declined to act. Concerning this trend, Justice Marshall wrote, "There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can be struck because of their race by a prosecutor's use of peremptory challenges."[26]

Justice Marshall was taking direct aim at the standard articulated in *Swain v. Alabama*,[27] the first case to examine the equal protection rights of criminal defendants at the peremptory challenge stage. The petitioner in *Swain* was a Black man who had been convicted of rape and sentenced to death by an all-White jury[28] in a segregated southern town. The prosecutor had used his challenges to strike all six Blacks from the jury.[29] Swain sought to quash the indictment on equal protection grounds.[30]

The Supreme Court upheld the conviction by erecting a statistical burden of proof that all but declared invidious discrimination to be permissible in individual cases. In order for a defendant to prevail on an equal protection claim, the defendant would have to show systematic discrimination. The Court then outlined its quasi-criteria for determining whether there had been systematic discrimination:

> [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that *no Negroes ever* serve on petit juries . . . the presumption protecting the prosecutor may well be overcome.[31]

The standard was vague,[32] but its application in *Swain* was telling: although no Blacks had served on a Talladega County jury in fifteen years, the Court was unwilling to make a finding of systematic discrimination.

Swain survived untouched through twenty-one years of criminal prosecutions. For two decades, a Black defendant's only weapon against a bigoted prosecutor was the blunt, dull edge of *Swain*. *Swain*'s insistence upon lifting a procedural device above the constitutional guarantees of a criminal defendant meant that prosecutors' peremptory challenges operated in an environment

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otherwise qualified groups . . . violates our Constitution and the laws enacted under it [and] is at war with our basic concepts of a democratic government . . . ." *Id.* at 130.

26. McCray v. New York, 461 U.S. 961, 968 (1983) (cert. denied) (Marshall, J., dissenting).
27. 380 U.S. 202 (1965).
28. *Id.* at 203.
29. *Id.* at 205.
30. *Id.* at 203.
31. *Id.* at 223-24 (emphasis added).
32. The Eleventh Circuit has refined the standard in recent years. In Willis v. Zant, 720 F.2d 1212, 1220 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984), the court set forth the method by which a prima facie case can be made under *Swain*. Proof may consist of "direct evidence such as testimony or indirect evidence such as statistical proof." *Id.* at 1220 n.18. The proof must show an intentional practice of discrimination and that the intentional practice "continued unabated at petitioner's trial." *Id.* at 1220. The facts, moreover, must "manifestly show an intent . . . to disenfranchise blacks." *Id.*

"largely immune from constitutional scrutiny."[33]

It was not until *Batson v. Kentucky*[34] that the evidentiary burden announced in *Swain* was rejected. In *Batson*, a Black man was convicted of second degree burglary and receipt of stolen goods. The prosecutor used his peremptory challenges to dismiss all four Blacks on the venire; an all-White jury remained.[35] The trial court refused to prevent the prosecutor from violating the defendant's equal protection rights, but the Supreme Court reversed.

The *Batson* opinion began by asserting that a " 'State's purposeful or deliberate denial to Negroes . . . participation as jurors in the administration of justice violates the Equal Protection Clause.' "[36] The Court then traced the evolution of the standards needed to show equal protection violations since *Swain*. The principles announced in the intervening years convinced the Court that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[37] The defendant no longer needed an historian, or an archaeologist, to demonstrate that he had been denied the equal protection of the laws.

Nonetheless, the defendant did need to demonstrate that the prosecutor had dismissed Black jurors because of discriminatory *motives*. The sufficiency of this initial demonstration, or prima facie case,[38] was to be determined by a trial judge based on "all relevant circumstances."[39] Once the prima facie showing had been made, moreover, the burden shifted to the prosecutor to "articulate a neutral explanation related to the particular case to be tried."[40] Once again, trial judges (usually White), would determine whether or not prosecutors had articulated race-neutral reasons. Results, therefore, mattered less than apparent intentions. The road to *McCollum* had begun.

Justice Marshall warned that emphasis on intent might render the *Batson* remedy "illusory."[41] After reviewing the shortcomings of state court attempts to employ similar procedural safeguards, Marshall asserted that such safeguards merely required prosecutors to keep "discrimination to an acceptable

33. Batson v. Kentucky, 476 U.S. 79, 93 (1986).
34. 476 U.S. 79 (1986).
35. *Id.* at 83.
36. *Id.* at 84 (quoting Swain v. Alabama, 380 U.S. at 203-04).
37. *Id.* at 96.
38. The Court described the mechanics of the prima facie case in this way:

> [T]he defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen . . . on account of race.

Id. (citations omitted). The third requirement underscores *Batson*'s presumption that the prosecutor does not discriminate until the defendant shows otherwise. Because prosecutors possess such a long history of deploying peremptories in a discriminatory fashion, it would be logical for the presumption to run the other way. Thus, the Court could have held that once the prosecutor has peremptorily removed members of a racially cognizable group the prosecutor would be forced to rebut the presumption that he acted in a discriminatory manner.

39. *Id.* at 96. Although the Court mentioned a few instances that would seem to create an inference of discriminatory intent, the matter was left substantially in the trial courts' hands.
40. *Id.* at 97.
41. *Id.* at 106 (Marshall, J., concurring).

level."[42] Indeed, one commentator has remarked that "the tangible effects of *Batson* are not as impressive" as its symbolic significance.[43] Because of the difficulty in some jurisdictions of establishing a prima facie case, coupled with the corresponding ease of manufacturing race-neutral rebuttals,[44] *Batson* may have only converted a crippling burden of proof into an "onerous one."[45]

Once the burden was overcome, however, the *Batson* remedy attempted to protect three identifiable interests.[46] *Batson* attempted to protect communities;[47] it attempted to protect prospective jurors;[48] and it attempted to protect the rights of defendants. The Court minimally addressed the interests of the jurors and the community, devoting the bulk of the opinion to vindicating the rights of the accused, an African American.[49]

Concern for the interests of the accused transcended concern for all other interests. As significant as these interests were, however, they were not enough to end the Court's inquiry. The peremptory challenge system possessed an impressive historical pedigree, and any interference with the system would require careful balancing. Although the opinion did not explicitly announce the presence of a balancing test, the nondiscrimination principle was clearly not absolute; it would adhere only if it prevailed, in an act of balancing, over two countervailing interests.[50]

One countervailing interest concerned the creation of "serious administrative difficulties."[51] Because the Court found the increased burden to be slight in states that had implemented their own version of the *Batson* showing, this concern hardly tilted the balance. The second interest troubled the *Batson* Court substantially more; the Court was unwilling to "undermine the contribution the [peremptory] challenge generally makes to the administration of justice."[52] Nonetheless, the Court found that concerns about partiality and

42. *Id.* at 105.

43. Goldman, *supra* note 4, at 197.

44. *Id.*

45. Bowen, *supra* note 20, at 329.

46. Powers v. Ohio, 111 S. Ct. 1364, 1368 (1991) (*Batson* was designed to serve multiple purposes). *See also* Goldman, *supra* note 4, at 181.

47. Communities would be protected because the purposeful exclusion of Blacks "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

48. Prospective jurors would be protected from becoming the victims of unconstitutional discrimination. *Id.*

49. The Court asserted that the defendant had the right to be "tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Id.* at 86. Furthermore, "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 . . . ." *Id.* (emphasis added). When a defendant's equal protection rights are violated in this manner, said the Court, "the protection[s] that a trial by jury is intended to secure" are denied. *Id.* The Court also paid tribute to the jury: its central function, and therefore the central function of jury selection procedures, was to safeguard "a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Id.* Thus, the Court took pains to elevate the defendant's rights to a plane above all others.

50. Professor Goldman provides the most innovative, astute, and exhaustive analysis of the balancing done in *Batson*. Goldman, *supra* note 4, at 181-96. Her analysis relies upon a model that is defined in mathematical terms. Goldman's "Batson function", which the Court's decisions attempt to minimize, is dependent upon three variables of decreasing significance: the harm from discrimination, the harm from partiality, and the harm from administrative costs. *Id.* at 182. Although I occasionally disagree with the manner in which Goldman applies the *Batson* function, my examination of *Batson* balancing is largely informed by Professor Goldman's premises.

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

52. *Id.* at 98-99.

fair trial values would not be noticeably diminished by placing antidiscrimination restraints on the prosecutor's use of the challenge.

The *Batson* balance was again applied in *Powers v. Ohio.*[53] Powers, unlike Batson, was White. He was indicted on two counts of aggravated murder, pleaded not guilty, and requested a jury trial. Although race was not implicated, in any way, as being a factor in the crime, the State used six of its nine peremptory challenges to remove Blacks from the jury. Powers objected to the prosecution's use of its peremptory strikes, yet his objections were overruled.[54] The Supreme Court reversed the trial court, holding that a White defendant had standing to protect the Fourteenth Amendment rights of prospective jurors.[55]

The Court first determined that jurors possessed a Fourteenth Amendment right not to be excluded on the basis of race.[56] Next, the Court established that a criminal defendant had standing to raise those rights. In order to establish standing, the defendant had to satisfy a three-pronged test. First the litigant had to possess "a close relation to the third party;"[57] and second, there had to exist "some hindrance to the third party's ability to protect . . . her own interests."[58] Most importantly, the defendant "must have suffered an 'injury-in-fact,' thus giving . . . her a 'sufficiently concrete interest' in the outcome of the interest in dispute."[59] The Court addressed the first two prongs in summary fashion: defendants and jurors shared converging interests and there were clear hindrances to the ability of jurors to press their own claims.

It is the final prong that was central to the finding of third party standing, and it is the one that the Court addressed with inordinate care. The injury to the defendant was cognizable and concrete because "[t]he jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors."[60] The Court added that "jury selection is the primary means by which a court may enforce a *defendant's* right to be tried by a jury free from . . .

53. 111 S. Ct. 1364 (1991).

54. Powers v. Ohio, 111 S. Ct. 1364, 1366-67 (1991).

55. *Id.* at 1374.

56. In *Powers*, the Court paid more than mere lip service to both the interests of the excluded jurors and the interests of the community at large. Regarding these rights the Court stated, "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system." *Id.* at 1368. According to the Court, the community's interest in the sanctity of the jury system could not be gainsaid. Indeed, one of the system's "greatest benefits [resided] in the security it [provided] the *people* that they, as jurors actual or possible, being part of the judicial system of the country [could] prevent its arbitrary use or abuse." *Id.* (emphasis added).

The jurors' individual interests in nondiscrimination were no less compelling. In responding to the dissenters' claim that no stigma or dishonor attached to the exclusion even though it was made solely on the basis of race, the Court tersely stated, "We do not believe a victim of the classification would endorse this view; the assumption that no stigma . . . attaches contravenes equal protection principles." *Id.* at 1370. The Court next rejected the argument that because members of every race were subject to exclusion based on race, equal protection analysis did not apply. Noticeably, the Court did not appear to distinguish between the stigma which attached to excluded Whites and that which attached to excluded Blacks.

57. *Id.* at 1370.

58. *Id.* at 1370-71.

59. *Id.* at 1370 (citations omitted). The point is somewhat subtle. Professor Goldman, for instance, failed to realize that the interests of the defendant were a necessary consideration in the establishment of third-party standing. Goldman, *supra* note 4, at 184 (asserting that only "[j]uror and community interests" were at issue).

60. *Powers*, 111 S. Ct. at 1371.

prejudice . . . or predisposition about the *defendant's* culpability."[61] The injury to the defendant, although he did not share the racial characteristics of the excluded jurors, was eminently clear.

By raising the defendant's rights to the level of paramount concern, the Court attempted to protect not only African-American communities and jurors, but White criminal defendants as well. The three interests that formed the crux of *Batson's* antidiscrimination principle, therefore, were pivotal to the *Powers* decision. *Batson* had been extended with only minor change in its analysis: criminal defendants, regardless of their race, would be granted the ability to challenge juries selected by bigoted prosecutors.

Nonetheless, the limitations of the *Batson* regime remained. Both *Batson* and *Powers* had focused upon motives; neither displayed a desire to implement affirmative steps to insure African-American representation. The Court's willingness to balance costs against antidiscrimination principles, moreover, indicated that a defendant's freedom from racial bias was not absolute.[62] Perhaps most significantly, *Powers* appeared to equate a White criminal defendant's interest in antidiscrimination with that of an African-American defendant. The Court's construction of a race-neutral doctrine in the jury selection context was underway.

III. EXTENDING *BATSON* TO THE CIVIL CONTEXT: PRELUDE TO *MCCOLLUM*

Edmonson v. Leesville Concrete Co.[63] introduced *Batson* principles to the civil arena.[64] Here, the Court applied a *Batson* balance that had been modified to consider the initial question of state action. *Powers* and *Batson* had presented cases in which prosecutors were readily identified as state actors; *Edmonson* presented the more difficult question of whether private civil litigants could be similarly characterized. Attributing state actor status to civil

61. *Id.* at 1370 (emphasis added) (citations omitted).

62. The Court has not hesitated to compromise the rights of African-American criminal defendants in an effort to preserve the institutional practices of criminal justice systems. *See Developments*, *supra* note 21, at 1477-78 (stating that the Court's obsession with institutional concerns has produced "constitutional standards that might substantially underenforce equality norms").

63. 111 S. Ct. 2077 (1991).

64. Thaddeus Donald Edmonson brought an action in negligence against Leesville Construction Company for an injury sustained at Fort Polk, Louisiana, a federal enclave. Edmonson claimed that the job-site accident was caused by one of Leesville's employees who allowed a truck "to roll backward and pin him against some construction equipment." *Id.* at 2081. The negligence claim was tried to a jury in federal district court. *Id.*

Both the plaintiff and the defendant were allowed three peremptory challenges during voir dire. Edmonson, a 34-year-old Black male, used all three of his to excuse prospective white jurors. Leesville excused two Blacks and one White from the venire. *Id.* Relying on the *Batson* holding, Edmonson argued that Leesville should be required to articulate a race neutral explanation for the way in which it had used its challenges. The district court did not inquire into the defendant's motives on the ground that *Batson* did not apply to civil proceedings. The jury, which consisted of eleven Whites and one Black, was then empaneled. *Id.*

The jury verdict was rendered for Edmonson, "assessing his total damages at $90,000." *Id.* Yet, because Edmonson was found to be 80% contributorily negligent, he received only $18,000. Edmonson made a timely motion for a new trial. On appeal, a three-judge panel of the Fifth Circuit reversed on the ground that the *Batson* rule applied to civil cases. The panel remanded to the trial court, but the full court ordered a rehearing en banc. The en banc court, holding that the exercise of peremptory strikes in civil cases did *not* involve state action, affirmed the trial court. Certiorari was granted, and the United States Supreme Court reversed. *Id.*

litigants was a necessary prerequisite to attributing state actor status to criminal defendants (such as the McCollums). *Edmonson*, then, is important not only for its altered balancing analysis, but also for establishing the analytical foundation upon which the *McCollum* Court would resolve the state action dilemma. Thus, this Part first discusses the balancing done in *Edmonson*; second, it discusses the finding of state action.

A. *The Balancing*

The Court applied the balancing test it had used in its prior decisions and grounded its holding in *Batson's* analytical framework to determine that *Batson* would constrain private litigants as well as government prosecutors. *Edmonson*'s balancing reveals the way in which the *Batson* balance would change with changing interests.

First, the Court reiterated its commitment to the antidiscrimination principle. Jurors had a solid interest in not falling prey to prejudiced litigators, because "discrimination on the basis of race in selecting a jury in a civil proceeding harm[ed] the excluded juror no less than [the] discrimination"[65] that occurred in *Batson* and *Powers*. Second, societal interests supported the rights of jurors to be free from invidious discrimination. Third, and most significantly, the litigants themselves had a protectable interest in prohibiting discrimination.

This last finding was again pivotal, for it was necessary in order to establish Edmonson's capacity to assert standing. The Court reviewed the *Powers* holding and stated, "The harms we recognized in *Powers* are not limited to the criminal sphere."[66] Edmonson had a significant stake in the jurors' rights because a violation of their rights could mean a violation of Edmonson's rights. The jury's verdict, moreover, would become the "binding judgment of the court."[67] The litigant's interests, then, not only existed, they were as strong as his interests in the outcome of the trial.

There were no new interests to be weighed against this antidiscrimination principle. Once again, the harm from increased partiality and the harm from increased administrative costs constituted the two interests in competition with the antidiscrimination principle. The harm from partiality was somewhat diminished in the civil context. Although the partiality harm may have legitimately concerned the Court, the typically fewer peremptories given in civil trials may have also indicated that the peremptories served not only a smaller role for eliminating bias, but also for eliminating the perception of bias in the community.[68] The fact that the stakes are typically lower in the civil context may have further influenced the *Edmonson* outcome.[69]

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65. *Edmonson*, 111 S. Ct. at 2082.
66. *Id.* at 2088.
67. *Id.*
68. *See* Goldman, *supra* note 4, at 193.
69. For instance, a civil judgment is not preclusive on any criminal issue, though a criminal judgment may be preclusive in a civil setting. Furthermore, a litigant's long-term freedom and indeed his life, are not determined by civil proceedings. Rather, the State's primary purpose in a civil trial is the promotion of "civic peace." Edmonson v. Leesville Concrete Co., 895 F.2d 218, 222 (5th Cir. 1990) (en banc), *rev'd*, 111 S. Ct. 2077 (1991). *See also* William H. Pryor, Jr., *Applying* Batson *in Civil Trials: The Greatest Sideshow on Earth!*, 22 CUMB. L. REV. 49, 64-66 (1991-1992) (highlighting the differences between civil and criminal trials).

Administrative costs were not overtly considered by the Court, though Justice Scalia indicated that these costs might weigh more heavily in the civil context than under the *Batson/Powers* regime. Justice Scalia wrote,

> The concrete costs of today's decision . . . are enormous. We have now added to the duties of already submerged state and federal trial courts the obligation to assure that race is not included among the other factors . . . used by private parties in exercising their peremptory challenges . . . . [T]oday's decision means that both sides, in all civil jury cases, no matter what their race (and indeed, even if they are artificial entities such as corporations), may lodge racial-challenge objections and, after those objections have been considered and denied, appeal the denials with the consequences, if they are successful, of having the judgments against them overturned.[70]

The majority made no attempt to refute Scalia's assertion that the administrative costs were high, thereby indicating that administrative costs were unlikely to determine the outcome in future cases, such as *McCollum*.

B. *The Finding of State Action*

Questions surrounding the issue of state action, however, did threaten to be outcome determinative.[71] *Lugar v. Edmonson Oil*[72] formed the cornerstone of the Court's analysis. In *Lugar*, the Court applied a two-part test to assay for the presence of state action. *Lugar* stated, "The first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, . . . private parties may be appropriately characterized as state actors."[73]

The *Edmonson* Court opined that the first part of the *Lugar* test was easily met. The statutory authorization and regulation of the peremptory challenge revealed the source of state authority.[74] The analysis surrounding the second part of the *Lugar* test was more complex. The Court acknowledged that characterizing a particular course of conduct as governmental in nature required a "factbound inquiry,"[75] guided by consideration of three primary factors: "the extent to which the actor relie[d] on governmental assistance and benefits; whether the actor [was] performing a traditional

70. *Edmonson*, 111 S. Ct. at 2096 (Scalia, J., dissenting). One commentator has labeled the application of *Batson* principles to the civil context the "greatest sideshow on earth." Pryor, *supra* note 69, at 50. *But see* Goldman, *supra* note 4, at 193 (stating that the allocation of fewer peremptories to the civil litigant increases the difficulty of making a prima facie case, thereby reducing the number of *Batson* hearings granted and lessening the administrative costs imposed).

71. The Court stated, "Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action." *Edmonson*, 111 S. Ct. at 2081. For a detailed discussion of the state action problems presented to the *McCollum* Court, see Michael N. Chesney & Gerard T. Gallagher, Note, *State Action and the Peremptory Challenge: Evolution of the Court's Treatment and Implications for* Georgia v. McCollum, 67 NOTRE DAME L. REV. 1049 (1992).

72. 457 U.S. 922 (1982).

73. *Id.* at 939.

74. "Peremptory challenges," the majority noted, "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." *Edmonson*, 111 S. Ct. at 2083. Such regulation of the peremptory predated the Constitution, and absent the existence of an applicable statute, "Leesville would not have been able to engage in the alleged discriminatory acts." *Id.*

75. *Edmonson*, 111 S. Ct. at 2082.

government function; and whether the injury caused [was] aggravated in a unique way by the incidents of governmental authority."[76]

In consideration of the first factor, the Court asserted that the "overt, significant assistance of state officials"[77] was necessary for both the peremptory challenge system and indeed, the jury system, to work. The government provided both the setting and the means for private parties to act, not only because the exercise of peremptory challenges was a statutory right, but also because the government "summon[ed] jurors, constrain[ed] their freedom of movement, and subject[ed] them to public scrutiny and examination."[78] Because the party exercising the peremptory challenge had to rely upon the "formal authority of the Court,"[79] and because the participation of the judge—a state actor—was indispensable to the peremptory right, governmental assistance exceeded the threshold level.

Secondly, the governmental assistance provided to the discriminatory party was found to aggravate the injury in a unique manner. Discrimination that occurred within a courthouse, the majority concluded, was particularly obnoxious. Because "[f]ew places are a more real expression of the constitutional authority of the government than a courtroom,"[80] the Court suggested that damages inflicted on both the excluded jurors and the public were proportionately more severe. Not only did courtroom bigotry raise "serious questions as to the fairness of the proceedings,"[81] but it also "compound[ed] the racial insult inherent in judging a citizen by the color of . . . her skin."[82] The incidents of state authority, therefore, heightened the injury.

The traditional functions test, moreover, formed the core of the state action finding. The Court determined that whenever a constitutional right to trial by jury was involved, the jury functioned as a governmental entity. Indeed, it became the primary factfinder, weighed the evidence, judged credibility, and pronounced a verdict that would become preclusive and enforceable by the court.[83] These duties transformed jurors into "employees or officials" of the state.[84] And the state was responsible for its hiring decisions.

The government's delegation of hiring authority to a private party, therefore, could not insulate the hiring (or selection) process from judicial review. The seminal plurality opinion in *Terry v. Adams*[85] recognized as much. In addressing the public character of racial discrimination in the all-White primary, *Terry* noted that "any part of the machinery for choosing officials becomes subject to the Constitution's constraints."[86] The *Edmonson* majority concluded that the goal of jury selection mirrored the goal of the primary election in *Terry*: both "determined representation on a governmental body."[87] It seemed, then, that the traditional functions criteria embedded in

76. *Id.* at 2083.
77. *Id.* at 2084.
78. *Id.*
79. *Id.* at 2085.
80. *Id.* at 2087.
81. *Id.*
82. *Id.*
83. *Id.* at 2085.
84. *Id.*
85. 345 U.S. 461 (1953).
86. *Edmonson*, 111 S. Ct. at 2085 (quoting Terry v. Adams, 345 U.S. at 481).
87. *Id.* at 2086.

Lugar had been satisfied.

Yet recent precedent provided the Court with a seemingly insurmountable obstacle. *Polk County v. Dodson*[88] had held that a public defender was not a state actor in her role as a litigant. Although the public defender was indisputably a governmental employee, her actions as an advocate were held to be private actions. In this light, it seemed unlikely that the Court would cloak a private civil litigant with the mantle of governmental authority when it refused to cloak a bona fide employee with the same authority.

The Court, however, avoided the paradox by stressing that the nature of the traditional functions test was indeed functional. This rendered the government's functional relationship with the litigant determinative. In *Polk County*, the relationship was adversarial in nature, and so the State's interests opposed, rather than buttressed, the litigant's interests. The Court asserted that "an adversarial relation [did] not exist" in the civil context.[89] This fact-laden distinction led the *Edmonson* Court to conclude: "Just as a government employee was deemed a private actor because of his purposes and functions in *Dodson*, so here a private entity becomes a governmental actor . . . ."[90] *Edmonson*, then, appeared to meet the *Polk County* challenge by emphasizing the absence of an adversarial relationship.

The central dissenting opinion, written by Justice O'Connor, objected to the finding of state action. According to the dissent, the second prong of the *Lugar* test had not been met. In the dissent's view, neither the "significant participation" nor the "traditional functions" criteria had been properly analyzed.[91]

The dissent first attacked the finding of significant participation. The government would regulate jury selection even without peremptory challenges, and thus, regulation of the challenge did not "constitute participation in the challenge."[92] It was true that "there could be no [peremptory] challenge without a venire from which to select" jurors, but this did not make the challenge state action any more "than the building of roads and provision of public transportation makes state action of riding on a bus."[93] Thus, the peremptory was but "an enclave of private action."[94]

The dissent recognized that the judge was a state actor, but claimed that her role was de minimis. The judge's only role in the entire process was to "advise the juror . . . he has been excused."[95] Clearly, the litigants did not represent the judge, nor was the judge responsible for their actions.[96] In *Edmonson*, then, the government had not coerced the litigants at all.

Prior findings that ostensibly private action was state action, however, had been highly dependent on the element of coercion. In *Shelley v. Krae-*

88. 454 U.S. 312 (1981).
89. *Edmonson*, 111 S. Ct. at 2086.
90. *Id.*
91. *Id.* at 2089 (O'Connor, J., dissenting).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. In fact, the dissent asserted, "the government has no role in the use of peremptory challenges. Indeed, there are jurisdictions in which . . . voir dire and jury selection may take place in the absence of any court personnel." *Id.* at 2090.

mer,[97] the Court struck down racially-restrictive housing covenants on equal protection grounds. *Shelley* hinged largely on the fact that "the coercive power of the State was necessary in order to enforce"[98] the covenants. The borders of state action were similarly constrained by *Blum v. Yaretsky*.[99] *Blum* asserted that the State "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragements, either overt or covert, that the choice must in law be deemed to be" its own.[100] Thus, the dismissal of challenged jurors could not be characterized as encouragement to discriminate.

The traditional functions analysis had the largest implications for *McCollum*. Justice O'Connor asserted that reliance on *Terry v. Adams*, to establish a traditional function, was simply misplaced. In *Terry*, "private control over certain core governmental activities rendered the private action attributable to the State."[101] Yet the linchpin of this finding was exclusivity. According to *Flagg Brothers, Inc. v. Brooks*,[102] "the public function doctrine requires that the private actor exercise 'a power traditionally exclusively reserved to the State.' "[103] The dissent stressed that in order for private conduct to be state action, it must "not only comprise something that the government traditionally does, but something that only the government traditionally does."[104] Because the history of peremptory challenges revealed that this was not the case, the traditional functions doctrine could not apply.

The dissent, moreover, contended that the majority had misread *Polk County*. According to the dissent, if *Polk County* "[stood] for anything, it is that the actions of a lawyer in a courtroom [did] not become those of the government by virtue of their location."[105] Nor did they become those of the government by virtue of an employment contract with the attorney. The majority simply missed the underlying principle of *Polk County*: it is impossible for an attorney to represent the government and a private client at the same time.[106]

According to Justice O'Connor, the majority had also drawn an illusory distinction between *Edmonson* and *Polk County*. It was true that the adversarial relationship was pivotal to *Polk County*, but it was also true that the *Edmonson* litigation was an adversarial one.[107] Because Justice O'Connor had characterized the use of peremptories by civil litigants as an adversarial act,[108] rather than as a state act, there was little doubt that she would similarly char-

97. 334 U.S. 1 (1948).
98. *Edmonson*, 111 S. Ct. at 2090 (O'Connor, J., dissenting).
99. 457 U.S. 991 (1982).
100. *Id.* at 1004.
101. *Edmonson*, 111 S. Ct. at 2090 (O'Connor, J., dissenting).
102. 436 U.S. 149 (1978).
103. *Edmonson*, 111 S. Ct. at 2093 (O'Connor, J., dissenting) (quoting *Flagg Brothers*, 436 U.S. at 157).
104. *Id.* at 2093.
105. *Id.* at 2095.
106. *Id.* at 2094.
107. Justice O'Connor wrote, "Attorneys for private litigants do not act on behalf of the government, or even the public as a whole,—attorneys represent their clients. . . . This is essentially a private function . . . for which state office and authority are not needed." *Id.* at 2094.
108. Justice O'Connor stated that the "peremptory strike is a traditional adversarial act: parties use these strikes to further their own perceived interests, not as an aid to the government's process of jury selection." *Id.* at 2094.

acterize the use of peremptories by a criminal defendant. The contention that the peremptory challenge served as an adversarial device within the meaning of *Polk County* would be even stronger in *McCollum*, when the State of Georgia would seek to limit the use of peremptories by three criminal defendants. Nonetheless, there was also little doubt that the majority had spoken in terms broad enough to evade the adversarial dilemma and to impose *Batson* restraints upon the criminally accused. Indeed, the *McCollum* Court would adhere to this latter, broader conception of state action.

IV. THE SUPREME COURT'S DECISION IN *MCCOLLUM*

A. *The Factual Background and Course of Proceedings*

McCollum involved a crime of racial animus committed by three Whites, the McCollums, against two African Americans, Jerry and Myra Collins.[109] The McCollums, owners of a dry cleaning establishment, were indicted by a Dougherty County, Georgia grand jury in August, 1990. The grand jury returned a six-count indictment charging the McCollums with aggravated assault and simple battery.[110]

Shortly after the attack took place, a leaflet was distributed in the local African-American community describing the attack and urging all African Americans to choose another dry cleaners. A racial boycott was in the works, prompting the McCollums to argue that they possessed the right to peremptorily challenge potential African-American jurors.[111] The State argued that the defendants should not be permitted to use their peremptories in a racially biased fashion. If the defendants' peremptory challenges were immune from judicial review, the State declared, the defendants would be capable of removing every potential African-American juror and thereby create an all-White jury.[112]

In order to prevent this occurrence, the State sought an order allowing it to invoke the principles of *Batson v. Kentucky*.[113] After the trial judge denied the State's motion, the issue was certified for immediate interlocutory appeal.[114] The trial court's ruling was affirmed by the Georgia Supreme Court[115] in an opinion that made no mention of the race of the parties. The state supreme court simply held that the free exercise of peremptory strikes was an important component of a treasured human right—the right to trial by jury.[116] A motion for rehearing was denied.[117]

The United States Supreme Court granted certiorari to determine whether a "criminal defendant" was constitutionally prohibited from using his

109. Georgia v. McCollum, 112 S. Ct. 2348, 2351 (1992).
110. *Id.*
111. *Id.*
112. *Id.* Because the defendants were indicted for offenses carrying penalties of four or more years, they were allocated 20 peremptory challenges. GA. CODE ANN. § 15-12-165 (Michie 1990). Because the county was roughly 43% African American, a statistically representative panel would include 18 African Americans. Given 20 strikes, the defendants could remove the 18 African Americans. *Id.*
113. 476 U.S. 79 (1986).
114. *McCollum*, 112 S. Ct. at 2352.
115. State v. McCollum, 405 S.E.2d 688 (1991).
116. *Id.*
117. *McCollum*, 112 S. Ct. at 2352.

or her peremptory challenges in a racially motivated manner.[118] The issue was framed in broad, race-neutral terms. By a score of seven to two, the Supreme Court reversed.[119]

B. *State Action*

The bulk of the battle regarding state action in *McCollum* had been fought in *Edmonson*. Nonetheless, it remained to be seen how the Court would resolve the adversarial dilemma and to what extent this resolution would affect the application of the Court's balancing test.

In deciding the question of state action, the Court did more than reapply *Edmonson*, for it was forced to distinguish *Polk County* in order to overcome the barrier posed by the paradigmatic adversarial context.[120] To do this, the majority found that *Polk County* merely held that the adversarial relationship existing between the public defender and the State "prevented the attorney's public employment from *alone* being sufficient to support a finding of state action."[121] Thus, said the majority, a finding that the selection of jurors was severable from the other functions an adversary performed would render jury selection state action. The majority then determined that the "exercise of the peremptory challenge differ[ed] significantly from other actions taken in support of a defendant's defense,"[122] and therefore, a defendant's discriminatory acts were fairly attributable to the State.

To this conception of state action, the dissenters and two concurrences[123] vigorously objected. Justice O'Connor ridiculed the "remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges."[124] Justice Scalia referred to the state action finding as a "sheer inanity," a principle that is "terminally absurd."[125]

Justice O'Connor focused on this absurdity: at three separate junctures

118. *Id.*

119. *Id.* at 2359.

120. *Polk County* had found that a public defender, who was employed by the State, could nonetheless be considered an adversary of the State. The Court had commented that it was the defender's duty "to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants." *Polk County*, 454 U.S. 312, 320 (1981). In light of these adversarial functions, *Polk County* held, "We find it peculiarly difficult to detect *any* color of state law in such activities." *Id.*

In this relationship analysis, a criminal defense attorney, representing clients such as the McCollums, would seem to be functionally identical to the public defender. As Justice O'Connor stated, "Attorneys in an adversarial relation to the State are not state actors." *Edmonson*, 111 S. Ct. at 2094 (O'Connor, J., dissenting). In this respect, *Polk County* appeared to destroy *Lugar*'s capacity to characterize the accused's use of peremptory strikes as state action. The *McCollum* Court was asked to resolve the adversarial dilemma and decide whether *Polk County* did in fact serve as an impermeable barrier through which *Batson* could not pass. Ultimately, neither the adversarial nature of the criminal proceeding nor a defendant-oriented Constitution persuaded the high Court to rule against the State of Georgia.

121. *McCollum*, 112 S. Ct. at 2356.

122. *Id.*

123. Chief Justice Rehnquist expressed his belief that the finding of state action in *Edmonson* was incorrect, but that the *Edmonson* opinion was controlling. *Id.* at 2359 (Rehnquist, J., concurring). Justice Thomas opined that he did not believe that state action was present, but that he too felt constrained by *Edmonson*. *Id.* (Thomas, J., concurring in the judgment).

124. *Id.* at 2361 (O'Connor, J., dissenting).

125. *Id.* at 2364 (Scalia, J., dissenting).

in her discussion of state action, O'Connor accused the Court of creating an imaginary world. She asserted that the majority had foregone "a realistic appraisal of the relationship between defendants and the government."[126] *Polk County*, which embodied this "realistic approach,"[127] recognized that the "partisan interests of the State and the defendant" could not coincide "during jury selection in a criminal trial."[128] *Polk County* "accords with common sense,"[129] because "[f]rom arrest to trial to possible sentencing and punishment, the antagonistic relationship between the government and the accused is clear for all to see."[130]

O'Connor's qualms with the state action doctrine, moreover, were revealed in her belief that *Batson*'s balancing analysis had been subverted by equating the State's interests with the defendant's interests. Although O'Connor made much of the doctrinal butchering that had been visited upon state action theory, the crux of the jurisprudential debate in *McCollum* resided in its implications for affecting the *Batson* balance. The sheer absence of state action would alter the balancing in the dissenters' favor, and it is within their balancing that *McCollum*'s significance is initially found.

C. *The Balancing*

Extending the availability of the *Batson* challenge to prosecutors inevitably required the application of the balancing test employed in prior peremptory decisions. The new context, however, altered the weight that the various interests were given in ways not seen in any prior case. All Justices agreed that excluded jurors continued to suffer cognizable harm. However, the weight that this harm would receive in relation to the other harms was a point of contention. The harms addressed by the other two components of the antidiscrimination principle—the component of harm to the community and the component of harm to the party—would also engender substantial disagreement among the Justices.

The O'Connor dissent and the Thomas concurrence agreed that harm to the community constituted a valid concern, but they also believed that this

126. *Id.* at 2361 (O'Connor, J., dissenting).

127. *Id.* at 2363.

128. *Id.*

129. *Id.*

130. *Id.* Other opinions by the Court have noted that the prosecutor is one of the most powerful officials to act in the State's behalf. The Court once remarked, for instance, that "[b]etween the private life of the citizen and the public glare of criminal accusation stands the prosecutor. The state official has the power to employ the full machinery of the State in scrutinizing any given individual." Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 814 (1987). In McClesky v. Kemp, 481 U.S. 279 (1987), Justice Blackmun referred to the prosecutor as "the quintessential state actor." *Id.* at 350 (Blackmun, J., dissenting). *See also* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (arguing that the Supreme Court's shift in focus from enforcing due process to endorsing the popular wars on crime continues to vest prosecutors with ever-increasing power). Even *Batson* corroborates Gershman's model. Although *Batson* ostensibly expands defendants' rights, it in fact places the burden to prove purposeful discrimination upon defense counsel. Gershman, *supra* at 441. In addition, the benefits of *Batson* become diminished as race-neutral rebuttals that are offered by prosecutors, and appear pretextual, become more readily countenanced by the courts. In *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (plurality opinion), for example, the plurality emphasized that once a prima facie case had been made by a defendant, "great deference" was to be given to a prosecutor's rebuttal. *Id.* at 1869. The spectrum upon which *Batson, Hernandez,* and *McCollum* lie, therefore, may be viewed as one strengthening the prosecutorial arm of State power.

harm had been artificially inflated by the majority. Similarly, Thomas and O'Connor voiced dismay over the excessive solicitude granted to the harmed "party"—the State in this case. Compared to the countervailing interests of the criminal defendant in general, and of the Black criminal defendant in particular, they found the State's interest to be minimal. Finally, the countervailing concerns arising out of increased administrative costs and partiality further divided the Court.

1. *The* McCollum *Majority*

The majority initially determined that jurors were harmed whether they were excluded by the prosecutor or the defense. The Court stated, "[T]here can be no doubt that the harm is the same—in all cases the juror is subjected to open and public racial discrimination."[131] As in each of the prior jury discrimination cases, the Court drew no distinctions as to whether the excluded juror was Black or White. Apparently the Court believed that White jurors excluded for reasons of racial animus were harmed in a manner identical to the harm suffered by Black jurors excluded for reasons of racial animus.[132] This belief constitutes a central tenet of race-neutral doctrine.[133]

It is not clear that this race-neutral sentiment also permeated the Court's discussion of community harm. The Court did speak in general terms about the harm visited upon "the affected community" in "cases involving race-related crimes,"[134] about maintaining public confidence in the court system, and about "preserving community peace."[135] Significantly, the Court illustrated the harm communities could undergo by referring exclusively to African-American communities.[136] In addition, the Court explicitly stated, "Selection procedures that purposefully exclude *African-Americans* from juries undermine . . . public confidence—as well they should."[137]

This explicit reference to African-American communities could be

131. *McCollum*, 112 S. Ct. at 2353.

132. Justices Thomas and O'Connor did not characterize the exclusion of the majority race to prevent an all-White jury as "discrimination." Even if one did characterize the exclusion as invidious (and I do not: *see infra* Part V), the proposition that excluded Whites suffer the same harms as excluded Blacks remains dubious. In a culture in which racial domination has eternally been an organizing principle, differences in experiences and perception inevitably emerge among racial groups. A White person who is excluded from an institutional enclave of White power—such as a criminal courtroom—would surely feel something different from an African American excluded from the same institution. See *infra* notes 245-53, 257, 275-77 and accompanying text for a catalogue of continuing racial hegemony existing in the criminal courtroom. *See also* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479 (1990) (comparing American courts to the apartheid courts of South Africa). It would seem axiomatic that for Whites to feel the same as Blacks, they would have to undergo a prolonged "history of political, social, and economic oppression by a ruling majority of black people." Toni Massaro, *Peremptories or Peers?Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 541 (1986). *See also* James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505, 513-15, 526 (1991) (symbols of White supremacy, such as Confederate flags, impose unique psychological harms on African Americans).

133. For two excellent overviews of race-neutral doctrine, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) and Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1 (1993).

134. *McCollum*, 112 S. Ct. at 2354.

135. *Id.*

136. The Court referred to two race-related trials in Miami, Florida, where the removal of all Blacks from the venire resulted in acquittals and riots. *Id.*

137. *Id.* at 2353-54 (emphasis added).

grounded in the view that African-American defendants and communities are differently impacted by racial discrimination than are White defendants and communities. More likely, the reference results from the factual context of *McCollum*. After all, in Dougherty County, Georgia, race was of consequence to the African-American community within which Jerry and Myra Collins lived.[138]

Other pronouncements in the Court's opinion, however, vitiate the view that it aspired to race-conscious remedies. For instance, the Court later opined that racial discrimination was "repugnant in *all* contexts."[139] Never again did the Court highlight the unique harms that accompanied racial discrimination against Black communities.[140] The Court ignored the disproportionate harms that Black defendants have been forced to endure.[141] The remainder of the opinion, in fact, generalized the concept of race and universalized the attendant harm in order to generate this broad holding: "[T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party."[142] Thus, the Court declined to acknowledge any cognizable distinctions between the interests of Black jurors and White jurors, between Black defendants and White defendants, or between Black communities and White communities.[143]

The sum of all countervailing interests, moreover, could not overwhelm the generalized antidiscrimination interests asserted by the State.[144] The countervailing interests in *McCollum*, because they were stronger than they had been in any prior case, could not be ignored. In addition to considering

138. *Id.* at 2351.

139. *Id.* at 2354 (emphasis added).

140. For an unusual perspective on the harm inflicted upon Black communities by racial discrimination that exists in the administration of criminal punishments, see Randall Kennedy, McClesky v. Kemp: *Race, Capital Punishment, and the Supreme Court,* 101 HARV. L. REV. 1388, 1440 (1988) (suggesting that the failure to execute those who commit capital crimes against Blacks is analogous to the failure to provide streetlights to the Black community). *See also* Note, *The Case for Black Juries,* 79 YALE L.J. 531, 537 (1970) (identifying the underanalyzed problem of injury inflicted upon Black communities by "unrepresentative juries").

141. *See generally Developments, supra* note 21 (outlining the many mechanisms by which racial considerations harm African-American defendants). *See also infra* notes 245-53, 257, 275-77 and accompanying text.

142. *McCollum,* 112 S. Ct. at 2359.

143. It is not conclusive that the Court dismissed this view, since any broad pronouncements would constitute dicta in *McCollum*—a case involving the dismissal of Black jurors, in a Black community, where the defendants were White and the victims were Black. It is more conclusive that the Court dismissed—or at least suspended in the realm of jury selection cases—the constitutional distinction between the prosecution and the defense. The Court noted that public confidence is eroded when a defendant obtains a false acquittal as surely as it is eroded when the State obtains a false conviction. *Id.* at 2354. Elevating this truism to constitutional stature casts significant aspersions upon the constitutional preference for false acquittals over false convictions, a preference made explicit by the presumption of innocence. Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial,* 102 HARV. L. REV. 808, 822 (1989) (citing *In re Winship,* 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

144. *Batson, Powers,* and *Edmonson* all factored the interest of the complaining party into the antidiscrimination principle. The *McCollum* majority, understandably, de-emphasized this component of the antidiscrimination principle. Nonetheless, the State's interest had to be present in order to assert standing. *McCollum,* 112 S. Ct. at 2357. The Court held that the State suffered a concrete injury "when the fairness and integrity of its own judicial process [was] undermined." *Id.* For criticism of attempting to protect the State, in a criminal trial, from discrimination, see Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial,* 60 S. CAL. L. REV. 1019 (1987) and Goldwasser, *supra* note 143.

the effects of increased administrative costs and the harm from partiality,[145] the Court was forced to decide whether *Batson*'s goals had to yield "to the rights of a criminal defendant."[146] The Court decided that they did not.

Although peremptory challenges were one "state-created means to the end of an impartial jury and a fair trial,"[147] the Court did "not believe that [its] decision [would] undermine the contribution of the peremptory challenge to the administration of justice."[148] The notion that partiality had any correlation with race was rejected as being an illegitimate basis upon which peremptory strikes could be made. Although the majority couched the discussion of partiality in terms of "invidious" discrimination,[149] it was not evident that the majority would be any more hospitable to the presence of benign discrimination.[150] Thus, although the harm from increased partiality would hurt

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145. The harm from partiality was of a qualitatively different nature in *McCollum*, where the increased partiality threatened to harm the defendant, not the State. A jury's partiality may be aggravated by restricting the exercise of the peremptory challenge. *Batson*, *Powers*, and *Edmonson* admitted as much. In those cases, the increase in partiality was tolerated because of the theoretical decrease in discrimination. Yet in those cases, the increased partiality did not jeopardize the fair trial interests of a constitutionally favored party. When the partiality spectrum is tilted against the State in criminal cases (as *Powers* and *Batson* permitted), no constitutional value is lost. The presumption of innocence is merely enhanced. However, when the spectrum is tilted against the defendant—particularly in a capital case—much more than constitutional integrity may be destroyed.

146. *McCollum*, 112 S. Ct. at 2358. The history of peremptory challenges did not demand that they be distributed equally between prosecution and defendant. Indeed, history did not demand that the prosecution receive any peremptories at all. Two states, in fact, granted peremptory challenges only to defendants for most of the nineteenth century. New York finally granted the privilege to the prosecution in 1881, but Virginia did not do so until 1919. VAN DYKE, *supra* note 12, at 171. Most of the states that allowed prosecutors to strike peremptorily severely limited their number. *Id.* at 149.

Likewise, a federal statute of 1790 demonstrates that the American peremptory was primarily designed as a check on state power. The 1790 statute allowed defendants 20 peremptories in capital cases and 35 in the special instance of treason, "but made no mention of the right of the State to exercise peremptories." *Id.* Although the right of the prosecution to utilize peremptory challenges became the established rule by the twentieth century, *id.*, the device apparently originated as a safeguard against the raw power of the State.

Despite prosecutorial protestations to the contrary, denying *Batson* objections to the State would not have created a constitutional imbalance. The wholesale withdrawal of the peremptory challenge privilege from the State alone would not have done the trick, since the American system of criminal justice "does not envision an adversary proceeding between two equal parties." Wardius v. Oregon, 412 U.S. 470, 480 (1973). The primary function of the Bill of Rights is not to secure speedy prosecutions, but to redress the imbalance of power that inevitably inheres between the State and the accused. As Justice Black wrote:

> The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedures to be followed in criminal trials . . . . [T]hese rights are designed to shield the defendant against State power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State.

Williams v. Florida, 399 U.S. 78, 111-12 (1970) (Black, J., concurring in part and dissenting in part). Thus, neither the Constitution nor the history of the peremptory challenge demanded that the State and the accused be granted symmetrical peremptory rights. For a comprehensive discussion of these principles, see generally Bandes, *supra* note 144, at 1024-37 and Goldwasser, *supra* note 143, at 821-33.

147. *McCollum*, 112 S. Ct. at 2358.

148. *Id.*

149. *Id.* at 2359.

150. In its amicus brief, the NAACP contended, "For a white defendant to practice invidious discrimination by striking all African Americans from the jury that will try him for a racially motivated crime against an African American presents different issues from the case of an African American defendant who uses peremptories in an attempt to have some members of his race on the jury that

Black defendants more than White defendants,[151] the Court's broad language implied that the harm of increased partiality was identical for Blacks and Whites. Hence, the Court found that the Sixth Amendment requirement of an impartial jury would not be impermissibly compromised by allowing prosecutors to make *Batson* challenges.[152]

The Court stated that another Sixth Amendment right, the right to the effective assistance of counsel, also would not be jeopardized by the *McCollum* holding.[153] Likewise, the attorney-client privilege would remain sacrosanct. In reaching this conclusion, the Court may have seriously underestimated the administrative costs attendant to preserving these rights. The Court stated, "In the rare case in which the explanation for a challenges [sic] would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged."[154]

The need for this procedure may occur more frequently than the Court supposes. Moreover, the Court did not guarantee the right to *in camera* discussions, which means that the potential for their denial remains.[155] Likewise, the Court implied that voir dire is critical to preserving juror impartiality[156] because it allows the removal of "an individual juror who harbors racial prejudice,"[157] yet the Court took no action to guarantee the increased availability of voir dire. If there is to be any mechanism for the removal of such jurors, it would have to be through voir dire. This is particularly true for Black defendants who must face all-White juries. There is no doubt that if increased voir dire and *in camera* review are not allowed, the constitutional protections afforded to criminal defendants will be greatly diminished. Unfortunately, the Court's failure to recognize the significance of these administrative costs may reflect its disinclination to impose these costs—in future cases—upon the State.

2. *The Thomas Concurrence and the O'Connor Dissent: Inchoate Race-consciousness*

Both Justices Thomas and O'Connor assailed the majority for undervaluing the rights of criminal defendants. Justice Thomas characterized the eleva-

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will try him." Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* Suggesting Reversal at LEXIS printout page 6, *McCollum* (No. 91-372) [hereinafter *NAACP Brief*]. *See infra* Part V.A.

151. Black defendants have been the most frequent victims of racial abuse, and thus, Whites' purging Blacks from southern juries "is far more probative of invidious discrimination . . . than the striking of a few whites" in the Midwest. *NAACP Brief* at LEXIS printout page 7. *But see Government of the Virgin Islands v. Forte*, 865 F.2d 59 (3rd Cir. 1990) (prosecutor, in a race case involving a White defendant and a Black victim, struck Whites to create an all-Black jury). The NAACP would most likely characterize the action in *Forte* as "invidious discrimination against potential white jurors." *NAACP Brief* at LEXIS printout page 4.

152. *McCollum*, 112 S. Ct. at 2358-59.

153. *Id.* at 2358.

154. *Id.*

155. Nonetheless, attorneys would be well advised to request *in camera* proceedings at every pertinent juncture, for an invasion of the attorney-client privilege or an abridgement of the Sixth Amendment could constitute reversible error.

156. *McCollum*, 112 S. Ct. at 2358-59 (citing Morgan v. Illinois, 112 S. Ct. 2222 (1992), for the proposition that jurors who are incapable of considering any punishment other than death may be excluded from capital trials).

157. *Id.* at 2359.

tion of citizens' rights "to sit on juries over the rights of the criminal defendant, . . . who faces imprisonment or even death,"[158] as a "serious misordering of [the Court's] priorities."[159] Justice O'Connor asserted that because prosecutors are held to uniquely high standards of conduct, it was disingenuous to equate their interests in the outcome of the trial with the interests of defendants.[160] According to O'Connor, the majority's state action analysis was inaccurate largely because it had tilted the *Batson* balance in favor of the State by artificially inflating the State's interest to the detriment of the interests of the criminal defendant.[161]

Justices O'Connor and Thomas did not stop there, but rather, each asserted that the countervailing interest represented by the defendant's rights would vary according to the *defendant's race.* Their assertion was a bold one: the interests of a Black criminal defendant should be weighed differently from the interests of a White criminal defendant.[162] Perhaps most striking about this commentary was that it focused upon the rights of Black defendants when each of the respondents in the case at bar was White.[163]

That "Blackness" was a part of the Justices' balance was unambiguous. Justice Thomas declared, "I am *certain* that *[B]lack* criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes."[164] Justice O'Connor twice explicitly referred to the problem of the prejudices and biases of "white jurors,"[165] but not once, in a case involving a potentially all-Black jury, did she allude to the potential biases of Black jurors. The concern of both Justices was that Black defendants would be forced to endure the indignity of being tried by biased jurors unless they could secure representation of their race on the jury.[166] Without such representation, Black defendants would have to internalize the costs of increased partiality imposed by a Court that refused to recognize the reality of continued racial animus.

Justice Thomas confronted this reality in an opinion that was historically grounded in the context of American race relations. As far back as

158. *Id.* at 2360 (Thomas, J., concurring in the judgment).

159. *Id.*

160. *Id.* at 2364 (O'Connor, J., dissenting).

161. *Id.* at 2362 ("[T]he independence of defense attorneys from state control . . . is a constitutionally mandated attribute of our adversarial system."). Justice Scalia agreed, for he charged the Court with destroying the "ages-old right of criminal defendants." *Id.* at 2365 (Scalia, J., dissenting).

162. This is more clearly O'Connor's view than it is Thomas's, for Thomas does express doubts that Black defendants may be treated differently from Whites given the majority's holding in *McCollum. Id.* at 2360 n.2 (Thomas, J., concurring in the judgment). Nonetheless, Thomas's opinion is unquestionably imbued with an awareness that African Americans have more at stake in the *McCollum* decision, and its treatment of racially informed peremptory challenges, than do Whites. This point was not acknowledged by Justice Marshall, who endorsed the abolition of peremptory challenges for all defendants and all prosecutors. Batson v. Kentucky, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring). Likewise, in Strauder v. West Virginia, the Court viewed the interests of Blacks and Whites as being identical when it asserted that equal protection was violated if the persons excluded from jury service were Black, just as surely as it was violated if the "person's excluded . . . were white men." 100 U.S. 303, 308 (1880).

163. *McCollum,* 112 S. Ct. at 2351.

164. *Id.* at 2360 (Thomas, J., concurring in the judgment) (emphasis added).

165. *Id.* at 2364 (O'Connor, J., dissenting).

166. *Id.* at 2360 (Thomas, J., concurring in the judgment) (stating that representation helps to overcome bias and increases the chances of a fair trial).

Strauder,[167] the Court had acknowledged that the presence of Blacks on juries might well affect the outcome of a case. Indeed, *Strauder* had stated, "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy."[168] Because "conscious and unconscious prejudice persists in our society" and may influence some jurors,[169] and because, according to Thomas, it remains reasonable to assume "that all-white juries might judge black defendants unfairly,"[170] the concerns expressed by the *Strauder* Court have "not become obsolete."[171] Thomas argued that the protections of *Strauder*, therefore, should not be discarded simply because a century had passed.[172]

The replacement protections offered by the Court did little to placate Thomas's concerns. Both Thomas and O'Connor were concerned that the majority, misled by an idealized vision of race relations, had entered a peculiar fantasy land in which bigotry was viewed as a discrete entity, unattached to social context, and detectable by a rigid membrane considered to be impermeable to prejudice—voir dire.[173] Such assurances did not quell Thomas's or O'Connor's suspicions that racial partiality would infect criminal trials, for without peremptory challenges, it would be even more difficult to stymie the "conscious and unconscious racism [that affects] the way *white* jurors perceive

167. Strauder v. West Virginia, 100 U.S. 303 (1880).

168. *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring in the judgment) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1880)). *Strauder* had advanced two other principles as well. In addition to its concerns over eradicating partiality, *Strauder* sought to protect the integrity of the jury as a form of legal decisionmaking ("The very idea of a jury is a body . . . composed of . . . peers") and to prevent the devaluation of all members of the Black community ("The very fact that colored people are singled out and expressly denied by a statute all rights to participate . . . as jurors . . . is practically a brand upon them, . . . an assertion of their inferiority, and a stimulant to [societal] race prejudice . . . ."). *Strauder*, 100 U.S. at 308, *discussed in* Lewis H. LaRue, *A Jury of One's Peers*, 38 WASH. & LEE L. REV. 841, 846 (1976).

169. *McCollum*, 112 S. Ct. at 2360 (Thomas, J., concurring in the judgment).

170. *Id.*

171. *Id.* Justice Marshall noted, "It is worth remembering that '114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.' " Batson v. Kentucky, 476 U.S. 79, 106-07 (1986) (Marshall, J., concurring) (quoting Rose v. Mitchell, 443 U.S. 545, 558-59 (1979)).

172. This echoes the theme of Martin Luther King, Jr.'s *Letter From Birmingham City Jail*, (1963), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND TEACHINGS OF MARTIN LUTHER KING, JR. 289 (James M. Washington, ed., 1986). In this letter, King rebuked those who said that the Civil Rights Movement should postpone protests until segregationists had sufficient time to become accustomed to social equality. King asserted that the mere passage of time did not guarantee progress, and that only affirmative actions could change social conditions. The consistent thread running through Justice Thomas's opinion is that social conditions have not changed so much since *Strauder* and that racial prejudices remain intact. The fact that a century has passed since the Court declared racial discrimination deplorable does not mean that this country has attained its race-neutral ideals. The mere passage of time, without the occurrence of affirmative steps to act upon the conditions of that time, does not insure progress. The reality, moreover, is that racism continues to infect juries and generate unjust verdicts. *See infra* pp. 113-20. According to Thomas, the majority has destroyed one of the defendant's few safeguards against bigoted jurors—the peremptory challenge—with the apparent belief that the process of voir dire will sufficiently excise the bigotry. The result is that once again, Black defendants must pay the price (often with their lives) for the Court's wishful thinking.

173. *McCollum*, 112 S. Ct. at 2358-59 (reducing voir dire to the sole "mechanism for removing those on the venire [who] . . . would be incapable of confronting and suppressing their racism").

minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."[174]

Justice Thomas scoffed at the notion that voir dire would provide adequate protection to defendants, noting that biased jurors would be untouchable unless they "actually admit[ted] prejudice."[175] Thus, in "purely pragmatic terms,"[176] an extension of the Court's holding to Black defendants might increase, rather than decrease, the presence of courtroom discrimination.[177] Moreover, using peremptory challenges as a means of insuring minority juror representation would act to "minimize the distorting influence of race."[178]

At this point, Justices O'Connor and Thomas parted ways. In the final analysis, Thomas had capitulated to the majority, accepting its finding of state action.[179] Thomas had also indicated a reluctance to grant Black defendants immunity from *Batson*'s rigors while forcing those same rigors on White defendants.[180] O'Connor, on the other hand, remained steadfast in her endorsement of the NAACP's "pragmatic" view of affirmative jury selection that was in accord with common "experience and common sense."[181]

O'Connor chided the majority for grounding its decision in shadowy ideals.[182] Such ideals would be laudable in a world where "conscious and unconscious prejudice" did not persist and did not continue to affect verdicts.[183] But, "[i]n a world where the outcome of a *minority* defendant's trial may turn on the misconceptions or biases of *white* jurors, there is good cause to question the implications of this Court's good intentions."[184] So long as the majority continued to view prejudice as an exclusively conscious, forthright phenomenon, the rights of African-American criminal defendants would be placed in jeopardy.

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174. *Id.* at 2364 (O'Connor, J., dissenting) (emphasis added).

175. *Id.* at 2360 (Thomas, J., concurring in the judgment). *See also NAACP Brief* at LEXIS printout page 5 (arguing that "*voir dire* and challenges for cause are not enough" to protect minority defendants from "biased white jurors"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1693 (1985) ("Techniques such as *voir dire*, that may have aided in the elimination of the openly prejudiced from the jury, are largely futile with their modern counterparts.").

176. *McCollum*, 112 S. Ct. at 2364 (O'Connor, J., dissenting). The reference to pragmatism indicates O'Connor's discontent with the majority's naive conception of the principles it propounds and the means it offers to address them. On three separate instances, O'Connor criticized the majority's analysis of state action as being unrealistic. *See supra* notes 126-30 and accompanying text.

177. *Id.* at 2364.

178. *Id.*

179. *Id.* at 2359 (Thomas, J., concurring in the judgment).

180. *Id.* at 2360 n.2 (Thomas, J., concurring in the judgment) (stating that it was "difficult to see how the result could be different if the defendants . . . were black"). Such a belief does not gainsay Thomas's recognition of the Black defendant's unique stake in the outcome of the case. Clearly, Thomas viewed the peremptory as a greater necessity for Blacks than for Whites. He repeatedly noted that Blacks would pay the price for the Court's extension of *Batson* privileges to prosecutors. Thomas, however, did not seize upon the view of the peremptory challenge as a narrowly tailored race-conscious remedy, by which African Americans might resist the underlying racism of potential jurors. Nonetheless, it is noteworthy that neither Thomas nor the majority explicitly rejected this view.

181. *Id.* at 2363 (O'Connor, J., dissenting).

182. *Id.* at 2364 (faulting the Court for pursuing "non-discriminatory jury selection" as a disembodied "ideal").

183. *Id.* at 2360 (Thomas, J., concurring in the judgment).

184. *Id.* at 2364 (O'Connor, J., dissenting) (emphases added). Justice Scalia also took sardonic aim at the Court's good intentions, mocking its vain attempt to promote "the supposedly greater good of race relations." *Id.* at 2365 (Scalia, J., dissenting).

V. THE POTENTIAL FOR POST-*McCOLLUM* AFFIRMATIVE JURY SELECTION: THE INCLUSION SOLUTION

The O'Connor opinion indicated a means of mitigating the impact of the majority's brave new doctrine. If one limited *McCollum* to its facts, the holding would not require imposing *Batson* rigors upon African-American defendants. The majority, moreover, had not foreclosed the use of peremptories as an affirmative action device. Justice O'Connor recognized this and endorsed the position that the NAACP advocated:

> The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit a challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.[185]

Similar suggestions have been made and upheld by other courts. In *United States v. Crawford*,[186] the Court of Military Appeals upheld the deliberate selection of an African American to serve on a court-martial. This conscious inclusion of African Americans, designed to guarantee fair representation, did not violate equal protection principles.[187] Similarly, *Brooks v. Beto*[188] determined that it was permissible to purposefully include two African Americans on the list from which a grand jury was selected.[189] In the same spirit, *Wright-Bey v. State*[190] asserted that the "small minority population" of Iowa may require the courts to "take additional affirmative steps to assure minority representation on jury panels."[191]

Both the Thirteenth and Fourteenth Amendments provide legal justification for affirmative jury selection procedures. Subpart A, below, explains that the Fourteenth Amendment is properly interpreted to permit race-conscious jury selection. Subpart B contends that the Thirteenth Amendment not only provides a more potent legal justification for affirmative jury selection procedures, but also provides the basis for implementing extensive structural changes in the criminal justice system.

A. *Alleviating Equal Protection Concerns*

In order to survive the strict scrutiny analysis of the contemporary Supreme Court, the act of peremptorily striking White jurors must implicate interests that are both rational and compelling.[192] The government would cer-

185. *Id.* at 2364 (O'Connor, J., dissenting) (quoting *NAACP Brief* at LEXIS printout pages 5-6).

186. 35 CMR 3 (1964).

187. *Id.* at 13.

188. 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

189. *Id.* at 4-5. Twelve people were chosen to serve on the grand jury from a list of 16 candidates. The two African Americans were selected, and served on the grand jury returning the indictment. *Id.* *See also James v. United States*, 416 F.2d 467, 472 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970) (permitting the conscious inclusion of African Americans on grand jury).

190. 444 N.W.2d 772 (Iowa App. 1989).

191. *Id.* at 777.

192. Actions informed by racial considerations are evaluated under the rubric of strict scrutiny, which requires that the action be narrowly tailored to further a compelling governmental interest. *See* City of Richmond v. J.A. Croson, 488 U.S. 469 (1989).

tainly have a compelling interest in acquitting the innocent;[193] such an interest, moreover, would be infinitely magnified in a capital case.[194] Furthermore, as the riots following the state court's acquittal of Rodney King's assailants demonstrate,[195] insuring public confidence in jury verdicts is properly viewed as a compelling governmental interest.[196] Providing racially balanced juries is narrowly tailored to elevate that confidence.

Race-conscious peremptories are more than narrowly tailored to protect the appearance of justice; they are also tailored to prevent racially discriminatory verdicts. Empirical evidence presented by Professor Sheri Lynn Johnson has demonstrated that guilt adjudication in the absence of Black jurors depends upon racially biased assumptions.[197] Johnson posits that the effect of these assumptions may be largely eradicated by the presence of three Black jurors on a twelve-member venire.[198] At least two uses of a race-conscious peremptory challenge, then, would be narrowly tailored to the goal of eliminating racially biased verdicts. The first use would be to secure an appropriate level of representation (at least as much as Johnson suggests is required) to constrain the forces of bias, and the second use would be to remove "a juror whom the defendant believes harbors racial prejudice."[199]

The degree to which race-conscious strikes are narrowly tailored would seem to overcome the Court's objections to race-conscious remedies in other contexts. In *Wygant v. Jackson Bd. of Ed.*,[200] for example, the Court determined that artificially granting minority workers seniority status over White workers, and thereby preserving some minority jobs at the expense of White jobs, was too tenuously related to the goal of rectifying the effects of past economic or societal discrimination to qualify as a narrowly tailored rem-

193. *See* Johnson, *supra* note 175, at 1701.

194. Courts uniformly hold that capital cases are sufficiently different from non-capital cases as to warrant exceptional procedural safeguards. The Supreme Court has repeatedly emphasized that this principle applies to both the guilt and penalty phases of capital trials. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399 (1986); Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Gardner v. Florida, 430 U.S. 349, 358 ((1977); Woodson v. North Carolina, 428 U.S. 280 (1976); *see also Ex parte Monk*, 557 So. 2d 832 (Ala. 1989) (upholding a trial court order granting a capital defendant access to the prosecution's entire file).

195. *See, e.g.*, Tom Mathews et al., *The Siege of L.A.*, NEWSWEEK, May 11, 1992, at 30 (describing the "deadliest riot in 25 years").

196. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2354 (1992) (discussing the necessity of maintaining "public confidence" in the criminal justice system).

197. *See* Johnson, *supra* note 175, at 1619-25; Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 110-15 (1990) (discussing the results of several sociological studies and asserting that these results indicate the consistent inability of White jurors to be impartial toward Black people).

198. Johnson, *supra* note 175, at 1694.

199. *NAACP Brief* at LEXIS printout page 5. The NAACP distinguished race-conscious jury selection from invidious discrimination. The *amicus* brief stated:

> [T]he only possible uses of the peremptory against potential white jurors are either to strike those for whom some basis for suspecting bias exists, or to attempt to retain African Americans on the venire so that they may sit on the jury. Neither purpose is either invidious or unconstitutional, but is related to the compelling state interest of providing the defendant with a jury that represents the community and is truly fair and impartial. *Id.* at LEXIS printout page 8.

The NAACP acknowledged that distinguishing race-conscious acts from invidious acts could be problematic, but concluded, "Whatever the injury to a prospective juror of being excluded from a particular jury, the injury to a defendant by being tried by a jury infected with racial prejudice is far greater." *Id.* at LEXIS printout page 5.

200. 476 U.S. 267 (1986).

edy.[201] Although some affirmative action remedies may be characterized as too broad—in part because "most victims of discrimination will not benefit at all from affirmative action" although a few will have received disproportionate benefits[202]—race-conscious peremptories can readily avoid this characterization. After all, each minority defendant receives the same amount of the benefit (prevention of erroneous verdicts) and no defendant receives "more than he deserves."[203]

Significantly, scarcity concerns do not permeate the process of juror selection as they do the process of job promotion, dismissal, and hiring. When employment is at issue, the material quality of an individual's life may be directly affected for an extended period of time. By contrast, the denial of a seat in a jury box has a qualitatively less impressive effect.[204] Such a distinction may reconcile Justice O'Connor's antipathy for affirmative action plans with her advocacy of race-conscious remedies in the jury selection process.[205] In *Metro Broadcasting, Inc. v. FCC*,[206] for instance, Justice O'Connor demonstrated her distaste for licensing preferences by dissenting from the Court's holding that the FCC's licensing procedure did not violate the equal protection clause. The licenses, of course, represented scarce economic goods.

Similarly, the affirmative action plan dismantled in *City of Richmond v. J.A. Croson*[207] involved the allocation of a finite number of city contracts, and the admissions program condemned in *Bakke* involved the career-determinative allocation of seats in a medical school class. On the other hand, the Court has upheld government actions that are not race-neutral in such contexts as redistricting[208] and school desegregation.[209] If scarcity does indeed define the ideological battleground, and the Court determines that the interests of criminal defendants more closely resemble the interests of voters and students than they do the interests of entrepreneurs,[210] the Court's isolated equal protection analysis may be competent to countenance race-conscious peremptory challenges. In this light, the Court may be more hospitable to race-conscious jury selection procedures.

The Supreme Court's summary disposition of a recent state court case, however, seriously undermines the possibility that equal protection principles,

201. *Id.* at 276-77. *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (regarding a medical school's affirmative action admissions policy).

202. Johnson, *supra* note 175, at 1702.

203. *Id.* at 1702.

204. Indeed, jury duty is frequently viewed less as a profitable opportunity than as a burdensome, time-consuming task. Few citizens experience a sense of deprivation because they, personally, have not been called to serve. In this light, it would seem that jury duty more closely resembles a tax than a coveted good.

205. This may also explain Justice Thomas's race-conscious concurrence in *McCollum*, and the extent to which it represents a departure from his conviction that the Constitution is "colorblind." *See, e.g.*, Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 993 (1987).

206. 497 U.S. 547 (1990).

207. 488 U.S. 469 (1989). The majority opinion was authored by Justice O'Connor.

208. *See* United Jewish Orgs. v. Carey, 430 U.S. 144 (1977).

209. *See* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971) (busing).

210. An additional distinction between affirmative juror selection and affirmative job selection is that the former makes no judgment about "qualifications." Jurors are not evaluated for their qualifications but are evaluated for their potential biases. Similarly, the harm from the deprivation of resources and from the stigma that attaches in the context of segregated schools may not even exist in the context of race-conscious juror selection. *But see* discussion *supra* note 56.

standing alone, will suffice to justify racially motivated strikes by African-American defendants. *State v. Carr*[211] presented the Georgia Supreme Court with the same issue featured in *McCollum*, with the exception that Carr was Black.[212] The high court of Georgia, on the same grounds that it decided *McCollum*, found that *Batson* was unavailable for prosecutorial use. The court's decision, perhaps because it seemed unnecessary, made no distinction between the racially motivated strikes committed by Whites and those committed by Blacks. Without supplying written reasons or instructions, the United States Supreme Court granted a writ of certiorari in *Carr*, vacated the judgment, and remanded the case "for further consideration in light *Georgia v. McCollum*."[213]

The Supreme Court of Louisiana has interpreted this to mean that *McCollum* leaves no room for distinctions in the treatment of Black and White defendants.[214] Nonetheless, because the United States Supreme Court merely remanded—but did not reverse—*Carr*, Louisiana may have misread the Court's intentions. The reluctance to reverse may indicate that the Court has yet to eliminate a race-conscious role for peremptory strikes, that the Court would like to hear more argument on the matter, and that the Court will remain open to arguments for restricting prosecutorial use of *Batson* challenges.

The unique factual circumstances of *Carr* may have also compelled the Court to remand rather than reverse. In *Carr*, the defendant used all fifteen of his peremptory strikes to remove Whites from the jury and to insure a jury consisting of eleven Blacks and one Hispanic.[215] This scenario was not envisioned by the NAACP, who declared that "a minority defendant is powerless to purge the jury of whites."[216] The scenario may also have been unforeseen by Justices Thomas and O'Connor. Indeed, the defendant Carr seemed to believe that a fair trial required more than merely the proportionate representation that Thomas and O'Connor espoused, a belief that the Supreme Court may not be willing to adopt based upon equal protection theory alone.

Nonetheless, the Court has never held that *Batson* proceedings are available to the State in capital cases, for none of the prosecutorial *Batson* cases have involved capital offenses. The McCollums were indicted for aggravated assault and simple battery.[217] Carr was indicted for "drug-related offenses."[218] Knox was charged with obscenity involving a White woman[219] and Jackson with the distribution of cocaine.[220] The Supreme Court's consistent assurances that the State must be held to higher, more exacting standards in capital cases[221] provides reason to believe that the prosecutor's access to *Batson* may be thwarted when the accused is defending against an imminent

211. 413 S.E.2d 192 (1992) (per curiam).
212. *Id.* at 192.
213. Georgia v. Carr, 113 S. Ct. 30, 30 (1992).
214. State v. Knox, 1992 WL 355140 La. at *3; State v. Jackson, 1992 WL 355140 La. at *3.
215. *Carr*, 413 S.E.2d at 192.
216. *NAACP Brief* at LEXIS printout page 8.
217. *McCollum*, 112 S. Ct. at 2351.
218. *Carr*, 413 S.E.2d at 192.
219. *Knox*, 1992 WL 355140 at *1.
220. *Id.* at *1.
221. *See supra* note 194.

execution.[222] Even if *McCollum* were extended to the death penalty context, however, the Court could still determine that a racially motivated peremptory challenge was uniquely essential to a *Black* defendant's case.[223] In other words, the *Batson* balance may not only be affected by the unique features of a death penalty case, but may also be affected by the fact that the criminal defendant potentially subject to execution is Black.[224]

Furthermore, even assuming that the *Carr* remand imposes *McCollum* restrictions upon African Americans (as the Louisiana Supreme Court assumes), the Court could still allow asymmetrical application of these restrictions. Indeed, the NAACP argued that the State should face a higher burden for establishing a prima facie case of discrimination when the defendant is Black.[225] The prima facie case should be more difficult to make, argued the NAACP, especially in areas where the jury pool is saturated with Whites.[226]

Similarly, the standards for rebutting a prima facie case should be reduced for criminal defendants, and should be reduced even more for African Americans. Much contention remains over what suffices as a "racially neutral reason" when *Batson* is used by defendants.[227] The ambiguity in the meaning of "race neutral reasons" may induce trial courts to apply the standard as though "racially neutral" meant "free from racial animus." If this comes to fruition, the strikes motivated by a desire for increased representation or suspicion of bigotry may pass as "race neutral." Under this analysis, a race-conscious strike could be characterized as sufficiently race-neutral.[228]

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222. This issue has not been foreclosed for white defendants either, since the McCollums were charged only with aggravated assault and simple battery.

223. *See Developments*, *supra* note 21 (cataloging the unique hazards Black criminal defendants face throughout their experience with the criminal justice system). In addition, the Court could determine that racially motivated strikes were uniquely essential in a case like *Knox*. *Knox* is unique because Knox has been the only defendant in this line of cases subject to a trial by a six-member jury. *Knox*, 1992 WL 355140 at *1. The paucity of jurors could raise additional concerns that would disfavor the Court's granting *Batson* privileges to the State. Indeed, with a six-member jury, it could be particularly difficult to secure minority representation.

224. *See Batson* discussion *supra* notes 34-62 and accompanying text.

225. *NAACP Brief* at LEXIS printout page 7.

226. The NAACP contended that three inquiries should determine whether the State was able to establish a prima facie case. First, the Court should determine whether the litigant had the opportunity to produce a one-race jury, and similarly, whether the litigant seized upon that opportunity. This would be the only consideration working against Carr. Second, the Court should consider the statistical composition of the venire and the numerical possibility that all strikes would be used against Whites by chance alone. Third, the burden on the State should increase to the extent that excluded jurors were not members of a group historically victimized by discrimination, particularly with respect to juror selection. *Id.* at LEXIS printout page 8.

227. This contention is reflected in the plurality opinion of Hernandez v. New York, 111 S. Ct. 1859 (1991). Justice Kennedy wrote,

> [T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. . . . Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race-neutrality.

Id. at 1866-67.

228. Applying *Batson* to African-American defendants (or any defendants) may necessitate that lower courts generously grant extended voir dire and *in camera* hearings upon defendants' requests. The procedures provide a weak, but necessary substitute, for the peremptory's ability to remove jurors suspected of bias. *See supra* text accompanying notes 152-57.

B. *The Thirteenth Amendment*

The Thirteenth Amendment[229] has yet to be formally recognized by a court as a source for a race-conscious jury selection procedure. Neither *McCollum*, nor any of the other state cases, considered it. Yet, in an exhaustive exploration of the Thirteenth Amendment's history, operation, and intent, Professor Colbert concludes that the Thirteenth Amendment forbids prosecutorial discrimination while it guarantees racially-motivated peremptory strikes to African Americans.[230] The Thirteenth Amendment's dictates, moreover, are perfectly asymmetrical: the amendment constrains only Whites,[231] and it empowers only Blacks.

Colbert characterized the all-White jury's historic role in denying justice to African Americans as a "lingering vestige of slavery."[232] During the century after the Civil Rights Act of 1866,[233] the all-White jury managed to acquit "virtually every white person charged with committing violence against African-Americans."[234] The all-White jury also institutionalized slavery's legacy of "summarily convicting black defendants on the accusation and testimony of whites."[235] In this way, verdicts rendered by all-White juries "reinforced the stigma of black inferiority by denying African-Americans legal protection" from racial attacks.[236]

Because peremptory challenges, within this paradigm, are identified as an "inseparable concomitant to slavery,"[237] prosecutors would be prohibited from using them against Blacks.[238] Likewise, White criminal defendants would be forbidden from using peremptory strikes when the victim is Black (as was the case in *McCollum*), since such usage conveys the message that Blacks are unprotected by the State's laws.[239]

The potency of the Thirteenth Amendment's legal dictates is that the amendment attacks those institutions historically designed to deny African

229. The text of the Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

230. *See* Colbert, *supra* note 197, at 119.

231. *Id.* Professor Colbert stated:

> [T]he Thirteenth Amendment would provide no support for a prosecutor seeking to prevent this defensive use of the peremptory challenge. Simply stated, no historical justification exists for the prosecution's intrusion on the black defendant's right to choose a jury he believes is impartial. The predominantly black jury was neither a badge or incident of slavery nor a symbol of whites' second class citizenship; the white crime victim would find it extremely difficult to discover historical evidence showing that predominantly nonwhite jurors have been unable to reach impartial verdicts.

Id.

232. *Id.* at 111.

233. 14 Stat. 27 (1866).

234. Colbert, *supra* note 197, at 116.

235. *Id.*

236. *Id.*

237. *Id.* at 117.

238. Because of the harm inflicted upon Black jurors, this applies even when Blacks are not parties to the action. Colbert, *supra* note 197, at 117. Colbert extends this principle to the civil context, in part because of the harm inflicted upon the jurors. Additionally, in civil cases involving racially-charged issues, the Thirteenth Amendment should prevent the peremptory from being used to deny "equal justice and legal protection" to African Americans. *Id.* at 115

239. *Id.* at 118.

Americans justice. Not only would all-White juries be found violative of the Thirteenth Amendment, but mostly-White juries, upon which the current system of criminal justice depends, would also violate the Thirteenth Amendment. Thus, I posit that the current court structure, as an artifact and implement of racial supremacy, runs afoul of the Thirteenth Amendment and should be replaced.[240] Professor Colbert's work confirms this premise, for he plainly demonstrates that predominantly White juries are not impartial.[241] In addition, the Thirteenth Amendment places restrictions upon the usage of peremptory challenges by Black criminal defendants because "the predominantly Black jury was neither a badge . . . of slavery nor a symbol of whites' second class citizenship."[242] This highly historicized reading of the Amendment justifies the unfettered use of peremptory challenges by African-American criminal defendants.[243]

Although Colbert focuses upon the peremptory challenge as an impermissible incident of slavery, the categorization of any mechanism that played an historic role in subordinating the interests of Black people would violate the Thirteenth Amendment. Thus, not only does the all-White jury violate the amendment, but the *primarily* White jury does as well. Indeed, any institution that perpetuates the incidents of slavery violates the Thirteenth Amendment.

Colbert's proposed solution, however, is less helpful than his analysis; in the end, he merely surmises that a jury panel which is at least twenty-five percent Black would largely eradicate the effects of racial bias. Although Colbert's hypothesized solution is largely speculative, he admits that his work does not dwell upon specific remedial mechanisms.[244] I offer one such specific mechanism: the displacement of the contemporary and problematic court structure with a separatist system of all-Black courts.

VI. Solutions Beyond the Beaten Path: A Separatist Approach

The Thirteenth Amendment not only permits race-conscious peremptory strikes but also provides the legal framework within which the racially biased jury and the racially biased court system may be abolished as a badge and incident of slavery. Conceptualizing the problem of racism in the administration of criminal justice as a Thirteenth Amendment problem,[245] I call for the establishment of an African-American court system.

240. The legal avenues for replacing the current court structure reside within the Thirteenth Amendment, Sections 1 and 2, as well as Section 5 of the Fourteenth Amendment.

241. Colbert, *supra* note 197, at 110-15, 124-25 (discussing empirical evidence and Professor Johnson's research).

242. *Id.* at 119.

243. The only scenario that Colbert does not address is one involving a Black defendant and a Black victim, where the defendant attempts to create an all-White jury. Under a Thirteenth Amendment analysis, the Black victim's rights would trump the Black defendant's rights because the all-White jury, as an incident to the service of slavery, is no less wicked when deployed by another Black person. *Id.* at 120-24.

244. *Id.* at 124.

245. Section 5 of the Fourteenth Amendment would also provide a valid legal conceptualization. Professor Kennedy reports that the end of slavery did not end the supremacist function served by the "entire apparatus of the criminal law." Kennedy, *supra* note 140, at 1411-12. Rather, the function has "persisted", essentially uninterrupted, into the present. Thus, criminal courtrooms constitute a substantial and enduring force in the efforts to subordinate Black people.

Perhaps nowhere in society has the integrationist goal[246] failed as miserably, and with such detrimental effects, as it has in the criminal courts. The extensive collection of data Professor Johnson examines, relating to the injection of racial bias in jury deliberations, reveals but a segment of the racial bias permeating the African-American experience with the criminal justice system. African Americans are subject to disproportionally more arrests,[247] "more prosecutions, heavier sentences, longer probations, and fewer paroles"[248] than are Whites. Black men, moreover, constitute almost half of all state prisoners in the Nation.[249]

A sizeable amount of this racially disproportionate impact stems from underlying social conditions,[250] but much of it stems from the racially biased administration of our criminal justice system. Systemic racial prejudice begins with a pattern of biased police behavior. Numerous studies indicate that police use race as an independent, or even determinative factor in their evaluation of whom to "follow, detain, search, or arrest."[251] The fruits of this behavior—the arrests—are then passed along for prosecutorial use.

Race informs—at the expense of Black criminal defendants—prosecutorial behavior as well.[252] Prosecutors pursue racial strategies both before and during[253] trials, strategies which may go either ignored or undetected by biased judges.[254] Jurors who are predisposed to accepting racially coded messages—either consciously[255] or unconsciously[256]—are then prepared to

246. Gary Peller defines integrationism as "the replacement of prejudice and discrimination with reason and neutrality." Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 760, 763-83 (explaining the individual components of the integrationist goal).

247. In 1984, while Blacks comprised 12% of the Nation's population, they constituted almost 46% of those persons arrested for violent crime. *Developments, supra* note 21, at 1495. Black citizens, moreover, are far more likely to be shot at and seriously injured by the police than are members of other racial groups. *Id.*

248. Bowen, *supra* note 20, at 300.

249. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 648 (1991) (reporting that Black males constituted 45.3% of the state prison population in 1986). *See also* Randolph N. Stone, *Crisis in the Criminal Justice System*, 8 HARV. BLACKLETTER J. 33, 35 (1991) (discussing numerous ways in which African Americans are victimized by the criminal justice system); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 503-07 (1992) (noting the manner in which racism and poverty determine the prison population and thereby undermine the moral legitimacy of the conviction process). Nearly 25% of Black men in their twenties are either in jail or prison, on probation, or on parole. *See* David Savage, *1 in 4 Young Blacks in Jail or in Court Control, Study Says*, LOS ANGELES TIMES, Feb. 27, 1990, at 1.

250. *See, e.g.*, DERRICK A. BELL, JR., FACES AT THE BOTTOM OF THE WELL 3-4 (1992) (reporting data of widespread racial disparity in the allocation of economic and social goods).

251. *Developments, supra* note 21, at 1496 (footnotes omitted).

252. *Id.* at 1525-29 (presenting statistical studies that reveal that prosecutors are "more likely to pursue full prosecution, file more severe charges, and seek more stringent penalties" in cases involving African Americans). *Id.* at 1520.

253. *See id.* at 1588-92 (discussing the means by which prosecutors inject issues of race at trial).

254. *See, e.g.*, Colbert *supra* note 197, at 122 ("If a judge is consciously or unconsciously racist, he or she will have even more difficulty identifying racial prejudice as a legally sufficient ground on which to disqualify a juror."). Justice Marshall identified the biases of judges as a problem: "Even if [judges] approach [the *Batson*] mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet." Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

255. Even in the extraordinary situation in which defense counsel becomes privy to evidence of deliberate juror bias, evidence of this bias may be inadmissible under Federal Rule of Evidence 606(b). *See Developments, supra* note 21, at 1597; Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987); Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court*

convict. Penalties, which may be highly correlated with racial factors, are subsequently imposed.[257]

Against this background—upon which the race-neutral dimension of America's system of criminal justice is difficult to detect—commentators have proposed numerous mechanisms of reform.[258] A review of the more provocative proposed mechanisms reveals that an independent African-American court structure forms the most promising solution. Indeed, Professor Bowen concluded that in order to establish genuine racial justice, the current "system must be abandoned and a new one constructed."[259] Establishing a system of African-American courts initiates the laborious process of reconstruction.

A. *Approaches to Reform*

Previous calls for reform push in the direction of an African-American court system. Professor Johnson, having demonstrated that racial bias does indeed distort guilt determinations, called for the mandatory inclusion of racially similar jurors.[260] Johnson believed that the inclusion of three racially similar jurors was "likely" to offset juror prejudices.[261] Professor Colbert, while not committing himself to any specific remedy, agreed that "at least twenty-five percent" of an African American's petit jury should consist of African Americans.[262] Colbert, moreover, emphasized that this percentage constituted the base minimum, and that counties with larger proportions of African Americans should guarantee juries with corresponding proportions of African Americans.[263]

A 1970 proposal for all-Black juries remains the boldest proposal in the literature, for all-Black juries eliminate the need for speculation as to the minimum proportion of African Americans required to insure fairness.[264] An early commentator insisted that racial fairness could not be insured by "a token number of blacks,"[265] although the commentator betrayed this vision by constructing a system of jury selection that would force some African-Ameri-

Under Rule 606(b), 57 NEB. L. REV. 920, 942 n.93 (1978) (suggesting that proof of racial prejudice may be inadmissible because it implicates the mental processes of jurors). *But see* United States v. Dean, 647 F.2d 779, 785 (8th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982); Smith v. Brewer, 444 F. Supp. 482, 485 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978) (if bias had affected result, court might have considered juror testimony competent).

256. *See* Johnson, *supra* note 175, at 1693 (noting that covert or "unconscious stereotyping does not diminish the harm [to a criminal defendant] wrought by racial bias").

257. *See, e.g.*, McClesky v. Kemp, 481 U.S. 279 (1987) (upholding Georgia's death penalty statute despite the pronounced correlation between the frequency of death verdicts and the race of the victim). *See also Developments*, *supra* note 21, at 1525-28 (presenting empirical evidence indicating the significant effect a defendant's race has upon the final disposition of his case); David Bruck, *Decisions of Death*, NEW REPUBLIC, Dec. 12, 1983, at 24 (asserting that all-White juries are incapable of valuing Black lives to the same extent they value White lives).

258. *See* Bowen, *supra* note 20, at 329 (reviewing various proposals).

259. *Id.* at 301. Despite the bold assertion, Bowen ultimately proposed only that the prosecutorial peremptory be eliminated. *Id.* at 329.

260. Johnson, *supra* note 175, at 1694, 1697.

261. *Id.* at 1699.

262. Colbert, *supra* note 197, at 124,

263. *Id.* at 124. *See also* LaRue, *supra* note 168, at 848-53 (sketching the history of mixed juries in Europe through nineteenth century America, as well as tentatively suggesting that mixed juries might provide protection against racial animus).

264. *The Case for Black Juries*, *supra* note 140.

265. *Id.* at 536.

can defendants to be tried by "all-white juries."[266] This problem was one of logistics: the jury districts were to be drawn in accord with residential patterns. Hence, the supposedly all-Black juries were in actuality only "substantially all-black."[267]

The African-American court system will avoid this problem simply by ignoring the constraint of racial residential patterns. Every African-American defendant will be guaranteed venue in such a court. This will be true even if cases have to be tried in communities that are not in close proximity to the community in which the crime has occurred.

All of the judges, in the trial and the appellate courts, will also be African Americans. They will be chosen by the African-American community. Because both Professors Johnson and Colbert recognize that a judge's conscious or unconscious prejudice may materially affect a case, it is surprising that neither one advocates a defendant's right to demand a trial before a Black judge in an all-Black court system.[268] Indeed, in countless situations, judicial discretion may determine the fate of a criminal defendant. Judges may prejudice defendants through their behavior (body language, tone of voice) as well as through their rulings (such as on challenges-for-cause, *Batson* motions, and 606(b) hearings).

Surprisingly, "[t]here is little systematic analysis of the racial sentiments of sitting jurists and the extent to which these sentiments affect their judicial

266. *Id.* at 549.

267. *Id.* at 548.

268. A right to an all-Black court system was suggested as a form of parody, by Justice Field, in 1880. Expressing his discontent with the holdings in Strauder v. West Virginia, 100 U.S. 303 (1880), and *Ex parte Virginia*, 100 U.S. 339 (1880) (upholding congressional authority to punish a state court judge who refused to select any African Americans for jury service), Justice Field proposed what he believed to be absurd: that African Americans be provided access to courts comprised exclusively of Black judges and jurors. Specifically, Justice Field wrote,

> If, when a colored person is accused of a criminal offence, the presence of persons of his race on the jury by which he is to be tried is essential to secure to him the equal protection of the laws, it would seem that the presence of such persons on the bench would be equally essential, if the court should consist of more than one judge, as in many cases it may; and if it should consist of a single judge, that such protection would be impossible. A similar objection might be raised to the composition of any appellate court to which the case, after verdict might be carried.
>
> The position that in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury, is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race. To this result the doctrine asserted by the District Court logically leads. The jury *de medietate linguae*, anciently allowed in England for the trial of an alien, was expressly authorized by statute, probably as much because of the difference of language and customs between him and Englishmen, and the greater probability of his defense being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language.

Ex parte Virginia, 100 U.S. 367, 368-69 (Field, J., dissenting), *analyzed in* LaRue, *supra* note 168, at 844-49. To Justice Field, the all-Black justice system was ludicrous, yet the all-White system was uncontroversial.

performance."[269] One commentator asserts that most "judges . . . do not know that they approach the question of law from a perspective that excludes black concerns."[270] This commentary is disturbing, especially since the "outcomes of cases may depend on who constitute the members of the community of interpretation and what their values are."[271]

Even more disturbing is the quasi-divine power state court judges exercise over criminal defendants. Nowhere is this power, as a verifiable legacy of slavery, more clear than in the state courts of Alabama. In Alabama, judges may sentence defendants to death despite a jury's determination that life without parole is the appropriate punishment.[272] The fact that only ten votes for death are required to implement the death penalty[273]—as opposed to the twelve required to determine guilt—renders "jury override" ever more lethal. Restraints upon a trial judge's override discretion, moreover, are virtually nonexistent, for Alabama has articulated no standard by which a trial judge must abide before overriding a sentence of life without parole.[274] The breadth of this discretion produces stark statistics: when the override device is used, it is more probable than not that it will be used against a Black defendant.[275] In addition, nearly half (49%) of those awaiting execution are African Americans.[276] Thus, Alabama's death penalty provisions appear peculiarly drawn to facilitate an enhanced execution rate of a disproportionate[277] number of African Americans.

Furthermore, the State of Alabama is currently fighting a suit in federal

269. Kennedy, *supra* note 140, at 1417 n.141.

270. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 41-42. Professor Culp's article focuses upon legal scholarship—an activity central to framing the discourse that molds the thinking of future judges—and deems it "one of the last vestiges of white supremacy in civilized intellectual circles." *Id.* at 41. If this view is correct, the problem of prejudice in the White judiciary appears unlikely to subside rapidly.

271. Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664 (1985). Professor Brest labels the view that judges' decisions depend on their psychological and sociological circumstances the "hermeneutic insight." *Id.* at 661. *See also id.* at 661-64 (discussing contemporary theories of interpretation). Another commentator posits, moreover, that Supreme Court decisionmaking emerges from the Justices' formative experiences and is shaped by each Justice's individual character. Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992).

272. *See* ALA. CODE § 13A-5-47(e) (1982) (jury's recommended sentence "is not binding upon the court"). In fact, 22-23% of the inmates on death row are there because a judge overturned a jury's decision to spare the defendant's life. Marcia Coyle, *Counsel's Guiding Hand is Often Handicapped by the System it Serves*, NAT'L L.J., June 11, 1990, at 35.

273. ALA. CODE § 13A-5-46(f) (1982). Ten votes are required for the jury to render an advisory verdict in favor of execution. The court, of course, is not bound by the recommendation.

274. *See* Murry v. State, 455 So. 2d 53, 65 (Ala. Crim. App. 1983) (characterizing Florida's standard as an "extra" and unnecessary protection), *rev'd on other grounds*, *Ex parte Murry*, 455 So. 2d 72 (Ala. 1984).

275. There have been 45 instances in which a judge imposed a death sentence over a jury recommendation of life without parole. This total includes people no longer under sentence of death as well as multiple death sentences imposed on the same defendant. In 25 cases, or 56% of the time, the defendant was Black. Tracking Project, Alabama Capital Representation Resource Center, Montgomery, Alabama [hereinafter Tracking Project] (figures are current as of January 20, 1993).

276. Sixty-three of 129 people on death row are Black. The total includes six defendants previously sentenced to death and now awaiting retrial or resentencing. Tracking Project (numbers current as of Jan. 20, 1993).

277. African Americans constitute 25% of Alabama's population. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 24 (1992).

court, brought under Section 2 of the Voting Rights Act,[278] that challenges the method by which the state's judiciary is elected.[279] Alabama's judiciary is the last area of that state's government that remains unaltered by the Voting Rights Act. While African Americans have made strides in electing their preferred candidates in other branches of government, they have not done so in the judiciary. This reality imposes unilateral risks on Black criminal defendants, for a judge who has spent his life in a separate, supremacist culture is unlikely to fully understand the habits of speech, dress, and body-language exhibited by certain defendants. If such a misunderstanding results in an unusually heavy sentence, the defendant is doomed: no criminal defendant in American history has ever had his punishment reversed on the ground of racial discrimination in sentencing.[280]

The race-conscious politics surrounding the appointment of federal judges demonstrate that racial dynamics also imbue the federal courts. After Reconstruction, Alabama did not have an African-American federal judge until 1980.[281] Without question, the appointments of Judge Clemon and Judge Thompson to the bench were widely viewed as a means to insure fairness in court proceedings.[282] Such beliefs reveal an understanding that conceptions of justice and fairness "depend on *who* is doing the interpreting or [judging]."[283] Randall Kennedy, agreeing with this sentiment and attempting to explain the Supreme Court's "detestable"[284] decision in *McClesky v. Kemp*,[285] flatly stated, "[G]iven the pervasiveness and power of racial [biases], it stands to reason that Justices no less than other citizens are influenced by [those biases]."[286] Viewed from this perspective, one may conclude that the racial identity of judges is relevant at every level of the judicial system,[287] that racial

278. 42 U.S.C. § 1973 (1982). Section 2 grants all citizens the right, regardless of race, "to participate in the political process to elect representatives of their choice." *Id.*

279. SCLC v. Evans, 785 F. Supp. 1469 (M.D. Ala. 1992), *appeal docketed*, No. 92-6257 (11th Cir. March 27, 1992).

280. Kennedy, *supra* note 140, at 1402.

281. In 1980, Judge U.W. Clemon was appointed to the Northern District of Alabama and Judge Myron Thompson was appointed to the Middle District of Alabama. *See Alabama Senator Drops Backing of Critical Judgeship Nominee*, N.Y. TIMES, Aug. 13, 1980, at A18. Clemon and Thompson remain the only two African-American district court judges in Alabama.

282. *See, e.g.*, Charles R. Babcock, *Carter Names Record Number of Minorities to Federal Bench*, WASH. POST, May 25, 1980, at A12 (characterizing the appointment of African-American judges as "a way to count increasing equality in justice").

283. Brest, *supra* note 271, at 663.

284. Kennedy, *supra* note 140, at 1389.

285. 481 U.S. 279 (1987) (refusing to interfere with Georgia's system of capital punishment despite statistical evidence showing it to be inundated with White racial bias).

286. Kennedy, *supra* note 140, at 1417.

287. Indeed, Professor Kennedy suggests that it was no accident that the only African-American judges to review *McClesky* decided in the Black defendant's favor. *Id.* at 1417 n.142. The relevance of race to judicial identity became conspicuously evident through the political maneuvering and symbolism surrounding the Supreme Court appointment of Clarence Thomas—the Nation's second African-American Justice. *See, e.g.*, Charles R. Lawrence, III, *Cringing at Myths of Black Sexuality*, 65 S. CAL. L. REV. 1357, 1357 (1992) (quoting Thomas's reference to the confirmation hearings as "a high-tech lynching of an uppity black man"); Estelle B. Freedman, *The Manipulation of History at the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1361 (1992) (also discussing the lynching metaphor).

The press, moreover, is undeniably interested in the judiciary's racial composition. *See, e.g.*, Stuart Taylor, Jr., *Carter Judge Selections Praised, But Critics Discern Partisanship*, N.Y. TIMES, Oct. 3, 1988, at A1 (reporting that more Blacks were appointed by President Carter than by all the previous presidents combined); Babcock, *supra* note 282, at A12 (same).

bias infiltrates the White judiciary's finest minds, and that the inclusion of *some* African Americans on the judiciary is perceived to be a mechanism for restraining supremacist bias.[288]

If the presence of only a few Black judges injects an added dimension of fairness into the trials of Black defendants, one may ask, would it not be appropriate to guarantee that *all* Black defendants enjoy this protection? The proposed African-American court system assumes that it would, and thus, replaces the current system's offer of a random chance[289] to be tried before a Black judge with a guarantee that African Americans may demand such trials. The appellate courts that would accompany the trial courts, moreover, would be established in the same spirit that other specialty courts—such as the United States Court of Appeals for the Federal Circuit—have been established.

The existence of African-American judges and juries, however, "cannot check prosecutorial powers not dependent on trial."[290] Therefore, African-American courts will further guarantee that they will hear cases prosecuted exclusively by African Americans. At present, prosecutors enjoy nearly limitless discretion in their decisions regarding whom to prosecute, the amount of investigatory resources to invest, and the harshness of the penalty sought. This broad discretion, coupled with the political nature of the office, creates the likelihood that criminal penalties "will be imposed arbitrarily . . . [against] racial and ethnic minorities."[291] The extent to which law enforcement work is significantly driven by racial presumptions[292] provides more reason to insist on a minimally biased prosecutorial force. After all, the "fate of most of those accused of crime is determined by prosecutors."[293] African-American prosecutors, chosen by the African-American community, will be uniquely attuned to the needs and ambitions of that community and more capable of minimizing the degree to which a defendant's fate is determined by racial bias.

B. *Legal Principles*

The Thirteenth Amendment, particularly through Section 2, should viti-

288. This contention is analogous to the contention that African-American communities should be policed by African Americans. Proponents of this view gain support from statistics that show, in some cities, that African Americans are 10 times more likely to be shot at unsuccessfully, 18 times more likely to be wounded, and 5 times more likely to be killed by police than are Whites. *See Developments, supra* note 21, at 1495 n.7 (citing James J. Fyfe, *Blind Justice and Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 718-20 (1982)). State officials identified with the African-American community provide a unique dimension of fairness, whether they be police officers, judges, or prosecutors.

289. And a small chance it is. *See* Brest, *supra* note 271, at 664 (1985) (describing the federal judiciary as "overwhelmingly Anglo [and] male"). In 1977, when President Carter took office, there were a total of 19 Blacks on the federal judiciary. *Senate Unit Approves Black for U.S. Bench, Rebuffing Bar Group*, N.Y. TIMES, June 25, 1980, at A17.

290. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981). *See also* Kennedy, *supra* note 140, at 1420 (positing that the inability of White "prosecutors, jurors, and judges" to sympathize with African Americans contributes to racial subordination in the administration of criminal justice).

291. *Id.* at 1555.

292. *See Developments, supra* note 21, at 1495-96; *supra* notes 247-52 and accompanying text.

293. Vorenberg, *supra* note 290, at 1522. *See also* Tracey L. McCain, Note, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601 (1992) (calling for reexamination of the impact unchecked prosecutorial discretion may have on the racial dynamics of a criminal trial).

ate any competing Fourteenth Amendment interests implicated by the separate system. Even if the Court did apply an equal protection analysis, the separate system should be upheld for the same reasons that affirmative jury selection (in a racially mixed environment) would be upheld.[294] Indeed, the separate court system may stand a greater chance of survival than the affirmative peremptory strike.

After all, the separate court system does no more than grant to Black criminal defendants a right White defendants routinely enjoy: the right to be tried, prosecuted, and sentenced by a racially homogenous institution. Furthermore, "innocent" Whites would not be harmed because they would not have to be dismissed from jury service—they would simply never be called. Thus, the existence of any stigma—if any does indeed exist—would be dispersed rather than personalized.[295] These factors, taken as a whole, should buttress the claim that the presence of rampant prejudice requires the implementation of an extraordinary remedy, such as the establishment of separate court structures.

C. *Separatist Implications*

The separatist court structure philosophically discards the integrationist vision of criminal justice. It insists that the problems endemic to White institutions are the problems of American power relations and that these problems are remedied only by structural, race-conscious mechanisms. Contrasting this vision with the color-blind language of *McCollum* reveals the core crime of that opinion: the Justices turned a blind eye to the continuing status of racism in American power relations.[296]

For those who despair the abandonment of the integrationist vision—even in the criminal justice context—the separatist view insists that nationalism[297] offers "a source of community, culture, and solidarity"[298] for African Americans. At bottom, nationalism asserts that race is properly viewed as the "organizing basis for group consciousness" inasmuch as African Americans possess "different families, neighborhoods, churches, and histories."[299] Adherents to this nationalist principle have called for the establishment of African-American colleges, African-American immersion schools, and even African-American cities.[300] I call for the establishment of African-American

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294. *See supra* Part V.

295. The *Powers* Court had been concerned with the stigma that jurors encountered when racial animus was the source of their dismissal. Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991); *see supra* note 56. In addition, the existence of separate judicial structures finds precedent in the tribal courts of Native Americans. *See infra* notes 302-06 and accompanying text. Yet another factor supporting the separate courts is that no immediately apparent reason exists to deny access to *defendants* who are members of other racial and ethnic groups.

296. Indeed, Derrick Bell describes the contemporary status of racism this way: "[R]acism lies at the center, not the periphery; in the permanent, not in the fleeting; in the real lives of black and white people, not in the sentimental caverns of the mind." BELL, *supra* note 250, at 198.

297. Nationalism, as used here, is synonymous with "separatism" and refers not to a geographical location but to an ideological commitment to autonomy and independence.

298. Peller, *supra* note 246, at 761.

299. *Id.* at 792.

300. *See* Ankur J. Goel et al., Note, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker Than* Brown, 23 HARV. C.R.-C.L. L. REV. 415 (1988) (analyzing the quest for political control of community life through the process of incorporation).

courts.[301]

African-American courts, moreover, find a parallel system of courts governing Native Americans. Tribal courts, though they are far from ideal sources of sovereignty, have empowered Native Americans to "govern themselves according to cultural standards which are not those of the general society."[302] The courts establish a zone of Indian autonomy, which derives from the constitutional recognition of the Indian Tribes as separate sovereigns.[303]

Although there is presently no analogous recognition of African-American sovereignty, strong similarities exist between the experiences of Native Americans and the experiences of African Americans.[304] Neither group entered the United States voluntarily: African Americans were captured and enslaved, the Indian Nations were conquered and displaced. Thus, both cultures originally encountered European culture as an exploitative one, and subsequently both cultures have been the objects of immense subjugation and abuse. Native Americans, like African Americans, were initially evaluated as potential slave labor. Additionally, both cultures continue to suffer disproportionate economic, social, and political burdens.[305] Most significantly, neither African Americans nor the Indian Nations consented to the compact known as the United States Constitution.[306] Rather, the jurisdictional provisions of the document have been thrust upon them. The establishment of African-American courts, through either Section 1 or 2 of the Thirteenth Amendment, acts to remove this shackle of conquest from the administration of criminal justice.

CONCLUSION

Thus, I posit that American courts should play no part and enjoy no role in punishing African-American criminal defendants. This separatist conten-

301. Much like the incorporated communities, African-American courts "can promote local control and responsiveness to the needs of the black community." *Id.* at 417. The court system should also function to enhance "cultural identity and group pride." *Id.*

302. Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 269 (1989).

303. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 679 (noting that "Indian tribes are arguably truly distinct sovereigns"); Rachel San Kronowitz et al., Note, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 509, 511-22 (1987) (discussing the Founders' vision of Indian Nations and the historical underpinnings for Indian sovereignty).

304. The recognition of the similarity between the experience of African Americans and Native Americans could engender a monumental restructuring in the current application of equal protection analysis to cases involving African Americans. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court employed a rational basis test to evaluate classifications that benefitted Native Americans and upheld the BIA's hiring preference program. In *Bakke*, however, the Supreme Court refused to convey the same "*sui generis*" status upon African Americans. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 304 n.41 (1978). The presence of tangible institutions, such as African-American courts, would allow the Court to reconceptualize the validity of affirmative action programs when they are designed to further the principles of political autonomy and self-determination. These principles formed, in large measure, the central determinants in *Mancari*. *Mancari*, 417 U.S. at 542.

305. Rennard Strickland, *"You Can't Rollerskate in a Buffalo Herd if You Have All the Medicine": Some Thoughts on Indian Law and Lawyering*, *in* AMERICAN INDIAN LAW STUDENTS ASSOCIATION, 1989 HARVARD INDIAN LAW SYMPOSIUM 3, 7-8 (1990) (outlining the widespread impoverishment among Native Americans). *See* BELL, *supra* note 250, at 304 (describing analogous conditions in the African-American community).

306. *See* Resnik, *supra* note 303, at 680.

tion flows from the ideology most forcefully announced by Malcolm X.[307] Although it is true that legalistic separatism can achieve little without economic empowerment, courts organized and controlled by African Americans can bestow concrete benefits upon African-American defendants. American courts that presently exist should be divested of their jurisdiction over African Americans accused of crimes, such that the new system observes jurisdictional boundaries as if those boundaries were geographical.

The debate *McCollum* engenders, then, is about more than defining the boundaries of state action or the contours of jury selection. It is about a larger jurisprudential debate that pits an historicized, realistic view of race relations against an acontextual, utopian view of those relations. The historicized view recognizes that African-American criminal defendants have repeatedly been forced to submit to a criminal justice system that is infested with racial bias; it then proposes that race-conscious courts represent the most immediate and realistic antidote to this bias.

There are, of course, problems with this proposal,[308] but this Note is meant to be suggestive and provocative, not conclusive or definitive. Ultimately, the proposal may require restructuring American political, economic, and social relations. What lies at the end of the separatist path is not clear, but at least it rejects the convenient, facile course chartered by *McCollum*. And, like any path into unchartered territory, the initial steps could prove to be the most transformational.

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307. *See* Peller, *supra* note 246, at 783-811 (exploring the logic and coherence of separatist philosophy as announced by Malcolm X and other Black Nationalists).

308. For one, this proposal has not addressed the large question of whether civil cases will also be heard by African-American courts. Indeed, the nature of the interplay between the African-American courts and the present court structure has not been fleshed out, nor has it been determined that there should be any interplay at all. Although there is no good reason to deny members of other racial groups the opportunity to be tried in African-American courts, the question remains as to whether other historically subjugated groups should also be granted group-specific court systems. A strong case can be made, for example, particularly in such areas as sexual harassment, that women should be granted hearings before all-female tribunals. Numerous commentators, in fact, have decried the impropriety of holding the Anita Hill/Clarence Thomas hearings before a tribunal of 14 men. *See, e.g.*, Judith Resnik, *Hearing Women*, 65 S. CAL. L. REV. 1333, 1341 (1992). Indeed, depending on the extent to which "gender affects decisionmaking," the need for exclusively female courts may extend to an "array of substantive areas." *Id.*

One final issue deserves attention. In Castenada v. Partida, 430 U.S. 482 (1976), Justice Marshall warned against assuming that "*all* members of *all* minority groups have an 'inclination to assure fairness' to other members of their group." *Id.* at 503 (Marshall, J., concurring) (quoting *Castenada*, 430 U.S. at 516 (Powell, J., dissenting)). I do not rely upon that assumption. Rather, I rely upon the data presented by Professors Johnson and Colbert to conclude that increasing the number of minority group members on a decisionmaking body tends to diminish the decisionmakers' biases. More importantly, the creation of an African-American court system provides an environment wholly unlike the one present in *Castenada*. In *Castenada*, Mexican Americans did not run Mexican-American institutions; instead, they merely occupied positions of authority in White institutions with a distinctly supremacist tradition. African-American courts, by contrast, sever ties to White supremacy by providing a system of justice controlled by and responsive to the African-American community.

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