

Michigan Law Review

Volume 118 | Issue 5

2020

For Cause: Rethinking Racial Exclusion and the American Jury

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Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020).

Available at: <https://repository.law.umich.edu/mlr/vol118/iss5/3>

<https://doi.org/10.36644/mlr.118.5.cause>

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FOR CAUSE: RETHINKING RACIAL EXCLUSION AND THE AMERICAN JURY

Thomas Ward Frampton*

Peremptory strikes, and criticism of the permissive constitutional framework regulating them, have dominated the scholarship on race and the jury for the past several decades. But we have overlooked another important way in which the American jury reflects and reproduces racial hierarchies: massive racial disparities also pervade the use of challenges for cause. This Article examines challenges for cause and race in nearly 400 trials and, based on original archival research, presents a revisionist account of the Supreme Court's three most recent Batson cases. It establishes that challenges for cause, no less than peremptory strikes, are an important—and unrecognized—vehicle of racial exclusion in criminal adjudication.

Challenges for cause are racially skewed, in part, because the Supreme Court has insulated the challenge-for-cause process from meaningful review. Scholars frequently write that jury selection was “constitutionalized” in the 1970s and 1980s, but this doctrinal account is incomplete. In the interstices of the Court's fair-cross-section, equal protection, and due process jurisprudence, there is a “missing” law of challenges for cause. By overlooking challenges for cause, scholars have failed to notice the important ways in which jury selection remains free from constitutional regulation.

Challenges for cause as they exist today—effectively standardless, insulated from meaningful review, and racially skewed—do more harm than good. They hinder, more than help, the jury in its central roles: (1) protecting the individual against governmental overreach; (2) allowing the community a democratic voice in articulating public values; (3) finding facts; (4) bolstering the perceived legitimacy and fairness of criminal verdicts; and (5) educating jurors as citizens. We need to rethink who is qualified to serve as a juror and how we select them.

* Climenko Fellow and Lecturer on Law, Harvard Law School. This project benefited tremendously from feedback received during the Climenko “Half-Baked” Workshop, the Colorado Junior Criminal Law Workshop, CrimFest 2019, and several additional talks; many thanks to the participants and organizers. I'm indebted in particular to Valena Beety, Jon Booth, Ryan Copus, Jack Chin, Erin Collins, George Frampton, Aya Gruber, Eve Hanan, Sheri Lynn Johnson, Emma Kaufman, Michael Klarman, Benjamin Levin, Nancy Marder, Justin Murray, Patrick Mulvaney, William Ortman, Shaun Ossei Owusu, Anna Roberts, Mary Rose, Carol Steiker, William Thomas, Susannah Barton Tobin, and Ronald Wright. Part I of this Article builds on the extraordinary work of journalists at *The New Orleans Advocate* (particularly Jeff Adelson, Gordon Russell, and John Simerman) and American Public Media (particularly Will Craft). Many thanks to my research assistants—Zachary Buchanan, Madeleine O'Neill, and Gege Wang—and the team of editors with the *Michigan Law Review*.

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INTRODUCTION

Peremptory strikes, and criticism of the permissive constitutional framework regulating them, have dominated the scholarship on race and the jury for the past several decades.¹ The standard critique is well known: *Bat-*

1. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467 (2012); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501; Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279 (2007); Vida B. Johnson, *Arresting*

son v. Kentucky² notwithstanding, prosecutors in jurisdictions across the United States continue to wield peremptory strikes to exclude black prospective jurors at a rate far exceeding their elimination of other groups.³ Causal explanations for these disparities vary—they may stem from overt racial discrimination,⁴ or attorneys' implicit biases,⁵ or the disparate effect of “race-neutral” criteria that correlate with race⁶—but the figures are troubling re-

Batson: *How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 414 (2016); Sheri Lynn Johnson, *Batson from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71 (2014); Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585 (2012); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683 (2006) [hereinafter Marder, *Justice Stevens*]; Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361 (1990); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Camille A. Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687 (2008); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994); William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97; Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503 (2015) [hereinafter Roberts, *Asymmetry as Fairness*]; Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359 (2012) [hereinafter Roberts, *Disparately Seeking Jurors*]; Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1431; Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535 (2016); Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121 (2006).

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

3. For empirical studies documenting this phenomenon, see David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001); Ann M. Eisenberg et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373 (2017); Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. U. L.J. 299 (2017); Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1627 (2018); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 697 (1999); Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61 (1986); and Wright et al., *supra* note 1.

4. See, e.g., Frampton, *supra* note 3, at 1627 (highlighting “reasons to suspect that the more overt variety of racially motivated exclusions—the narrow type of racially discriminatory action *Batson* aimed to ferret out—also remain common”).

5. See, e.g., Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

6. E.g., Roberts, *Disparately Seeking Jurors*, *supra* note 1; Wright et al., *supra* note 1, at 1431 (“It is also possible that prosecutors removed jurors based on a factor correlated with race Prosecutors might have been fully aware of the disparate racial impact of these choices and regretted that unintentional side effect of their removal strategy.”). For a notable recent attempt to prohibit the use of justifications for peremptory strikes that highly correlate with

ardless.⁷ There is now a broad scholarly consensus that *Batson* has failed to meaningfully limit systemic racial exclusion in jury selection.⁸ And, to *Batson*'s most strident critics, studies documenting wide racial disparities in the use of peremptory strikes have validated the argument (urged by Justice Thurgood Marshall and others) that only by abolishing peremptory strikes can we purge the taint of racial bias from jury selection.⁹

Our myopic focus on peremptory strikes, however, has led to the neglect of an adjacent problem: equivalent racial disparities pervade the exercise of challenges for cause. Challenges for cause and peremptory strikes differ in important respects, of course. First, challenges for cause ostensibly “permit rejection of jurors on a narrowly specified . . . and legally cognizable basis of partiality”;¹⁰ peremptory strikes generally require no justification (unless they are contested, at which time the proponent’s “implausible[,] fantastic[,] silly or superstitious” rationale may suffice).¹¹ Second, challenges for cause must always be approved by a judge; unless subject to a *Batson* challenge, peremptory strikes receive no such scrutiny. And third, peremptory strikes are limited in number by statute; a party may raise challenges for cause against every single potential juror, should they wish. But despite these differences, challenges for cause resemble peremptory strikes in one important respect: they both disproportionately reduce black jurors’ participation on criminal juries. If the well-documented disparities in how legal actors exercise peremptory strikes are cause for concern (and they are), the existence of similar disparities in the use of challenges for cause should also set off alarm bells.

Yet too often, challenges for cause are treated as an afterthought. Like peremptory strikes, challenges for cause have a venerable common law pedigree,¹² and the Supreme Court often mentions them in passing.¹³ But the

prospective jurors’ race, see WASH. GEN. R. 37(h) (declaring “presumptively invalid” rationales like “expressing a distrust of law enforcement” for exercising a peremptory strike).

7. Ronald Wright, Opinion, *Yes, Jury Selection Is as Racist as You Think. Now We Have Proof*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html> [<https://perma.cc/39XZ-G8N7>] (discussing “especially pernicious effects” of racial disparities “even [if it remains impossible] to say exactly why a prosecutor, defense attorney or judge decides to remove any particular juror in a single case”).

8. See *supra* notes 1, 3. *But cf.* Jonathan Abel, *Batson’s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713 (2018) (acknowledging “*Batson*’s failings as a trial doctrine—its inability to prevent and remedy strikes in real time—but . . . focus[ing] [on] *Batson*’s virtues in appellate and postconviction proceedings”).

9. See *Miller-El v. Dretke*, 545 U.S. 231, 266–67 (2005) (Breyer, J., concurring) (discussing empirical studies as bolstering Justice Marshall’s argument for the abolition of peremptory strikes); see also Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 809–10 (1997) (discussing the problems with peremptory challenges from the perspective of a trial judge).

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

11. *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

12. See 3 EDWARD COKE, *FIRST INSTITUTE OF THE LAWS OF ENGLAND* *447–504 (J.H. Thomas ed., Philadelphia, Robert H. Small 1826) (1644); 4 WILLIAM BLACKSTONE,

Court has established few rules governing when jurors may or must be excused “for cause”: “Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”¹⁴ Scholars, too, have shied away from the topic¹⁵: the leading treatise on the “law of juries” devotes seven pages to challenges for cause and seven times that to peremptory strikes.¹⁶ The profound ways in which race shapes the process of “qualifying” the American jury has been overlooked and undertheorized.

This Article’s central claim—that black jurors’ “qualifications” for jury service, or lack thereof, operate as an important instrument of racial exclusion today—situates the present moment within a broader historical narrative. For over a century, both state and federal actors justified the exclusion of black jurors from criminal trials, in whole or in part, on the grounds that few possess the requisite objectivity (e.g., “sound judgment and fair character”¹⁷) to serve. Traditionally, this exclusion occurred when officials developed lists of prospective jurors from which individual trial venires were randomly drawn.¹⁸ The ostensible lack of “qualified” black jurors has been invoked since black jury service began in the middle of the nineteenth century;¹⁹ it remained a common refrain until the 1970s, when Congress²⁰ and the

COMMENTARIES *342–44 (endorsing Coke’s categories). Importantly, however, at common law the grounds for excluding prospective jurors “for cause” were far narrower than they are today. See G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87 (2008) (detailing development of death qualification of American juries); *infra* Section III.C.

13. See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (“The attorneys may challenge prospective jurors for cause, which usually stems from a potential juror’s conflicts of interest or inability to be impartial.”).

14. *Skilling v. United States*, 561 U.S. 358, 386 (2010) (quoting *United States v. Wood*, 299 U.S. 123, 145–46 (1936)).

15. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 94 (2007) (“How often people are removed for cause has not been extensively studied.”); Mary R. Rose & Shari Seidman Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC’Y REV. 513, 513–14 (2008) (“The judge’s behavior in making these decisions [on challenges for cause] has been almost entirely ignored by researchers, while other forms of judicial behavior have attracted substantial recent attention from scholars.”).

16. Compare NANCY GERTNER ET AL., *THE LAW OF JURIES* §§ 3:4–:7 (10th ed. 2018), with *id.* §§ 4:1–:32.

17. See, e.g., *Gibson v. Mississippi*, 162 U.S. 565, 588 (1896).

18. See *infra* Section II.A.

19. Histories of the American jury uniformly report that “the first African-Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860.” Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884 (1994); see also JEFFREY ABRAMSON, *WE, THE JURY* 2 (1994) (“No African-American served on any trial jury in the United States, North or South, until 1860 during a criminal trial in Worcester, Massachusetts.”); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 31 (1990) (“Moreover, despite the *de jure* eligibility of many

Supreme Court²¹ began insisting that jury pools comprise a “fair cross section” of the community.²² But, through challenges for cause, the practice subtly continues: in courtrooms across America today, prosecutors allege (and judges confirm) that black jurors remain less “qualified” than white jurors to participate in an institution frequently touted as central to American democracy.

Part I reveals the stark racial disparities in how challenges for cause are wielded. Sections I.A and I.B provide an empirical examination of how prosecutors and defense attorneys exercise challenges for cause by analyzing 317 criminal jury trials in Louisiana and 74 criminal jury trials in Mississippi. Prosecutors overwhelmingly use such challenges to exclude black jurors. The racial disparities documented in the prosecutors’ exercise of challenges for cause actually exceed the sizeable disparities in their use of peremptory strikes in both datasets. Then, to demonstrate how these general trends play out in individual cases (and to highlight our relative blindness to the phenomenon), Section I.C offers a revisionist account of the Supreme Court’s three most recent cases involving racial discrimination in jury selection: *Flowers v. Mississippi* (2019),²³ *Foster v. Chatman* (2016),²⁴ and *Snyder v. Louisiana* (2008).²⁵ In each case, the Court took pains to parse prosecutors’ justifications for using peremptory strikes against individual jurors, seeking to ascertain whether racial bias infected those decisions. But a return to the original trial records—including full voir dire transcripts and handwritten

qualified black people, northern juries remained all-white prior to 1860.”); James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910 (2004) (“It is believed that 1860 was the first year in which African Americans served on juries, in either the North or the South.”). Research for this Article has revealed at least one prior instance: a prominent Buffalo, New York abolitionist named Abner H. Francis served as a petit juror for a term in 1843. The unusual occurrence was noted in newspapers around the country. See, e.g., *A Colored Jurymen*, MILWAUKIE SENTINEL, Oct. 7, 1843, at 1 (“This is the first instance of the kind, we believe which has ever occurred in this country.”); *A Negro Jurymen*, BATON ROUGE GAZETTE, Sept. 30, 1843, at 2. The existence of (limited) black suffrage before the Civil War, see CHRISTOPHER MALONE, BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM NORTH (2008), and laws enacted to prohibit black citizens from serving as jurors, see FRANK U. QUILLIN, THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE 23 (1913) (discussing 1831 Ohio law barring black jurors), suggest there may have been earlier examples.

20. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (current version at 28 U.S.C. §§ 1861–1869 (2018)).

21. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

22. See, e.g., *Turner v. Fouche*, 396 U.S. 346, 357 (1970) (noting that 171 of the 178 potential grand jurors struck from master list “either because of their being unintelligent or because of their not being upright citizens” were black); cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 312–13 (1966) (“The good-morals requirement [for voter registration] is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.”).

23. 139 S. Ct. 2228 (2019).

24. 136 S. Ct. 1737 (2016).

25. 552 U.S. 472 (2008).

attorney notes that were not before the Supreme Court—offers a much richer story. In each trial, challenges for cause, not peremptory strikes, eliminated most of the black prospective jurors and enabled the empaneling of an all-white (or nearly all-white) jury.

Part II weighs various explanations for these disparities and explains why they have remained hidden: existing constitutional doctrine offers little opportunity to contest what occurs at the challenge-for-cause stage of jury selection. During the 1970s and 1980s, the Court assertively “constitutionalized” important parts of the jury selection process: the drawing of jury venires and the exercise of peremptory strikes became subject to Sixth and Fourteenth Amendment regulation, respectively.²⁶ But the Court’s simultaneous retreat from the regulation of challenges for cause—beginning just a week after the Court’s landmark 1986 ruling in *Batson v. Kentucky*—has escaped notice. In cases involving the scope of the Sixth Amendment’s fair-cross-section requirement,²⁷ the Fourteenth Amendment’s Equal Protection Clause,²⁸ and the relationship between peremptory strikes and challenges for cause,²⁹ the Court quietly foreclosed criminal defendants’ ability to meaningfully contest the challenge-for-cause process (and, in particular, the disproportionate removal of black jurors through such challenges). Jury selection might look very different—and the massive disparities identified in Part I might not exist—had the Court not ruled as it did.

Part III appraises challenges for cause as they exist today—and, relatedly, the contemporary vision of the “qualified” juror—in light of the traditional roles of the jury, the data presented in Part I, and the legal landscape outlined in Part II. The Framers, the Supreme Court, and legal scholars have defended and celebrated the jury as an institution that (1) protects the individual against governmental overreach;³⁰ (2) allows the community a democratic voice in articulating public values;³¹ (3) finds facts;³² (4) bolsters the perceived legitimacy and fairness of criminal verdicts;³³ and (5) educates jurors as citizens.³⁴ On each of these fronts, today’s challenges for cause—effectively standardless, insulated from meaningful review, and racially skewed—do more harm than good. We should rethink who is qualified to serve as a juror and how we select them.

26. See Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 946–47 (1998) (“The Supreme Court has had more to say about who sits on criminal juries in the last twenty years than it did in the previous 180.”).

27. *Infra* Section II.A.

28. *Infra* Section II.B.

29. See *infra* Section II.C.

30. See *infra* Section III.A.

31. See *infra* Section III.B.

32. See *infra* Section III.C.

33. See *infra* Section III.D.

34. See *infra* Section III.E.

I. RACIAL EXCLUSION AND CHALLENGES FOR CAUSE

In study after study, scholars have shown that there are stark racial differences in whom prosecutors and defendants exclude through peremptory strikes.³⁵ But, unnoticed,³⁶ the same racial discrepancies that have been documented in the use of peremptory strikes exist in the use of challenges for cause, as well.

In this Part, I analyze data on race and the jury from Louisiana and Mississippi, and I reconstruct the trial record in the three most recent Supreme Court cases involving claimed *Batson* violations. In both Louisiana and Mississippi, teams of investigative journalists working on independent award-winning projects recently compiled a wealth of information on state-court criminal jury trials.³⁷ Much of these journalists' source material, including digital scans of court records and trial transcripts, is now available to the public and to researchers; it provides the basis for the analysis in Sections I.A

35. See *supra* note 3.

36. There has been little empirical work done on challenges for cause, but a few exceptions warrant mention. Two studies of peremptory strikes have shown that challenges for cause—taken as a whole—can distort the racial composition of the venire. The earliest examined thirteen felony trials involving 348 prospective jurors within a single North Carolina county. See Rose, *supra* note 3. The author found that black jurors were moderately overrepresented among those prospective jurors eliminated for cause: they made up 32% of prospective jurors and 38% of those excused for cause. *Id.* at 698. In a far more ambitious study involving more than 1,300 felony trials and almost 30,000 prospective jurors, a group of scholars recently collected trial data for an entire year's worth of trials throughout North Carolina. Wright et al., *supra* note 1. They found that judges removed black prospective jurors "for cause" 30% more frequently than white jurors (and judges removed "other" nonwhite jurors 110% more frequently than white jurors). *Id.* at 1426.

Relatedly, there have been several studies examining how the process of "death qualification" skews the racial composition of jury pools in capital cases. Professor Aliza Cover, for example, recently examined transcripts from eleven trials in Louisiana that resulted in a death verdict between 2009 and 2013. See Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L. REV. 113 (2016). In the seven trials for which the race of the prospective jurors was available, 35.2% of black prospective jurors were excluded on the basis of their opposition to the death penalty. A much smaller percentage (17%) of white jurors were removed on this basis, making the pool of eligible jurors significantly whiter than it would have otherwise been. *Id.* at 137. See also Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513 (2014).

37. Both efforts received the George F. Polk Award in Journalism in 2019; the Louisiana project also won a Pulitzer Prize for Local Reporting. See Eileen Sullivan, *New York Times Wins Two George Polk Awards*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/us/politics/george-polk-awards.html> [<https://perma.cc/KW9V-MH24>] (discussing Polk Award for American Public Media's investigation in Mississippi); Staff Report, *The Advocate Honored with George Polk Award for 'Tilting the Scales' Series on Split Jury Verdicts*, ADVOCATE (Feb. 19, 2019, 12:14 PM), https://www.theadvocate.com/baton_rouge/news/business/article_23f6b76a-3472-11e9-928d-2f446b73d815.html [<https://perma.cc/5AKG-Q7VL>]; Staff Report, *The Advocate Wins First Pulitzer Prize for Series that Helped Change Louisiana's Split-Jury Law*, ADVOCATE (Apr. 15, 2019, 2:15 PM), https://www.theadvocate.com/baton_rouge/news/article_dba87282-5f28-11e9-92b3-bfba0cf08ab2.html [<https://perma.cc/BL8R-E4D6>].

and I.B. In Section I.C, public records requests, visits to courthouse storage rooms, and the assistance of local trial attorneys supplied what was missing from the Supreme Court record: full voir dire transcripts and information sufficient to identify the race of (the vast majority of) prospective jurors.³⁸

A. Louisiana

Over several years, investigative journalists in Louisiana examining the effect of nonunanimous verdicts³⁹ compiled a dataset (“the *Russell-Simerman* dataset”) containing information from over 3,000 criminal jury trials conducted across Louisiana from 2009 to 2017.⁴⁰ For 316 jury trials, the dataset includes the race of (nearly) all jurors in the initial venire; the party responsible for successful challenges for cause; the party responsible for peremptory strikes; and the race of the empaneled jurors.

The dataset provides an unprecedented look at how deeply entwined race and challenges for cause are. In total, 14,616 prospective jurors were members of the initial venire for these 316 trials. While many of these jurors were simply “surplus” jurors—never questioned or challenged because the jury box was filled before they were needed—the racial demographics of this initial venire serve as a baseline. Of the prospective jurors, 32.6% were black; 61.7% were white; and 3.6% were Asian, Hispanic, or “Other.” (Racial information was unavailable for 2.0% of prospective jurors.)

38. This information has been compiled in five appendices available for download online. Thomas Ward Frampton, *For Cause: Appendices*, GOOGLE DRIVE, <https://drive.google.com/file/d/1x3piBF6dZwmKNnAjP-ow3YrOFFFK1AW2/view> (on file with the *Michigan Law Review*). All of the data in Part I come from jurisdictions in the Deep South, and some caution is therefore warranted in drawing generalizations based on the patterns identified; future research will have to determine whether equivalent racial disparities in the use of challenges for cause exist across the United States. But it is noteworthy that the racial patterns identified in the use of challenges for cause in these jurisdictions match or exceed those involved in peremptory strikes. See *infra* Figures 2, 4. And there is good reason to believe that the ongoing use of racially motivated peremptory strikes is not a regional phenomenon. See, e.g., *State v. Saintcalle*, 309 P.3d 326, 348 (Wash. 2013) (González, J., concurring) (“Peremptory challenges are used in trial courts throughout this state, often based largely or entirely on racial stereotypes or generalizations.”), *abrogated by* *Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017); Baldus et al., *supra* note 3 (noting large racial disparities in use of peremptory challenges in Philadelphia capital cases in 1980s and 1990s).

39. See Frampton, *supra* note 3, at 1621.

40. For the collection methodology and raw data for the *Russell-Simerman* dataset, see Jeff Adelson, *Download Data Used in The Advocate’s Exhaustive Research in ‘Tilting the Scales’ Series*, ADVOCATE (Apr. 1, 2018, 8:00 AM), https://www.theadvocate.com/new_orleans/news/courts/article_6f31d456-351a-11e8-9829-130ab26e88e9.html [<https://perma.cc/UEX3-B652>].

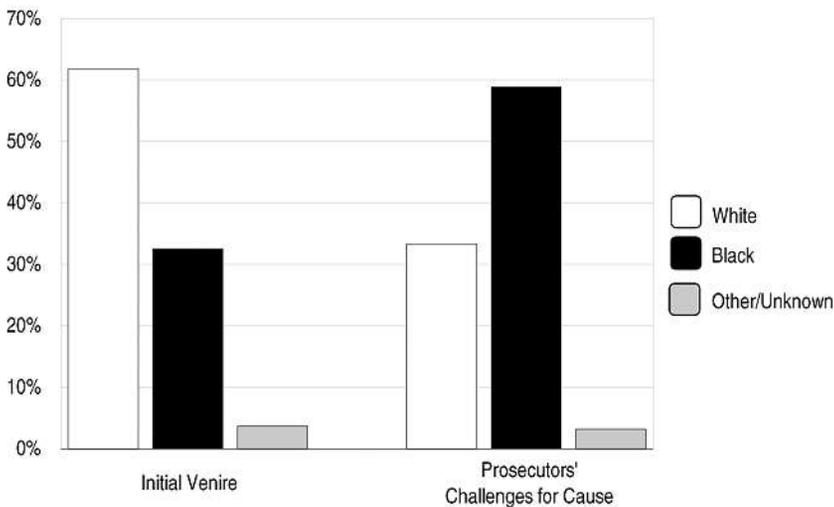
TABLE 1: RACIAL COMPOSITION OF INITIAL VENIRE (LOUISIANA)

	Raw Number	Percentage
White	9,019	61.7%
Black	4,770	32.6%
Other Nonwhite	531	3.6%
Unknown	296	2.0%
Total	14,616	100.0%

If race and the exercise of juror challenges or strikes were not correlated, the racial demographics of the challenged or struck jurors should match the racial demographics of the initial venire. In other words, we would expect roughly 62% of each party’s challenges for cause and peremptory strikes to be directed at white jurors and 33% of challenges for cause and peremptory strikes to be directed at black jurors.

Instead, prosecutors overwhelmingly used challenges for cause to exclude nonwhite jurors. Of 967 successful challenges for cause by prosecutors—the *Russell-Simerman* dataset does not include information on attempted but unsuccessful challenges—58.9% of challenges ($n = 570$) removed black prospective jurors and only 34.4% ($n = 333$) removed white prospective jurors. The discrepancies between the composition of the original venire and the jurors excluded “for cause” by prosecutors are depicted in Figure 1.

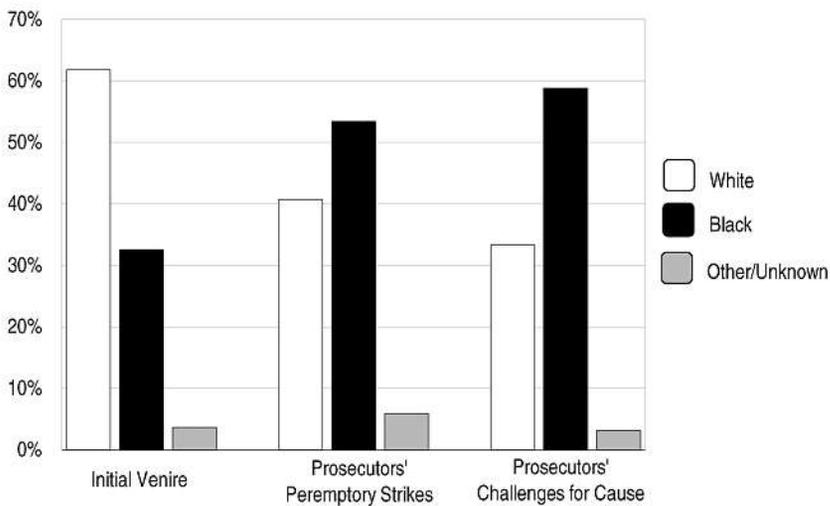
FIGURE 1: RACIAL DISPARITIES IN PROSECUTORS’ USE OF CHALLENGES FOR CAUSE (LOUISIANA)



This means that prosecutors excluded black prospective jurors at 181% of the frequency we would expect if race and challenges for cause were not correlated and excluded white prospective jurors at just 56% of the frequency we would expect. Comparatively speaking, these disparities mean that black jurors were 3.24 times more likely than white jurors to be excluded by the government “for cause.”

Notably, these disparities are even greater than the substantial racial disparities in the exercise of peremptory strikes in the same 316 trials. As with challenges for cause, prosecutors used peremptory strikes to “overstrike” black jurors and “understrike” white jurors, targeting the former group with 53.6% of their peremptory strikes and the latter with 40.5% of their peremptory strikes (despite the much larger number of white prospective jurors in the initial venire). This is a sizeable departure from the expected percentages if race were not correlated with the use of peremptory strikes: prosecutors were 2.50 times more likely to use a peremptory strike against any given black potential juror than any given white potential juror. But these disparities are still less dramatic than those involved with challenges for cause. A comparison of the relative disparities appears in Figure 2.

FIGURE 2: RACIAL DISPARITIES IN PROSECUTORS’ USE OF PEREMPTORY STRIKES AND CHALLENGES FOR CAUSE (LOUISIANA)



B. *Mississippi*

As part of a lengthy investigation into the many murder trials of Curtis Flowers in central Mississippi,⁴¹ American Public Media collected every available jury trial record from Mississippi's Fifth Judicial District (covering seven counties) from 1992 to 2017.⁴² Their inquiry focused on racial disparities in the use of peremptory strikes,⁴³ but helpfully, the nonprofit media organization made available to the public all of their raw source material. For 83 trials (involving 4,717 prospective jurors), full voir dire transcripts and juror lists allow for an original analysis of racial disparities in the use of challenges for cause, as well.⁴⁴

The racial composition of the initial venire in Mississippi's Fifth Judicial District is roughly similar to that in Louisiana (although virtually all prospective jurors are either black or white). As before, these figures provide a baseline for the expected challenge rates. If jurors' race and challenges for cause were not correlated, we would expect roughly 60% of each party's challenges to be directed at white prospective jurors and roughly 34% to be directed at black prospective jurors.

TABLE 2: RACIAL COMPOSITION OF INITIAL VENIRE (MISSISSIPPI)

	Raw Number	Percentage
White	2,823	59.8%
Black	1,614	34.2%
Asian	3	0.1%
Unknown	277	5.9%
Total	4,717	100.0%

The observed racial distribution of the actual challenges for cause, however, looked nothing like the expected results. Unlike in Louisiana, the trial judge initiated the vast majority ($n = 760$) of challenges for cause; the common practice was for the judge to identify a potential for-cause challenge and invite objections and argument from the parties. Those prospective jurors

41. See Section I.C.1.

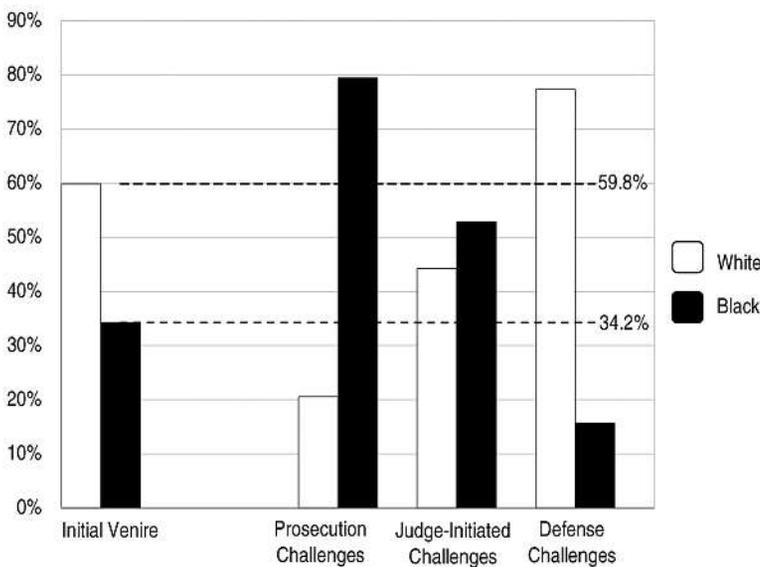
42. *In the Dark: S2 E8: The D.A.*, APM REP. (June 12, 2018), <https://www.apmreports.org/story/2018/06/12/in-the-dark-s2e8> [<https://perma.cc/F2BL-TXM9>].

43. *Id.*

44. For source notes and a full methodology of American Public Media's study, see Will Craft, *Mississippi D.A. Has Long History of Striking Many Blacks from Juries*, APM REP. (June 12, 2018), <https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries/> [<https://perma.cc/S58H-9CGN>]. Although APM's dataset had ninety-one cases, eight of its cases do not include all of the information needed to independently verify and code who raised which challenge to each juror.

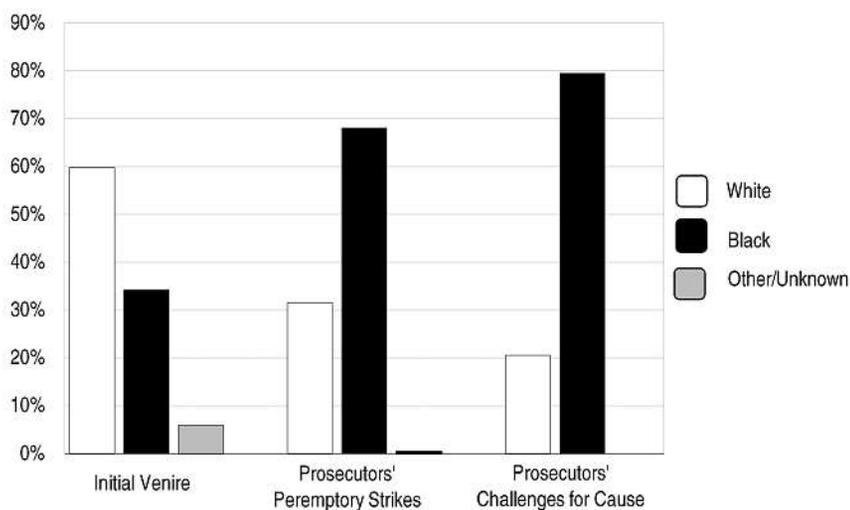
first identified by the judges were disproportionately black: although white jurors outnumbered black jurors by nearly two to one in the initial venires, 52.9% of the judge-proposed disqualifications were black jurors and 44.2% were white jurors. In all 83 trials, prosecutors *never once* objected to the judge-proposed dismissal of a black juror; in large part, it seems, prosecutors seemed content to allow the judge to remove those whom they would have targeted anyway. Defendants objected with more frequency to judge-proposed removals, and they did so roughly equally with black and white nominees for exclusion. Defendant-initiated challenges ($n = 128$) and prosecutor-initiated challenges ($n = 73$) occurred much less frequently, but when they occurred, the racial disparities were even more dramatic. Only 20.5% of prosecutors' challenges for cause were aimed at white prospective jurors, while 79.5% of their challenges aimed to remove black prospective jurors. Given their comparative representation in the initial venire, these disparities meant that prosecutors were 6.8 times more likely to initiate a challenge for cause against any given black prospective juror than any given white prospective juror. Defendants, meanwhile, targeted white prospective jurors with 77.3% of their challenges and black prospective jurors with 15.6% of their challenges.

FIGURE 3: RACIAL COMPOSITION OF THE VENIRE AND CHALLENGES FOR CAUSE (MISSISSIPPI)



As in Louisiana, prosecutors' challenges for cause were even more racially skewed than their peremptory strikes. In the same 83 trials, prosecutors used 68.1% of their peremptory strikes to exclude black prospective jurors and 31.6% to exclude white prospective jurors. While this figure represents a significant "overstriking" of black prospective jurors, it is again not as severe as the "overchallenging" of black prospective jurors for cause.

FIGURE 4: RACIAL DISPARITIES IN PROSECUTORS' USE OF PEREMPTORY STRIKES AND CHALLENGES FOR CAUSE (MISSISSIPPI)



C. "I Didn't Think There Were Any Left": Reexamining Three Batson Cases

Another way to see the role that challenges for cause play in the exclusion of nonwhite jurors—and the extent to which we fail to notice this consistent pattern—is by reconstructing the full jury selection process in individual cases. In *Flowers v. Mississippi* (2019), *Foster v. Chatman* (2016), and *Snyder v. Louisiana* (2008), the Supreme Court considered whether prosecutors' peremptory strikes were improperly motivated by race.⁴⁵ In each of these cases—all of which involved black defendants convicted of murder⁴⁶—a majority of the Court found that lower courts had erred in failing to recognize that racial bias motivated prosecutors' use of peremptory strikes.⁴⁷ But the parties and the Court paid almost no attention to what

45. See *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 490 (2008).

46. See *Flowers*, 139 S. Ct. at 2234; *Foster*, 136 S. Ct. at 1742; *Snyder*, 552 U.S. at 474, 476.

47. See *Flowers*, 139 S. Ct. at 2235; *Foster*, 136 S. Ct. at 1755; *Snyder*, 552 U.S. at 485–86.

came first: a significant reduction in the pool of eligible black jurors through challenges for cause.

1. *Flowers v. Mississippi*

Curtis Flowers has been tried six times for a quadruple murder that occurred in 1996.⁴⁸ The killings took place inside a furniture store in the small, racially mixed town of Winona (population 5,000) in Montgomery County, Mississippi; Flowers is black, and three of the four victims were white. In Flowers's sixth trial, prosecutors accepted one black juror and then used five of six peremptory strikes to exclude black prospective jurors.⁴⁹ The jury (consisting of eleven white jurors and one black juror) convicted Flowers and recommended death.⁵⁰ In a 7–2 opinion authored by Justice Kavanaugh, the Court held that one of the five challenged peremptory strikes was unconstitutionally motivated by race.⁵¹

While the Court's opinion naturally focused on prosecutors' peremptory strikes, the full 1,300-page voir dire transcript (which was not included in the joint appendix submitted to the Court) shows how prosecutors used more than just peremptory strikes to assemble a nearly all-white jury in the case.⁵²

Despite the skewed composition of the final petit jury, the initial pool of 156 prospective jurors was relatively racially balanced: 88 prospective jurors were white (56%), and 68 prospective jurors were black (44%).⁵³ Over the next several days of voir dire, however, these figures shifted. The first round

48. *Flowers*, 139 S. Ct. at 2234. Flowers's first five trials provide anecdotal evidence that the racial composition of a jury can be outcome determinative. Flowers's first trial was before an all-white jury. He was convicted and sentenced to death. *See id.* at 2236. The Mississippi Supreme Court reversed the conviction due to "numerous instances of prosecutorial misconduct," including improper questioning of witnesses and the introduction of impermissible other-crimes evidence. *Flowers v. State (Flowers I)*, 773 So. 2d 309, 327 (Miss. 2000). In the second trial in 1999, prosecutors used peremptory strikes to eliminate the last five black prospective jurors; the trial court disallowed one of these strikes under *Batson*, empaneling a jury with eleven white jurors and one black juror. *See Flowers*, 139 S. Ct. at 2236. Flowers was again convicted and sentenced to death. As before, the Mississippi Supreme Court reversed on prosecutorial misconduct grounds. *Flowers v. State (Flowers II)*, 842 So. 2d 531, 532 (Miss. 2003). In the third trial in 2004, prosecutors exercised all fifteen of their peremptory strikes against black prospective jurors, again producing a jury of eleven white jurors and one black juror; the sole black juror was seated after the State ran out of peremptory challenges. *See Flowers*, 139 S. Ct. at 2236–37. On appeal, the Mississippi Supreme Court reversed, with a plurality concluding that at least two of the strikes were racially motivated. *Flowers v. State (Flowers III)*, 947 So. 2d 910, 916–17 (Miss. 2007). Flowers's fourth and fifth trials ended with hung juries; notably, the juries in those trials included five black jurors and three black jurors, respectively. *See Flowers*, 139 S. Ct. at 2237.

49. *Flowers*, 139 S. Ct. at 2235–36.

50. *Id.* at 2237.

51. *Id.* at 2235.

52. *See Voir Dire Transcript* at 477–1802, *Flowers v. State*, No. 2003-0071-CR (Miss. Cir. Ct. 2010).

53. Frampton, *supra* note 38, Appendix A.

of questioning, conducted exclusively by the judge, probed the prospective jurors' relationships with the parties, law enforcement, and potential witnesses (and whether those relationships would impact jurors' ability to be "fair and impartial").⁵⁴ Equivocal answers often led to heated disputes. For example, defense attorneys objected to the dismissal of a black female juror whose son had fathered a child by the defendant's sister (whose name the juror could not recall); the juror allowed that the relationship "probably" would impact her ability to be fair and impartial and conceded (upon leading questioning by the judge) that there were "doubts in [her] mind" about whether she could be fair.⁵⁵ Prosecutors were incensed by the defendant's objection to her excusal: "Your Honor, for the record I object to them only objecting to cause strikes on certain jurors. I think it is very clear that they are only objecting [to] cause on black jurors, and this is extremely improper."⁵⁶

But both parties were following a similar playbook: In the coming days, when attorneys had the opportunity to question individual jurors, prosecutors objected exclusively to the proposed dismissal of white prospective jurors, while defense attorneys did the same regarding black prospective jurors.⁵⁷ And when the parties had the opportunity to raise challenges for cause on their own—the bulk of the for-cause dismissals were initially proposed by the judge, subject to the parties' objections⁵⁸—prosecutors raised 11 of their 15 challenges (73%) to urge the elimination of black prospective jurors (nearly all were granted); 18 of the 19 challenges (95%) Flowers raised sought the exclusion of white prospective jurors (most were denied).⁵⁹

In total, challenges for cause resulted in a significant "whitewashing" of the jury pool. A significant number of prospective jurors (30 white and 7 black) were removed because their relationship with the victims affected their ability to be fair and impartial; 32 prospective jurors (all black) were removed because of their relationship with Flowers.⁶⁰ "Death qualification"⁶¹ disproportionately excluded black prospective jurors: 9 black jurors and 2 white jurors were removed based on opposition to capital punishment.⁶²

54. See, e.g., Voir Dire Transcript, *supra* note 52, at 750.

55. See *id.* at 751–52, 841.

56. *Id.* at 841–42.

57. Frampton, *supra* note 38, Appendix A; see, e.g., Voir Dire Transcript, *supra* note 52, at 838–39, 844. In the only potential exception to this pattern, the prosecution *initially* objected to the for-cause dismissal of a black woman who was related to a victim, *id.* at 844, before ultimately moving to have her dismissed for cause, *id.* at 1262.

58. See, e.g., Voir Dire Transcript, *supra* note 52, at 836–59.

59. See Frampton, *supra* note 38, Appendix A.

60. See *id.*; see also, e.g., Voir Dire Transcript, *supra* note 52, at 836–58.

61. See *infra* notes 232–234 and accompanying text.

62. See Frampton, *supra* note 38, Appendix A; see also, e.g., Voir Dire Transcript, *supra* note 52, at 1260–62.

And the remainder were struck for a variety of reasons,⁶³ usually (though not exclusively) after reporting doubts about their own impartiality.⁶⁴ At the end of voir dire, with over 100 jurors removed for cause, 45 jurors advanced to the peremptory-strike stage: 35 were white (78%) and only 10 were black (22%).⁶⁵ Thus, before peremptory strikes began, challenges for cause had already eliminated most black prospective jurors from the pool. More importantly, the process also reduced the *relative* share of black jurors in the jury pool from 44% of the initial venire to 22% of the “qualified” venire. Peremptory challenges reduced that percentage of black jurors even further to 8% (1 of 12 seated jurors),⁶⁶ of course, but the greater part of the racial exclusion in Flowers’s sixth trial was attributable to challenges for cause.⁶⁷

2. *Foster v. Chatman*

Timothy Foster, who is black, was convicted by an all-white jury and sentenced to death for the torture and murder of an elderly white woman in Rome, Georgia.⁶⁸ His original trial took place in 1987, but after his direct appeal, Foster obtained prosecutors’ files through a Georgia Open Records Act request.⁶⁹ These documents, which included prosecutors’ handwritten notes from jury selection, bolstered Foster’s state habeas claim that prosecutors impermissibly targeted black jurors with their peremptory strikes.⁷⁰ In *Foster v. Chatman*, the Supreme Court sided with Foster and ordered a new trial.⁷¹ Undertaking an extensive review of the available record, the Court conclud-

63. For example, 8 jurors (6 black and 2 white) were removed for cause after disclosing that they might be influenced by having had a close friend or family member prosecuted for unrelated criminal conduct. Nine white jurors were removed for personal or familial connections with law enforcement.

64. See, e.g., Voir Dire Transcript, *supra* note 52, at 1481, 1510, 1536. One notable exception was a white juror successfully challenged by the defense. Although giving assurances that she could be fair and impartial, the juror began crying when recalling one of the victim’s funerals, which she attended. See, e.g., *id.* at 1634. The court granted the defendant’s challenge (over prosecutors’ objections): “I think if the mere asking about the case would reduce her to tears, then I think that would show an indication that she would have real difficulty being fair and impartial.” *Id.*

65. See Frampton, *supra* note 38, Appendix A.

66. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2237 (2019).

67. The ways in which challenges for cause altered the racial composition of the jury pool was not lost on all members of the Court: Justice Thomas mentioned it briefly in his dissent, though he dismissed the shift as a “statistical abnormality” of little significance. See *id.* at 2262 (Thomas, J., dissenting); see also Thomas Ward Frampton, *What Justice Thomas Gets Right About Batson*, 72 STAN. L. REV. ONLINE 1 (2019).

68. See *Foster v. State*, 374 S.E.2d 188, 190–91 (Ga. 1988).

69. *Foster v. Chatman*, 136 S. Ct. 1737, 1743 (2016).

70. See *id.* at 1744.

71. *Id.* at 1755.

ed that two of prosecutors' peremptory strikes targeting black jurors were "motivated in substantial part by discriminatory intent."⁷²

But the full voir dire transcript provides a fuller portrait of racial exclusion. Unlike Flowers's case, the initial pool in Foster's prosecution was mostly white: Foster began with 98 prospective jurors, 87 of whom were white (88.8%) and 11 of whom were black (11.2%).⁷³ By the time the pool of 50 jurors was "qualified" for peremptory strikes, however, 7 of the 11 black jurors had already been excused or dismissed.⁷⁴ In absolute terms this marks only a modest decline in the total percentage of black jurors in the venire (from 11.2% to 8.0%), but comparatively, it marks a 29% drop in black jurors' "share" of the total.⁷⁵ The decline was significant enough that the trial judge acted surprised when defense counsel asked how the judge wished to handle (anticipated) *Batson* challenges during the final stage of jury selection. "I didn't realize we had any left," the judge remarked, referring to black jurors.⁷⁶

Prosecutors seemed particularly keen to excuse black jurors using challenges for cause, even when the jurors' possible bias seemed to *favor* their side. One black prospective juror, for instance, gave conflicting answers as to whether she would "lean" in favor of the prosecution or the defense;⁷⁷ as to the death penalty, though, she indicated clearly that she would vote to impose death if the jury reached a "guilty" verdict ("If somebody has done killed somebody, yeah, an eye for an eye.").⁷⁸ Prosecutors, correctly,⁷⁹ recognized that this bias in favor of capital punishment provided grounds to challenge the juror and she was excused (without defense objection).⁸⁰ When white jurors demonstrated similar progovernment biases, however, prosecutors remained silent or fought to rehabilitate them.⁸¹

72. *Id.* at 1754.

73. Frampton, *supra* note 38, Appendix B.

74. *Id.*; see also *Foster*, 136 S. Ct. at 1743.

75. Cf. *Berghuis v. Smith*, 559 U.S. 314, 323 (2010) ("'Absolute disparity' is determined by subtracting the percentage of African-Americans in the jury pool (here, 6% in the six months leading up to Smith's trial) from the percentage of African-Americans in the local, jury-eligible population (here, 7.28%). By an absolute disparity measure, therefore, African-Americans were underrepresented by 1.28%. 'Comparative disparity' is determined by dividing the absolute disparity (here, 1.28%) by the group's representation in the jury-eligible population (here, 7.28%). The quotient (here, 18%) showed that, in the six months prior to Smith's trial, African-Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list.").

76. Voir Dire Transcript at 1330, *Foster v. Chatman*, 136 S. Ct. 1737, 1743 (2016) (No. 14-8349).

77. *Id.* at 780.

78. *Id.* at 782.

79. See *Morgan v. Illinois*, 504 U.S. 719, 719 (1992) (holding that "a capital defendant may challenge for cause any prospective juror who will automatically vote for the death penalty").

80. Voir Dire Transcript, *supra* note 76, at 782.

81. See, e.g., *id.* at 920.

Race also seemed to have provided important subtext when the attorneys debated jurors' claims of hardship. For example, after an older black juror was qualified, prosecutors nevertheless urged that she be excused:

Before we ask the other juror to come in, I just have one—you know, I don't know. . . . [C]onsidering that this case may or may not go into next week, the fact that Mrs. Hardge has a husband who is a double amputee; that has no reason—has no other help but herself, and she has claimed that this sequestered trial would be a hardship. . . . I also feel like that we ought to accommodate Mrs. Hardge and ask that she be excused, purely for the reasons—her reflections—her answer to the question.⁸²

Moments later, however, prosecutors' solicitude was absent when a younger white juror protested that she "[a]bsolutely" had a reason not to be sequestered insofar as she "ha[d] an 18-month-old daughter who" needed her care.⁸³

Apart from the exclusions first suggested by the court, prosecutors raised 10 challenges for cause (all but one of which were granted); of these, 4 aimed to eliminate black jurors and 6 aimed to eliminate white jurors.⁸⁴ Given the small percentage of black jurors in the initial venire (11.2%), the frequency of challenges for cause against black jurors (40%) was 357% what we would expect if race and challenges for cause were not correlated. All 11 of Foster's challenges sought the exclusion of white jurors, though this represents only a 13% increase over the "expected" frequency of challenges to white jurors; the court granted only 3 of Foster's challenges.⁸⁵

3. *Snyder v. Louisiana*

Allen Snyder, who is black, was tried for capital murder before an all-white jury in Jefferson Parish, Louisiana, in 1996.⁸⁶ Of the 36 jurors remaining at the final stage of jury selection, 5 were black.⁸⁷ Prosecutors used 7 peremptory strikes against white prospective jurors and 5 against the remaining black prospective jurors, ensuring an all-white jury.⁸⁸ Snyder was convicted

82. *Id.* at 420–21. The trial judge politely declined the invitation. *Id.* ("THE COURT: Well, when the Court sits here and sees the husband, the double amputee, get up and walk out unassisted, except by a cane, then he appears to the Court that he can get his own water, go to the bathroom, whatever is needed. So I don't believe he's helpless. [PROSECUTOR]: I noticed he was smiling as he left the courtroom too, and the way he waved. . . . THE COURT: Well, he's been knowing me, and I've been knowing him for close to a hundred years.").

83. *See id.* at 459; *see also id.* at 1069 (arguing, during defense questioning of a white prospective juror, "[n]obody wants to sit on the jury").

84. *See* Frampton, *supra* note 38, Appendix B.

85. *See id.*

86. *Snyder v. Louisiana*, 552 U.S. 472, 474–76 (2008).

87. *Id.* at 475–76.

88. *See* Frampton, *supra* note 38, Appendix C. For each of the jurors in the *Snyder* dataset, the "race" information was hand-collected by cross-referencing the jurors' addresses—drawn from the master jury list document from the court file, Listing of Jurors Assigned to

and sentenced to death.⁸⁹ In 2008, the Supreme Court reversed, concluding that the peremptory strike of at least one of the black jurors was motivated in substantial part by discriminatory intent.⁹⁰

The all-white jury in Snyder's case was assembled from an initial pool that—although not reflecting the overall demographics of Jefferson Parish—looked relatively diverse. In the initial group of 138 potential jurors, 108 were white (78.3%), 24 were black (17.4%), and 6 were Asian, Hispanic, or "Other" (4.3%).⁹¹ From the outset, prosecutors aggressively pursued potential challenges for cause against black jurors. One black juror, for instance, indicated that she might be unable to serve because she was "a diabetic, and I get so nervous a lot."⁹² When defense attorneys assured the juror that the court "ha[d] a whole staff of people that [she] could call on if [she] felt nervous," the juror allowed that she might get nervous even with access to her medication: "Because you see, I had a son that was in jail, and he died in jail."⁹³ Prosecutors immediately interjected: "This is about the death penalty too, ma'am, you're going to see gruesome photos, and hear about murder. That's going to make you nervous?"⁹⁴ The reluctant juror allowed that it would, and she was excused for cause.⁹⁵

As in Flowers's trial, the attorneys explicitly referenced prospective jurors' race while making challenges for cause. When prosecutors successfully removed one black juror for cause—the juror admitted to wanting to kill his wife's lover, in circumstances similar to the allegations against the defendant—defense attorneys objected and "note[d] for the record that [the prospective juror] is a black man."⁹⁶ The remark triggered a terse on-the-record argument between the two prosecutors, who debated whether they should proffer additional race-neutral justifications for their challenge.⁹⁷

Overall, as in *Flowers* and *Foster*, there were unmistakable patterns in whom the parties challenged for cause (and when the parties objected). Prosecutors initiated 24 challenges for cause, 5 against black prospective ju-

Case 955114, *State v. Snyder*, No. 95-5114 (La. Dist. Ct. Aug. 27, 1996)—with public records, including voter registration documents and criminal or traffic records.

89. *Snyder*, 552 U.S. at 474.

90. *Id.* at 485.

91. See Frampton, *supra* note 38, Appendix C.

92. Joint Appendix at 116, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (No. 06-10119).

93. *Id.* at 117.

94. *Id.*

95. *Id.* at 117–18.

96. *Id.* at 562–63, 584.

97. See *id.* at 584–85 ("[PROSECUTOR 1]: Well, he's being excused for cause is my understanding. If the cause would not hold up, Judge, my reasoning— [PROSECUTOR 2]: No, you don't — Would you be quiet? You don't have to give one. [PROSECUTOR 1]: Jim, look, please don't do that again. [PROSECUTOR 2]: Fred — Okay. Don't put anything on the record that we don't have to put on. [PROSECUTOR 1]: Please don't do that again. [PROSECUTOR 2]: But don't — [PROSECUTOR 1]: Then don't — Just don't do that again. THE COURT: All right. Any other challenges for cause?").

rors and 2 against Asian prospective jurors.⁹⁸ This frequency of challenges against nonwhite prospective jurors (29.2%) was 35% greater than what one might expect based on nonwhite jurors' representation in the initial pool (21.7%). Prosecutors vocally objected to the dismissal of only 4 jurors for cause; all were white.⁹⁹ Defense attorneys, meanwhile, overwhelmingly targeted white prospective jurors: of their 35 challenges, 33 were made against white prospective jurors, and 2 targeted Hispanic or "Other" prospective jurors.¹⁰⁰ Defense counsel also objected mainly, although not exclusively, to the excusal of black jurors urged by prosecutors or suggested by the court.¹⁰¹ While nearly a quarter of the initial venire comprised nonwhite jurors, the final pool before peremptory challenges comprised 31 white jurors (86%), 5 black jurors (14%), and no other nonwhite jurors.¹⁰²

* * *

At the end of the voir dire process, peremptory strikes often have dramatic effects on the racial composition of the "qualified" venire: the final strikes in *Foster* and *Snyder*, for example, removed 100% of the potential black jurors remaining at that late point in the proceedings.¹⁰³ For all of our focus on how the last black jurors were removed in a case, however, we rarely ask what happened to the first, second, and third black jurors excused.¹⁰⁴ The data from Louisiana, from Mississippi, and from recent *Batson* cases suggest that challenges for cause also serve as an important, but overlooked, vehicle for racial exclusion.

II. THE MISSING LAW OF CHALLENGES FOR CAUSE

We lack a legal framework for addressing the form of racial exclusion detailed in Part I. Since the 1970s, the Supreme Court has "constitutionalized" parts of the jury selection process in important ways.¹⁰⁵ Under *Taylor*

98. See Frampton, *supra* note 38, Appendix C.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Foster v. Chatman*, 136 S. Ct. 1737, 1741 (2016); *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008).

104. While this Article argues that challenges for cause merit greater attention in their own right, our failure to examine challenges for cause also undermines our ability to recognize the pernicious effects of peremptory strikes. Justice Marshall presciently touched upon the relationship between the two forms of exclusion in his *Batson* concurrence. See *Batson v. Kentucky*, 476 U.S. 79, 105 (1986) (Marshall, J., concurring) (arguing that "where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race" because it will be difficult for defendants to establish a *prima facie* case of discrimination).

105. See Leipold, *supra* note 26; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 62–63 (1997).

*v. Louisiana*¹⁰⁶ and *Duren v. Missouri*,¹⁰⁷ criminal juries must be drawn from a representative cross section of the community; under *Batson v. Kentucky*¹⁰⁸ and its progeny, racially motivated peremptory strikes are forbidden.¹⁰⁹ But the Supreme Court's constitutional (de)regulation of challenges for cause complicates this narrative. Over the past several decades, the Court has quietly insulated the challenge-for-cause process, including racial exclusion through such challenges, from meaningful review. In the interstices of the Court's fair-cross-section, equal protection, and due process jurisprudence, there is a missing law of challenges for cause.

Before turning to the constitutional dimensions of the problem, though, it is helpful to think through what might be driving the disparities identified in Part I. Consider three possible accounts:

- The “disparate impact” theory—Prosecutors and judges are acting in a perfectly race-neutral manner, but certain disqualifying beliefs and experiences (e.g., opposition to capital punishment, negative views of law enforcement) are more prevalent among black potential jurors.¹¹⁰ In a polarized community, even if prosecutors eschew any reliance on race during jury selection, such dynamics could lead to radically unrepresentative juries.
- The “mixed motive” theory—Prosecutors’ principal aim is to exclude any jurors prone to acquit defendants, but they consider race as a method of identifying and targeting those jurors. Prosecutors thus ask leading questions of black prospective jurors designed to elicit disqualifying responses, while largely ignoring white prospective jurors.¹¹¹ The result is that prosecutors disproportionately identify and eliminate black jurors (many of whom may, in fact, be “biased” or “partial”).

106. 419 U.S. 522 (1975).

107. 439 U.S. 357 (1979).

108. 476 U.S. 79.

109. In this regard, jury selection mirrors most other aspects criminal procedure from the Warren Court onward. See Stuntz, *supra* note 105, at 18 (discussing constitutional regulation of jury selection as parcel of larger constitutionalization of criminal procedure).

110. See Baldus et al., *supra* note 3 (noting stark racial differences in opinion polls tracking attitudes toward law enforcement); see also Jocelyn Simonson, Essay, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 277–78 (2019) (“But these doctrines defining the composition of ‘unbiased’ juries exemplify a conception of criminal procedure that defines ‘bias’ as the tendency to side with defendants.”).

111. See JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 152–53 (1977) (discussing training materials in Dallas County District Attorney’s Office instructing prosecutors to avoid “any member of a minority group . . . they almost always empathize with the accused”); Roberts, *Asymmetry as Fairness*, *supra* note 1, at 1522–23 (discussing a prosecution training video in Philadelphia explicitly recommending reliance on prohibited group-based assumptions).

- The “judicial bias” theory—Rather than focusing on jurors or prosecutors, the problem rests with judges.¹¹² Perhaps judges generally are indulgent in granting challenges for cause raised by prosecutors and/or against black jurors and stingy when weighing equally worthy challenges raised by defendants and/or against white jurors. The result is a significant number of erroneous rulings on challenges for cause—incorrect findings that particular jurors are or are not sufficiently “impartial” to warrant removal—that skew the racial composition of the pool.

I suspect there is some merit to each of the foregoing explanations, and ascribing relative weight to each causal mechanism is beyond the scope of this Article. But if *any* of these accounts are accurate, we might expect the law to provide some meaningful relief. That assumption, it turns out, would be wrong.

Section II.A examines the Court’s fair-cross-section jurisprudence and its relationship to challenges for cause. If the “disparate impact” theory is correct, the Sixth Amendment’s fair-cross-section requirement would seem like a plausible vehicle for confronting this phenomenon. A jury pool from which most or all nonwhite potential jurors have been purged through challenges for cause hardly seems “fairly representative of the community,”¹¹³ after all. And, unlike equal protection claims, fair-cross-section challenges do not require a showing of discriminatory bias, so the fact that prosecutors were acting in a scrupulously race-neutral manner when raising their challenges for cause should not pose any doctrinal obstacles.¹¹⁴ But, as Section II.A explains, any Sixth Amendment fair-cross-section claim would likely fail if used to contest racial disparities attributable to challenges for cause.

Section II.B turns to the Court’s equal protection jurisprudence, which since 1880 has limited (some forms of) racial discrimination in jury selection. If the “mixed motive” theory is correct—if prosecutors were invidiously relying upon potential jurors’ race to decide which jurors to target for challenge and removal—we might think such a practice would offend the Equal Protection Clause’s prohibition on “[r]acial discrimination in [the] selection of jurors.”¹¹⁵ Again, though, this assumption would be mistaken.

Finally, Section II.C examines the Court’s approach to judges’ errors in accepting or rejecting a challenge for cause; these cases typically turn on the Sixth Amendment’s guarantee of an “impartial jury” and the Fourteenth Amendment’s Due Process Clause. If the “judicial bias” theory is correct, we might expect to see a considerable body of case law dealing with the erroneous denial of defendants’ challenges for cause or the erroneous granting of

112. Bennett, *supra* note 5, at 149–50 (“My own introduction to implicit bias was deeply unnerving. . . . [A]s a former civil rights lawyer and seasoned federal district court judge . . . I was eager to take the [implicit bias] test. I knew I would ‘pass’ with flying colors. I didn’t.”).

113. Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

114. Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

115. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

prosecutors' challenges for cause. Yet, once more, the Court's rulings over the past several decades have foreclosed any meaningful avenue for defendants to obtain relief. Even glaring errors in such rulings, the Court has held, do not violate the constitutional rights of defendants.

A. Fair Cross Section

The argument that black citizens simply are not "qualified" to serve on juries in similar numbers as white citizens now seems deeply antithetical to basic constitutional norms. There is a solid constitutional basis for this intuition: the Sixth Amendment's guarantee of an "impartial jury" has been interpreted to encompass a defendant's right to a jury drawn from a "representative cross section of the community."¹¹⁶ And importantly, the question of "discriminatory purpose" is irrelevant to claims alleging that an unrepresentative jury pool violates this fair-cross-section requirement; the Court long ago recognized that race-neutral practices in assembling venires could result in race and sex disparities sufficient to implicate the Sixth Amendment.¹¹⁷ But this "representative" conception of the jury is of surprisingly recent vintage, and it remains modest in its reach.¹¹⁸ Because the Court has limited its fair-cross-section inquiry only to the demographic composition of the initial venire (i.e., those summoned to the courthouse) and endorsed unrepresentative venires when "significant state interests" are implicated, even the complete exclusion of nonwhite jurors through challenges for cause would likely survive Sixth Amendment scrutiny.

To understand why, it is important to remember that for most of American history, the fact that petit juries were drawn from unrepresentative lists was not understood to be in tension with the Constitution; rather, it was assumed that juries would comprise only an elite (and thus, necessarily, disproportionately white and male) subset of the population.¹¹⁹ From Reconstruction to the Civil Rights Era, criminal defendants occasionally succeeded in challenging convictions by arguing that local officials deliberately and completely excluded black jurors in violation of the Fourteenth Amendment's Equal Protection Clause.¹²⁰ But, for the most part, the eviden-

116. *Taylor*, 419 U.S. at 528.

117. *Duren*, 439 U.S. at 368 n.26 (distinguishing Sixth Amendment fair-cross-section claims from Fourteenth Amendment equal protection claims). *But see* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141 (2012).

118. Jeffrey Abramson, *The Jury and Democratic Theory*, 1 J. POL. PHIL. 45 (1993); *accord* Leipold, *supra* note 26, at 951 ("The phrase 'fair cross section of the community' sounds so natural to the modern ear that it is easy to believe that the requirement has always been part of the right to a jury trial. To the contrary . . .").

119. *See* Alschuler & Deiss, *supra* note 19, at 894–95, 898–901 (providing detailed explanations of how women and people of color were excluded from jury service in the United States).

120. *See, e.g.,* *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Hill v. Texas*, 316 U.S. 400 (1942); *Norris v. Alabama*, 294 U.S. 587 (1935); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

tiary burden required to prevail—typically, at minimum, a candid admission of racist intent and the total exclusion of the targeted group—made equal protection claims prohibitively difficult to assert successfully.¹²¹

Importantly, the bulk of this race-based (and sex-based) exclusion occurred by application of “neutral” criteria. In 1910, for example, the Supreme Court heard an appeal from a black South Carolina man—condemned to death by an all-white jury—challenging the state’s jury selection process.¹²² Under state law, jury commissioners were charged with preparing lists of prospective jurors of “good moral character” and “sound judgment”; the defendant urged that such arbitrary criteria permitted the complete exclusion of black jurors from venires.¹²³ The Court had little trouble upholding the law, since “nothing in this statute . . . discriminates against individuals on account of race or color . . . [It] simply provides for an exercise of judgment in attempting to secure competent jurors of proper qualifications.”¹²⁴ “Key man” systems—under which civic leaders, judges, or local officials would nominate citizens for jury service based on their reputations for intelligence or good character—were the norm for most of the twentieth century.¹²⁵ And as late as the 1970s, even while devoting greater scrutiny to the discriminatory application of such standards, the Court positively cited these Jim Crow-era precedents affirming the states’ freedom to exclude from jury service those lacking “good intelligence, sound judgment, and fair character.”¹²⁶ Of course, the potential for such race-neutral criteria to generate massive racial disparities in jury composition was never a secret.¹²⁷ But it was not until the Jury Selection and Service Act of 1968, which mandated random selection of prospective jurors from voter lists, that Congress finally abolished the practice in federal courts.¹²⁸

121. Frampton, *supra* note 3, at 1641–43.

122. *Franklin v. South Carolina*, 218 U.S. 161 (1910).

123. *Id.* at 167–68.

124. *Id.* at 168.

125. See Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1287 (1984); see also *Carter v. Jury Comm’n of Greene Cty.*, 396 U.S. 320, 331 (1970) (upholding Alabama requirement that jurors be “generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment” (quoting ALA. CODE § 30-21 (Supp. 1967))); *Turner v. Fouche*, 396 U.S. 346, 353–54 (1970) (upholding requirement that jurors be “upright” and “intelligent”).

126. *Carter*, 396 U.S. at 332 (citing *Gibson v. Mississippi*, 162 U.S. 565, 589 (1896)).

127. See *Castaneda v. Partida*, 430 U.S. 482 (1977); *Norris v. Alabama*, 294 U.S. 587 (1935). For a rich account of a legal challenge to the exclusion of Mexican American jurors in Los Angeles, see IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003).

128. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861–1869 (2018)).

The cross-sectional ideal was constitutionalized seven years later in *Taylor v. Louisiana*.¹²⁹ There, the Supreme Court first held that “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”¹³⁰ Four years later, in *Duren v. Missouri*,¹³¹ the Court clarified its fair-cross-section inquiry. The Court explained that a prima facie violation of the fair-cross-section requirement is established where (1) a “distinctive” group is involved; (2) its underrepresentation in jury venires is “not fair and reasonable in relation to the number of such persons in the community”; and (3) this disparity is due to “systematic exclusion” in the jury selection process.¹³² Upon such a showing, the State must identify a “significant state interest [that is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group.”¹³³

But there are at least two significant obstacles to countering the form of racial exclusion at issue in this Article—the continuing exclusion of nonwhite jurors through challenges for cause—under the Sixth Amendment’s fair-cross-section requirement. First, while criminal defendants have a right to a jury drawn from a representative cross section of the community, the Court has been unwilling to extend its “representativeness” inquiry beyond the composition of the initial venire (*before* the “qualification” process). In 1986, a week after issuing its landmark opinion in *Batson v. Kentucky*, the Court issued an opinion rejecting a fair-cross-section claim based on the elimination of jurors unwilling to impose the death penalty (so-called “*Witherspoon*-excludable” jurors¹³⁴) from the guilt phase of a bifurcated capital trial.¹³⁵ Such jurors, the Court held in *Lockhart v. McCree*, were not a “‘distinctive’ group in the community,” so the defendant’s fair-cross-section claim failed under *Duren*’s first prong.¹³⁶ But in expansive dicta, the Court also went much further:

[W]e do not believe that the fair-cross-section requirement can, or should, be applied as broadly as [the appellate] court attempted to apply it. We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to re-

129. 419 U.S. 522, 526, 528 (1975). As Professor Leipold notes, *supra* note 26, at 952–55, the phrase “cross-section of the community” first appeared in the 1940s. See Ballard v. United States, 329 U.S. 187, 191 (1946); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946); Glasser v. United States, 315 U.S. 60, 86 (1942).

130. *Taylor*, 419 U.S. at 528.

131. 439 U.S. 357, 358–60 (1979).

132. *Duren*, 439 U.S. at 364.

133. *Id.* at 367–68.

134. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

135. *Lockhart v. McCree*, 476 U.S. 162 (1986).

136. *Id.*

quire petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.¹³⁷

Four years later, in *Holland v. Illinois*, the Court returned to the issue, rejecting a claim that prosecutors' removal of the only two black jurors from a venire (through peremptory strikes) violated the Sixth Amendment's fair-cross-section requirement.¹³⁸ "[O]nce a fair hand is dealt," the Court explained, the Sixth Amendment had nothing to say about the "eliminat[ion of] prospective jurors belonging to groups [a party] believes would unduly favor the other side."¹³⁹

But even if the Sixth Amendment fair-cross-section requirement dictated that petit juries be drawn from representative pools of *qualified* jurors (i.e., after the winnowing that occurs during challenges for cause)—as Justice Thurgood Marshall argued for, in dissent, in *Holland v. Illinois*¹⁴⁰—racial disparities stemming from disproportionate challenges for cause might still be permissible: demographic disparities that advance a "significant state interest"¹⁴¹ do not offend the Sixth Amendment. In *Duren*, the Court indicated that a state has such an interest in "assuring that those members of the family responsible for the care of children are available to do so"; sex disparities in jury venires arising from an "appropriately tailored" rule to further this goal, the Court said, would likely satisfy the Sixth Amendment.¹⁴² The *Taylor* Court noted that significant disparities might also be permissible if arising from a state's decision to exempt "those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare."¹⁴³ The State's interest in excluding biased or partial jurors to ensure "the fairness and integrity of [the] judicial process"¹⁴⁴ would likely qualify as a "significant" interest, too.¹⁴⁵

If there is a constitutional infirmity in the massively disproportionate exclusion of nonwhite jurors through challenges for cause, it does not lie in its inconsistency with the Sixth Amendment's fair-cross-section requirement, at least as presently constituted.

137. *Id.* at 173.

138. 493 U.S. 474 (1990).

139. *Holland*, 493 U.S. at 481.

140. *See id.* at 497–98 (Marshall, J., dissenting) ("[N]o rational distinction can be drawn in the context of our fair-cross-section jurisprudence between the claims we accepted in *Taylor* and *Duren* and the claim at issue here.").

141. *Duren v. Missouri*, 439 U.S. 357, 367–68 (1979).

142. *Id.* at 370.

143. *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (citing *Rawlins v. Georgia*, 201 U.S. 638 (1906)).

144. *Georgia v. McCollum*, 505 U.S. 42, 56 (1992).

145. *See infra* Section III.D (discussing case law emphasizing the importance of public perceptions that jury adjudication is fair).

B. *Equal Protection*

What if the disparities identified in Part I are, at least in part, attributable to challenging decisions that are, in fact, partially “based on race” (i.e., motivated by the sort of discriminatory intent *Batson* proscribes)? In the context of peremptory strikes, scholars generally assume that race- and sex-based decisionmaking remains rampant. Challenges for cause, of course, are different—proponents must articulate good justifications for their challenges, and courts must sign off on these rationales.¹⁴⁶ But an attorney’s invocation of a cognizable for-cause justification does not foreclose the possibility that her decision to target and challenge that juror was also tainted by improper bias. If racial bias frequently motivates the decision to exercise a peremptory strike—clear constitutional prohibition notwithstanding—it seems improbable that such bias would play no role in the exercise of challenges for cause against the same prospective jurors. Challenges for cause offer attorneys a free bite at the apple, without the risk of sanction.¹⁴⁷

To the extent racial bias does inform challenges for cause, one might assume the practice implicates the Fourteenth Amendment’s Equal Protection Clause. Since *Strauder v. West Virginia*, a landmark case involving a state statute that on its face prohibited the summoning of black jurors, the Court has held that “discriminating in the selection of jurors . . . because of their color” denies criminal defendants equal protection of the laws in violation of the Fourteenth Amendment.¹⁴⁸ Shortly after *Strauder*, in *Neal v. Delaware*, the Court clarified that discriminatory practices in summoning potential jurors could also deny defendants “equal protection of the laws”¹⁴⁹ (even where “there was no law of the State forbidding” the selection of black jurors outright¹⁵⁰). A century later, in *Batson*, the Court addressed racial bias in the exercise of peremptory strikes, but in broad terms reaffirmed the constitutional prohibition against any “[r]acial discrimination in [the] selection of jurors.”¹⁵¹ “[T]he State may not draw up its jury lists pursuant to neutral procedures,” the Court explained, “but then resort to discrimination at ‘other stages in the selection process.’”¹⁵² If the Fourteenth Amendment prohibits intentional racial discrimination in the drawing of the venire (as in *Strauder*

146. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).

147. Attorneys currently face one (exceedingly minor) risk by engaging in nakedly biased practices when raising challenges for cause: this behavior can provide circumstantial evidence that their subsequent peremptory strikes were race motivated. See *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003) (discussing disparate questioning as evidence of improper motive).

148. 100 U.S. 303, 310 (1880).

149. 103 U.S. 370, 397 (1881) (quoting *Ex parte Virginia*, 100 U.S. 339, 347 (1880)).

150. *Neal*, 103 U.S. at 400 (Field, J., dissenting).

151. *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986).

152. *Id.* at 88 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)); see also *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting from denial of certiorari) (“The systematic exclusion of prospective jurors because of their race is therefore unconstitutional at any stage of the jury selection process.”).

v. Virginia and *Neal v. Delaware*) and at the preemptory-strike stage (as in *Batson v. Kentucky*), it is reasonable to think it prohibits discrimination that occurs in between.

But, as with the Sixth Amendment's fair-cross-section requirement, our existing equal protection doctrine offers little help when confronting racial exclusion in the challenge-for-cause context. The first, and more mundane, obstacle is same that plagues *Batson*: the practical problem of proof of discriminatory purpose. At the final stage of *Batson's* familiar three-step framework, those challenging a preemptory strike carry the burden of proving that the proponent's race-neutral justification is merely "pretextual."¹⁵³ As Justice Thurgood Marshall foresaw, this burden will rarely be met unless the "proffered 'neutral explanation' plainly betrays an underlying impermissible purpose."¹⁵⁴ In the challenge-for-cause context, however, where the proponent has articulated a valid "for cause" basis for excluding the juror, the race-neutral explanation is (almost by definition) not completely frivolous or transparently thin. And, having just endorsed the sufficiency of the proponent's stated rationale, the trial court would be hard-pressed to then declare it pretextual. As with challenges to preemptory strikes, there may be ways to surmount this hurdle in exceptional circumstances¹⁵⁵—for example, prosecutors' notes,¹⁵⁶ comparative analyses with unchallenged jurors,¹⁵⁷ disparate questioning,¹⁵⁸ historical evidence of racial bias¹⁵⁹—but anything resembling the current *Batson* framework for identifying and eliminating racial bias in this context is structurally ill-suited to the task.¹⁶⁰

153. *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995).

154. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari); *accord* *Bellin & Semitsu*, *supra* note 1, at 1077–78 (“[T]he Supreme Court has decreed that before a trial court can find a *Batson* violation it must determine that an attorney has (1) exercised a racially motivated preemptory challenge and (2) lied to the court in an effort to justify the strike. The trial court must find all of this based almost solely on the attorney's demeanor. Accordingly, trial courts rightly hesitate to make the damning findings *Batson* requires on such paltry evidence. Add to this the fact that attorneys may not even be aware of the racial motivation for their own strikes, as well as the administrative difficulty of remedying *Batson* violations, and it should come as no surprise that *Batson*, in application, is all form and little substance.” (footnote omitted)).

155. *See* *Abel*, *supra* note 8, at 726; *see also supra* note 111 and accompanying text (discussing discovery of discriminatory policies and training materials).

156. *Cf.* *Foster v. Chatman*, 136 S. Ct. 1737, 1743–44 (2016) (detailing documents, including prosecutors' notes, disclosed pursuant to Georgia Open Records Act request).

157. *Cf.* *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (“A comparison between Mr. Brooks and Roland Laws, a white juror, is particularly striking.”).

158. *Cf.* *Miller-El v. Dretke*, 545 U.S. 231, 256–57 (2005) (“The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire. . . . This argument, however, . . . simply does not fit the facts.”).

159. *Cf.* *Craft*, *supra* note 44.

160. *But see* *Roberts, Disparately Seeking Jurors*, *supra* note 1 (exploring flexibility of *Batson* framework to counter exclusionary justifications that have disparate impact).

But there is an antecedent problem: even if a proponent candidly admitted that racial bias motivated a successful challenge for cause, the federal courts' tepid equal protection jurisprudence (particularly in the jury selection context) leaves uncertain whether such discrimination would offend the Fourteenth Amendment at all. An analogous situation arises in the case of "dual motive" or "mixed motive" peremptory strikes. When a combination of permissible and impermissible considerations animate a peremptory strike, attorneys frequently argue that the impermissible bias, although present, was not "determinative" of the decision to exercise the strike.¹⁶¹ The Supreme Court, in a footnote in *Foster*, declined to resolve whether this defense should be available in response to a *Batson* challenge.¹⁶² But every federal court of appeals to consider the question has endorsed some version of the defense, essentially creating a "*Batson* Step 4." In the Second, Third, Fourth, Eighth, and Eleventh Circuits, the "person accused of discrimination [in jury selection may] avoid liability by showing that the same action would have been taken in the absence of the improper motivation."¹⁶³ The Ninth Circuit has endorsed a more modest version of the defense, allowing the use of peremptory strikes tainted by purposeful discrimination if such bias did not "in substantial part" motivate the decision.¹⁶⁴ (Many states, on the other hand, reject this approach.¹⁶⁵ If discriminatory reasons motivated the strike in any way, the juror's removal is *per se* unconstitutional.¹⁶⁶)

Were the courts to seriously scrutinize the role of racial bias in challenging for cause, a similar problem would undoubtedly arise.¹⁶⁷ Even if race

161. See Covey, *supra* note 1, at 289 (discussing mixed-motive peremptory challenges); cf. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271–72 n.21 (1977) ("Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.").

162. *Foster v. Chatman*, 136 S. Ct. 1737, 1754 n.6 (2016).

163. *Howard v. Senkowski*, 986 F.2d 24, 26–27 (2d Cir. 1993); see also *Gattis v. Snyder*, 278 F.3d 222, 234–35 (3d Cir. 2002); *Jones v. Plaster*, 57 F.3d 417, 420 (4th Cir. 1995); *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995); *Wallace v. Morrison*, 87 F.3d 1271, 1275 (11th Cir. 1996).

164. *Cook v. LaMarque*, 593 F.3d 810, 815 (9th Cir. 2010) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008)).

165. *People v. Douglas*, 232 Cal. Rptr. 3d 305, 314–15 (Cal. Ct. App. 2018) (collecting cases).

166. See *id.*; see also *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

167. The difficulty here is *not* one of remedy. A common response to a *Batson* violation, if identified during jury selection, is the seating of the improperly challenged juror. See Jason Mazzone, *Batson Remedies*, 97 IOWA L. REV. 1613, 1624 (2012). When dealing with a bias-motivated challenge for cause, because there has already been a judicial finding that the challenged juror is "unqualified," seating that juror may be impossible. Bellin & Semitsu, *supra* note 1, at 1110. But trial courts may, and frequently do, remedy a *Batson* violation in other

played an important role in the decision to challenge a particular juror for cause, the proponent of the challenge could highlight that independent and sufficient reasons exist for the contested juror's removal. Of course, the fact that the same result could have been (but was not) achieved by lawful means does not necessarily render government conduct lawful, particularly in the criminal context. For example, the Equal Protection Clause bars the government from prosecuting a criminal defendant—no matter how guilty—where “the decision whether to prosecute [is] based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification’ ” (at least in theory).¹⁶⁸ But, to the extent the mixed-motive defense enjoys success when it comes to peremptory strikes, it is unsettled whether even the clearest showing of racial bias would matter when contesting an otherwise meritorious challenge for cause on equal protection grounds.

C. Impartial Jury/Due Process

Sections II.A and II.B have dealt with the relationship between challenges for cause and constitutional doctrines typically associated with race and the jury. But what of more straightforward claims—which may or may not implicate race—that the trial court erred in granting or denying a challenge for cause? Such systemic errors by judges, particularly if skewed in favor of prosecutors or certain categories of potential jurors, could also account for the disparities described in Part I.

If such slanted and erroneous rulings were a widespread problem, however, we would expect to see the issue frequently litigated (just as *Batson* claims are frequently pursued on appeal).¹⁶⁹ But this expectation presupposes the availability of meaningful relief. Traditionally, claims that the trial court erred in ruling on a challenge for cause have been litigated as implicating the defendant's right to an impartial jury under the Sixth Amendment or the defendant's right to due process under the Fourteenth Amendment.

ways. *Mazzone*, *supra* at 1614. Dismissing the entire venire, stripping peremptory strikes from the offending party, or granting additional peremptory strikes to the opposing party (as well as disciplinary sanctions) are all responses to *Batson* violations that would apply equally well to a problematic challenge for cause. *Id.* at 1614, 1624; *see also* WAYNE R. LAFAYE ET AL., 6 CRIMINAL PROCEDURE § 22.3(d) (4th ed. 2015), Westlaw (database updated Dec. 2019).

168. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). The caveat “at least in theory” is necessary here in light of the courts' extraordinary reluctance to grant such claims. *See, e.g.*, Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 213 (2007) (noting the difficult burden faced by defendants raising such claims); *see also* *Hudson v. Michigan*, 547 U.S. 586, 616 (2006) (Breyer, J., dissenting) (emphasizing that “[w]hat a man could do is not at all the same as what he would do” in context of inevitable discovery doctrine (quoting J.L. Austin, *Ifs and Cans*, 42 PROC. BRIT. ACAD. 109, 111–12 (1956))). *But see* *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding arresting officer's subjective motivation irrelevant to Fourth Amendment analysis of lawfulness of stop). Thanks to Professor Russell Covey for suggesting the *Armstrong* analogy.

169. *See* *Abel*, *supra* note 8, at 733 (celebrating virtues of *Batson* in appellate litigation).

Once again, however, the Court has largely shut the door to such arguments in recent years.

1. Erroneous Grants of (Prosecutors') Challenges for Cause

The Term after *Batson*, the Court signaled it was prepared to devote similar scrutiny to other improper exclusions in the jury selection process. In 1987, the Court heard a capital case, *Gray v. Mississippi*, presenting the question whether an erroneous for-cause exclusion was subject to harmless-error review; in a 5–4 opinion, the Court indicated that the answer was “no.”¹⁷⁰ In *Gray*, the trial court granted prosecutors’ challenge for cause to a prospective juror who indicated moderate (but not disqualifying) reluctance to impose a death sentence.¹⁷¹ The defendant was convicted and sentenced to death.¹⁷² The Mississippi Supreme Court acknowledged that the juror’s dismissal was erroneous, but it nevertheless held that the exclusion was “harmless error.”¹⁷³ The Supreme Court reversed and vacated the death sentence.¹⁷⁴ Even if prosecutors had unexercised peremptory strikes remaining (i.e., strikes they might have used to eliminate the disputed juror), the Court explained, the complex and unpredictable “nature of the jury selection process defies any attempt to establish” what might have happened had a proper ruling been made.¹⁷⁵ The effect of adopting a harmless-error approach “would be to insulate jury selection error from meaningful appellate review.”¹⁷⁶ The relevant inquiry was simply “whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court’s error.”¹⁷⁷ When the trial court improperly excused a juror who should have remained, that bar was met.¹⁷⁸

But the very next Term—with Justice Kennedy now occupying the seat formerly held by Justice Powell—the *Gray* dissenters gained a fifth vote and promptly issued an opinion clarifying that *Gray* should not be “applied literally.”¹⁷⁹ In *Ross v. Oklahoma*—a case that involved the somewhat different issue of *defense* challenges for cause¹⁸⁰—the Court went out of its way to cabin *Gray*: the prior opinion applied solely to the validity of a death sentence in

170. 481 U.S. 648, 660 (1987).

171. The trial court expressly found that the juror was capable of imposing death, and the Mississippi Supreme Court agreed that the juror “was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria.” *Gray v. State*, 472 So. 2d 409, 422 (Miss. 1985).

172. *Id.* at 411.

173. *Id.* at 422–23.

174. *Gray*, 481 U.S. at 668.

175. *Id.* at 665.

176. *Id.*

177. *Id.* (quoting *Moore v. Estelle*, 670 F.2d 56, 58 (5th Cir. 1982) (Goldberg, J., concurring)).

178. *Id.* at 664–65.

179. *Ross v. Oklahoma*, 487 U.S. 81, 87 (1988).

180. See *infra* Section II.C.2.

a capital case where a prospective juror was erroneously found to be a “*Witherspoon*-excludable” juror (i.e., someone unable to impose the death penalty).¹⁸¹ In every other setting in which a prosecutor’s challenge for cause was erroneously granted, the inquiry should focus not on the improper exclusion of the qualified juror but rather on the impartiality of those replacement jurors who tried and convicted the defendant.¹⁸² Even if the trial court erred (and perhaps spared prosecutors the need to exercise a peremptory challenge), the defendant could not complain of the impartiality of the actually empaneled petit jury.¹⁸³ Accordingly, his rights under the Sixth Amendment were not violated.¹⁸⁴

A recent case from Massachusetts’s high court, *Commonwealth v. Williams*,¹⁸⁵ illustrates the practical problems that defendants face when raising these sorts of claims (and, coincidentally, the ways that race may inform challenges for cause). There, during voir dire, a prospective juror shared her belief that “the system is rigged against young African American males,” particularly with respect to drug prosecutions, and the trial court granted prosecutors’ challenge for cause.¹⁸⁶ Surveying the nuanced distinction between strongly held personal beliefs and improper bias, the Supreme Judicial Court decided that the trial judge abused his discretion in excluding the juror.¹⁸⁷ The petit jury was thus (improperly) deprived of the input of a qualified juror whose views and beliefs, as a matter of law, in no way disqualified her from service.¹⁸⁸ And the absence of that perspective in the jury box might have made a real difference: the defendant was a young black male charged with a drug distribution offense.¹⁸⁹ But the court’s discussion of these important issues was technically dicta.¹⁹⁰ Because the defendant was convicted by twelve jurors whose qualifications the defendant did not dispute, his conviction was affirmed.¹⁹¹

181. *Ross*, 487 U.S. at 87–88.

182. *See id.* at 86.

183. *See id.* at 85–86.

184. *Id.* at 88 (“So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.”).

185. 116 N.E.3d 609 (Mass. 2019).

186. *Williams*, 116 N.E.3d at 612–13.

187. *Id.* at 614–19.

188. *Id.* at 619.

189. *See id.* at 612–13.

190. *Id.* at 622.

191. *Id.* at 619; *accord* *United States v. Padilla-Mendoza*, 157 F.3d 730, 733–34 (9th Cir. 1998) (finding abuse of discretion in excusing jurors for cause who expressed opposition to drug laws, but affirming conviction for lack of prejudice); *see also* *United States v. Brooks*, 175 F.3d 605, 606 (8th Cir. 1999) (same). *But see* *Mason v. United States*, 170 A.3d 182, 190 (D.C. 2017) (ordering new trial on similar facts).

2. Erroneous Denials of (Defendants') Challenges for Cause

An erroneous ruling on a challenge for cause might also receive appellate scrutiny when the trial court rejects a meritorious request by the defendant to exclude a juror. Again, however, the Court has made it nearly impossible for a defendant to obtain relief in such circumstances.

In *Ross v. Oklahoma*,¹⁹² the Court considered the mirror image of the problem posed in *Gray*: the trial court improperly rejected the defendant's meritorious challenge for cause to a juror in a capital case. During voir dire, the prospective juror revealed that he would automatically impose death if the defendant were found guilty,¹⁹³ rendering him automatically excludable.¹⁹⁴ Meritorious challenge for cause denied, the defendant then exercised a peremptory strike against the juror.¹⁹⁵ This strike was effectively required under Oklahoma law: a defendant waives her right to complain of an improperly denied challenge for cause if she fails to use an available peremptory strike against the juror.¹⁹⁶ (A similar requirement exists in most jurisdictions.¹⁹⁷) But the Court upheld the conviction and death sentence. By striking the biased juror, the Court reasoned, the defendant had cured any Sixth Amendment violation: twelve impartial jurors heard his case, so the defendant was not deprived of his right to an impartial jury.¹⁹⁸ Nor did the effective taxing of the peremptory strike constitute a denial of due process. "[P]eremptory challenges are a creature of statute and are not required by the Constitution," and there was "nothing arbitrary or irrational" about Oklahoma's requirement that they be exhausted to cure an alleged error on a challenge for cause.¹⁹⁹ Thus, the defendant, having received exactly what state law provided he was entitled to, could not complain.

Twelve years later, in *United States v. Martinez-Salazar*,²⁰⁰ the Court answered a question left open in *Ross*: whether the same result would obtain if the governing rules did *not* require a curative peremptory. Even after *Ross*, most federal courts had continued to follow an "automatic reversal" rule when a defendant's challenge for cause was erroneously denied.²⁰¹ The Fed-

192. 487 U.S. 81 (1988).

193. *Ross*, 487 U.S. at 83–84.

194. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Morgan v. Illinois*, 504 U.S. 719 (1992).

195. *Ross*, 487 U.S. at 84.

196. William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49, 55 n.27 (1999).

197. William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1398 (2001); accord Childs, *supra* note 196, at 55 n.27.

198. *Ross*, 487 U.S. at 86.

199. *Id.* at 89–90.

200. 528 U.S. 304 (2000).

201. *United States v. Polichemi*, 201 F.3d 858, 862 (7th Cir. 2000) (citing *United States v. Hall*, 152 F.3d 381, 408 (5th Cir. 1998); *United States v. Martinez-Salazar*, 146 F.3d 653 (9th Cir. 1998); *United States v. Cambara*, 902 F.2d 144, 147 (1st Cir. 1990); *United States v. Ruus-*

eral Rules of Criminal Procedure lacked a “curative peremptory” requirement akin to Oklahoma’s waiver rule, these courts noted, and without such a requirement a defendant was constitutionally “entitled to use his peremptory challenges solely to strike those jurors who would not otherwise be excused for cause.”²⁰² In *Martinez-Salazar*, the Court disagreed. Whether the defendant was deprived of his peremptory by operation of statute or by choice was irrelevant; by voluntarily electing to strike the juror, the defendant had remedied the constitutional problem on his own.²⁰³ Having eliminated the biased juror, the Court held, the defendant “cannot tenably assert any violation of his Fifth Amendment right to due process.”²⁰⁴ If the defendant wanted to contest the mistaken ruling on his challenge for cause, he “had the option of letting [the biased juror] sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal.”²⁰⁵ This was a hard choice, the Court conceded, but “[a] hard choice is not the same as no choice.”²⁰⁶

In practice, though, strategically leaving a biased juror on a petit jury is almost unthinkable. As the Seventh Circuit wrote in a case reheard immediately after *Martinez-Salazar* was announced: “[W]e suspect that prudent defense counsel will continue to use peremptory challenges to protect their clients against potentially biased jurors, rather than gambling everything on their ability to show bias after-the-fact and to obtain a reversal of a conviction on this basis.”²⁰⁷ And, as other scholars have noted, the rule has the curious effect of “invit[ing] defense lawyers . . . to intentionally infect the jury with a biased juror,” an approach arguably in tension with “ethical duties that even criminal defense lawyers owe to the integrity of the judicial system.”²⁰⁸ In short, in all but the most unusual cases, the Court has shut the door on defendants’ ability to contest either the erroneous grant or the erroneous denial of a challenge for cause.

* * *

It is not difficult to imagine a very different set of constitutional rules regulating challenges for cause. Justice Marshall’s dissenting opinions in the cases surveyed in this Part—in particular *Lockhart v. McCree*,²⁰⁹ *Holland v. Illinois*,²¹⁰ *Wilkerson v. Texas*,²¹¹ and *Ross v. Oklahoma*²¹²—sketch such a

ka, 883 F.2d 262, 268 (3d Cir. 1989); *United States v. Ricks*, 776 F.2d 455, 461 (4th Cir. 1985); and *United States v. Hill*, 738 F.2d 152, 153–54 (6th Cir. 1984)).

202. *Martinez-Salazar*, 146 F.3d at 658.

203. *Martinez-Salazar*, 528 U.S. at 307.

204. *Id.* at 317.

205. *Id.* at 315.

206. *Id.*

207. *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000).

208. *Pizzi & Hoffman*, *supra* note 197, at 1405.

209. *See* 476 U.S. 162, 184–86 (1986) (Marshall, J., dissenting).

210. *See* 493 U.S. 474, 490–94 (1990) (Marshall, J., dissenting).

211. *See* 493 U.S. 924, 924–26 (1989) (Marshall, J., dissenting from denial of certiorari).

doctrinal framework. If the Sixth Amendment's fair-cross-section requirement applied at the level of the "qualified" venire (as opposed to the level of the initial venire), for example, Curtis Flowers could have asserted a fair-cross-section claim once prosecutors' challenges for cause eliminated a significant share of the black potential jurors initially summoned to his Mississippi courthouse.²¹³ If the Court adopted a more robust approach to investigating and evaluating alleged equal protection violations, challenges for cause like those advanced in Timothy Foster's trial—where prosecutors curiously excluded black potential jurors whose biases seemed to favor the State²¹⁴—might give rise to constitutional claims.²¹⁵ And if erroneous rulings on challenges for cause required automatic reversal, it seems likely that both attorneys and judges would treat the matter with far greater care than they do now.²¹⁶ Taken together, such changes might go a long way toward eliminating the disparities identified in Part I of this Article.

But that is not the path the Court pursued. In 1987, the Court warned that it was imperative not to "insulate jury selection error from meaningful appellate review."²¹⁷ By 2000, the Court had accomplished precisely that.

212. See 487 U.S. 81, 91–92 (1988) (Marshall, J., dissenting).

213. Admittedly, ensuring that challenges for cause produced representative pools of "qualified" jurors would present some practical difficulties. Perhaps the trial court could continue qualifying nonwhite potential jurors until some semblance of representativeness was restored; in other contexts, though, the Court has explained that such "outright racial balancing . . . is patently unconstitutional," *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Alternatively, the trial court could discharge the venire and begin again with a new slate of prospective jurors; in many cases, though, it seems likely that the same pattern would simply recur once the parties began qualifying the next batch of potential jurors.

214. See *Voir Dire Transcript*, *supra* note 76, at 782.

215. When a *Batson* violation is found at the trial court level, the typical remedy is to seat the improperly stricken juror; for obvious reasons, seating a biased potential juror would not be an attractive remedy for the species of equal protection violation contemplated here. See *Mazzone*, *supra* note 167, at 1619–20. But trial courts have discretion to craft an appropriate response when they encounter an equal protection violation during jury selection: they may begin jury selection anew, order the forfeiture of peremptory challenges by the offending party, grant additional peremptory challenges to the opposing party, or sanction attorneys. *Id.* at 1618–20, 1624. Each of these remedies would be entirely appropriate if a court found that racial bias unconstitutionally tainted a challenge for cause.

216. Cf. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 662 (2d Cir. 1946) (Frank, J., dissenting) ("A legal system is not what it says, but what it does. Our 'criminal law,' then, cannot be described accurately in terms merely of substantive prohibitions; the description must also include the methods by which those prohibitions operate in practice—must include, therefore, not the substantive and procedural rules as they appear in words but as they actually work, or, as Llewellyn puts it, 'the net operation of the whole official set-up, taken as a whole,' for it 'is that net operation—it is the substantive rule only as it trickles through the screen of action—which counts in life.'") (quoting K.N. Llewellyn, *Introduction to JEROME HALL, THEFT, LAW AND SOCIETY*, at xv, xxiii (1935)).

217. *Gray v. Mississippi*, 481 U.S. 648, 665 (1987).

III. CHALLENGES FOR CAUSE AND THE ROLES OF THE JURY

Racial disparities equivalent to those identified in Part I have prompted scholars and jurists to call for reforms in the rules governing peremptory strikes—or even for the abolition of such strikes altogether. These critiques vary in their emphasis and perspective, but generally critics highlight the ways in which peremptory strikes—or prosecutors’ peremptory strikes, in particular²¹⁸—are antithetical to the core functions of the jury.²¹⁹ But the problem goes deeper than most critics have realized: challenges for cause, as they exist in practice today, raise many similar concerns. Effectively stand-alone, insulated from meaningful review, and profoundly racially skewed, our current system of challenges for cause is far more problematic than we have realized.

This Part repurposes an approach taken by previous scholars of jury selection: it “consider[s] the various roles we expect the jury to fulfill and . . . ask[s] whether [challenges for cause] hinder or help the jury to fulfill these roles.”²²⁰ These functions sometimes bleed into one another, and sometimes they work at cross-purposes, but among those most frequently invoked by the Supreme Court and scholars are (1) protecting the individual against governmental overreach; (2) enabling democratic control over the judiciary; (3) finding facts; (4) bolstering the perceived legitimacy and fairness of criminal verdicts; and (5) serving as a “practical school of free citizenship”²²¹ (i.e., teaching ordinary citizens about their rights and duties).²²² On each front, challenges for cause—and, particularly, prosecutors’ challenges for cause—raise grave concerns. Our reflexive ascription of objectivity, legitimacy, and utility to challenges for cause is unwarranted.

218. See, e.g., Roberts, *Asymmetry as Fairness*, *supra* note 1.

219. See, e.g., Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1045 (1995).

220. Cf. *id.* (discussing peremptory challenges). In her appraisal of peremptory strikes, Professor Marder—to whom this Part owes a significant debt—consolidates some of the themes I address in Sections III.A and III.B under the heading “The Jury’s Role in Articulating Public Values.” *Id.* at 1052–66. I have opted to disaggregate these two ideas for reasons discussed in Section III.B.

Despite the possible tension between these roles, the Court often emphasizes the various functions of the jury in tandem. The opening paragraph of the Court’s recent opinion in *Peña-Rodriguez v. Colorado*, for instance, touches in rapid succession on four of the five roles discussed in this Part. 137 S. Ct. 855, 860 (2017) (“The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.”).

221. FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 236 (Theodore D. Woolsey ed., Philadelphia, J.B. Lippincott Co. 3d ed., rev. 1891) (1853).

222. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–88 (1991).

The purpose of this exercise is not to advocate for the abolition of challenges for cause (although I am persuaded that alternative models, including jury selection by lottery,²²³ would not be radically inferior to our current regime). Rather, the point is to interrogate more carefully what we want the jury to accomplish and whether our current system of challenges for cause is furthering those purposes. Apart from rethinking the constitutional framework governing challenges for cause, as discussed in Part II, this inquiry necessarily forces us to confront an antecedent question: Who should be “qualified” to participate in the jury system today?

A. Government Overreach

In *Duncan v. Louisiana*—a case that stemmed from a racially charged confrontation between white and black teenagers and a locally notorious segregationist judge²²⁴—the Supreme Court explained that the “right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government.”²²⁵ The jury, the Framers recognized, was “an inestimable safeguard” for the individual defendant against the “overzealous prosecutor” and the “compliant, biased, or eccentric judge.”²²⁶ Fifty years later, in yet another case implicating racial bias within the jury, the Court reaffirmed this vision of the jury: “Whatever its imperfections in a particular case, the jury is a necessary check on governmental power.”²²⁷

This understanding of the jury, as “introduc[ing] a slack into the enforcement of law,”²²⁸ extends to its role as a buffer against harsh penal sanctions, including the death penalty. As Blackstone noted in his *Commentaries*, English jurors regularly violated their oaths to avoid returning verdicts that would result in capital punishment; in a trial for grand larceny (“stealing above the value of tweldepence”), for instance, jurors might value the stolen item at a lesser amount, notwithstanding clear evidence to the contrary.²²⁹ Such “pious perjury” was evidently commonplace and, in Blackstone’s estimation, altogether proper.²³⁰ Early American juries likewise were familiar

223. See Amar, *supra* note 125, at 1287–89 (discussing democratic virtues of lottery regimes, including in the selection of jury venires).

224. See Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, in *CRIMINAL PROCEDURE STORIES* 261, 261–66 (Carol S. Steiker ed., 2006).

225. 391 U.S. 145, 155 (1968).

226. *Duncan*, 391 U.S. at 156; accord *THE FEDERALIST* NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (lauding trial by jury as a check against “arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions”).

227. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

228. *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (Hand, J.).

229. 4 BLACKSTONE, *supra* note 12, at *238–39.

230. Julia Simon-Kerr, *Pious Perjury in Scott’s The Heart of Midlothian*, in *SUBVERSION AND SYMPATHY: GENDER, LAW, AND THE BRITISH NOVEL* 101, 104–05 (Martha C. Nussbaum & Alison L. LaCroix eds., 2013) (quoting 4 BLACKSTONE, *supra* note 12, at *239).

with the sanctions that would attach to convictions for various offenses, and they tailored verdicts accordingly.²³¹

Whatever the other merits of challenges for cause, they generally harm (rather than help) the jury in its role as a restraint on excessive state power. This dynamic is most acute in the capital context, where under *Witherspoon v. Illinois* and its progeny prosecutors may exclude “for cause” prospective jurors who harbor strong opposition to the death penalty.²³² (This rule appears to date to 1820. Justice Joseph Story, riding circuit, authored an opinion endorsing the removal of two Quaker jurors from a capital case on the grounds their service would “corrupt[] the very sources of justice.”²³³) The result of this rule on modern death penalty cases is “well documented and profound”: juries empaneled after the “death qualification” process “are, on the whole, uncommonly conviction- and death-prone, as well as disproportionately punitive and inclined toward believing the prosecution.”²³⁴

231. See generally *United States v. Polizzi*, 549 F. Supp. 2d 308 (E.D.N.Y. 2008) (Weinstein, J.) (providing lengthy overview of colonial-era practices regarding nullification and sentencing).

232. 391 U.S. 510, 522 n.21 (1968); see also *Wainwright v. Witt*, 469 U.S. 412, 419–20 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

233. *United States v. Cornell*, 25 F. Cas. 650, 655–56 (C.C.D.R.I. 1820) (No. 14,865a) (“To compel a Quaker to sit as a juror on such cases, is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to the principles of justice and common sense. To insist on a juror’s sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to procure the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice which the law requires of us; and I am not bold enough to introduce a practice, which corrupts the very sources of justice.”). See generally Cohen & Smith, *supra* note 12, at 93 (detailing development of death qualification of American juries).

234. Cover, *supra* note 36, at 121. Capital defendants receive the reciprocal benefit of excluding “automatic death” jurors (i.e., those unwilling to impose a life sentence, rather than death, if they conclude the defendant is guilty), see *Morgan v. Illinois*, 504 U.S. 719 (1992), but this advantage is relatively modest. First, because most jurisdictions require a unanimous recommendation of death to impose a capital sentence, the empanelment of a single “*Witherspoon*-excludable” juror (whose opinion, standing alone, could block a death recommendation) would greatly benefit a capital defendant; the defendant’s ability to exclude a single “automatic death” juror achieves comparatively little, insofar as that juror would still have to convince eleven fellow jurors that her support for the death penalty was warranted to alter the outcome. See Cover, *supra* note 36, at 122. Second, the segment of the general population rendered ineligible under *Witherspoon*: there are simply more people with scruples against capital punishment than those “who believe[] literally in the Biblical admonition ‘an eye for an eye.’” *Adams v. Texas*, 448 U.S. 38, 49 (1980). And third, even with *Morgan* in place, studies have shown that a significant number of “automatic death” jurors still make it into the jury box. Cover, *supra* note 36, at 122 (citing John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1212 & n.8 (2001), and William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 62–63 (2003)). Thus, the “cumulative impact of

But the distorting effects of challenges for cause extend to noncapital cases as well, wherever prospective jurors may harbor conscientious scruples against particular enforcement practices or the criminalization of certain conduct (e.g., drug offenses, nonviolent property offenses). Notably, the American tradition of excluding jurors “for cause” due to moral objections to a particular law (or enforcement practice) again has its origins in America’s fraught racial politics: “Slavery, or more specifically challenges to the slavery regime, marks the first context where [for cause] challenges to jurors with ‘conscientious scruples’ against a particular law appeared in cases.”²³⁵

A defendant’s challenges for cause do serve as an important “check on governmental power” in some ways—excluding prospective jurors who automatically credit police witnesses,²³⁶ or expect the defendant to testify,²³⁷ or disregard the presumption of innocence²³⁸—but, again, the gains must be placed in context. Direct admissions of bias are rare,²³⁹ and except in extreme situations, the courts have shown reluctance to find “implied bias” based on a prospective juror’s personal connections with law enforcement or prosecutors.²⁴⁰ Moreover, the net “whitewashing” of venires described in Part I suggests that the overall effect of challenges for cause does not accrue to the defendant’s benefit, even where defendants aggressively attempt to exclude those perceived as hostile to their side.²⁴¹ Finally, to the extent that defendants’ challenges for cause do occasionally serve this function, it is an argument for preserving the defendant’s ability to raise them; it says nothing about the merits of the greater share of challenges for cause (i.e., those urged by prosecutors or suggested by judges).²⁴²

Witherspoon proceedings—even as moderated by *Morgan*—is to yield juries more death prone than the communities from which their members were drawn.” Cover, *supra* note 36, at 123.

235. Cohen & Smith, *supra* note 12, at 93; cf. *Reynolds v. United States*, 98 U.S. 145, 157 (1879) (holding no error in trial court granting government’s challenges for cause against two prospective jurors who were Mormon and bigamists in federal prosecution for bigamy).

236. See, e.g., *United States v. Sithithongtham*, 192 F.3d 1119 (8th Cir. 1999); *State v. Draper*, 675 S.W.2d 863 (Mo. 1984).

237. See, e.g., *Overton v. State*, 801 So. 2d 877, 888–93 (Fla. 2001); *State v. Stewart*, 692 S.W.2d 295 (Mo. 1985).

238. See, e.g., *People v. Bludson*, 761 N.E.2d 1016 (N.Y. 2001); *Green v. Commonwealth*, 546 S.E.2d 446 (Va. 2001).

239. LAFAVE ET AL., *supra* note 167, § 22.3(c) (“Direct admissions of bias, however, are not frequently made; it is ‘unlikely that a prejudiced juror would recognize his own personal prejudice—or knowing it, would admit it.’” (quoting ALFRED FRIENDLY & RONALD L. GOLDFARB, *CRIME AND PUBLICITY* 103 (1967))).

240. In *Smith v. Phillips*, 455 U.S. 209 (1982), for example, the Supreme Court affirmed a defendant’s murder conviction where a juror submitted a job application to the prosecutors’ office midtrial (and prosecutors were aware of this fact). See also *United States v. Mitchell*, 690 F.3d 137 (3d Cir. 2012) (finding no implied bias where juror was coworker of key government witnesses).

241. See *supra* Sections I.A and I.B.

242. Cf. Roberts, *Asymmetry as Fairness*, *supra* note 1 (arguing for the asymmetrical allocation of peremptory strikes).

B. Democratic Control

Apart from any potential benefits to those accused of criminal offenses, the American jury also constitutes an institution embodying core republican values, “a political institution . . . [representing] a mode of the sovereignty of the people.”²⁴³ It was this vision of the jury that Thomas Jefferson invoked when he wrote that

in America . . . it is necessary to introduce people into every department of government as far as they are capable of exercising it Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the legislative.²⁴⁴

The jurors of whom Jefferson wrote were, of course, almost uniformly freeholding or taxpaying white men,²⁴⁵ and (as this Article has attempted to illustrate) our commitment to the jury as a truly representative institution remains qualified today. But this democratic conception of the jury—that it is not just “a valued right of persons accused of crime, [but] also an allocation of political power to the citizenry”²⁴⁶—enjoys a central place in the American legal imagination.²⁴⁷

Even stripped of its traditional prerogative to determine both the facts and the law, the jury still “defines for the community the duties that its members owe to each other and the standard of conduct to which a reason-

243. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 261 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835). While this role of the jury may frequently overlap with that discussed in Section III.A, it may also conflict. During Reconstruction, for instance, black activists’ efforts to integrate the jury were animated largely by the legal system’s “failure to protect black victims of white violence.” Forman, *supra* note 19, at 897. The participation of black jurors was seen as a means of countering the impunity guaranteed by all-white juries, which regularly acquitted or failed to indict white perpetrators. *Id.* at 931. *But see* Frampton, *supra* note 3, at 1601–02 (arguing that by the end of the nineteenth century, “securing fair treatment for black defendants” surpassed other concerns—including affirming the citizenship of black jurors and countering impunity for white purveyors of racial violence—in organizing efforts against “the Jim Crow jury”).

244. Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in *THE COMPLETE BILL OF RIGHTS* 595, 595–96 (Neil H. Cogan ed., 1997); *see also* Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 *IND. L. REV.* 397, 398 (2009) (“I go further still, claiming that even the Sixth Amendment jury trial right, which sounds grammatically like a right of the accused, is actually a restatement of the collective right in Article III.”); Amar, *supra* note 125, at 1287–89.

245. Alschuler & Deiss, *supra* note 19, at 877.

246. *Id.* at 876.

247. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 407 (1991) (“[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”). For a more thorough and nuanced examination of “[t]he ‘juries and democracy’ linkage,” *see* William Ortman, *Chevron for Juries*, 36 *CARDOZO L. REV.* 1287, 1326–31 (2015) (disentangling related claims associating the jury with democracy).

bel person is held.”²⁴⁸ For better or worse, we trust the criminal jury, on behalf of the community it embodies, to “make judgements as to public values”²⁴⁹ and to articulate and enforce community norms: whether a sexual encounter was consensual,²⁵⁰ whether a killing was justified,²⁵¹ whether a politician acted with corrupt intent.²⁵²

Challenges for cause are “antidemocratic” in the same basic way that “key man” jury selection regimes and peremptory strikes are: they remove from the jury “a range of values and perspectives,” and if “a range of views is lost to the jury, then the verdict is less likely to reflect public values.”²⁵³ To be sure, there may be good reason to police the jury box for such disfavored values and perspectives; limiting the practice would strike many as reckless and detrimental to the administration of justice.²⁵⁴ But it is worth remembering that the relatively recent shift to more democratic “lottery” venires—now ubiquitous—was no less abhorrent to champions of the “key man” system.²⁵⁵ Many of the arguments were the same. As Professor Akhil Amar has written:

[A] tension clearly exists in democratic theory between the conception of democratic representatives as citizens of moderation and stature—men of the middle who each *represent* the soundest instincts and values of the community—and the conception of representatives as a cross-sectional group that collectively will be *representative of* all important subgroups within the community.²⁵⁶

248. Marder, *supra* note 219, at 1058–59.

249. *Id.* at 1056.

250. *E.g.*, Timothy Williams, *What Was Different for Jurors this Time?*, N.Y. TIMES, Apr. 27, 2018, at A19 (examining whether #MeToo movement swayed jury in retrial of Bill Cosby after initial trial ended in hung jury).

251. Compare Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1, with Mitch Smith, *Jurors Believed Their Eyes, Not Officer’s Words*, N.Y. TIMES, Oct. 7, 2018, at A17 (discussing jury conviction of Chicago police officer Jason Van Dyke of second-degree murder).

252. Compare Kim Severson & John Schwartz, *Edwards Acquitted on One Count; Mistrial on 5 Others*, N.Y. TIMES, June 1, 2012, at A1 (discussing acquittal of John Edwards), with Monica Davey & Emma G. Fitzsimmons, *Ex-Governor Found Guilty of Corruption*, N.Y. TIMES, June 28, 2011, at A1 (discussing jury conviction of former governor of Illinois Rod R. Blagojevich).

253. *Cf.* Marder, *supra* note 219, at 1045, 1064 (discussing peremptory strikes).

254. *But see* Simonson, *supra* note 110, at 249 (challenging the premise “that the rules of criminal procedure must limit direct public participation to an illusory, limited subset of the public that is deemed ‘neutral’ and ‘unbiased’”).

255. VAN DYKE, *supra* note 111, at 14–15 (discussing opposition to Jury Selection and Service Act of 1968).

256. Amar, *supra* note 125, at 1288.

In the context of the American jury, the latter vision has been ascendant for the last half century, and few voices today would argue that this radical expansion of jury service in recent decades has been unwise.²⁵⁷

In this sense, challenges for cause are undemocratic regardless of the racial disparities they reflect or generate—as would be a restriction on electoral franchise for those with strong partisan views²⁵⁸—but the data presented in Part I greatly amplify the core concern. As has already been articulated across forty-five years of fair-cross-section jurisprudence and countless scholarly critiques of *Batson*, large racial disparities in the jury selection process undermine any claim that the criminal jury serves as an authentically democratic body.

One might counter that challenges for cause, by eliminating extreme views on both sides, in fact aid the jury in its democratic role, facilitating the jury's ability to serve and speak as the true conscience of the community.²⁵⁹ Put succinctly: “The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise.”²⁶⁰ But proponents of this view should acknowledge that it is (quite literally) the same rationale advanced by the Court's majority in *Swain v. Alabama* and by the dissenters in *Batson v. Kentucky*.

C. Factfinding

Juries find facts.²⁶¹ It is frequently said that factfinding is the primary, or even sole, role of the jury (“although it is not clear that anyone believes this”).²⁶² And there is a longstanding debate as to whether juries are particularly *adept* at accurately finding facts.²⁶³ Indeed, the jury's efforts in this re-

257. *But see* *Berghuis v. Smith*, 559 U.S. 314, 334 (2010) (Thomas, J., concurring) (arguing the “conclu[sion] that the Sixth Amendment guarantees a defendant the right to a jury that represents ‘a fair cross section’ of the community . . . seems difficult to square with the Sixth Amendment’s text and history”).

258. For an analysis of the utility (and limits) of this analogy, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

259. *Cf.* ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 15 (2006) (“The theory of the electoral college was that a body of men should be chosen . . . who would be distinguished by their eminent ability and wisdom, who would be independent of popular passion, who would not be influenced by tumult, cabal, or intrigue, and that in the choice of the President they would be left perfectly free to exercise their judgment in the selection of the proper person.” (quoting S. REP. NO. 43-395, at 3 (1874))).

260. *Batson v. Kentucky*, 476 U.S. 79, 120 (1986) (Burger, C.J., dissenting) (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).

261. For an overview of the debates surrounding the jury as factfinder, see Marder, *supra* note 219, at 1066–68.

262. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 116 (1966).

263. *Compare* Letter from Thomas Jefferson, *supra* note 244 (“[The public] are not qualified to judge questions of law; but they are capable of judging questions of fact. In the form of

gard are impeded by a host of constitutional and subconstitutional rules that are antagonistic to the “truth-seeking function” of the trial.²⁶⁴ But, to the extent possible without sacrificing other values, a jury that is more accurate in its factfinding would seem preferable to one that is less so. Indeed, as Professor Richard Primus has argued in defending the unanimity requirement, jury accuracy (defined there as “the factually correct application of the law to the case at hand”) may be democratically required.²⁶⁵

Unquestionably there are many instances where the exclusion of “biased” or “partial” jurors through challenges for cause is consistent with (or even required by) the factfinding role of the jury. As Chief Justice John Marshall, sitting as circuit judge, explained in the trial of Aaron Burr, “[S]trong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to [a prospective juror].”²⁶⁶ Were it otherwise, Marshall declared, the constitutional guarantee of an “impartial jury” would mean very little.²⁶⁷

But the question whether, all told, challenges for cause advance or inhibit the jury’s factfinding role is a different matter. Consider two of the most frequent bases for excusing jurors for cause: (1) the prospective juror has some prior association with the defendant, the alleged victim, or likely witnesses (or some other prior knowledge of the allegations),²⁶⁸ and (2) the prospective juror acknowledges that, for some other reason (e.g., skepticism of law enforcement, being a victim of a similar crime), she fears she will not be entirely “fair” or “impartial” if empaneled.²⁶⁹ There may be good policy reasons for excluding such jurors, particularly when it comes to the public per-

juries they determine all matters of fact . . . [Though i]t is therefore left to the juries, if they think the permanent judges are under any bias whatever in any cause, to take upon themselves to judge the law as well as the fact.”), with Robert J. MacCoun, *Comparing Legal Factfinders: Real and Mock, Amateur and Professional*, 32 FLA. ST. U. L. REV. 511 (2005) (discussing inherent difficulties measuring factfinding ability of juries).

264. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

265. Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1424, 1457 (1997).

266. *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g).

267. *Id.* at 50; cf. *Powers v. Ohio*, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting) (“In a criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of [a means of winnowing out possible . . . sympathies and antagonisms on both sides] should not be minimized.”).

268. See ABRAMSON, *supra* note 19, at 45–46.

269. See, e.g., C. La Rue Munson, *Selecting the Jury*, 4 YALE L.J. 173, 184 (1895) (“In a general way, the proper rule has been well stated in an able note to *Commonwealth v. Brown*, 9 Am. State Rep. 746: ‘Whenever a juror shows upon his examination that he himself fears that his deliberations cannot be impartial, or where he expresses a state of feeling from which it appears that his mind is in an improper condition, he will generally be excluded.’”); see also ABRAMSON, *supra* note 19, at 47 (“Beyond these problems, the *Burr* standard more or less required judges to take jurors at their word.”).

ception of the jury trial as fair,²⁷⁰ but neither category of exclusion, I contend, advances the factfinding role of the jury.

The version of the “impartial jury” that now reigns in American criminal procedure—distant, dispassionate, ignorant of the parties and allegations—contrasts with the “local jury” that predominated (and was celebrated, particularly in Anti-Federalist writings) at the country’s founding.²⁷¹ Though the history of the Sixth Amendment is “scanty,”²⁷² the heated debates over vicinage²⁷³ reveal a “vision of jury deliberation enriched by the ability of local jurors to know the context in which events on trial took place.”²⁷⁴ Narrowing the geography from which jurors were drawn, vicinage proponents argued, aided the factfinding mission of the jury.²⁷⁵ Local jurors, for example, would know whether the defendant is “habitually a good or bad man”; such knowledge might be dispositive if the case turned on whether the defendant performed a deed “maliciously or accidentally.”²⁷⁶ Jurors of the vicinage would also be acquainted with the character and reliability of the alleged victim and potential witnesses.²⁷⁷ They might even have useful knowledge of the incident itself, “which would permit them to evaluate better the testimony concerning the incident given at the trial.”²⁷⁸ And, if not, those closest to the alleged wrongdoing were still best suited to interpret “the mannerisms, colloquialisms, and fashions of the participants, as well as the names of roads, locations, and businesses constituting the setting in which the incident occurred.”²⁷⁹

270. See *infra* Section III.D.

271. ABRAMSON, *supra* note 19, at 17–55.

272. *Apodaca v. Oregon*, 406 U.S. 404, 409 (1972).

273. See generally Drew L. Kershen, *Vicinage* (pts. 1–4), 29 OKLA. L. REV. 801 (1976), 30 OKLA. L. REV. 1 (1977).

274. ABRAMSON, *supra* note 19, at 22.

275. *Id.* at 27; Kershen, *supra* note 273, at 75–79.

276. See ABRAMSON, *supra* note 19, at 27 (quoting Agrippa, Letter V (Dec. 11, 1787), in 4 THE COMPLETE ANTI-FEDERALIST 78 (Herbert Storing ed., 1981)); see also Patrick Henry, Address at the Virginia Ratifying Convention (June 14, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 434, 435 (“[P]erson[s] accused may be carried from one extremity of the state to another, and be tried, *not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both . . .*” (emphasis added)). But see Christopher Gore, Address at the Massachusetts Ratifying Convention (Jan. 30, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 419, 421 (“The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable.”).

277. Kershen, *supra* note 273, at 834; see also ABRAMSON, *supra* note 19, at 28 (quoting James Wilson: “When jurors can be acquainted with the characters of the parties and witnesses . . . they not only hear the words, but they see and mark the features of the countenance; they can judge of weight due to such testimony.”).

278. Kershen, *supra* note 273, at 834; see also ABRAMSON, *supra* note 19, at 28.

279. Kershen, *supra* note 273, at 834; see also ABRAMSON, *supra* note 19, at 28. To be sure, much of the Anti-Federalists’ regard for local juries, and their opponents’ ambivalence,

At Burr's trial, this "local knowledge" model of the jury collided with a much different (and, today, more familiar) model, in which the jurors' distance from the events assured impartiality. Marshall's opinion rejected the "local knowledge" model and "outlined the portrait of the impartial juror we still try to sketch today."²⁸⁰ But even Marshall was unwilling to reject entirely the common law rule, then still widely accepted, that a potential juror could serve despite having formed opinions about the case based on the juror's personal knowledge of events.²⁸¹ "Impartiality" was a critical value, to be sure, but there was still broad adherence to the view that jurors' "personal knowledge about the criminal case [was] an attribute, not a defect, of the jury."²⁸²

The point here is not to rehash or resolve these old debates but simply to emphasize that a certain form of knowledge is lost through challenges for cause as they now operate. Few jurors today would be seated if they revealed during voir dire that, knowing the defendant from work, they would view skeptically her account of where the missing money went. Or that, living on the block where the alleged drug transaction took place, they mistrusted the narcotics officers who claimed to observe a hand-to-hand transaction. Or that, knowing the victim and her family for many years, they considered it improbable she would submit a false police report. Excluding these jurors might be justifiable on other grounds, but it does not necessarily *enhance* the factfinding role of the jury; if anything, it deprives the jury of valuable information.²⁸³

went beyond "accurate" factfinding. Both sides candidly admitted as much. See THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 435–39. At the Virginia Ratifying Convention, defending Article III's lack of a vicinage provision, James Madison explained, "If it could have been done with safety, it would not have been opposed. It might happen that a trial would be impracticable in the country. Suppose a rebellion in a whole district; would it not be impossible to get a jury?" *Id.* at 435–36. Patrick Henry answered, "This gives me comfort—that, as long as I have existence, my neighbors will protect me. Old as I am, it is probable I may yet have the appellation of rebel." *Id.* at 438.

280. ABRAMSON, *supra* note 19, at 42.

281. See *United States v. Burr*, 25 F. Cas. 49, 52 (C.C.D. Va. 1807) (No. 14,692g) ("Without determining whether the case put by Hawk. bk. 2, c. 43, § 28, be law or not, it is sufficient to observe that this case is totally different. The opinion which is there declared to constitute no cause of challenge is one formed by the juror on his own knowledge; in this case the opinion is formed on report and newspaper publications."); see also ABRAMSON, *supra* note 19, at 42–43 ("Marshall was careful to stress that a person did not lose his ability to be an impartial juror simply because he had read the papers.").

282. Kershen, *supra* note 273, at 77.

283. Cf. Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 777 (1998) (arguing for abandonment of existing character evidence rules). But cf. Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437, 2475–76 (2000) ("A basic principle of our criminal law is that persons be judged for their acts, not for their personalities or their membership in discrete, identifiable groups. Evidence law's ban on character evidence [supports] . . . the moral norms that underlie our system of criminal justice. The harm done to the liberal ideal of judging the act, not the actor, cannot be calculated on a case-by-case basis, or factored into the balancing process of probative value versus prejudice.

Relatedly, the challenge-for-cause process today is dominated by prospective jurors' self-assessments of their own biases.²⁸⁴ Only in the rarest of cases will appellate courts find that it was improper to seat a juror who confidently asserted she would try the case fairly and impartially;²⁸⁵ I have found no reported case finding error by a trial court in excusing a juror who acknowledged doubts about her fairness and impartiality. This approach may be sound, but it is equally plausible that juror confidence acts as a heuristic for judges that is unrelated to the jurors' actual ability to accurately find facts.²⁸⁶ Perhaps the familiar ritual even has a perverse effect: those who are most conscientious in interrogating their own biases (and, thus, the most capable factfinders) are eliminated, while those most blind to their own biases (and, thus, the least capable factfinders) are empaneled.²⁸⁷

The limited experimental research conducted in this field lends support to the hypothesis. In one study on voir dire, researchers exposed mock jurors to various forms of prejudicial pretrial publicity; asked questions to assess whether they could serve as fair and impartial jurors; and, finally, recorded the jurors' "verdicts."²⁸⁸ The results came as a surprise: juror's self-assessments of their own bias (i.e., whether they had formed an opinion that they strongly doubted they could set aside) were largely independent of their final verdict preferences.²⁸⁹ In another study, researchers presented judges and laypeople with experimental vignettes setting forth criminal allegations, a prospective juror's biography, and that prospective juror's self-assessed impartiality.²⁹⁰ The vignettes were then modified to reflect differing levels of confidence in the juror's self-reported impartiality (e.g., "I'm pretty sure I could be fair" versus "Yes, yes I can"), and the respondents were asked to assess whether the prospective juror should be excused.²⁹¹ Judges' assessments of bias closely tracked the prospective juror's level of confidence, while the changes in self-confidence were effectively meaningless to the lay respond-

Bright-line rules excluding character to prove conduct can instantiate and send a message about these moral norms.").

284. VIDMAR & HANS, *supra* note 15, at 94; Rose & Diamond, *supra* note 15, at 515.

285. See Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC'Y REV. 601, 607 (2005) (observing that no prospective juror who stated he or she would be fair was dismissed for cause in study of thirteen felony trials).

286. Cf. Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315 (1995) (noting limited correlation between confidence and accuracy in eyewitness identifications).

287. Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias*, in ENHANCING JUSTICE: REDUCING BIAS 289 (Sarah E. Redfield ed., 2017). See generally Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012) (arguing that juror education on implicit bias can ameliorate its harms).

288. Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 668-69 (1991).

289. *Id.* at 695.

290. Rose & Diamond, *supra* note 15, at 519-20.

291. *Id.* at 522-24.

ents.²⁹² Such results are disquieting in light of previous work by legal anthropologists and other scholars, who have documented that “those with less education and lower occupational status[] are more prone to ‘powerless language’ ” than others.²⁹³ Taken together, the two studies undermine our dominant approach to identifying jurors who would make bad factfinders: self-reporting appears to be (at best) meaningless, and rulings on challenges for cause may be skewed by judges’ class, race, sex, and status biases.²⁹⁴

Finally, juries find facts collectively: we hope (and there is some reason to believe) that deliberation has a “curative effect” on the biases all jurors bring into jury room.²⁹⁵ Indeed, much of the Court’s fair-cross-section jurisprudence is premised on the idea that “[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.”²⁹⁶ The product is a “diffused impartiality,”²⁹⁷ where a diversity of perspectives ensures that the relevant facts “will be carefully and critically examined.”²⁹⁸ And to the extent challenges for cause have the effect of rendering petit juries more racially homogenous—which we know they do—there is strong evidence that such exclusions significantly undermine the accuracy of the jury’s factual determinations.²⁹⁹

292. *Id.* at 538.

293. *Id.* at 541.

294. In this regard, it is notable that at common law, challenges for cause involving “probable circumstances of suspicion, as acquaintance, and the like,” were not determined by the judge. 3 BLACKSTONE, *supra* note 12, at *363. Rather, such challenges

must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The *triors*, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn; and then he and the two *triors* shall try the next; and when another is found indifferent and sworn, the two *triors* shall be superseded, and the two first sworn on the jury shall try the rest.

Id.

295. Hoffman, *supra* note 9, at 858 (“Our system of peremptory challenges, on the other hand, substantially devalues both the ability of jurors to set those biases aside and the curative effect of deliberation.”).

296. *E.g.*, Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975) (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972)); see also Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978) (“All jurors’ experiences have shaped their values and attitudes, and these, in turn, are likely to shape jurors’ perceptions of the trial evidence and hence their votes. In this sense, ‘prejudice’ is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to the trial.”).

297. Taylor, 419 U.S. at 530 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

298. Marder, *Justice Stevens*, *supra* note 1, at 1725.

299. See Roberts, *Asymmetry as Fairness*, *supra* note 1, at 1523 (“A reduction in jury diversity is a significant loss, not least because diversity appears to enhance a jury’s effectiveness

D. *Legitimacy*

Another critical feature of our jury system, distinct from its actual fairness, is the perception of the jury as an instrument for impartial justice. Time and again, the Court has emphasized that the jury system is both “dependent on the public’s trust”³⁰⁰ and a mechanism for maintaining “public confidence in the fairness of our system of justice.”³⁰¹ Fostering “acceptance in the community” of the jury’s verdict is thought “essential to respect for the rule of law.”³⁰² “[C]onfidence in jury verdicts,” the Court recently wrote, “is a central premise of the Sixth Amendment trial right.”³⁰³ Indeed, particularly in its *Batson* jurisprudence, the Court has placed the *perception* of fairness alongside *actual* fairness as a paramount interest. Allowing bias to infect the jury selection process “invites cynicism respecting the jury’s neutrality and its obligation to adhere to the law”;³⁰⁴ it “create[s] the impression that the judicial system has acquiesced in suppressing full participation by one [group]” and that the “‘deck has been stacked’ in favor of one side.”³⁰⁵

A strong argument for retaining our system of challenges for cause, both by the defendant and the prosecution, can be grounded in the desirability of maintaining popular confidence in the jury system.³⁰⁶ Few would accept as legitimate an acquittal where the defendant’s mother sat in the jury, or a conviction where the defendant’s romantic rival did the same. At worst, verdicts that (rightly or wrongly) are perceived as contrary to the evidence can spark riots or vigilantism.³⁰⁷ And, because of our longstanding aversion to postverdict “impeachment” of the jury’s verdict³⁰⁸—a rule thought essential

in many ways, including imposing some sort of limitation on the operation of bias.”); *see also id.* at 1523 n.132 (collecting sources).

300. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

301. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

302. Peña-Rodriguez, 137 S. Ct. at 860.

303. *Id.* at 869.

304. Powers v. Ohio, 499 U.S. 400, 412 (1991).

305. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); *see also* Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 *YALE L.J.F.* 525, 526–27 (2014) (“[T]he primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair procedure, irrespective of whether members of the public are evaluating decisions made by the Supreme Court or by local courts, or reacting to the decisions made or rules enacted by any legal authorities. Research clearly shows that procedural justice matters more than whether or not people agree with a decision or regard it as substantively fair.”).

306. *Cf. Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (“Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.”).

307. See, e.g., ABRAMSON, *supra* note 19, at 103–04.

308. See FED. R. EVID. 606(b)(1) (“During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any

to protecting the integrity and independence of juries—identifying and eliminating juror bias during voir dire assumes significant import.³⁰⁹

But against this undeniable benefit must be weighed the delegitimizing force of how challenges for cause are currently conducted. Some of these critiques are old. Mark Twain, in 1872, pilloried the manner in which upstanding community leaders were disqualified from serving as jurors because they had read newspaper coverage of a crime: “[T]he [jury selection] system rigidly excludes honest men and men of brains . . . Ignoramuses alone [are entrusted to] mete out unsullied justice.”³¹⁰ A century later, Judge John Sirica famously made a similar point during Watergate. Questioning prospective jurors, Judge Sirica was astonished when “a handful [of prospective jurors] indicated they had not heard of the scandal”; he “indicated that those persons ought perhaps to be the least qualified to sit on the jury.”³¹¹ There are nontrivial legitimacy costs to be paid for empaneling the form of “unbiased” jurors to which we have become accustomed.

The graver concern, though—which has not been recognized previously—stems from the racial disparities identified in Part I. As presently constituted, challenges for cause (and, specifically, prosecutors’ challenges for cause) systemically reduce the representation of nonwhite jurors on petit juries. They do so to an even greater extent than peremptory strikes.³¹² Whether or not these disparities alter any given verdict, and whether or not they stem from overt “racial bias” (as understood in the *Batson* sense), we know from decades of scholarship that unrepresentative juries “threaten the public’s faith in the . . . legal system and its outcomes.”³¹³ If there is a danger that

juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.”); *Tanner v. United States*, 483 U.S. 107, 120–21 (1987). *But see Peña-Rodriguez*, 137 S. Ct. at 869 (“[T]he Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”).

309. See Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 551 (1975); see also *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973) (emphasizing importance of voir dire in identifying and eliminating racial bias). *But see* Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1147 (1993) (“What I failed to recognize . . . was that, even though no words were spoken, tides of racial passion swept through the courtroom when the peremptory challenges were exercised.”).

310. MARK TWAIN, *ROUGHING IT* 341–42 (Shelley Fisher Fishkin ed., Oxford Univ. Press 1996) (1872); see also *Saturday Night Live*, *Season 34, Ep. 2* (“*OJ Jury Selection*”) (NBC television broadcast Sept. 20, 2008) (“DEFENSE ATTORNEY: Juror No. 4? JUROR NO. 4: [*barking*]. PROF. DAVENPORT: Perhaps I can explain. . . . I just discovered this woman in the Arctic tundra. She was raised by wolves and has no knowledge of human language or culture. DEFENSE ATTORNEY: Excellent.”).

311. VAN DYKE, *supra* note 111, at 143–44.

312. See *supra* Sections I.A and I.B.

313. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003); see also Nancy J.

peremptory strikes undermine public confidence in the fairness of jury adjudication by altering the jury's overall racial composition, the same danger exists with respect to challenges for cause.

In some ways, the legitimacy harms stemming from racial disparities in the government's challenges for cause may be even greater than those harms inflicted by commensurate disparities in the government's peremptory strikes. Both categories of exclusions seem predicated on "the widely held belief that, at least in certain types of cases, a juror's [group characteristic] has some statistically significant predictive value as to how the juror will behave."³¹⁴ Such conduct is pernicious and constitutionally impermissible—though perhaps not altogether irrational³¹⁵—in large part due to the harmful lesson it communicates to excluded jurors and the public.³¹⁶ But challenges for cause differ from peremptory strikes insofar as they delimit, on a more fundamental level, who has the legal capacity to participate in the administration of law as a juror in the first instance. When the government pursues one racial group for legal disqualification with such disparate vigor, the insult is more profound: it is, as the Supreme Court said in 1880, "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to [further] race prejudice."³¹⁷ There would be widespread indignation (one would hope) if an elected official announced, "In general, our black citizens are simply much less qualified than our white citizens to be jurors." Yet this is the precise message that prosecutors and judges communicate on a daily basis when raising and ruling upon challenges for cause.

It might be answered that this claim (that challenges for cause undermine perceptions of fairness by eliminating minority jurors) is undercut by the relative obscurity of the problem—how could challenges for cause be a source of public disillusionment if we are only just noticing that they are problematic? I suspect that, on the ground, the issue is not invisible. Consider the trial of Curtis Flowers, wherein challenges for cause significantly reduced the percentage of black prospective jurors.³¹⁸ Immediately before peremptory strikes began, Flowers's lawyer raised a concern: "Your Honor, we are dealing with a venire [after challenges for cause] that is [now] so blaringly disproportionate to the population of this county."³¹⁹ The trial court

King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1181, 1182–85 (1994) ("Existing research confirms that . . . racially representative juries[] can enhance perceptions of jury fairness.").

314. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 (1994) (Scalia, J., dissenting).

315. See Frampton, *supra* note 3, at 1635–39 (documenting racial disparities in jurors' votes in nonunanimous verdicts).

316. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 742–50 (1992).

317. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

318. See *supra* Section I.C.1.

319. Voir Dire Transcript, *supra* note 52, at 1736.

patiently explained that there was no legal infirmity in the “whitewashing” of the venire:

You have got to look into the purpose, the reason. And the reason why is because Mr. Flowers has a number of brothers and sisters. His parents are well-known. [Curtis’s father] Mr. Archie Flowers is apparently one of the most well-thought of people in this community.

... Mr. Flowers [has the right] to be tried in his home county. ... But he cannot then come around and complain because people are excused because they know him.

... [I]f there is a statistical abnormality now, it is because almost every African-American that has been excused for cause, other than those on the death question, were because they knew him.

....

So you know, there is—nothing the State has done has caused this statistical abnormality.

... It is strictly because of the prominence of his family.³²⁰

This account probably persuaded few black onlookers of the fairness of the proceedings when the (nearly all-white) jury returned its recommendation of death.

E. Education

Finally, the jury is thought to “play[] an important role as educator of the citizenry in the lessons of democracy.”³²¹ In the early republic, “[j]ury service came to be viewed as an educational opportunity, whereby each citizen learned the workings of the law and received training in the pursuit of justice.”³²² Jury service promised “crucial civic education and moral transformation [for] the common man.”³²³ Alexis de Tocqueville described the jury as a “school, free of charge and always open, where each juror comes to be instructed in his rights, where he enters into daily communication with the most instructed and most enlightened members of the elevated classes.”³²⁴ Whether or not it benefited the immediate parties to the litigation, the jury was still “one of the most efficacious means for the education of the

320. *Id.* at 1736–39.

321. Marder, *supra* note 219, at 1083.

322. Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 167 (2014); accord THE FEDERAL FARMER, NO. 4 (Oct. 12, 1787), in THE COMPLETE BILL OF RIGHTS, *supra* note 244, at 446, 447 (describing trial by jury as the “fortunate invention[]” that allows “common people . . . to acquire information and knowledge in the affairs and government of the society”).

323. ABRAMSON, *supra* note 19, at 32–33.

324. DE TOCQUEVILLE, *supra* note 243, at 262.

people which society can employ.”³²⁵ These perceived benefits of the jury are still regularly invoked by scholars³²⁶ and by the Court.³²⁷

It would be a mistake, I think, to dismiss such sentiments as antiquated or patronizing. There are precious few institutions in American democracy that compel private individuals to engage meaningfully with those from different racial or socioeconomic backgrounds; there are fewer still that ask those assembled individuals to seek consensus.

But jury service also teaches less salubrious lessons, which challenges for cause compound. As Professors Benjamin Justice and Tracey L. Meares have argued, “the jury system offers an empty symbol of civic education at best, and a consistently racist civic education at worst.”³²⁸ Disproportionate exclusions of various groups “send[] a clear message that some people are worthy citizens whose opinions and judgments are valued, while other citizens’ views do not count.”³²⁹

The widespread (and understudied) exclusion from jury service of one class of “presumptively biased” prospective jurors, persons convicted of criminal offenses, offers a paradigmatic example.³³⁰ To the extent our commitment to the jury system stems from a faith in the “civic education and moral transformation” such participation provides, certainly these individuals (and others who disclose strong potential biases outside of the community’s norms) should be leading candidates for such tutelage. Yet every state except for Maine and Colorado limits jury participation for those convicted of felonies in some way, and twenty-eight states impose complete bans.³³¹ Thirteen states disqualify at least some potential jurors based on misdemeanor convictions.³³² The sole empirical study examining the pretrial biases of this group, however, reveals that levels of pro-defense and anti-

325. *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334–37 (Henry Reeve trans., Schocken Books 1961) (1835)).

326. Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 242–73 (2013).

327. *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring); *Powers*, 499 U.S. at 407.

328. Justice & Meares, *supra* note 322, at 169.

329. *Id.*

330. See Anna Roberts, *Casual Ostracism: Jury Exclusions on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592 (2013); see also Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (“Perhaps more surprising is that scholars have ignored ‘felon exclusion’ despite a mass of legislation and appellate litigation, and despite the glaring racial disparities.”).

331. James M. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service*, 43 LAW & SOC. INQUIRY 4, 4 (2018); COLO. REV. STAT. § 13-71-105(3) (2018) (excluding convicted felons from serving on grand juries, but not on trial juries). *But see* Kenneth Lovett, *Harlem State Senator’s Bill Would Allow Felons to Serve on Juries After Completing Their Sentences*, N.Y. DAILY NEWS (Nov. 25, 2018, 6:00 AM), <https://www.nydailynews.com/news/politics/ny-pol-benjamin-parole-felons-juries-20181121-story.html> [<https://perma.cc/NEH3-ACG7>].

332. Roberts, *supra* note 330, at 593.

prosecution pretrial biases among those convicted of felonies roughly match those of law students.³³³ And recent qualitative research into this group's experience serving on criminal juries in Maine has found that those convicted of felonies typically "seek to conform to what they perceive as the state's expectations of an exemplary juror, and ultimately incorporate the characteristics of the juror role into their own self-concepts."³³⁴ For many of the study's subjects, the experience was validating and transformative, a "recognition of their reformation."³³⁵ In short, the jury-as-educator model may have much to recommend it, if we have the courage to fully embrace it.

* * *

The foregoing suggests the advantages that might flow from adopting a more expansive view of who is "qualified" to serve as a juror (and, correspondingly, sharply limiting the role that challenges for cause play in jury selection). To be sure, in limited circumstances—particularly when necessary to ensure the defendant's Sixth Amendment right to an impartial jury—challenges for cause could continue to play an important role in how juries are empaneled. But many potential jurors ordinarily excluded from service should be "qualified" to serve, including many of those familiar with the parties or events in question, those harboring strong views about specific laws or law enforcement generally, those with prior convictions, and even those who disclose good-faith reservations about their own partiality. Our jury system could survive such changes; in many ways, they would make it stronger. And, perhaps more than any of the doctrinal shifts suggested in Part II, such changes might reduce the extraordinary racial disparities that presently pervade challenges for cause today.

CONCLUSION

As Justice Sotomayor recently wrote (albeit not in a discussion of challenges for cause), "racial bias is 'a familiar and recurring evil' " afflicting the American jury; it "can and does seep into the jury system," often "subtly."³³⁶ This is a valuable insight, and one that seems to anticipate the limits of even the most ambitious current proposals for reform (e.g., abolition of peremptory strikes). "The work of 'purg[ing] racial prejudice from the administration of justice,' " she wrote, "is far from done."³³⁷ In a racially stratified society, where worldviews, life experiences, and opinions on criminal justice

333. James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 18 (2014).

334. Binnall, *supra* note 331, at 10.

335. *Id.* at 15.

336. *Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., concurring in denial of certiorari) (quoting *Peña-Rodríguez v. Colorado*, 137 S. Ct. 855, 868 (2017)).

337. *Id.* (quoting *Peña-Rodríguez v. Colorado*, 137 S. Ct. 855, 859 (2017)).

issues are often shaped by race, it should come as little surprise that challenges for cause continue to reflect and reproduce racial hierarchies, too.³³⁸ We are past due for recognizing this phenomenon and developing ways to structure our jury system to address it.

338. Cf. Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2218 (2019) (“In a racially stratified world, any method of prediction will project the inequalities of the past into the future. This is as true of the subjective prediction that has long pervaded criminal justice as it is of the algorithmic tools now replacing it.”).

