

# Michigan Law Review

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Volume 83 | Issue 7

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1985

## Black Innocence and the White Jury

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### Recommended Citation

Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985).

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# BLACK INNOCENCE AND THE WHITE JURY

Sheri Lynn Johnson\*

*Racial prejudice has come under increasingly close scrutiny during the past thirty years, yet its influence on the decisionmaking of criminal juries remains largely hidden from judicial and critical examination. In this Article, Professor Johnson takes a close look at this neglected area. She first sets forth a large body of social science research that reveals a widespread tendency among whites to convict black defendants in instances in which white defendants would be acquitted. Next, she argues that none of the existing techniques for eliminating the influence of racial bias on criminal trials adequately protects minority-race defendants. She contends that this will remain so even if the prosecution-oriented rules of Swain v. Alabama (peremptory challenges) and Ristaino v. Ross (voir dire) are modified or overruled in cases currently before the Supreme Court. Finally, Professor Johnson details an equal protection argument that turns on accepting the social science data as proof of purposeful discrimination, and she proposes a prophylactic remedy.*

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### INTRODUCTION

Justice is often painted with bandaged eyes, she is described in forensic eloquence as utterly blind to wealth or poverty, high or low, white or black, but a mask of iron however thick could never blind American justice when a black man happens to be on trial. . . . It is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence. The reasonable doubt which is usually

interposed to save the life and liberty of a white man charged with crime, seldom has any force or effect when a colored man is accused of crime.<sup>1</sup>

These words, spoken by Frederick Douglass in 1883, are now generally accepted as an accurate depiction of a distant and unfortunate past.<sup>2</sup> Of course, most contemporary judges — and laymen — would have denied Douglass' accusation.<sup>3</sup> This is not merely because hindsight is better than foresight; it is also because it is easier to detect the speck in another's eye than the log in one's own eye.

Complaints that adjudications of guilt are biased against the minority-race defendant persist.<sup>4</sup> Such complaints cannot be dismissed as the rantings of a few cranks with legal training, for survey data show that many minority group members perceive unfairness in the administration of the criminal law.<sup>5</sup> Do such perceptions reflect ongoing, albeit increasingly subtle, injustices, or are they anachronistic, the psychological vestiges of a long history of convicting the innocent because of his color?

The Supreme Court has never ventured an opinion on this question or even openly considered it. Furthermore, one cannot distill a coherent approach to the problem of racial prejudice in the jury box from the cases involving minority-race defendants tried by all-white juries; the holdings in these cases instead reflect a variety of discrete criminal procedure doctrines. The Court has applied a fairly lenient standard for proof of discrimination in the selection of jury venires,<sup>6</sup> but its insistence on nondiscriminatory selection of the venire sharply contrasts with its laxity concerning the selection of the panel that will try a par-

1. Frederick Douglass as quoted in *Symposium on The Black Lawyer in America Today*, HARV. L. SCH. BULL., Feb. 1971, at 6, 57.

2. See, e.g., D. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969); R. GINZBURG, *100 YEARS OF LYNCHINGS* (1962); Higginbotham, *Racism and the Early American Legal Process, 1619-1896*, 407 ANNALS 1, 15 (1973).

3. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 25 (1883):

When a man has emerged from slavery and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws . . . .

4. See, e.g., *FROM THE BLACK BAR: VOICES FOR EQUAL JUSTICE* (G. Ware ed. 1976); Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973); Burns, *Can a Black Man Get a Fair Trial in This Country?*, N.Y. Times, July 12, 1970, § 6 (Magazine), at 5; Crockett, *Racism in the Courts*, 20 J. PUB. L. 385 (1971).

5. See, e.g., Hagan & Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329 (1982); see also REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 183 (1968) (noting that the courts "have lost the confidence of the poor").

6. See *Castaneda v. Partida*, 430 U.S. 482 (1977). Compare this with the more stringent standard for the proof of purposeful discrimination in civil matters. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

ticular defendant. Under *Swain v. Alabama*,<sup>7</sup> a prosecutor may deliberately use his peremptory challenges to exclude all blacks from a jury trying a black defendant.

The Supreme Court recently granted certiorari in a case challenging *Swain* on sixth amendment grounds,<sup>8</sup> and the state courts continue to consider state constitutional challenges to the racially discriminatory use of peremptory challenges,<sup>9</sup> but this instability cannot be read to signal the evolution of a more unified — and sympathetic — judicial view of the minority-race defendant's plight. In the voir dire area, the Supreme Court has drastically cut back on the due process right to question potential jurors about their racial prejudice.<sup>10</sup> Finally, the Court remains unsympathetic to arguments that racial prejudice has in fact infected jury deliberations, most notably when it has ignored claims of racially discriminatory applications of the death penalty.<sup>11</sup>

Some commentators have deplored each of these developments while others have given their qualified approval, but virtually all have confined their critique to cases within a single doctrinal area. Thus, both the Court and its critics have largely ignored the question of whether the entire package of protections against racial discrimination in criminal trials is adequate. It is the purpose of this Article to address that question and those that flow from its answer.

Such an endeavor might seem peculiar, both misguided and naively optimistic: misguided, because it is unlawyerly to criticize the Court for adhering to doctrinal distinctions; naively optimistic, because it is impossible for the Court to assess the cumulative effectiveness of any system of protections with respect to every possible policy objective. It is not my intention, however, to criticize the convention of doctrinal distinctions or to propose that the Court embark upon a long series of inquiries into how well the criminal process as a whole accomplishes each of the numerous specific objectives of the criminal justice system. Instead, my premise is that this particular holistic inquiry is constitutionally mandated, for if the amalgamated safeguards

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7. 380 U.S. 202 (1965).

8. *Batson v. Kentucky*, No. 84-SC-733-MR (Ky. Dec. 20, 1984) (mem.), cert. granted, 105 S. Ct. 2111 (No. 84-6263).

9. See notes 249-81 *infra* and accompanying text.

10. *Ristaino v. Ross*, 424 U.S. 589 (1976). But see *Turner v. Bass*, 753 F.2d 342 (4th Cir.), cert. granted *sub nom.* *Turner v. Sielaff*, 53 U.S.L.W. 3807 (U.S. May 13, 1985) (No. 84-6646).

11. See *Wainwright v. Ford*, 104 S. Ct. 3498 (1984) (denying state's application to vacate stay on other grounds); *Wainwright v. Adams*, 104 S. Ct. 2183 (1984) (vacating stay); *Sullivan v. Wainwright*, 464 U.S. 109 (1983) (denying stay of execution to allow evidentiary hearing on eighth amendment claims based on statistics showing race-of-victim effect); see also *Coker v. Georgia*, 433 U.S. 584 (1977) (reversing conviction but ignoring substantial evidence of racial disparities); *Maxwell v. Bishop*, 398 U.S. 262 (1970) (same).

of general criminal procedure doctrines fail to shield completely criminal defendants from racial prejudice, then one would expect the equal protection clause of the fourteenth amendment to fill in the gaps.<sup>12</sup>

In fact, equal protection theory has played a very minor role in ferreting out racial discrimination in criminal trials; it is only in the area of venire selection that equal protection claims have been successful.<sup>13</sup> Even this limited role has diminished in importance with the rise of an overlapping "fair cross section of the community" requirement stemming from the sixth amendment.<sup>14</sup> One might hypothesize two very different explanations for the negligible contribution of the equal protection clause to the rights of minority-race defendants. The optimistic explanation is that prejudice has been largely eradicated from the pool of white potential jurors and that standard criminal procedure safeguards eliminate the effects of any remaining bias. The pessimistic alternative is that current formulations of equal protection doctrine are ill-suited to the task of uncovering discrimination in non-repetitive decisions in which the process of decisionmaking is not open to scrutiny: the emphasis on proving purposeful discrimination generally precludes relief for the defendant who has been convicted after a racially biased determination of guilt. For the individual minority-race defendant, producing evidence showing that covert or perhaps even unconscious discrimination influenced the verdict in his case is impossible.

Whether this impossibility is troubling depends upon whether Douglass' assessment of the position of the minority-race defendant remains accurate today. Part I of this Article will examine the evidence that racial prejudice influences jury deliberations, using a cross-disciplinary approach to surmount the problems of making inferences from isolated cases. Part II will consider existing legal protections and how they control — or fail to control — the effects of the prejudice documented in Part I. Finally, Part III will argue that the empirical evidence described in Part I constitutes proof of purposeful discrimination and will offer a proposed equal-protection-based remedy for persisting discrimination against minority-race defendants. Parts I and II focus on the black defendant because historically the injustice done to black defendants was most egregious, because prejudice against blacks is more virulent and more widespread than against any other minority race, and because researchers have collected the most

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12. See Part III. A. *infra*.

13. See notes 193-213 *infra* and accompanying text.

14. See notes 214-20 *infra* and accompanying text.

data on black defendants. Part III nevertheless proposes a remedy for all minority-race defendants who choose to claim it, because in some areas of the country, prejudice against Hispanics, Asians,<sup>15</sup> or Native Americans<sup>16</sup> is likely to have similar consequences for defendants who are members of those groups.

### I. THE INFLUENCE OF RACIAL BIAS ON THE DETERMINATION OF GUILT

How does racial bias influence the determination of guilt? If juries were approximately half black and half white, we probably would not need to ask this question because any individual juror's biases would be unlikely to alter the verdict. But many American juries are all white or almost all white,<sup>17</sup> in part because of the racial proportions of our population and in part because of the system of juror selection.<sup>18</sup> This state of affairs leads to a more specific question: Are innocent black defendants tried by white juries disproportionately subject to conviction?

Before turning to the empirical evidence, we must be clear about the kind of innocence and the kind of disproportion that are relevant to our inquiry. By the term "innocent" I mean to embrace all defendants who are wrongfully convicted; we are interested in the totally blameless convicted defendants, the criminally culpable defendant guilty of a lesser offense than the offense of which he is convicted, and the factually guilty but legally not guilty convicted defendant.<sup>19</sup> Because some (unknown) number of wrongful convictions is inevitable,

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15. See Smith & Dempsey, *The Polls: Ethnic Social Distance and Prejudice*, 47 PUB. OPINION Q. 584 (1983); see also Alker, Hosticka & Mitchell, *Jury Selection as a Biased Social Process*, 11 LAW & SOC. REV. 9, 31-32 (1976); Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275 (1983); J. Solernou, *Effects of Ethnic Group Membership on Attribution of Responsibility* (1977) (unpublished dissertation) (available at the University of Kentucky).

16. Smith & Dempsey, *supra* note 15, do not find a high level of antagonism toward Native Americans, and this is probably an accurate reflection of national opinion since most Americans do not have any contact with Native Americans. Stereotypes and even overt hostility are nevertheless present in areas with high concentrations of Native Americans — areas in which Native Americans are most likely to be tried. See *United States v. Bear Runner*, 502 F.2d 908, 909, 912 (8th Cir. 1974); see also C. O'Connor & S. Doherty, "Open Season" on Indians, NEWSWEEK, Sept. 30, 1985, at 35 (reporting racial tensions in Wisconsin arising from the Chippewa tribe's hunting privileges, which prompted a campaign to plaster northern Wisconsin with bumper stickers reading "Save a Deer, Shoot an Indian" and other offensive slogans).

17. J. VAN DYKE, *JURY SELECTION PROCEDURES* 28-32, app. G (1977).

18. J. VAN DYKE, *supra* note 17, at 30; Alker, Hosticka & Mitchell, *supra* note 15, at 33 (juror selection process underrepresents minorities in part because of reliance on voter registration lists and in part because of the higher mobility of the minority population).

19. A defendant is legally not guilty if his guilt has not been proved beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970).

we need to know more than whether some black defendants are wrongfully convicted; we need to know how many of those wrongful convictions can be attributed to the defendant's race. The proper comparison then is to otherwise similar white defendants tried by white juries. If black defendants are convicted under the same circumstances in which white defendants are acquitted, then the fourteenth amendment's guarantee of equal protection of the law is implicated.<sup>20</sup>

Assuming that by and large the institution of trial by jury works well, one would expect that if the defendant's race influences guilt determinations, it would do so by increasing the number of times that innocent black defendants were convicted. However, an equal protection issue is raised even if the convicted black defendant is not innocent in *any* sense of the word, so long as a white defendant in the same circumstances would have been acquitted. One might object that data showing that black defendants are convicted in situations where white defendants are acquitted do not show wrongful convictions; perhaps observed differences are due to unwarranted leniency toward white defendants rather than unwarranted harshness toward black defendants. For the purposes of an equal protection claim, however, it is irrelevant whether own-race favoritism or other-race antagonism motivated the discriminatory treatment.<sup>21</sup> If one is cynically convinced that white defendants are often improperly acquitted — because jurors misunderstand the reasonable doubt standard or because they display sympathy based on extralegal factors — then one is quarreling with the wisdom of the institution of trial by jury. One might advocate reform of this institution (or even its abolition through constitutional amendment), but the obligation to treat defendants the same regardless of their race remains. Just as a black defendant is entitled to the racially neutral application of the legal standard of guilt beyond a reasonable doubt, he is also entitled to the racially neutral exercise of the jury's traditional function of mitigating the harshness of the law. Whatever system the state uses to adjudicate guilt, that system must comply with the commands of the fourteenth amendment.

To answer the question of whether black defendants are more likely to be convicted merely because they are black means, in social science terms, testing the null hypothesis that race is not a factor in the determination of guilt. The data relevant to the testing of this hy-

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20. See Part III. A. *infra*.

21. Although some of the available data will not permit us to distinguish between disproportionate conviction of innocent black defendants and disproportionate acquittal of guilty white defendants, it is important to keep in mind that such a distinction is unnecessary. The black defendants' convictions are improper *because* similarly situated white defendants are acquitted.



pothesis may be divided into three categories: observations and statistics from real criminal trials, results of mock jury experiments, and conclusions from general research on racial prejudice. Although each of these data sources considered in isolation is incomplete, taken together they provide sufficient evidence to warrant rejecting the null hypothesis.

### A. *Trial Data*

Data from the field, or "real life," are intuitively attractive; if large numbers of events could be studied in great detail, the results of those studies would be extremely persuasive. Unfortunately, it is extremely expensive and time-consuming to study people's behavior in natural settings. Refusals to cooperate often make such studies completely impossible. Therefore, observers usually must choose between studying a small number of occurrences quite thoroughly and collecting rather limited information about a large number of occurrences.

When an observer chooses the first alternative, he may label his endeavor a "case study," but whatever the label, he will be recounting essentially anecdotal information. Such information can provide great insight into a single occurrence, but is very difficult to generalize to other occurrences. Thus, data from those who have observed an entire trial or interviewed all of the jurors concerning their deliberations may convince us that prejudice did play a role in that particular trial, but this conclusion does not speak to the question of whether prejudice often affects verdicts.

If the observer chooses instead to collect more limited information about a large number of occurrences, inferences from his observations are marred by a lack of control. The observer may take a large sample from court records and then calculate the correlation between race and length of sentence. If he finds a statistically significant correlation, he can fairly confidently predict that the correlation will be present in cases he did not sample. However, he cannot tell us much about what that correlation means. Correlations between two variables may be spurious; that is, they may not reflect a causal relationship, but may be due to a third intervening variable. For example, the correlation between race and sentence length may be caused by the fact that both race and sentence are correlated with prior criminal record. Although the influence of some *obviously* relevant variables — such as prior criminal record — may be statistically controlled for, it is impossible to make sufficiently detailed observations of each case to control for *all* of the variables that might produce spurious correlations. Because race in American society is correlated with a very large number of other

variables, it is difficult to control for even the obviously relevant variables, many of which may not appear in the court records used by the researcher.

The inherent weaknesses of all field observations do not compel the conclusion that trial data are worthless. Those weaknesses certainly warn against heavy reliance on any *one* such study, regardless of the direction of the findings in that study. The trends from a number of different field observations, however, may have probative value, particularly when considered in conjunction with the outcomes of controlled experiments.

### 1. *Case Studies*

The widespread perception among minorities that the criminal justice system treats them unfairly<sup>22</sup> probably has its origin in very large numbers of individual observations; experiences in particular cases are reported back to the minority community and form the basis of generalizations. Of course, many such observations are far from unbiased because the observer has a strong and immediate stake in the proceedings, but the case studies by detached court observers, though limited in number, tend to corroborate this perception.

One of the earliest case studies was conducted by the University of Chicago Jury Project.<sup>23</sup> All jury trials arising in a single northern United States district between January 1954 and June 1955 were observed and, following each trial, all lawyers and jurors were extensively interviewed. Of the twenty-three trials studied, four were criminal trials involving black defendants. The interviewer reported that racial prejudice influenced the jury deliberations in all four cases, including the one case in which the defendant was acquitted.<sup>24</sup> Several jurors explicitly argued during deliberations that the defendant should be convicted simply because he was black.<sup>25</sup> Many other jurors expressed unsolicited derogatory views of blacks to the interviewer.<sup>26</sup>

In the early 1960s Kalven and Zeisel investigated the functioning of the jury through a different technique: they interviewed trial judges concerning their views of jury verdicts in 1191 cases.<sup>27</sup> In 293 of these cases, the presiding judge disagreed with the jury's determination and was asked to explain the jury's behavior. If the judges' observations

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22. See note 5 *supra* and accompanying text.

23. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 20 n.3.

24. *Id.* at 21-22.

25. *Id.* at 23.

26. *Id.* at 24.

27. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

and impressions are to be trusted, the race of the defendant affected jury deliberations in three ways. First, in only twenty-two cases did the jury vote to convict when the judge would have acquitted; in four of these cases, the judge saw substantial evidentiary problems and explained the jury's verdict as prompted by the jurors' antagonism toward the defendant's involvement in interracial sex.<sup>28</sup> Second, the juries tended toward undue leniency in black defendant/black victim assault cases.<sup>29</sup> Third, although judges thought that jurors often acquitted guilty defendants out of sympathy for the particular defendant (this explanation was offered for 22% of all judge/jury disagreements, or 4% of *all* verdicts rendered<sup>30</sup>), black defendants were much less likely than white defendants to be the recipients of such leniency because they were viewed as extremely unsympathetic.<sup>31</sup>

There are no comparable recent studies. In part, this is because permission from the courts to engage in direct and systematic inquiry concerning the content of jury deliberations is very difficult to obtain. Occasionally a particular verdict is attacked based upon convincing evidence that jury deliberations were infected by racial prejudice.<sup>32</sup> Attorneys for black defendants who are allowed unusually extensive voir dire on the question of a prospective juror's racial prejudice report frequent instances where jurors initially deny any bias but eventually admit to strong antagonism toward blacks and strong presumptions about the defendant's guilt.<sup>33</sup> It is difficult, though, to infer from these unsystematic observations that the frequency of prejudiced determinations of guilt observed in the 1950s and 1960s persists today.

## 2. Conviction Rates

Three studies find significant differences in the conviction rates of black and white defendants. Gerard and Terry report their analysis of data gathered in several Missouri counties in 1962.<sup>34</sup> The data were comprised of a randomly selected sample of all cases in which an information or indictment charging the commission of a felony had been filed; nineteen of these cases were tried by a jury.<sup>35</sup> Juries convicted

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28. *Id.* at 409. At least three of these cases involved a black defendant. *Id.* at 398.

29. Kalven and Zeisel reported four such cases. *Id.* at 340-41.

30. *Id.* at 217.

31. *Id.* at 343-44.

32. See cases cited in notes 373-75 *infra*.

33. See, e.g., Ginger, *What Can be Done to Minimize Racism in Jury Trials?*, 20 J. PUB. L. 427, 434-38 (1971).

34. Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 WASH. U. L.Q. 415.

35. *Id.* at 430.

ten of thirteen black defendants but only two of six white defendants.<sup>36</sup> Uhlman's sample of all felony cases docketed and disposed of between July 1968 and June 1974 in a large northeastern metropolitan area also found a statistically significant greater overall conviction rate for black defendants; 72% of all white defendants were found guilty and 75.9% of black defendants were found guilty.<sup>37</sup> Uhlman did not isolate jury trial verdicts, but he did investigate 24,100 bench trials presided over by twenty judges. Both black and white judges convicted black defendants more often than white defendants but the interracial disparity was greater for white judges than for black judges.<sup>38</sup> Aggregating these rates across judges concealed enormous individual variation: for two white judges, the difference in conviction rates between black and white defendants differed by *more than 70%*, and for another two the conviction rates differed by *more than 40%*.<sup>39</sup> While it is possible that factors not controlled for by the researchers accounted for the overall difference in conviction rates of black and white defendants, it seems unlikely that the extraordinary differences reported for these four judges did not reflect racial bias. Finally, a study of all persons indicted for first degree murder in twenty-one Florida counties between 1972 and 1978 revealed that black defendants were significantly more likely to be found guilty than were white defendants.<sup>40</sup>

Another kind of conviction rate datum bears indirectly on the question of prejudiced adjudication of guilt. When Baltimore jury commissioners switched in 1969 from a juror selection method that yielded at least 70% white jurors to one that yielded between 34% and 47% black jurors, the jury trial conviction rate dropped from almost 84% to less than 70%.<sup>41</sup> Similarly, a temporary change in jury selection methods in Los Angeles County that led to the inclusion of more black and Hispanic jurors produced lower conviction rates: the percentage of convictions fell from 67% in 1969 to 47.2% in 1971 and

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36. *Id.*

37. T. UHLMAN, *RACIAL JUSTICE* 37, 78 (1979). A difference of 4% is statistically significant, extremely unlikely to have been caused by chance—because of the large number of cases involved. Whether it is of practical importance depends upon the interpretation of the correlation. Is it spurious, resulting from correlations with other variables, or does it represent the effect of racial prejudice in marginal evidence cases, as suggested by the mock jury studies described *infra*? If the former interpretation is correct, there is no practical importance in these findings; if the latter is correct, 4% of the black defendants who went to trial in that city were wrongfully convicted.

38. *Id.* at 66.

39. *Id.* at 68.

40. L. FOLEY, *The Effect of Race on the Imposition of the Death Penalty* (1979) (paper presented at the meeting of the American Psychological Association in New York, Sept. 1979).

41. J. VAN DYKE, *supra* note 17, at 33.

then rose again to 66.6% in 1972 when the older system of jury selection was reinstated.<sup>42</sup> We cannot infer from these statistics alone that white jurors were improperly convicting black defendants because it is possible to explain the conviction rate changes either by reference to improper leniency by minority jurors toward minority defendants or by greater leniency by minority jurors to all defendants. Nevertheless the statistics do suggest that, for whatever reason, minority race jurors may evaluate evidence differently than do white jurors. Prosecutors' use of racially based peremptory challenges corroborates this impression; both empirical investigations and judicial observations show the overwhelmingly frequent use of peremptory challenges to rid the jury of black jurors when the defendant is black.<sup>43</sup>

### 3. *Death Penalty Statistics*

If one believes that the determination of guilt is influenced by racial prejudice, then one might expect that the determination to impose the death penalty would also reflect racial bias. Conversely, if one discovered that imposition of the death penalty is infected by racial bias, then one might infer that such bias also affects guilt determinations. However, such inferences are risky, for they depend upon the nature of the racial bias one hypothesizes to be affecting jurors. A jury might be overtly and consciously hostile toward other-race offenders, in which case one would predict greater racial discrepancies in the imposition of the death penalty than those observed in conviction rates; one would expect hostility to lead to greater punitiveness toward those judged guilty, but not necessarily to a greater willingness to find the innocent guilty. Alternatively, juries might be subconsciously swayed in their evaluation of the likelihood of guilt, in which case discrepancies in conviction rates would not necessarily predict death penalty discrepancies; the task of guilt assessment probably would be more vulnerable to the influence of unconscious stereotypes than would be the selection of the appropriate penalty for a defendant already determined to be guilty. Thus, caution in interpreting death penalty statistics is also necessary; whether racial discrepancies are or are not observed has a somewhat attenuated relationship to the question of whether guilt determinations are racially biased.

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42. *Id.* at 35.

43. *See id.* at 154-56; Crockett, *supra* note 4, at 387; Hayden, Senna & Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768, 790 (1978); *see also* People v. Payne, 99 Ill. 2d 135, 152-53, 457 N.E.2d 1202, 1210-11 (1983) (Simon, J., dissenting) (citing numerous Illinois cases in which prosecutors had exercised the peremptory challenge in a racially selective manner); cases cited in notes 243-99 *infra*.

Two older studies point in opposite directions. The most extensive death penalty study surveyed eleven southern states' death penalty sentences for the crime of rape for the years 1945 through 1965. This study produced overwhelming evidence that black defendants with white victims were executed in disproportionate numbers.<sup>44</sup> The other study, which analyzed California's first degree murder death sentences imposed from 1958 to 1966, found no evidence of discrimination based upon the victim's or defendant's race.<sup>45</sup>

In contrast, three modern studies, all examining sentences imposed after *Furman v. Georgia*,<sup>46</sup> produced consistent results. Bowers and Pierce studied death sentences under post-*Furman* statutes through 1977 in Florida, Georgia, Ohio and Texas; in all four states they found that the victim's race was an important determinant of sentence, and that black offender/white victim cases were the most likely to result in the death penalty.<sup>47</sup> Foley's study of data from twenty-one Florida counties from 1972 to 1978 statistically controlled for the effects of offender's and victim's occupations, number of prior convictions, and number of victims in the incident; she found that the important selection factor for the death penalty was the victim's race.<sup>48</sup> Finally, Baldus' study of all the death sentences imposed in Georgia between 1973 and 1979 found a statistically significant race-of-the-victim effect even when the effects of aggravating and mitigating circumstances, strength of evidence, and time period and geographical area of sentence imposition were statistically controlled for.<sup>49</sup>

#### 4. *Other Sentencing Data*

Because judges rather than juries determine noncapital sentences, other sentencing data are even less directly probative of the bias in guilt adjudications than are death penalty statistics. Nevertheless, evidence of bias in sentencing would be especially disturbing because one would expect judges to be less racially biased — or to control their

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44. Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973).

45. Special Issue, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297, 1421 (1969).

46. 408 U.S. 238 (1972). *Furman* struck down standardless statutes that left imposition of the death penalty entirely within the jury's discretion.

47. Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 578 (1980).

48. L. Foley, *supra* note 40.

49. *McCleskey v. Kemp*, 753 F.2d 877, 887 (11th Cir. 1985) (en banc) (describing findings of study and holding that they did not suffice to show an eighth or fourteenth amendment violation), *petition for cert. filed*, No. 84-6811 (U.S. May 28, 1985).

biases better — than jurors.<sup>50</sup>

Early studies of sentencing all showed substantial race effects, but many such studies did not attempt to control for other factors, such as type of offense or prior criminal record.<sup>51</sup> Numerous recent studies, some with adequate controls, have produced conflicting results.<sup>52</sup> One commentator has attempted to reconcile these studies by pointing out that even those studies finding statistically significant discrepancies show them to be of a small magnitude.<sup>53</sup> However, other commentators have argued that the apparent disparities may be only the tip of the iceberg: several forms of racial bias may operate in the sentencing of individual defendants but statistically cancel each other out.<sup>54</sup> There is some empirical support for this position. For example, harsher sentencing of black defendants convicted of interracial crimes may be offset by more lenient sentencing of black defendants convicted of intraracial crimes, as appears to be true in capital cases.<sup>55</sup> And, as another study has suggested, whites may be favored in the decision to incarcerate due to racial stereotypes about recidivism, but this may be offset by longer sentences for whites who are incarcerated, because their criminal success may be of a greater magnitude, particularly for larcenous crimes.<sup>56</sup> Finally, the harshness of some judges toward black defendants may sometimes be “balanced” by the lenience of other judges toward black defendants. Thus, Gibson has found that aggregate statistics showing no racial discrimination masked a mixture of pro-black and anti-black judges.<sup>57</sup>

50. Cf. S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* 94-95, 109 (1969) (probation officers more often discriminated on the basis of race and economic class than did judges).

51. See, e.g., Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 411 (1946) (classic study finding racial disparities in sentence length); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949) (black offenders treated more severely than white offenders); Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941) (differential sentencing for black offenders, particularly those with white victims).

52. For a review of recent studies, see R. MCNEELY & C. POPE, *RACE, CRIME, AND CRIMINAL JUSTICE* 17-21 (1981); Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC. REV. 357 (1974).

53. Hagan, *supra* note 52, at 362-69.

54. Nagel & Neef, *Racial Disparities that Supposedly Do Not Exist: Some Pitfalls in Analysis of Court Records*, 52 NOTRE DAME LAW. 87 (1976).

55. See notes 47-48 *supra* and accompanying text.

56. Nagel & Neef, *supra* note 54, at 90.

57. Gibson, *Race as a Determinant of Criminal Sentences: A Methodological Critique and a Case Study*, 12 LAW & SOC. REV. 455 (1978). See also T. UHLMAN, *supra* note 37, at 37, 68, 78 (Although overall conviction rates varied only 4%, for two white judges the difference in conviction rates between black and white defendants was more than 70%, and for another two judges the conviction rates differed by more than 40%).

## B. *Mock Jury Studies*

Mock jury studies provide the strongest evidence that racial bias frequently affects the determination of guilt. These studies, like other laboratory experiments, do not suffer from lack of control, for the good experimenter assures that the *only* variable altered is the one being investigated. The problem of external validity, however, now arises; there is always the risk that causal relationships found in the laboratory are not present in the real world. This may occur because the laboratory setting interacted with the measured variables; for example, the condition of being observed might cause the subjects to try to conceal their racial bias. A second reason laboratory findings may not reflect real world phenomena is that the measured variables may not affect the subjects in the same way that their real world counterparts do; for example, the stimulus of reading that the defendant is black may not be functionally equivalent to the stimulus of seeing a black defendant through the course of a trial. Because of the strength and direction of the mock jury study findings, the question of external validity assumes particular importance. After reviewing the substance of these findings, that question will be considered in greater detail.

### 1. *Laboratory Findings*

Laboratory findings concerning the influence of race on white subjects' perception of criminal defendants are quite consistent. More than a dozen mock jury studies provide support for the hypothesis that racial bias affects the determination of guilt. Of the handful of studies whose findings initially appear to support the null hypothesis, all, upon close examination, are ambiguous in their import. The mock jury studies may be divided into three categories: experiments investigating race and guilt attribution, experiments investigating race and sentencing, and experiments investigating the interaction among race, attractiveness, and blameworthiness.

*a. Race and guilt attribution.* Studies investigating the relationship between race and determination of guilt provide subjects with a transcript or a videotape of a trial in which the race of one of the participants — the defendant, the victim, or the attorney, depending on the study — is randomly varied while all other aspects of the case are held constant. The subject is asked to determine whether the defendant is guilty, and correlations between the race of the trial participant and the judgment of guilt are tested for statistical significance.<sup>58</sup> Because the only factor that has been varied is a participant's race,

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58. Tests of statistical significance calculate the probability that the data obtained from an



statistically significant differences can be interpreted as reflecting a causal relationship between race and guilt attribution.

*i. Race of the defendant.* Nine very recent experiments find that the race of the defendant significantly and directly affects the determination of guilt.<sup>59</sup> White subjects in all of these studies were more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty. Four studies find a significant interaction between the race of the defendant, guilt attribution, and some third variable.<sup>60</sup> The one study that did not find any differences based on the race of the defendant may be reconciled with these findings based upon a careful analysis of its methodology.<sup>61</sup> Because of the centrality of these studies to the question of whether black defendants are treated fairly by white juries, it is appropriate to describe each study in some detail.

The least complicated of these studies was published by McGlynn, Megas, and Benson in 1976.<sup>62</sup> The subjects were 208 white college students at a Texas university. Subjects read a summary of a violent murder case in which an insanity defense was presented, and were asked to vote guilty or insane and to recommend a sentence for the defendant. Black males were found guilty in 69% of the cases and black females were found guilty in 56% of the cases; both white males and females were found guilty in 54% of the cases.<sup>63</sup>

Two experiments published by Ugwuegbu in 1978 systematically varied the victim's race, the defendant's race, and the amount of evidence pointing toward guilt (near zero, marginal, or strong).<sup>64</sup> The subjects in the first experiment were 256 white undergraduates at a midwestern university; the subjects in the second were 196 black undergraduates at the African American Affairs Institute.<sup>65</sup> After reading case transcripts, subjects in both experiments were asked four

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experiment could be the result of a random occurrence. See D. BARNES, STATISTICS AS PROOF 143-45 (1983); note 37 *supra*.

59. See notes 62-92 *infra* and accompanying text.

60. See notes 93-95, 101-03, & 105-06 *infra* and accompanying text.

61. See notes 96-100 *infra* and accompanying text.

62. McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. PSYCHOLOGY 93 (1976).

63. *Id.* at 96.

64. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 133 (1979).

65. The responses of twelve white and ten black undergraduates were deleted from the data analysis for various reasons.

questions assessing the defendant's culpability,<sup>66</sup> answers to those questions were then correlated with each of the independent variables. For white subjects, the correlation between the defendant's race and culpability was significant: those subjects rated a black defendant more culpable than a white defendant.<sup>67</sup> Additional statistical tests revealed that the significance of the defendant's race varied with the strength of the evidence: when the evidence of guilt was strong or near zero the white subjects rated black and white defendants equally culpable, but when the evidence was marginal they rated black defendants more culpable. As the author explained, "[W]hen the evidence is not strong enough for conviction a white juror gives the benefit of the doubt to a white defendant but not to a black defendant."<sup>68</sup>

Ugwuegbu's second experiment, investigating the responses of black subjects, revealed a similar pattern of own-race bias. Black subjects rated the black defendant as significantly less culpable than the white defendant, and again the significance of the defendant's race depended upon the strength of the evidence.<sup>69</sup> Like white subjects, black subjects held a racially dissimilar defendant more culpable than a racially similar defendant when the evidence was marginal and were unaffected by the defendant's race when the evidence was weak.<sup>70</sup> Unlike white subjects, however, black subjects also judged a dissimilar defendant more harshly than a similar defendant in the strong evidence condition; "black subjects tended to grant the black defendant the benefit of the doubt not only when the evidence is doubtful but even when there was strong evidence against him."<sup>71</sup>

In a sophisticated study published in 1979, Bernard examined the

66. The dependent variables include the following questionnaire items:

1. I feel that the defendant's *intention* was to cause the plaintiff, Miss Brown: (No harm at all, Some harm, Extreme harm.)
2. To what extent was Mr. Williams, the defendant, *responsible* for the rape?: (Not at all responsible, Moderately responsible, Very much responsible.)
3. With respect to my *verdict*, I feel the defendant is guilty as charged: (Not guilty of any crime, Moderately guilty as charged, Exactly guilty as charged.) [sic]
4. Based on the evidence, I feel I would recommend for the defendant as punishment: (No punishment at all; Suspended sentence; 1-5 years in the State Prison; 5-9 years; 10-14 years; 15-20 years; Over 20 years but not life; Life imprisonment; Death penalty.)

All of the items incorporated 9-point rating scales and were scored 1-9. The extremes and midpoints of items 1, 2, and 3 were verbally anchored with 1 indicating no culpability, 5 average, and 9 strong culpability, respectively. Item 4 was rated on a scale of nine alternatives. In each case, the higher the number the more punitive the judgment.

*Id.* at 137-38 (emphasis in original). The four items were then summed for each subject to derive a total score. *Id.* at 138.

67. *Id.* at 138-39.

68. *Id.* at 139-40.

69. *Id.* at 141.

70. *Id.* at 141-42.

71. *Id.* at 142.

effect of the defendant's race on the verdicts of juries with various racial compositions.<sup>72</sup> To increase verisimilitude, the experiment presented a videotaped "trial" (rather than a transcript) to a panel of jurors who were first asked for an individual verdict and then asked to deliberate and arrive at a unanimous verdict. The charge was assault and battery on a police officer, to which a defense of provocation and police brutality was offered. Deliberately ambiguous evidence was offered on the officer's propensity for violence and the defendant's intoxication. At the close of the testimony, the judge instructed the subjects on the applicable law. Five juries saw the videotape with a black defendant and five saw the videotape with a white defendant; in each set, one jury was 100% black, one jury was 75% black and 25% white, one jury was 50% black and 50% white, one jury was 25% black and 75% white, and one jury was 100% white.

On the individual ballot, white jurors tended to find the black defendant guilty more often than the white defendant, and black jurors showed a reciprocal tendency to find white defendants guilty more often than black defendants, although neither trend was statistically significant due to the small sample size.<sup>73</sup> There was a pronounced tendency for jurors to shift their votes toward acquittal as a result of group discussion, with one notable exception: white jurors who found the black defendant guilty on their first ballot tended to hold to this decision and not be influenced by group discussion. By the final individual ballot, the number voting guilty had decreased to 15% and *all* of these guilty votes came from white subjects viewing the black defendant.<sup>74</sup>

An examination of the group verdicts is also anecdotally instructive. The only jury unable to reach a verdict was racially balanced (50% black and 50% white) and assigned to view the black defendant. By the second ballot, all white jurors in this jury voted guilty and all black jurors voted not guilty; this polarization persisted through two more ballots, when the jury reported itself incapable of reaching a decision. A second jury with the same jury-defendant combination was run and this jury also reported itself unable to render a verdict. Furthermore, only one jury ultimately reached a unanimous verdict of guilty: this was an all-white jury viewing the black defendant.<sup>75</sup>

Lipton used a different methodology, examining the relationship

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72. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 *LAW & PSYCHOLOGY REV.* 103 (1979).

73. *Id.* at 109.

74. *Id.*

75. *Id.* at 110.

between the ethnic composition of juries and their assessments of the guilt of Anglo and Hispanic defendants.<sup>76</sup> Realism was attempted in a unique way; although transcripts were employed, the subjects were students solicited by the Intercampus Grievance Committee of the University of California and told that persons involved in the disciplinary hearings had chosen to have their cases decided by a jury of their peers. All juries contained both Anglo and Hispanic jurors:<sup>77</sup> one quarter were predominantly Hispanic, one quarter were predominantly Anglo, and half had three Hispanic and three Anglo jurors. Each jury decided two cases, one involving a Hispanic defendant ("Horacio Garcia") and one involving an Anglo defendant ("Richard Nelson"). One of the cases involved an alleged cheating incident and the other involved destruction of campus property; overall, each defendant was involved in each type of case an equal number of times. Jurors completed predeliberation questionnaires, then deliberated until they reached a verdict or announced that they could not do so, and finally were asked to fill out a postdeliberation questionnaire.

The jurors' ethnicity had significant effects on the predeliberation assessment of guilt of the Hispanic defendant, with Anglo jurors attributing more guilt to the Hispanic defendant than did the Hispanic jurors.<sup>78</sup> In addition, Anglo jurors liked the Hispanic defendant less than did Hispanic jurors, thought that he was less intelligent than did Hispanic jurors, and rated him as more dishonest than did Hispanic jurors.<sup>79</sup> However, after deliberation with jurors of both ethnic groups, the jurors' ethnicity no longer exerted a significant influence on their verdicts.<sup>80</sup> Deliberations had similar effects in the Anglo defendant cases: the predeliberation tendency for Anglo jurors to rate the Anglo defendant less guilty than the Hispanic jurors rated him diminished, with Anglo jurors tending to change their minds toward guilt and Hispanic jurors, toward innocence.<sup>81</sup>

Klein and Creech published the results of two studies on race and guilt attribution in 1982.<sup>82</sup> In the first study they used white students as subjects, asking them to read two transcripts of four possible crimes (rape, murder, drug sale, and burglary) and then rate which defendant

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76. Lipton, *supra* note 15.

77. Lipton refers to the defendants as Anglo and Hispanic, but to the jurors as Anglo and Chicano, without explanation.

78. *Id.* at 282.

79. *Id.*

80. *Id.*

81. *Id.*

82. Klein & Creech, *Race, Rape and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOLOGY 21 (1982).

they thought was more likely to be guilty. The race of the male defendant and of the female victim was systematically varied. The study yielded eight comparisons of the jurors' estimated probability that the defendant was really guilty. In seven out of the eight conditions, the estimated probability of guilt was higher for the black defendant than for the white defendant.<sup>83</sup> The disparities in two conditions were surprisingly high. After reading otherwise identical transcripts, white subjects rated the probability that the white defendant had raped the black victim at 33%, but rated the probability of the black defendant's guilt of that crime at 52%; they also rated the probability that the white defendant had burglarized the white victim at 52% but the probability of the black defendant's guilt at 63%.<sup>84</sup>

In their second experiment, Klein and Creech asked 133 white college students to watch the videotape of a trial and respond to seven different segments of testimony.<sup>85</sup> In fact, the videotapes were four versions of the same mock rape trial, all identical except for the race of the actors playing the defendant and of the actresses playing the victim; pretests of each actor's warmth, attractiveness, and sincerity revealed no differences. The evidence was weak and entirely circumstantial: the victim could not identify the defendant and the medical tests were inconclusive. Each subject was asked to estimate the probability of the defendant's guilt at the conclusion of each segment of the videotape, and at the conclusion of the entire tape the subject was asked to vote guilty or not guilty. The black defendant was believed more guilty in the preverdict assessment of guilt, particularly by male subjects during the detective's and the defendant's testimony.<sup>86</sup> Oddly enough, this main effect disappeared when jurors were

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TABLE 1  
Probability that Defendant is "Really" Guilty.

	Crime							
	Rape		Murder		Drug Sale		Burglary	
	White	Black	White	Black	White	Black	White	Black
Defendant race								
White	.68	.33	.58	.44	.45	.41	.52	.32
Black	.70	.52	.60	.54	.43	.46	.63	.36
Probability averaged across crime	.56		.54		.44		.46	

*Id.* at 24.84. *Id.*

85. Only 129 responses were used.

86. When data were aggregated for all subjects, the correlations were of marginal statistical significance, but the statistical relationship grew stronger when the responses of male subjects were analyzed alone. *Id.* at 26-28.

asked for their final votes, due to an interaction of sex of juror and race of defendant: the white female subjects were more likely to convict the white defendant and the white male subjects were more likely to convict the black defendant.<sup>87</sup>

Feild's study, published in 1979, was conducted with 896 white Alabama citizens with an average age of thirty-five, 19% of whom had actually served as jurors.<sup>88</sup> One of the dependent variables in the study combined the sentencing and guilt-determination questions — zero years were assigned to the innocent defendant — and the author decided to run statistical tests on this variable, rather than a pure guilty/not guilty determination. He noted, however, that the correlation between this aggregated guilt-punishment variable and the pure guilt variable was extremely high, making it unlikely that the results of his analysis would have been different if the pure guilty/not guilty variable had been used instead.<sup>89</sup> Feild found that the black defendant was judged much more culpable than the white defendant.<sup>90</sup>

Solernou and Bray asked Cuban, white American, and black American junior high school students to determine the guilt of a juvenile accused of shoplifting.<sup>91</sup> Cubans rated the white American defendant most guilty, white Americans rated the black American defendant most guilty, and black Americans' assessments of guilt were independent of the race of the suspect.<sup>92</sup>

Three studies fail to find a direct cause and effect relationship between the race of the defendant and guilt attribution. However, two of these studies found statistically significant interactions between race, guilt attribution, and a third variable, and all three of them suffer from a common methodological flaw so serious that the meaning of their findings is impossible to interpret. Gleason and Harris gave jurors "background material" on the defendant and a summary of testimony from a fictitious case; they found that socioeconomic status rather than race was the major determinant of simulated jurors' judgments of

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87. *Id.* at 28.

88. Feild, *Rape Trials and Jurors' Decisions: A Psychological Analysis of the Effects of Victim, Defendant and Case Characteristics*, 3 *LAW & HUM. BEHAV.* 261 (1979).

89. *Id.* at 270.

90. *Id.* at 271.

91. J. Solernou & R. Bray, *Effect of Ethnic Group Membership on Attribution of Guilt, Sentence Length, and Liking for the Defendant* (unpublished study reported in J. Solernou, *supra* note 15, at 14). Solernou's subsequent study examined the more nebulous concept of the "responsibility" of perpetrators and victims for injuries. Asking about "responsibility" produced much weaker race effects than had the earlier study inquiring about likelihood of guilt.

92. *Id.*

guilt and sentencing.<sup>93</sup> While they did not find race to exert a significant direct effect on blameworthiness, they *did* find an interaction between race, socioeconomic status, and blameworthiness, with black lower class defendants and white middle class defendants judged most blameworthy. Andrews found significant sex-of-juror effects on the degree of guilt assigned to a rape defendant, but found no direct effect of the race of the defendant upon juror decisions when the decisions of male and female jurors were aggregated.<sup>94</sup> However, a significant interaction between the sex of the juror, the race of the defendant, and the certainty of guilt was uncovered: female subjects were more likely to convict white defendants, and male subjects were less likely to convict white defendants.<sup>95</sup> McGuire and Bermant failed to find a significant effect of the race of the defendant on the verdict in a mock trial of a woman accused of murdering her husband.<sup>96</sup>

All three studies, however, are flawed by the failure to differentiate between the responses of white and black subjects.<sup>97</sup> Because most studies investigating minority-race subjects have found that those subjects display an own-race bias rather than a bias against minority-race defendants,<sup>98</sup> mixing the responses of minority-race subjects with white subjects could very easily conceal offsetting tendencies to judge defendants of another race as more likely to be guilty than defendants of the same race. Moreover, the particular crime chosen by McGuire and Bermant may have further confounded their analysis. Because subjects are likely to interpret the murder of a spouse as the murder of a person of the same race as the defendant, the experiment may have inadvertently introduced the variable of race of the victim. As discussed below, subjects tend to attribute more guilt to the defendant when the victim is the same race as the subject.<sup>99</sup> Thus, any guilt-attribution effect of the black defendant may have been offset by an opposite effect from her black victim.<sup>100</sup>

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93. Gleason & Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgements by Simulated Jurors*, 3 SOC. BEHAV. & PERSONALITY 175 (1975).

94. F. Andrews, *The Influence of Evidenciary [sic] and Extraevidenciary [sic] Factors on Decisions in a Simulated Rape Trial* (1982) (unpublished dissertation) (available at the University of Michigan).

95. *Id.* at 121.

96. McGuire & Bermant, *Individual and Group Decisions in Response to a Mock Trial: A Methodological Note*, 7 J. APPLIED SOC. PSYCHOLOGY 220, 224 (1977).

97. McGuire and Bermant describe their juries as "predominantly white," *id.* at 222, and neither of the other two studies discusses the race of their subjects. See Bernard, *supra* note 72, at 104-06.

98. See Bernard, *supra* note 72; Lipton, *supra* note 15; Ugwuegbu, *supra* note 64.

99. See notes 107-14 *infra* and accompanying text.

100. Also, the crime of murdering one's husband, because it may conjure up a host of family

Two other studies relating to guilt attribution and the race of the defendant are worthy of discussion. Hypothesizing that the race of the defendant may affect guilt attribution in different ways depending on the crime with which the defendant is charged, Sunnafrank and Fontes began their study by trying to identify what crimes were racially stereotyped.<sup>101</sup> Seventy-eight college students at a Michigan university were given ten photographs, five of black individuals and five of white individuals, and told that each of these persons had been convicted of a crime. Subjects were then given a list of ten crimes and asked to match each criminal with the crime he had been convicted of committing. The forced choice aspect of the experiment precluded any absolute conclusion that subjects thought blacks were more likely to be guilty of a particular crime than were whites. For example, the fact that only 36% of the subjects chose a black photograph as depicting the person convicted for rape<sup>102</sup> *could* mean that they thought whites were more likely to commit rape than were blacks, but it might merely mean that *if* a white person were convicted of a crime, he was more likely to have committed rape than assault. Even with that caveat, the results of the study were striking. Participants attributed to black criminals 83% of the mugging assaults, 81% of the auto thefts, 72% of the assaults on a police officer, and 95% of the soliciting offenses. To white criminals they assigned 65% of the frauds, 90% of the embezzlements, 79% of the child molestations, 64% of the rapes, and 77% of the counterfeiting offenses. Only with vehicular manslaughter were the disparities small enough to be explained by chance.<sup>103</sup> These results provide strong evidence that crime-related racial stereotypes exist, but do not permit more specific conclusions.

In their second study, Sunnafrank and Fontes investigated vehicular manslaughter, the one crime for which they did not find large discrepancies between the attribution to black defendants and the attribution to white defendants. Using seventy-five college students as subjects, they found no significant effect of defendant's race.<sup>104</sup> This might be explained by the lack of a racial stereotype for this crime, but it might also have resulted from the failure to analyze the responses of black and white subjects separately.

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issues, may not have a consistent racial stereotype. See notes 101-04 *infra* and accompanying text.

101. Sunnafrank & Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. REL. 1 (1983).

102. *Id.* at 7.

103. *Id.*

104. *Id.* at 9.



Finally, Foley and Chamblin's 1982 study is relevant for its findings on interracial and intraracial crime and guilt attribution.<sup>105</sup> Subjects, 191 students at a university in Florida, were asked to listen to a tape describing a trial in which an adult male was charged with sexual battery on an eleven-year-old child. The race of the offender and the race of the victim were randomly varied and each subject was asked to indicate an individual verdict on a five point scale (not guilty, possibly not guilty, undecided, possibly guilty, and guilty). White mock jurors were most likely to find a black defendant with a white victim guilty, but black jurors were much more likely to attribute guilt to intraracial offenses regardless of the race of the defendant.<sup>106</sup>

*ii. Race of the victim.* Three studies consider whether the race of the victim influences guilt attribution and all find a statistically significant effect.<sup>107</sup> These findings are important in two ways. First, by revealing one way in which racial bias affects determinations of guilt, they increase the plausibility of the hypothesis that racial bias infects criminal trials in other ways, thus indirectly supporting the findings that the race of the defendant affects guilt attribution. Second, they pose the possibility of a cumulative effect of the race of the defendant and the race of the victim, such that the black defendant on trial for a crime against a white victim is doubly disadvantaged.

Miller and Hewitt's subjects were 133 students at a Missouri university, approximately half of whom were black and half of whom were white.<sup>108</sup> Subjects saw a videotape of the beginning of an actual court case involving rape, showing a judge and a defense attorney conversing in the courtroom with the accused, a thirty-year-old black male. Subjects were then given written summaries of the prosecution and defense arguments actually used in the trial. All subjects were told that the victim was a thirteen-year-old female, but half were told that the victim was black and half were told that she was white. Subjects were then asked how they would have voted had they been on the jury. When the mock jurors were white, 65% voted for conviction in the white victim condition but only 32% voted for conviction in the black victim condition; when the mock jurors were black, 80% voted for conviction when the victim was black but only 48% voted for con-

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105. Foley & Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. PSYCHOLOGY 47 (1982).

106. *Id.* at 49.

107. See notes 108-14 *infra* and accompanying text.

108. Miller & Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOLOGY 159 (1978).

viction when the victim was white.<sup>109</sup>

Ugwuegbu's study, described earlier for its findings on culpability and the race of the defendant, also investigated the effect of the victim's race on culpability.<sup>110</sup> For both black and white subjects, the defendant was rated significantly less culpable when his victim was racially different from the subject.<sup>111</sup>

Klein and Creech's study, also described above,<sup>112</sup> investigated only white subjects. Their first experiment revealed that for three out of four hypothetical crimes, regardless of the race of the defendant, subjects estimated the defendant's guilt to be greater if the victim were white than if the victim were black.<sup>113</sup> In their second experiment, they found that the black victim of a black assailant was judged significantly less truthful than other victims.<sup>114</sup>

*iii. Race of the defendant's attorney.* Studies investigating the effect of the race of the defendant's attorney on guilt attribution may also be important in two ways. First, they are relevant because they provide evidence that racial bias affects guilt determinations in yet another way, again indirectly increasing the plausibility of the hypothesis that the race of the defendant affects guilt attribution. Second, to the extent that black defendants are more likely to be represented by black attorneys than are white defendants, the black defendant is more likely to be disadvantaged by bias against clients of black attorneys.

The only study investigating the effect of the defense attorney's race on the determination of his client's guilt found a consistent anti-black defense attorney bias.<sup>115</sup> Subjects who saw the photo of a black defense attorney were significantly more likely to find the defendant

109. For both black and white subjects, the greater tendency to vote for the conviction when the victim was racially similar to themselves was significant at the .01 level. *Id.* at 160.

110. Ugwuegbu, *supra* note 64. See text at notes 64-71 *supra* for a description of the study's methodology.

111. *Id.* at 139, 141.

112. Klein & Creech, *supra* note 82. See text at notes 82-87 *supra* for a description of the study's methodology.

113. Klein and Creech reported positive results of statistical significance tests for the crime of rape. They did not calculate the statistical significance for the other three crimes, although for two of them (burglary and murder) the estimates of guilt were far higher in the white victim situation than in the black victim situation. It was only for the drug sale, where there were no true victims, that the race-of-the-victim differences were small and interacted with the race of the defendant: the estimates of guilt were slightly higher for black defendants with black "victims" and for white defendants with white "victims." *Id.* at 24.

114. *Id.* at 29.

115. Cohen & Peterson, *Bias in the Courtroom: Race and Sex Effects of Attorneys On Juror Verdicts*, 9 SOC. BEHAV. & PERSONALITY 81 (1981). The subjects were Los Angeles high school students. The discussion of the results strongly implies that the subjects were white, but no explicit racial description is provided.

guilty.<sup>116</sup> In addition, a black defense attorney made the subjects significantly more likely to find the victim's mother a convincing witness, significantly more likely to feel sympathy for the victim's brother, significantly more likely to find the description of the prosecution witness complete, and significantly more likely to find the prosecutor honest and convincing.<sup>117</sup>

*b. Race and sentencing.* The results of mock jury studies investigating race and sentencing are not as consistent as those concerning race and guilt attribution. Reflection upon these inconsistencies suggests that at least two different forms of prejudice may affect jurors' deliberations.

Two studies found that the race of the defendant significantly affected sentencing decisions. In a study done at North Carolina State University, Klein and Creech found that "convicted" black rape defendants were sentenced more harshly by white subjects than were otherwise identical white rape defendants; furthermore, defendants convicted of raping white victims were sentenced more harshly than were defendants convicted of raping black victims.<sup>118</sup> In a study using white Alabama citizens as subjects, Feild obtained the same results: the subjects sentenced black rape defendants to significantly longer terms of imprisonment than white rape defendants, and they sentenced defendants accused of raping white victims significantly longer than defendants accused of raping black victims.<sup>119</sup> However, this finding did not separate out the effects of differential guilt attribution: the zero-year sentences of defendants who were acquitted by the subjects were included in the analysis of sentence length.

Four studies found that the race of the defendant did not affect mock jurors' sentencing decisions.<sup>120</sup> McGlynn, Megas, and Benson, using white Texas Tech University students, found that those students were significantly more likely to convict *black* defendants of murder, but of those defendants who were convicted, *white* male defendants received somewhat longer sentences.<sup>121</sup> Oros and Elman, using white student subjects at a large midwestern university, found no significant difference in the sentences assigned to black and white rape defend-

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116. *Id.* at 84.

117. *Id.*

118. Klein & Creech, *supra* note 82, at 28-29.

119. Feild, *supra* note 88, at 271.

120. See notes 121-24 *infra* and accompanying text.

121. McGlynn, Megas & Benson, *supra* note 62, at 96.

ants.<sup>122</sup> In this study, as in the Feild study, sentences of zero years assigned to defendants found not guilty were included in the tabulation of results. Interestingly, subjects judging black defendants indicated that they would have felt significantly more responsible for their decisions in a real trial than did subjects judging white defendants.<sup>123</sup>

The two other studies investigating the effects of race on sentencing varied both the defendant's race and his social attractiveness. Both of these studies found that subjects treated the socially attractive defendant more leniently than his unattractive counterpart, but found no disparity in the treatment of black and white offenders.<sup>124</sup>

These findings, read with those concerning race and guilt attribution, suggest that for *most* white subjects, bias against black defendants is based upon subconscious stereotypes. Were the bias conscious and motivated by hostility, one would expect white subjects to treat blacks less favorably at every opportunity; because the bias seems always to operate at the guilt adjudication stage but only occasionally at the sentencing stage, conscious hostility seems an unlikely explanation for the white subjects' behavior. Instead, it appears that stereotypes concerning blacks' propensity to commit crimes subconsciously sway most white subjects' evaluations of a black defendant's guilt; these stereotypes have little or no effect on decisions concerning the harshness of the penalty to be imposed upon a defendant already determined to be guilty. A few subjects — perhaps more frequently subjects from the South and perhaps particularly in rape cases — are also motivated by hostility and therefore penalize black defendants at the sentencing stage as well as at the guilt determination stage. This explanation of the mock jury studies on guilt attribution and sentencing is consistent with sentencing data from actual trials: racial discrepancies tend to show up only in records that (1) are older (perhaps thus increasing the likelihood of overt hostility toward black defendants), (2) are from Southern states, or (3) involve rape cases.<sup>125</sup> As we shall see, this hypothesis is also supported by more general research on racial prejudice.<sup>126</sup>

An alternative, even more pessimistic explanation is possible. Per-

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122. Oros & Elman, *Impact of Judge's Instructions Upon Jurors' Decisions: The "Cautionary Charge" in Rape Trials*, 10 REPRESENTATIVE RESEARCH IN SOC. PSYCHOLOGY 28, 34 (1979).

123. *Id.* at 34.

124. Feild & Barnett, *Simulated Jury Trials: Students vs. "Real" People as Jurors*, 104 J. SOC. PSYCHOLOGY 287, 290 (1978); Nemeth & Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOLOGY 221, 226 (1973).

125. See Parts I. A. 3. & 4. *supra*.

126. See Part I. C. *infra*.

haps determining the guilt of a black defendant prejudices decision-making in only one direction: white subjects will either be racially neutral or, because they are biased, will be more likely to convict black defendants than white defendants. This leads to a significant correlation between the race of the defendant and findings of guilt. In determining the appropriate punishment for a convicted defendant, however, white subjects might respond in three ways: they may be racially neutral, they may be motivated by hostility and therefore treat black defendants more harshly, or they may believe that because blacks are inherently more likely to commit crimes they are less morally blameworthy and therefore treat them more leniently. Depending upon the exact composition of the sample of mock jurors, and the particular facts of the case, these last two attitudes could offset each other, thus appearing to reflect perfect neutrality, or they could be imperfectly balanced and thus appearing to reflect either greater harshness or greater leniency toward black defendants. The older case studies<sup>127</sup> would support this explanation and the sentencing data from actual trials could also be explained in this way.

Actually, these two explanations need not be viewed as inconsistent with each other, but may differ largely in the matter of emphasis. It may be that *most* jurors are subconsciously biased and this influences the determination of guilt, but that *most* jurors, in *most* circumstances, are not consciously hostile. However, *some* subjects are consciously hostile and *some* are consciously patronizing; the exact number of subjects reacting to these motivations varies depending upon the particulars of the crime and the demographic characteristics of the pool from which the subjects were drawn.

*c. Race, attractiveness, and blameworthiness.* Studies relating attractiveness, race, and blameworthiness provide additional support — and perhaps a partial explanation — for the findings on race and guilt attribution discussed above.

*i. Attractiveness and blameworthiness.* Investigation of the relationship between attractiveness and perceived blameworthiness has yielded consistent results. In their judgments of blameworthiness, subjects respond to the defendant's physical beauty, his social status, and the similarity of his attitudes to their own. One study found crime-specific facial stereotypes and correlations of those stereotypes with judgments of guilt,<sup>128</sup> while two more found that physically at-

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127. See Part I. A. 1. *supra*.

128. Shoemaker, South & Lowe, *Facial Stereotypes of Deviants and Judgments of Guilt or Innocence*, 51 Soc. FORCES 427 (1973).

tractive defendants are less likely to be judged guilty.<sup>129</sup> Three mock jury studies found greater leniency in the sentencing of physically attractive defendants.<sup>130</sup> Furthermore, as with findings on race and blameworthiness, the effects of physical attractiveness operate on subjects through the victim's beauty as well as the defendant's: subjects tend to punish offenders whose victims were physically attractive more harshly than those whose victims were physically unattractive.<sup>131</sup> Socially desirable attributes, as well as physical beauty, appear to influence judgments of blameworthiness. One mock jury study found that defendants described as middle class were judged less guilty and assigned fewer years in prison than were defendants of a lower class background.<sup>132</sup> Three studies found that defendants described as working class and divorced were sentenced more harshly than were defendants described as middle class family men.<sup>133</sup> Finally, jurors' judgments of blameworthiness are altered by the extent to which the defendant's attitudes resemble their own: two studies found that subjects were more likely to find defendants with dissimilar attitudes guilty than defendants with similar attitudes.<sup>134</sup>

ii. *Race and attractiveness.* The findings on attractiveness and blameworthiness assume significance when considered with findings relating race to attractiveness. White subjects have more trouble dis-

129. Solender & Solender, *Minimizing the Effect of the Unattractive Client on the Jury: A Study of the Interaction of Physical Appearance with Assertions and Self-Experience References*, 5 HUMAN RIGHTS 201, 206-07 (1976).

130. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RESEARCH IN PERSONALITY 45, 49 (1974); Sigall & Ostrove, *Beautiful But Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOLOGY 410, 413 (1975) (finding greater leniency in the sentencing of physically attractive defendants, except where the crimes involved capitalizing on the defendant's attractiveness); Solomon & Schopler, *The Relationship of Physical Attractiveness and Punitiveness: Is the Linearity Assumption out of Line?*, 4 PERSONALITY & SOC. PSYCHOLOGY BULL. 483, 485 (1978).

131. Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts*, 4 PERSONALITY & SOC. PSYCHOLOGY BULL. 479, 480 (1978).

132. Gleason & Harris, *supra* note 93, at 178.

133. Feild & Barnett, *supra* note 124, at 290; Landy & Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOLOGY 141, 148-51 (1969); Nemeth & Sosis, *supra* note 124, at 226; *see also* Kaplan & Kemmerick, *Juror Judgment as Information Intergration: Combining Evidential and Nonevidential Information*, 30 J. PERSONALITY & SOC. PSYCHOLOGY 493, 496 (1974) (defendants with negative personality characteristics were more likely to be found guilty and punished severely than were defendants with positive personal traits).

134. Griffith & Jackson, *Simulated Jury Decisions: The Influence of Jury-Defendant Attitude Similarity-Dissimilarity*, 1 SOC. BEHAVIOR & PERSONALITY 1, 5-6 (1973); Mitchell & Byrne, *The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY & SOC. PSYCHOLOGY 123, 125-26 (finding that similar attitudes influenced authoritarian subjects but did not influence egalitarian subjects).

tinguishing black faces than white faces<sup>135</sup> and are likely to perceive black faces as less beautiful than white faces;<sup>136</sup> white mock jurors tend to perceive black defendants as coming from a lower socioeconomic class than white defendants despite otherwise identical descriptions of the defendants;<sup>137</sup> and white subjects without information on the attitude of other persons assume greater attitude dissimilarity from black persons.<sup>138</sup> It would appear that white subjects tend to assume less favorable characteristics about black defendants than white defendants and that such assumptions contribute to these subjects' greater tendency to find black defendants guilty.

## 2. *External Validity*

Given that white subjects consistently display an own-race bias in guilt-attribution decisions as mock jurors in a laboratory setting, and that the more limited studies on minority-race subjects suggest that they display a reciprocal bias, can we infer that jurors in criminal trials will tend to convict other-race defendants under circumstances in which they would acquit same-race defendants? We will answer this question affirmatively if the laboratory experiments have external validity, that is, if there is nothing peculiar to the laboratory experiments

135. See Barkowitz & Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12 J. APPLIED SOC. PSYCHOLOGY 255, 261 (1982); Brigham & Barkowitz, *Do "They all look alike?": The Effect of Race, Sex, Experience and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCHOLOGY 306, 314 (1978); Chance, Goldstein & McBride, *Differential Experience and Recognition Memory for Faces*, 97 J. SOC. PSYCHOLOGY 243 (1975) (reporting on two experiments); Cross, Cross & Daley, *Sex, Race, Age and Beauty As Factors in Recognition of Faces*, 10 PERCEPTION & PSYCHOPHYSICS 393, 394 (1971); Galper, *"Functional Race Membership" and Recognition of Faces*, 37 PERCEPTUAL & MOTOR SKILLS 455, 458 (1973); Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 39, 40 (1974); Malpass, *Racial Bias in Eyewitness Identification?*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 42, 43 (1974); Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 330, 332-33 (1969); Malpass, Lavigueur & Weldon, *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 285, 288 (1973); see also Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

136. Bernstein, Lin & McClellan, *Cross vs. Within-Racial Judgments of Attractiveness*, 32 PERCEPTION & PSYCHOPHYSICS 495, 500-501 (1982); see also Newman, Liss & Sherman, *Ethnic Awareness in Children: Not a Unitary Concept*, 143 J. GENETIC PSYCHOLOGY 103 (1983) (children prefer pictures of same-race children, with this effect particularly strong in white children).

137. Foley & Chamblin, *supra* note 105, at 49.

138. Byrne & Wong, *Racial Prejudice, Interpersonal Attraction, and Assumed Dissimilarity of Attitudes*, 65 J. ABNORMAL & SOC. PSYCHOLOGY 246, 247 (1962) (prejudiced white subjects assumed greater attitude dissimilarity from blacks than whites, but unprejudiced subjects did not); Hendrick, Bixenstine & Hawkins, *Race Versus Belief Similarity as Determinants of Attraction: A Search for a Fair Test*, 17 J. PERSONALITY & SOC. PSYCHOLOGY 250, 257 (1971); see also Stein, Hardyck & Smith, *Race and Belief: An Open and Shut Case*, 1 J. PERSONALITY & SOC. PSYCHOLOGY 281 (1965) (white teenagers responded to stimulus teenagers on the basis of similarity of belief when extensive information on the target's belief was supplied, but when that information was withheld, responded on the basis of racial similarity).

that creates the race and guilt-attribution correlation. There are no field experiments on race and guilt attribution and such experiments are unlikely ever to be possible.<sup>139</sup> Nevertheless, if we examine possible sources of external invalidity, we will see that there is no support for the position that the findings discussed above reflect a phenomenon that occurs solely in the laboratory.

There are four sources of concern about generalizability: the subjects, the independent variable (race), the dependent variable (the verdict), and the setting. There is no basis for arguing that the subjects of the experiments are more likely to respond to the race of the defendant than are prospective jurors.<sup>140</sup> Most of the subjects were students and they may differ in many respects from prospective jurors. However, the relevant differences suggest that prospective jurors would display a greater tendency toward racial bias in guilt attribution. Students are somewhat more lenient than other prospective jurors.<sup>141</sup> More important, because they are younger and better educated than much of the jury pool, they are likely to be less racially prejudiced.<sup>142</sup> In addition, the one study designed to sample subjects whose demographic characteristics resembled those of real jurors found a strong effect of race upon guilt attribution.<sup>143</sup>

Similarly, there is no basis for arguing that the experimental manipulation of race has stronger effects upon subjects than does the race of a defendant on trial. Most of the mock jury studies simply state in words that the defendant is black or white; actually seeing the defendant certainly would make his race more salient. Even those studies that use photographs or videotape clips exhibit the defendant for a much briefer period of time than jurors would view him at a trial; again, the increased exposure to the defendant at a real trial would tend to make his race more salient. The increased salience of the defendant's race in a real trial would hardly lessen jurors' tendencies to infer guilt from race. Indeed, the weakness of the experimental ma-

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139. More field *studies*, such as those described in the preceding section on trial data, are of course possible, but true field *experiments* would require tampering with real juries, which courts are unlikely to permit.

140. Of course, it is possible that the jurors who actually decide cases are less biased than are the student mock jurors due to the selection process of *voir dire*. This possibility is addressed and rejected in Part II. B.

141. See Feild & Barnett, *supra* note 124, at 290-91.

142. See J. JONES, PREJUDICE AND RACISM 74, 78 (1972). The fact that the one study using older subjects found some effects on guilt *and* sentencing also suggests that bias may be stronger in prospective jurors than in students. See Feild, *supra* note 88. However, the apparent correlation between age and racism may be spurious; it may result from the correlations between age and education, and education and racism. See notes 177-81 *infra* and accompanying text.

143. Feild, *supra* note 88, at 277-78.



nipulation of race suggests that the results of the experiments may underestimate the magnitude of the effect of race upon guilt attribution in the real trials.<sup>144</sup>

The dependent variable in the experiment — the assessment of guilt — differs in two ways from verdicts in real trials. First, most of the experiments use individual assessments of guilt whereas real trials rely upon the group's consensus or the majority verdict reached after deliberation.<sup>145</sup> Second, real jurors would almost certainly feel more responsibility for their decisions than do mock jurors. Neither of these differences is likely to account for the effect of race upon guilt attribution observed in the laboratory.<sup>146</sup> The two studies using group verdicts suggest that the introduction of group deliberations, *at least where the group would be racially homogenous*, would not eradicate the effect of race upon guilt attribution. One of these studies found that deliberations actually *increased* the tendency of white jurors to find black defendants more guilty than white defendants;<sup>147</sup> the other found that group deliberations did eliminate the effect of race upon guilt attribution, but all of the juries in that study contained jurors of both races.<sup>148</sup> Nor is it likely that the greater responsibility placed upon real jurors would eliminate the correlation between race and guilt attribution. Perhaps if we thought that the white subjects were *deliberately* judging black defendants more harshly, we might expect some inhibition of anti-black bias among real jurors, whose hostility might be tempered by awareness of the grave consequences of their decisions. On the other hand, conscious hostility might produce *more* biased results in real trials than in the laboratory, for the knowledge that no real harm would ensue from decisions in the laboratory would seem to decrease the motivation to treat blacks more harshly than whites. In any event, such speculation is not only inconclusive and unhelpful, it is probably irrelevant. Because the process of attributing guilt on the basis of race appears to be subconscious, jurors are un-

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144. Other attributes of real trials may operate to increase the effects of racial bias. One experiment suggests that adversarial presentations increase the likelihood that pro-guilt or pro-innocence biases will affect jurors' decisions. Kaplan & Miller, *Reducing the Effects of Juror Bias*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1443, 1449-50 (1978).

145. Although the requirement of a unanimous verdict is most common, some states permit convictions based upon a majority vote. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (sixth amendment does not require jury unanimity).

146. Simulations may, however, be very different from real trials in other respects. For example, the overall rate of acquittals may be quite different in simulations. See Bermant, McGuire, McKinley & Salo, *The Logic of Simulation in Jury Research*, 1 CRIM. JUST. & BEHAV. 224 (1974).

147. Bernard, *supra* note 72, at 109.

148. Lipton, *supra* note 15, at 281-82.

likely either to be aware of or to be able to control that process.<sup>149</sup> The seriousness of the consequences of bias cannot motivate jurors to put that bias aside if they are unaware of that bias.

The last validity concern is that the laboratory setting interacts with race and guilt attribution — that the condition of being observed creates a correlation that does not exist anywhere but in the laboratory. Although this is possible, it is extremely unlikely where, as here, the phenomenon observed is socially disapproved. Ordinarily we would expect that awareness of an observer would *discourage* conscious manifestations of racial bias.

Thus, none of the ordinary sources of concern about external validity seriously threatens the significance of the laboratory findings on race and guilt attribution. Moreover, as reviewed above, the data from real trials generally support the laboratory findings that racial bias influences criminal trials. Although the case studies may be questioned because of their age and limited number, and the conviction and sentencing data are accurately said to suffer from lack of control, their consistency with the results of the mock jury studies bolsters the argument that those results reflect real world phenomena. In turn, the mock jury studies supply what is lacking from the trial data: first, proof that the racial bias reported by the older case studies is not an outdated or freakish phenomenon, but still operates upon many white Americans; and second, evidence that the racial disparities found in court records are not entirely the product of spurious correlations — and may in fact underestimate the bias against black defendants due to the offsetting effects of other variables not controlled for, such as the victim's race. Finally, both the trial data and the mock jury studies are supported by the results of research on prejudice in other settings, to which we will now turn.

### C. *General Research on Racial Prejudice*

The third data source, the vast body of general research on racial prejudice, in large part avoids both the problem of lack of control and the concern about external validity because most of it was collected in controlled laboratory settings and has been corroborated using a variety of measurement techniques. Although this research cannot substitute for a more specific inquiry into the effects of racial bias on guilt attribution, a brief review of its results is useful for two reasons. Most importantly, a review of the patterns observed in other research on racial prejudice supports the external validity of the mock jury studies

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149. See notes 118-27 *supra* and accompanying text.

by demonstrating that the results of those studies are consistent with a more general social phenomenon. Second, a summary of selected aspects of the general findings on racial prejudice provides some insight into a matter not covered by the mock jury studies — the control of discrimination.

### 1. *The Nature of Racial Prejudice*

Allport, in his classic book on prejudice, defined ethnic prejudice as “an antipathy based upon a faulty and inflexible generalization.”<sup>150</sup> Prejudice differs from ordinary errors of prejudgment in that prejudgments may be discussed and rectified without emotional resistance.<sup>151</sup> Racial prejudice causes a person to ignore information about an individual contrary to his generalization, or stereotype, about that person’s racial group,<sup>152</sup> to fail to recognize errors of logic that would be obvious to him were an object of his prejudice not involved,<sup>153</sup> and to resist any implication that his conclusions resulted from prejudice.<sup>154</sup>

In the United States, racial stereotypes of black people have been overwhelmingly negative, and have encompassed a wide range of characteristics.<sup>155</sup> This is not surprising. When a minority is required to perform menial, distasteful, and dangerous types of work, it is convenient for the majority to believe that members of that minority are unsuited for any other kind of task because they are stupid, lazy, unambitious, unable or unwilling to plan for the future and thus oriented only toward immediate gratification, unclean, and otherwise unpleasant to associate with. It is also convenient for the majority to profess a few trivial positive stereotypes of the disadvantaged minority in order to persuade itself that it is not being unfair; disadvantaged minorities are therefore often believed to be content, appreciative, humble, and perhaps possessed of unusual musical or athletic abilities. However, if the minority begins to show signs of rebelling, additional negative stereotypes of dangerousness, unruliness, and criminal pro-

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150. G. ALLPORT, *THE NATURE OF PREJUDICE* 9 (1954).

151. *Id.*

152. *Id.*; H. EHRLICH, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 41-42 (1973); see also Kruglanski & Freund, *The Freezing and Unfreezing of Lay Inferences: Effects on Impression Primacy, Ethnic Stereotyping and Numerical Anchoring*, 19 *J. EXPERIMENTAL SOC. PSYCHOLOGY* 448, 454-58 (1983) (discussing the effect of ethnic stereotypes of Ashkenazi and Sephardic Jews upon awareness of plausible alternative hypotheses and attention to inconsistent pieces of evidence).

153. G. ALLPORT, *supra* note 150, at 168-69 (prejudiced subjects determined syllogisms identical in form to differ in validity depending upon whether the conclusion supported or contradicted their prejudices).

154. *Id.* at 169.

155. See, e.g., H. BLALOCK, *RACE AND ETHNIC RELATIONS* 21 (1982).

pensity are likely to be adopted.<sup>156</sup> One expert describes the evolution of white beliefs about blacks and Hispanics as the prototypical examples of this kind of stereotyping.<sup>157</sup>

There is ample empirical support for this characterization of white attitudes toward blacks. Every ethnic group except blacks ranks blacks at or near the bottom of the hierarchy of social preference.<sup>158</sup> Among the negative traits ascribed to blacks is a propensity for committing crimes. As early as 1946, a study of stereotypes in magazine fiction found that blonde Americans tended to be the heroes, while minority characters appeared only in minor roles and conformed to ethnic stereotypes.<sup>159</sup> Numerous studies have since established that the general populace also tends to ascribe unfavorable behavioral qualities to those with dark skin color, of whatever race.<sup>160</sup> When the dark-skinned person is black, this tendency is often greatly exaggerated. For example, Allport showed subjects a picture of several people in a subway car, including a white man holding a razor and apparently arguing with a black man. Over half of the subjects reported that the black man held the razor.<sup>161</sup> A recent study asked white children between eight and ten years of age to select from a biracial set of photographs those individuals they believed to be murderers. Black males were perceived primarily as murderers and white males were not.<sup>162</sup> This study also found differential perception of other violent crimes such as homicide, robbery, and assault.<sup>163</sup> When reading news reports, whites (1) overwhelmingly ascribed violent crimes to black perpetrators even though the reports did not supply a basis for such ascription, (2) overwhelmingly ascribed nonviolent crimes to white perpetrators even when the report did not support such ascription, and (3) made substantially greater attributions of crimes to black perpetrators than did black readers.<sup>164</sup> Another study found that newspaper

156. *Id.*

157. *Id.*

158. *Id.* at 96; see also Smith & Dempsey, *supra* note 15 (reporting results of a variety of measures of ethnic social distance and prejudice, all of which show blacks to be a disfavored ethnic group).

159. Berelson & Salter, *Majority and Minority Americans: An Analysis of Magazine Fiction*, 10 PUB. OPINION Q. 168 (1946).

160. See Secord, *Facial Features and Inference Processes in Interpersonal Perception*, in PERSON PERCEPTION AND INTERPERSONAL BEHAVIOR 300, 303-04 (R. Tagiuri & L. Petrullo eds. 1958) (reviewing the literature).

161. G. ALLPORT & L. POSTMAN, *THE PSYCHOLOGY OF RUMOR* 111 (1965).

162. J. Mayas, *Perceived Criminality: The Attribution of Criminal Race from News-Reported Crime*, 9 (1977) (Ph.D. dissertation) (available at the University of Michigan) (citing another study).

163. J. Mayas, *supra* note 162.

164. *Id.*

accounts overemphasized black-on-white rape — and that white sample respondents perceived reality as consistent with the biased newspaper accounts rather than actual rape statistics.<sup>165</sup>

The prevalence of phrases in the English language that link blackness to evil suggests the depth of the psychological process that causes these distortions of reality: to name but a few, “black as sin,” “black heart,” “black sheep,” “black deed.”<sup>166</sup> This imagery is so powerful that white subjects do not make distinctions of degree; regardless of actual color or proportion of ancestry, a person who is labeled black will be assumed to have the full complement, full strength, of stereotypical characteristics.<sup>167</sup> If a person is described as black, white subjects are less interested in the other traits he possesses, and his likeability will be less influenced by other attributes than would the likeability of a person described as white.<sup>168</sup> Furthermore, a recent study found that when a white subject was supplied with negative information about a black person, the subject would judge the person more unfavorably than an otherwise identically described white person.<sup>169</sup> Finally, an earlier study found that both high and low prejudiced subjects describe blacks pictured in stereotyped settings (jazz trio, rural slum, large family) with *twice* the frequency of negative stereotypes as the subjects would use to describe the same person pictured in a nonstereotyped (generally interracial) setting.<sup>170</sup> These findings are especially disturbing since they suggest that even “unprej-

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165. Abbott & Calonic, *Black Man, White Woman-The Maintenance of a Myth: Rape and the Press in New Orleans*, in CRIME AND DELINQUENCY: DIMENSIONS OF DEVIANCE 141, 147, 149 (M. Riedel & T. Thornberry eds. 1974).

166. See, e.g., L. HUGHES, BLACK MISERY (1969) (“Misery is when you first realize so many things bad have black in them, like black cats, black arts, blackball.”).

167. See Secord, Bevan & Katz, *The Negro Stereotype and Perceptual Accentuation*, 53 J. ABNORMAL AND SOC. PSYCHOLOGY 78, 81 (1956).

168. See EHRlich, *supra* note 152, at 81-82 (citing Long, Ziller & Thompson, *A Comparison of Prejudices: The Effects Upon Friendship Ratings of Chronic Illness, Old Age, Education and Race*, 70 J. PERSONALITY AND SOC. PSYCHOLOGY 101, 108 (1966)); see also Linville & Jones, *Polarized Appraisals of Out-group Members*, 38 J. PERSONALITY AND SOC. PSYCHOLOGY 689 (1980) (reporting several experiments showing that white subjects considered fewer dimensions in evaluating the personality traits and abilities of individuals described as black than of individuals described as white).

169. Linville & Jones, *supra* note 168, at 701; see also Forgas & Brown, *The Effects of Race on Observer Judgments of Nonverbal Communications*, 104 J. SOC. PSYCHOLOGY 243 (1978) (for white subjects, effects of positive nonverbal communication from black stimulus models were weaker than effects of positive nonverbal communication from white stimulus models); Whitehead, Smith & Eichhorn, *The Effect of Subject's Race and Other's Race on Judgments of Causality for Success and Failure*, 50 J. PERSONALITY 193, 200 (1982) (both black and white subjects tended to attribute the failure of another “more to lack of ability when the other [was] racially dissimilar than when he [was] similar”).

170. EHRlich, *supra* note 152, at 40 (citing Riddleberger & Motz, *Prejudice and Perception*, 62 AM. J. SOC. 498 (1957)).

udiced" jurors will respond with many negative stereotypes to the image of a black person as a defendant in a criminal trial (which newspapers and popular opinion deem an expected setting) and, that given negative information in the form of the prosecution's evidence, they will judge the defendant more harshly if he is black than if he is white. Although disturbing, these inferences from the general research on racial prejudice are entirely consistent with the results of the mock jury studies.

## 2. *The Persistence of Racially Prejudiced Attitudes*

Some social commentators have argued that race relations in this country have undergone such fundamental changes in recent years that the opportunities of black individuals are more influenced by their economic position than by race discrimination.<sup>171</sup> This argument might be taken as support for the quite different proposition that prejudice no longer significantly affects the thinking of white Americans. Whether or not the former is correct, the latter is untenable. All of the mock jury studies (and many of the studies cited in the preceding section concerning other findings on racial prejudice) were performed in the 1970s and 1980s. Nevertheless, it is useful to note the ways in which attitudes have and have not changed because some of the changes carry implications concerning the control of discrimination.

Replications of early research on social preference reveal a relatively stable pattern of aversion toward blacks.<sup>172</sup> Blacks are still at or near the bottom of general social preference scales.<sup>173</sup> Many negative feelings and stereotypes persist;<sup>174</sup> for example, a 1978 poll found that a majority of Americans still opposed interracial marriage and 31% preferred to live in a neighborhood with no blacks as neighbors.<sup>175</sup> However, negative stereotypes appear to be less extreme and less widespread than in the 1950s and 1960s.<sup>176</sup>

The prospects for further change in the immediate future are not

171. See, e.g., W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978). But see Willie, *The Inclining Significance of Race*, SOCIETY, July-Aug. 1978, at 10.

172. EHRLICH, *supra* note 152, at 36, 74-75; see also Smith & Dempsey, *supra* note 15, at 586 (polls show lessening hostility toward blacks but majorities still object to black/white intermarriage and sizable minorities are opposed still to black neighbors).

173. Blalock, *supra* note 155, at 96; see also Smith & Dempsey, *supra* note 15 (reporting results of a variety of measures of ethnic social distance and prejudice, all of which show blacks to be a disfavored ethnic group).

174. J. LEVIN & W. LEVIN, *FUNCTIONS OF DISCRIMINATION AND PREJUDICE* 92-95 (1982) (reviewing several recent studies); Smith & Dempsey, *supra* note 15.

175. Smith & Dempsey, *supra* note 15, at 591, 590.

176. J. LEVIN & W. LEVIN, *supra* note 174, at 92-95; Smith & Dempsey, *supra* note 15, at 591 (comparing poll data from different time periods).

particularly bright. One study found that between 1972 and 1977 the liberalizing trend drastically slowed down in some areas, halted entirely in other areas, and that in a few areas (such as attitudes toward integrated housing and black assertiveness) intolerance was actually increasing.<sup>177</sup> Initially, correlations between age and prejudice suggested that society-wide decreases in prejudice would occur gradually, but constantly, as older, more prejudiced persons were replaced by younger, more enlightened persons. However, it now appears that such correlations were spurious. There is a strong negative association between anti-black attitudes and education, but the apparent relationship between anti-black attitudes and age is due primarily to the association of those variables with education.<sup>178</sup> Furthermore, recent observations of young white children continue to show a strong own-race preference;<sup>179</sup> the only change from earlier studies on children's racial preferences is that more minority-race children now display an own-race preference whereas in earlier studies they tended to prefer white children.<sup>180</sup> One recent study found that white children between three and six years of age found it funnier to see a child of another racial or ethnic group victimized in humor than a white child; black and Mexican American children did not display this racially selective lack of empathy.<sup>181</sup>

Finally, any encouragement that might be drawn from the initial decrease in extreme negative stereotypes must be qualified by the likelihood that newer data reflect some fading of stereotypes — but also some faking. Sigall and Page investigated the possibility that a change in the social acceptability of prejudice has tainted responses in the newer studies.<sup>182</sup> White subjects were asked to indicate how characteristic each of twenty-two traits was of either “Americans” or “Negroes”; half of the subjects were presumably free to distort their responses, but the other half were led to believe that the experimenter had an accurate physiological measure of their true attitudes, and these subjects were asked to predict that measure. The subjects attributed the favorable traits of intelligence, honesty, and sensitivity *more*

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177. J. LEVIN & W. LEVIN, *supra* note 174, at 92.

178. J. JONES, *supra* note 142, at 75.

179. See Newman, Liss & Sherman, *supra* note 136, at 104, 108 (reviewing several studies and reporting the results of a new study).

180. *Id.* at 108 (black, Hispanic, and white children all tended to prefer same-ethnic pictures, although white children displayed this preference most strongly).

181. McGhee & Duffey, *Children's Appreciation of Humor Victimizing Different Racial-Ethnic Groups: Racial-Ethnic Differences*, 14 J. CROSS-CULTURAL PSYCHOLOGY 29 (1983).

182. Sigall & Page, *Current Stereotypes: A Little Fading, A Little Faking*, 18 J. PERSONALITY & SOC. PSYCHOLOGY 247 (1971).

often to "Americans" when they thought the experimenter would know their true feelings and they attributed these traits *less* often to "Negroes" when they thought the experimenter would know their true feelings.<sup>183</sup> Of particular significance for our purpose is the fact that the effect of being told that their physiological responses were being monitored was the greatest for attribution of the trait of honesty.<sup>184</sup> Moreover, ratings of the unfavorable traits of ostentatiousness, laziness, ignorance, physical dirtiness, stupidity, and unreliability were consistent with the ratings of the favorable traits: white subjects attributed them more often to blacks (and less often to whites) when they thought the experimenter would know their true feelings.<sup>185</sup>

These results, which suggest that many people may be more reluctant to admit prejudice than they were in the past, are complemented by observations concerning the prevalence of two kinds of racism. *Dominative* racists express their bigoted beliefs openly, frequently through physical force, while *aversive* racists do not want to associate with blacks but do not often express this feeling.<sup>186</sup> Social scientists once described the aversive mode as characterizing the North and the dominative mode as characterizing the South, but now suggest that aversive manifestations of racism increasingly predominate in all parts of the country.<sup>187</sup> Thus one might expect that many whites would agree in principle with the general goal of racial equality yet strongly resist specific reforms and perhaps believe that blacks are largely responsible for their inferior socioeconomic status. Poll data confirm the prevalence of such response patterns.<sup>188</sup>

### 3. *Prejudice and Discrimination*

Attitude/behavior congruence is a complex phenomenon: the documentation of a certain level of racially prejudiced attitudes does not necessarily imply the same level of discrimination. Many of the studies reviewed above have not inquired about "pure" attitudes toward blacks but have instead investigated people's predictions about what

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183. *Id.* at 252.

184. *Id.*

185. *Id.*

186. J. JONES, *supra* note 142, at 121-24; J. KOVEL, *WHITE RACISM* 54-55 (1970).

187. J. JONES, *supra* note 142, at 121-22.

188. I. KATZ, *STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS* 14-16 (1981) (reviewing a variety of studies finding conflicting attitudes and ambivalent feelings toward blacks); Pettigrew, *The Mental Health Impact*, in *IMPACTS OF RACISM ON WHITE AMERICANS* 97, 115 (B. Bowser & R. Hunt eds. 1981); cf. Smedley & Bayton, *Categories of Attitudes Toward Behavior and the Attitude-Behavior Relationship*, 113 *J. PSYCHOLOGY* 277 (1983) (general attitudes toward blacks did not correlate with students' predictions of successful treatment of black patients but attitudes toward blacks in positions of superior status did).



they would do in certain situations. Nevertheless, it is still possible that individuals would predict one behavior, but, when actually confronted with the situation, would engage in another.

Either prejudice or discrimination may be present without the other. Discrimination may be inhibited despite virulent prejudice. Where discrimination is not legally or socially approved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly.<sup>189</sup> On the other hand, discrimination may be engaged in without the presence of prejudiced attitudes when it will lead to social approval.<sup>190</sup> In some cases, a person might cooperate with another's discriminatory behavior without even being aware that discrimination is taking place: many whites are quite insensitive to cues of prejudiced behavior in others.<sup>191</sup> Finally, discrepancies between measured attitudes and actual behavior may occur because of dissimulation in the reporting of attitudes. As the Sigall and Page study suggests, it now may be quite common to underreport prejudiced attitudes, which will result in attitudinal data that underestimate the number of persons likely to engage in discrimination.

Thus, it is not possible to generalize across types of discrimination and settings as to whether the prevalence of prejudiced attitudes underestimates or overestimates the likelihood of discrimination. Consequently, we cannot be certain that the general findings on prejudiced attitudes can be translated into accurate predictions of discriminatory verdicts, just as we cannot be certain that the mock jury studies have external validity. But, as with the mock jury studies, there are good reasons to predict that these general findings do not overestimate discriminatory behavior in the jury box. First, this discrimination would not require open acknowledgment of prejudicial attitudes to others: it can be accomplished covertly by arguments that never allude to race. Second, the prejudice may well be unconscious, and thus influence judgments of guilt without the juror's acknowledging the prejudiced attitudes even to himself. Finally, several studies investigating discrimination in real life situations similar to the trial assessment of guilt

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189. G. ALLPORT, *supra* note 150, at 56-57.

190. *Id.* at 56; Bowser & Hunt, *Afterthoughts and Reflections*, in *IMPACTS OF RACISM ON WHITE AMERICANS* 245, 247 (B. Bowser & R. Hunt eds. 1981). See generally Liska, *Emergent Issues in the Attitude-Behavior Consistency Controversy*, 39 *AM. SOC. REV.* 261 (1974).

191. Rollman, *The Sensitivity of Black and White Americans to Nonverbal Cues of Prejudice*, 105 *J. SOC. PSYCHOLOGY* 73 (1978); see also M. Sherman, N. Sherman, & R. Smith, *Racial and Gender Differences in Perceptions of Fairness: When Race Is Involved in a Job Promotion*, 57 *PERCEPTUAL & MOTOR SKILLS* 719 (1983) (blacks and women perceived more unfairness in situations where one employee was promoted over an equally qualified employee).

have reported discriminatory behavior.<sup>192</sup>

## II. EXISTING TECHNIQUES FOR ELIMINATING THE INFLUENCE OF RACIAL BIAS ON CRIMINAL TRIALS

The compelling evidence that many prospective jurors walk into the courtroom predisposed to convict black defendants must be measured against existing legal procedures designed to eliminate the influence of racial bias upon the jury's ultimate decision to convict or acquit. If these procedures are adequate, the prospective jurors' predispositions are immaterial to the defendant. Unfortunately, all of the traditional protections against racially biased verdicts — the assurance of a representative jury, the screening out of biased jurors, or the control of the content of the jury's deliberations — are inappropriate tools for neutralizing the effects of the amount and kind of bias documented in Part I.

### A. *Assuring a Representative Jury*

Whether the racial composition of a jury is representative of the population depends upon a two-step process: the selection of the venire panel and the selection of prospective jurors from that panel to serve on a particular case. Racially discriminatory procedures in either phase of jury selection will result in an unrepresentative jury, but the Court has taken a very different approach to the two varieties of discrimination.

#### 1. *Selection of the Venire Panel*

In 1875, Congress enacted a criminal prohibition against excluding

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192. See, e.g., Dutton & Lake, *Threat of Own Prejudice and Reverse Discrimination in Interracial Situations*, 28 J. PERSONALITY & SOC. PSYCHOLOGY 94 (1973); Gaertner, Dovidio & Johnson, *Race of Victim, Nonresponsive Bystanders and Helping Behavior*, 117 J. SOC. PSYCHOLOGY 69 (1982) (white subjects in the presence of passive bystanders helped black emergency victims less quickly than white emergency victims); Lipton, *supra* note 15, at 277 (students who believed they were actually determining the punishment of another student discriminated against other-race students); Mukherjee, Shukla, Woodle, Rosen, & Olarte, *Misdiagnosis of Schizophrenia in Bipolar Patients: A Multiethnic Comparison*, 140 AM. J. PSYCHIATRY 1571 (1983) (black and Hispanic mental patients more likely to be misdiagnosed as schizophrenic even when other variables are controlled for); Yee, *Comment on Schulman's Article*, 81 AM. J. SOCIOLOGY 629, 632 (1975) (discussing finding that white subjects delivered more painful shocks to failing black confederate than to failing white confederate). Dutton and Lake found that whites who had been told that their responses to a questionnaire had shown them to be racially prejudiced gave more money to black panhandlers than to white panhandlers, but that whites who had been told that their responses showed them to be egalitarian gave less money to a black panhandler than to a white panhandler. Would "passing" the voir dire examination have a similar effect, that is, would it assure white jurors that they were unbiased and thus "free" them to discriminate against black defendants?

any qualified citizen from a jury on the basis of race.<sup>193</sup> Five years later in *Strauder v. West Virginia*, the Supreme Court struck down a statute excluding blacks from jury service as a violation of the equal protection clause of the fourteenth amendment.<sup>194</sup> The Court held that a defendant is entitled to a jury comprised of his "neighbors, fellows, associates, persons having the same legal status in society as that which he holds";<sup>195</sup> it further declared that denying blacks the right to participate in the administration of law branded them as inferior and stimulated prejudice.<sup>196</sup> Shortly thereafter the Court brought the same rules to bear upon the selection of grand jurors,<sup>197</sup> and the following year the Court extended *Strauder* to racially discriminatory administration of facially neutral jury selection laws.<sup>198</sup>

The impact of these early cases was quite limited for several decades because of the requirement that the defendant show a purpose to discriminate on the part of jury officials.<sup>199</sup> However, in the 1935 case of *Norris v. Alabama* the Court held that if a defendant in a criminal case could show (1) the existence of a substantial number of blacks in the community and (2) their total exclusion from jury service, then he had made out a prima facie case of discrimination.<sup>200</sup> When he had shown these facts, the burden of proof shifted to the state to prove that the exclusion did not flow from discrimination.<sup>201</sup> The Court declared that this burden could not be satisfied by general denials; testimony that no one was excluded because of his color or that qualified blacks were not known to the commissioners would not be deemed sufficient.<sup>202</sup> As cases arose that did not involve total exclusion of blacks, the Court extended the burden-shifting rule of *Norris* first to cases of gross underrepresentation<sup>203</sup> and then to cases where a substantial disparity between minority group members in the population and in the jury list "originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judg-

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193. Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (codified at 18 U.S.C. § 243 (1982)).

194. 100 U.S. 303 (1880).

195. 100 U.S. at 308.

196. 100 U.S. at 308.

197. *Ex parte Virginia*, 100 U.S. 339 (1880).

198. *Neal v. Delaware*, 103 U.S. 370 (1881).

199. Unless the defendant proved the contrary, state action was presumed constitutional and lower courts findings were presumed correct. *See, e.g., Thomas v. Texas*, 212 U.S. 278 (1909); *Smith v. Mississippi*, 162 U.S. 592 (1896).

200. 294 U.S. 587 (1935).

201. 294 U.S. at 598.

202. 294 U.S. at 598-99.

203. *See, e.g., Avery v. Georgia*, 345 U.S. 559 (1953).

ment rather than objective criteria."<sup>204</sup> This trend culminated in the 1977 *Castaneda v. Partida* decision, which held that a prima facie case of discrimination was established by a showing that the population of the vicinage was 79.1% Mexican American but that only 39% of the persons summoned for grand jury service over an eleven-year period were Mexican American.<sup>205</sup>

Discriminatory jury (and grand jury) selection procedures may be attacked in several ways. Under the Civil Rights Act of 1875, the federal government may bring a criminal action against state officials responsible for the discrimination, but such prosecutions have been quite rare.<sup>206</sup> Most common are direct appeals through the state courts and petitions for certiorari to the United States Supreme Court by black defendants who have been convicted or indicted by a jury or grand jury from which blacks were excluded. Defendants who have exhausted their appeals process may petition a federal district court for habeas corpus relief.<sup>207</sup> Although civil rights era case law from the Fifth Circuit had been receptive to discrimination claims raised for the first time on habeas corpus,<sup>208</sup> in 1973 the Supreme Court ruled that failure to comply with procedural rules concerning the timing of objections waived discrimination claims.<sup>209</sup> In the same year, the Court held that a voluntary guilty plea insulated prior constitutional defects from collateral review.<sup>210</sup> Ironically, as these decisions limited the number of black defendants *prevailing* on jury selection claims, the Court contemporaneously broadened the class of litigants permitted to *raise* the issue of the jury selection. In *Carter v. Jury Commission*<sup>211</sup> and *Turner v. Fouche*,<sup>212</sup> the Court recognized the standing of black citizens to raise constitutional and statutory challenges to the systematic exclusion of blacks from grand and petit juries. The plaintiffs did not prevail in either *Carter* or *Turner*, however, and successful civil class actions have been rare.<sup>213</sup>

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204. *Turner v. Fouche*, 396 U.S. 346, 360 (1970).

205. *Castaneda v. Partida*, 430 U.S. 482 (1977).

206. *Rose v. Mitchell*, 443 U.S. 545, 558 (1979). *See Ex parte Virginia*, 100 U.S. 339 (1880), for an early conviction.

207. *See, e.g., Rose v. Mitchell*, 443 U.S. 545 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977).

208. *See Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967); *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959).

209. *Davis v. United States*, 411 U.S. 233 (1973).

210. *Tollett v. Henderson*, 411 U.S. 258 (1973).

211. 396 U.S. 320 (1970).

212. 396 U.S. 346 (1970).

213. Most of the successful challenges appear to have arisen in the Fifth Circuit. *See, e.g.,*

A more drastic doctrinal change was brought about by the Court's determination in *Peters v. Kiff* that a white defendant could raise the issue of the exclusion of blacks from grand and petit juries.<sup>214</sup> Justice Marshall's plurality opinion concluded that a defendant is denied due process of law when he is indicted or tried by grand or petit juries that are plainly illegal in their composition.<sup>215</sup> He reasoned 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. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.<sup>216</sup>

Three Justices concurred in the judgment, but relied upon the statutory policy of the 1875 Civil Rights Act rather than the due process clause.<sup>217</sup>

Evolution away from an equal protection basis for jury exclusion claims was completed in *Taylor v. Louisiana* where the Court upheld a male defendant's right to challenge a law excluding women from jury service;<sup>218</sup> a majority of the Court agreed that the sixth amendment's guarantee of an impartial jury required a jury selected from a representative cross-section of the community.<sup>219</sup> The Court declared that if large distinctive groups were excluded from the jury pool, the purposes of the jury trial requirement might be frustrated and public confidence in the criminal justice system might be eroded.<sup>220</sup>

The venire selection cases present several paradoxes. The language of *Strauder* has been described as "the most vigorous statement of the antidiscrimination principle to be found in the United States Reports for a full century after Emancipation";<sup>221</sup> yet, early *Strauder* progeny

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*Broadway v. Culpepper*, 439 F.2d 1253 (5th Cir. 1971); *Black v. Curb*, 422 F.2d 656 (5th Cir. 1970); cf. *Bradley v. Judges of Superior Ct.*, 372 F. Supp. 26 (C.D. Calif. 1974).

214. 407 U.S. 493 (1972).

215. *But cf. Hobby v. United States*, 104 S. Ct. 3093 (1984), holding that race or sex discrimination in selection of the primarily ministerial position of foreman of a federal grand jury has no appreciable effect on a white male defendant's due process right to fundamental fairness and thus does not require reversal of his conviction and dismissal of the indictment. Whether the result would be different under an equal protection challenge by a female or black defendant was left unanswered.

216. 407 U.S. at 503-04.

217. 407 U.S. at 505.

218. 419 U.S. 522 (1975).

219. 419 U.S. at 530.

220. 419 U.S. at 530-31.

221. Schmidt, *Juries, Jurisdiction and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEXAS L. REV. 1401, 1414 (1983).

may be criticized as indifferent to the practicalities of enforcing *Strauder's* commands.<sup>222</sup> Still, it is obvious that jury selection was one of a very few areas in which equal protection doctrine had *any* vitality in the late nineteenth and early twentieth centuries.<sup>223</sup> This enhanced solicitude about venire selection processes persisted into the period in which equal protection doctrine was more broadly applied: the standards for proof of discriminatory purpose developed in this area were far more lenient than in virtually any other kind of equal protection litigation.<sup>224</sup> Nevertheless, the apparently powerful equal protection doctrine operating in this area was suddenly eclipsed by a broader sixth amendment right.<sup>225</sup>

Perhaps even stranger than the historical development and demise of an equal protection theory to explain venire selection requirements is the Court's consistently sharp distinction between venire selection and the composition of individual juries. All the venire selection cases stress that the exclusion of minorities impairs the impartiality and legitimacy of the jury system; one might assume that this reasoning would lead the Court to hold that a defendant's jury — and not simply the panel from which the jury is selected — must include minorities. Certainly bias can only manifest itself in individual cases and it is from individual cases that an impression of unfairness is formed. Yet the Court has adamantly maintained from *Strauder* to *Taylor* that all the Constitution forbids is systematic exclusion from jury panels. A defendant may not "challenge the makeup of a jury merely because no members of his race are on the jury,"<sup>226</sup> for there is no requirement that his *particular* jury be representative.

It is not clear how successful the fourteenth or sixth amendment doctrines have been in increasing the representation of blacks in jury venires. While these doctrines should be credited with eliminating the most egregious exclusions of blacks, substantial underrepresentation

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222. *Id.*

223. *Cf. Plessy v. Ferguson*, 163 U.S. 537 (1896) (applying "separate but equal" doctrine to segregation of public transportation facilities). The equal protection clause was also alive during this period in cases involving property rights. *See City of Richmond v. Deans*, 281 U.S. 704 (1930); *Harmon v. Tyler*, 273 U.S. 668 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917).

224. Compare, for example, the standard for proving discriminatory purpose in civil cases, as set forth in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

225. *But see Hobby v. United States*, 104 S. Ct. 3093 (1984), which dismissed a white male's due process claim that race or sex discrimination in the selection of the federal grand jury foreperson violated fundamental fairness without examining the impact of such discrimination upon his sixth amendment right to an impartial jury selected from a representative cross section of the community.

226. *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972).

persists.<sup>227</sup> Regardless of the adequacy of these doctrines for their avowed purpose, they provide only incidental protection against the risk of wrongful, racially biased convictions. The prejudice documented in Part I operates in individual cases, altering the assessment of the guilt of particular defendants. Even if the jury venire includes a representative number of blacks, the black defendant may face an all-white jury. This can occur when there are virtually no blacks in the community in which the defendant is being tried and thus virtually no blacks on the jury panel, or when the luck of the draw results in no blacks being drawn to serve on his case despite a large number of blacks being called for jury duty. It can even occur when blacks are among those called to serve on the defendant's case if the prosecutor uses his peremptory challenges to eliminate all prospective black jurors. The reason for the absence of black jurors is immaterial; if a black defendant faces an all-white jury, he faces a substantial risk that the assessment of his guilt will be affected by his race. The most that can be said for the doctrines that assure the representative presence of blacks on the jury rolls is that they seem to be a logical first step in eliminating the influence of racial bias on verdicts.

## 2. *Racially Selective Use of Peremptory Challenges*

If the doctrines that govern the first stage of jury selection make only very modest progress toward eliminating racial bias in criminal trials, the permissive rules that shape the second stage of jury selection reverse even those limited gains. The procedures determining which of the jurors on the jury panel will decide a case frequently result in all-white juries trying black defendants even when a substantial number of blacks had been present on the panel. The process begins with a list of eligible jurors, from which the venire for a particular term is chosen. After some jurors are excused for health or hardship reasons, the venire is questioned and challenges are made. Prospective jurors may be struck from a panel in two ways: a judge may remove "for cause" any juror whose bias is demonstrated by either side, and either side may exercise a given number of "peremptory" challenges, for which no reason need be given. Although challenges for cause may affect the black defendant's chances of an unbiased determination of his guilt,<sup>228</sup> it is the peremptory challenge that affects these chances by altering the representativeness of the jury's composition.

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227. See, e.g., Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968).

228. These effects are discussed in Part II. B. 1. *infra*.

In *Swain v. Alabama*<sup>229</sup> the prosecutor used his peremptory challenges to strike all six blacks from the defendant's jury panel. The Supreme Court held that it is "permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged."<sup>230</sup> The Court reasoned that the function of the peremptory challenge was "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 before them, and not otherwise."<sup>231</sup> This function of the challenge could only be performed if each side could act upon vague impressions and even

grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.<sup>232</sup>

Swain had further argued that his was not an isolated case of racially selective use of the peremptory challenge but that prosecutors in the county in which he was tried had systematically used their strikes to prevent all blacks on the petit jury venire from serving on the jury itself. The Court acknowledged that this claim "raise[d] a different issue," and that if the defendant could prove that regardless of the crime, the defendant, or the victim, the state were responsible for the removal of all blacks from juries, then the allegation that blacks were being denied the right to participate in the administration of justice would be supported.<sup>233</sup> This use of the peremptory challenge would pervert its purpose and raise a fourteenth amendment claim.<sup>234</sup> In short, if the peremptory challenge were used to circumvent the Court's jury venire selection requirements, thus denigrating the rights of prospective black *jurors*, this might be unconstitutional. But if it were merely used in cases with black *defendants*, thus decreasing their chances of acquittal, this was entirely proper.

The Court found no need actually to adjudicate the constitutionality of a uniform use of the peremptory challenge to strike all black

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229. 380 U.S. 202 (1965).

230. 380 U.S. at 223.

231. 380 U.S. at 219.

232. 380 U.S. at 220-21.

233. 380 U.S. at 223-24.

234. 380 U.S. at 224.



jurors because it deemed Swain's proof of this practice insufficient. Although Swain had shown that there had never been a black juror on a civil or criminal case in his county, the Court ruled that this evidence did not demonstrate that the prosecutor alone was responsible for such absence, citing testimony concerning several other cases in which the defense had agreed with the prosecution not to include blacks in the jury.<sup>235</sup>

Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, dissented on the question of whether the defendant had met the burden of proof on the systematic exclusion issue.<sup>236</sup> The dissent viewed the testimony as establishing that "the general practice was not to include Negroes by agreement between the prosecution and defense or by the State acting alone."<sup>237</sup> The dissent further objected that the defendant did not have an obligation to prove state involvement in the systematic exclusion; according to the previous systematic exclusion cases, proof that no black person had ever served on a petit jury in the county made out a prima facie case of unlawful exclusion that shifted the burden of proof to the state.<sup>238</sup> The dissent did not, however, dispute the majority's treatment of Swain's claim regarding the exclusion of blacks from the jury impaneled in a particular case.<sup>239</sup>

The immediate effects of *Swain* were entirely predictable. As the lower courts applied the *Swain* standard for proving systematic challenge, it turned out that no defendant could satisfy it. Adhering to the language of *Swain*, the lower courts made clear that it was inappropriate to present as evidence only those cases involving black defendants.<sup>240</sup> Twenty years later, there are no reported cases in which a court has determined that invidious discrimination under *Swain* has been demonstrated.<sup>241</sup>

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235. 380 U.S. at 224-28.

236. 380 U.S. at 228-47 (Goldberg, J., dissenting).

237. 380 U.S. at 235.

238. 380 U.S. at 238.

239. 380 U.S. at 245.

240. See, e.g., *United States v. Carter*, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976); *United States v. Pearson*, 448 F.2d 1207, 1216 (5th Cir. 1971) (noting that the peremptory challenge was used against black jurors only when the defendant was black); *McKinney v. Walker*, 394 F. Supp. 1015 (D.S.C. 1974); *State v. Simpson*, 326 So. 2d 54 (Fla. Dist. Ct. App. 1976); *State v. Baker*, 524 S.W.2d 122 (Mo. 1975); *Ford v. State*, 530 S.W.2d 25 (Mo. Ct. App. 1975); *State v. Davis*, 529 S.W.2d 10 (Mo. Ct. App. 1975); *Ridley v. State*, 475 S.W.2d 769 (Tex. Crim. App. 1972).

241. See Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1715 n.4, 1723 n.36 (1977); Annot., 79 A.L.R. 3d 14, 24 (1977) and 79 A.L.R. 3d 14-73, 1984 Supplement 3. Several cases acknowledged the difficulty in meeting the *Swain* standard but concluded it is not an impossible task. See, e.g., *United States v. Carter*, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976); *United States v. Pearson*, 448 F.2d

*Swain's* total rejection of an equal protection claim based upon the exclusion of blacks from a particular jury provoked a steady stream of unusually harsh comments.<sup>242</sup> Initially these views found judicial approval only in sporadic dissenting opinions;<sup>243</sup> even in extreme cases<sup>244</sup> the lower courts unanimously followed *Swain* until 1974.<sup>245</sup> That year Judge Alvin Rubin rejected the defendant's equal protection claim, but, relying upon a combination of factors including the prosecutor's use of all his peremptory challenges to strike black jurors, granted a new trial "in the interest of justice" under Federal Rule of Criminal Procedure 33.<sup>246</sup> In a subsequent case, the Eighth Circuit warned that it viewed with concern the practice of striking black persons from juries hearing cases with black defendants and suggested to trial judges that action in the exercise of their supervisory powers might be appropriate were abuses to continue.<sup>247</sup> However, when then federal district Judge Jon O. Newman held that a pattern of exercising peremptory challenges against blacks called for the exercise of his supervisory power to halt further abuses, the Second Circuit granted a writ of mandamus sought by the United States Attorney and vacated his order.<sup>248</sup>

Hope for reform was rekindled by the 1978 decision of *People v.*

1207 (5th Cir. 1971); *State v. Reed*, 324 So. 2d 373 (La. 1975). The California Court of Appeals noted the impossibility of meeting the *Swain* standard as one reason to abandon it. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); see also *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (N.M. Ct. App. 1980). One court has modified the *Swain* burden of proof. See notes 273-74 *infra* and accompanying text.

242. Kuhn, *supra* note 227; Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967); Note, *supra* note 241; Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 325 (1965); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 ST. LOUIS U. L.J. 662 (1974); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966); Recent Development, *United States v. Robinson—Racial Discrimination in Jury Selection*, 41 ALB. L. REV. 623 (1977); see also Hayden, Senna & Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768, 769 nn. 3-4 (1978). But see Recent Decisions, *JURIES — Systematic Exercise of Peremptory Challenge to Exclude Negro Jurors May Violate the Equal Protection Clause*, 1965 U. ILL. L.F. 588 (arguing that Court struck proper balance between competing concerns).

243. See, e.g., *State v. Jack*, 285 So. 2d 204 (La. 1973) (Barham, J., dissenting); *State v. Gray*, 285 So. 2d 199 (La. 1973) (Barham, J., dissenting); *Commonwealth v. Martin*, 461 Pa. 289, 336 A.2d 290 (1975) (Nix, J., dissenting).

244. See, e.g., *State v. Davison*, 457 S.W.2d 674 (Mo. 1970) (prosecutor used all of his 15 peremptory challenges to strike blacks from defendant's jury).

245. Annot., *supra* note 241, at 27-32.

246. *United States v. McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974) (defendant failed to prove the systemic exclusion of blacks from juries).

247. *United States v. Nelson*, 529 F.2d 40 (8th Cir.), cert. denied, 426 U.S. 922 (1976); see also *United States v. Carter*, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976).

248. *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976), revd. sub nom. *United States v. Newman*, 549 F.2d 240 (2d Cir. 1977).

*Wheeler*.<sup>249</sup> In *Wheeler*, the Supreme Court of California held that the use of peremptory challenges to strike prospective jurors on the sole ground of group bias violated the state analogue of the sixth amendment to the federal Constitution, article 1, section 16 of the California constitution.<sup>250</sup> The opinion reasoned that the rationale of *Taylor v. Louisiana*,<sup>251</sup> requiring a cross section of the community as an indispensable part of the right to an impartial jury, could not logically be confined to venire selection.<sup>252</sup> It concluded that a party is entitled to a petit jury that is as near an approximation of an ideal cross section of the community as a random draw permits;<sup>253</sup> peremptory challenges were therefore permissible to eliminate "specific bias" but not to eliminate bias presumed solely on the basis of group association.<sup>254</sup> The court explained that the use of the peremptory challenge would be presumed proper unless a party could make out a prima facie case of improper use; this burden could be met by evidence such as proof that (1) the opposing party had struck from the venire most or all of the members of the identified group, or (2) the opposing party had exercised a disproportionate number of his peremptory challenges against members of that group, or (3) the jurors in question shared only the characteristic of membership in that group and in all other respects were as heterogeneous as the community as a whole, or (4) the opposing party failed to engage those jurors in more than perfunctory voir dire.<sup>255</sup> Upon such a showing, the party accused of using his peremptory challenges improperly would have to satisfy the court that the challenges were not predicated upon group bias alone but based upon grounds relevant to the particular case, its parties, or witnesses.<sup>256</sup> If the accused party failed to rebut the prima facie case, the trial court would be required to dismiss the jurors thus far selected and quash the remaining venire.<sup>257</sup> Throughout its opinion the court made clear that either the prosecution or defense could object to peremptory challenges based upon group bias, that the defendant need not be a member of the group he claimed was being improperly challenged, and that the use of peremptory challenges to exclude any identifiable group

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249. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

250. 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.

251. 419 U.S. 522 (1975).

252. 22 Cal. 3d at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902-03.

253. 22 Cal. 3d at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.

254. 22 Cal. 3d at 278, 583 P.2d at 762, 148 Cal. Rptr. at 903.

255. 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905-06.

256. 22 Cal. 3d at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906.

257. 22 Cal. 3d at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.

cognizable under *Taylor* would be susceptible to this kind of attack.<sup>258</sup> Justice Richardson, dissenting, argued that the values protected by *Swain* — the jury's impartiality and the litigant's confidence in the jury's impartiality — were compromised by the majority's ruling.<sup>259</sup> He also objected that the remedy was standardless, ineffective, and time-consuming.<sup>260</sup>

A few months later, the Supreme Judicial Court of Massachusetts decided *Commonwealth v. Soares*.<sup>261</sup> The defendants in *Soares* and its three companion cases argued that peremptory challenges could not be used to exclude prospective jurors solely by virtue of their membership within an ethnic group. The Massachusetts court agreed, and, reasoning from the premise of a fair cross-section requirement in much the same manner as the California court had in *Wheeler*, ruled that the use of peremptory challenges against discrete groups violated the state constitutional assurance of an impartial jury.<sup>262</sup> To enforce the state constitutional guarantee of a petit jury as near to the ideal cross section of the community as the process of a random draw permits, *Soares* adopted the mechanics worked out by the *Wheeler* court.<sup>263</sup> Unlike *Wheeler*, however, *Soares* identified in advance those group affiliations that could not be the object of peremptory challenges: sex, race, color, creed, and national origin.<sup>264</sup> This list was derived from the Massachusetts Equal Rights Amendment, which prohibits denying or abridging equality under the law based upon any of these characteristics.<sup>265</sup> The concurrence in *Soares*, joined by three justices, agreed that the extraordinary circumstances of the case (the prosecutor struck twelve of thirteen prospective black jurors) warranted reversal, but found it unnecessary and unwise to establish the broad rule adopted by the majority.<sup>266</sup>

*Wheeler* and *Soares* have received substantial attention, both from commentators and from other state courts. While much of the commentary has been favorable,<sup>267</sup> many critics dispute the *Wheeler*/

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258. 22 Cal. 3d at 280-81, 583 P.2d at 764, 148 Cal. Rptr. at 905-06.

259. 22 Cal. 3d at 292, 294, 583 P.2d at 771, 773, 148 Cal. Rptr. at 913-14 (Richardson, J., dissenting).

260. 22 Cal. 3d at 293, 583 P.2d at 772, 148 Cal. Rptr. at 913-14 (Richardson, J., dissenting).

261. 377 Mass. 461, 387 N.E.2d 499 (1979).

262. 377 Mass. at 488, 387 N.E.2d at 516.

263. 377 Mass. at 488-91, 387 N.E.2d at 516-18.

264. 377 Mass. at 488-89, 387 N.E.2d at 516.

265. 377 Mass. at 488-89 n.33, 387 N.E.2d at 516 n.33.

266. 377 Mass. at 493-94, 387 N.E.2d at 519 (Braucher, J., concurring).

267. NATIONAL JURY PROJECT, JURYWORK § 4.01-4.04 (1983); Note, *Systematic Exclusion of Cognizable Groups by Use of Peremptory Challenges*, 11 FORDHAM URB. L.J. 927 (1983); Note,

Soares premise that an impartial jury panel is necessarily obtained from a random draw approximation of a fair cross section of the community,<sup>268</sup> and a few stress the practical difficulties pointed out by the *Wheeler* dissent.<sup>269</sup> Only New Mexico has followed California in ruling that the state constitution prohibits the use of peremptory challenges to eliminate *any* cognizable group.<sup>270</sup> However, four state courts have procrastinated in interpreting their state constitutions by ruling that the specific defendant before the court had failed to make out a *prima facie* case under the *Wheeler/Soares* test,<sup>271</sup> and two state courts have abandoned *Swain* and adopted intermediate positions.<sup>272</sup>

The Louisiana Supreme Court has ruled that the defendant's showing that the prosecutor in his case had been involved in six cases in which a disproportionate number of blacks had been struck from the venire was sufficient to establish "systematic exclusion" of blacks,<sup>273</sup> and that this showing shifted the burden of proof to the state to show that no discrimination on the basis of race had been practiced.<sup>274</sup> The Louisiana Supreme Court postponed resolution of the question of whether use of the peremptory challenge to eliminate black jurors in a single case would have violated the right of individual dignity guaranteed by article I, section 3 of the Louisiana Constitution of 1974.<sup>275</sup>

Florida has chosen a different compromise. Relying on Florida's

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People v. Wheeler: *Peremptory Challenge May Not Be Used to Remove Jurors Solely for Group Association*, 58 N.C. L. REV. 152 (1979); Comment, *Discrimination in Jury Selection Via Peremptory Challenge: Many are Called, But Few Are Chosen*, 5 N. ILL. U.L. REV. 71 (1984); Comment, *Prosecutor's Use of Peremptory Challenge to Exclude Racial Minorities from Criminal Juries*, 11 OHIO N.U. L. REV. 71 (1984); Comment, *People v. Wheeler: California's Answer to Misuse of the Peremptory Challenge*, 16 SAN DIEGO L. REV. 897 (1979); Casenote, *Prosecutorial Misuse of the Peremptory Challenge to Exclude Discrete Groups from the Petit Jury: Commonwealth v. Soares*, 21 B.C. L. REV. 1197 (1980).

268. Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979) [hereinafter cited as Note, *The Defendant's Right*]; Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177 (1980).

269. See Note, *The Defendant's Right*, *supra* note 268; Comment, *A New Standard for Peremptory Challenges: People v. Wheeler*, 32 STAN. L. REV. 189 (1979).

270. *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (N.M. Ct. App. 1980).

271. *Mallott v. State*, 608 P.2d 737 (Alaska 1980); *People v. Smith*, 622 P.2d 90 (Colo. Ct. App. 1981); *Saunders v. State*, 401 A.2d 629 (Del. 1979), *cert. denied*, 449 U.S. 845 (1980); *Commonwealth v. Futch*, 492 Pa. 359, 424 A.2d 1231 (1981).

272. *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *State v. Washington*, 375 So. 2d 1162 (La. 1979); *State v. Brown*, 371 So. 2d 751 (La. 1979).

273. *State v. Brown*, 371 So. 2d 751, 754 (La. 1979).

274. 371 So. 2d at 754; see also *People v. Frazier*, 127 Ill. App. 3d 151, 469 N.E.2d 594 (1984) (deciding to publish the names of prosecutors whose use of peremptory challenges have been questioned to help defendants meet the *Swain* burden of proving systematic exclusion).

275. *State v. Brown*, 371 So. 2d 751, 754 (La. 1979); see *State v. Eames*, 365 So. 2d 1361 (La. 1979) (Dennis, J., concurring) (proposing broader protection under article I, section 3).

constitutional guarantee of an impartial jury, the Florida Supreme Court ruled that neither party may use peremptory challenges to excise a distinct racial group from a jury;<sup>276</sup> the court explicitly reserved decision on the applicability of its rationale to the striking of other cognizable groups such as those based on sex, ethnicity, or religion.<sup>277</sup> This alternative was first advanced in a New York intermediate appellate court case, *People v. Thompson*,<sup>278</sup> which has since been disapproved.<sup>279</sup> The New York Court of Appeals has recently reaffirmed its adherence to *Swain*,<sup>280</sup> as have at least a dozen other state courts.<sup>281</sup>

In May of 1983 the Supreme Court denied the defendant's petition for certiorari in the New York case, *McCray v. New York*,<sup>282</sup> despite the State of New York's request that the petition be granted.<sup>283</sup> Two Justices dissented.<sup>284</sup> Justice Marshall, joined by Justice Brennan, noted that *Swain* had been decided before the Court had held the sixth amendment applicable to the states through the fourteenth amendment and well before the Court had interpreted the sixth amendment to require a jury drawn from a fair cross section of the community.<sup>285</sup> He expressed the view that the fair cross-section right is "rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury,"<sup>286</sup> and then concluded that the Court should reexamine *Swain* to determine whether it could

276. *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

277. 457 So. 2d at 487.

278. 79 A.D.2d 87, 435 N.Y.S.2d 739 (App. Div. 1981).

279. *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983). *But see* 57 N.Y.2d at 552 n.1, 443 N.E.2d at 920 n.1, 457 N.Y.S.2d at 446 n.1 (Meyer, J., dissenting).

280. *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983).

281. *See, e.g., Mitchell v. State*, 450 So. 2d 181 (Ala. Crim. App. 1984); *Blackwell v. State*, 248 Ga. 138, 281 S.E.2d 599 (1981); *People v. Payne*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983); *Hoskins v. State*, 441 N.E.2d 419 (Ind. 1982); *State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979); *Commonwealth v. McFerron*, 680 S.W.2d 924 (Ky. 1984); *Lawrence v. State*, 51 Md. App. 575, 444 A.2d 478 (1982), *affd.*, 295 Md. 557, 457 A.2d 1127 (1983); *State v. Sims*, 639 S.W.2d 105 (Mo. Ct. App. 1982); *State v. Shelton*, 53 N.C. App. 632, 281 S.E.2d 684 (1981), *review denied, appeal dismissed*, 305 N.C. 306, 290 S.E.2d 707 (1982); *Lee v. State*, 637 P.2d 879 (Okla. Crim. App. 1981); *State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981), *habeas corpus granted on other grounds sub nom. Thompson v. Leeke*, 590 F. Supp. 110 (D.S.C. 1984), *order affd.*, 756 F.2d 314 (4th Cir. 1985); *State v. Grady*, 93 Wis. 2d 1, 286 N.W.2d 607 (1979); *see also Doepel v. United States*, 434 A.2d 449 (D.C.), *cert. denied*, 454 U.S. 1037 (1981) (white defendant challenging use of peremptory challenges to exclude all whites from his jury).

282. 461 U.S. 961 (1983). The Court also denied certiorari in two companion cases, *Miller v. Illinois* and *Perry v. Louisiana*.

283. 461 U.S. at 970 n.9 (Marshall, J., dissenting).

284. 461 U.S. at 963.

285. 461 U.S. at 967.

286. 461 U.S. at 967.

be reconciled with the sixth amendment.<sup>287</sup> Justice Stevens' opinion, joined by Justices Blackmun and Powell, explained that his vote to deny certiorari did not reflect disagreement with the dissent's appraisal of the importance of the underlying issue,<sup>288</sup> but rather the view that sound exercise of the Court's discretion dictated "allow[ing] the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."<sup>289</sup>

Four months later, in *Gilliard v. Mississippi*,<sup>290</sup> the majority again declined to review the use of peremptory challenges to remove black jurors from a black defendant's jury. Justice Marshall's dissent, joined by Justice Brennan, addressed the position taken by Justices Stevens, Powell, and Blackmun in *McCray*:

When a majority of this Court suspects that such rights are being regularly abridged, the Court shrinks from its constitutional duty by awaiting developments in state or other federal courts. Because abuse of peremptory challenges appears to be most prevalent in capital cases, the need for immediate review in this Court is all the more urgent. If we postpone consideration of the issue much longer, petitioners in this and similar cases will be put to death before their constitutional rights can be vindicated. Under the circumstances, I do not understand how in good conscience we can await further developments, regardless of how helpful those developments might be to our own deliberations.<sup>291</sup>

Reviewing the steadfast adherence of most state courts to *Swain* even in the face of egregious factual circumstances, Justice Marshall also expressed doubt that many states would engage in meaningful reconsideration of the discriminatory use of peremptory challenges — at least in the foreseeable future.<sup>292</sup>

In 1984 the Court twice more avoided the peremptory challenge issue. Justice Marshall, joined by Justice Brennan, reiterated his sixth amendment objections in a dissent from the denial of certiorari in three companion cases from Illinois.<sup>293</sup> In the more recent case, *Thompson v. United States*,<sup>294</sup> Justice Brennan, joined by Justice Marshall, voiced a second reason for reexamining *Swain*. Brennan, who had joined the majority's opinion in *Swain* in 1965, argued that the decision's equal protection analysis was wrong:

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287. 461 U.S. at 970.

288. 461 U.S. at 961 (Stevens, J., concurring).

289. 461 U.S. at 963.

290. 104 S. Ct. 40 (1983).

291. 104 S. Ct. at 42.

292. 104 S. Ct. at 42-44.

293. *Williams v. Illinois*, decided with *Dixon v. Illinois* and *Yates v. Illinois*, 104 S. Ct. 2364 (1984).

294. 105 S. Ct. 443 (1984).

With the hindsight that two decades affords, it is apparent to me that *Swain's* reasoning was misconceived. Stripped of its historical embellishments, *Swain* holds that the state may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly. In other words, *Swain* authorizes the presumption that a Negro juror will be partial to a Negro defendant simply because both belong to the same race. Implicit in such a presumption is profound disrespect for the ability of individual Negro jurors to judge impartially. It is the race of the juror, and nothing more, that gives rise to the doubt in the mind of the prosecutor. Whatever the justification for permitting the idiosyncratic use of peremptory challenges in the run of cases, that justification ought not extend to permit the Government to make use of an unfounded racial presumption that disparages Negroes in this way.<sup>295</sup>

In the meantime, the defendant in *McCray v. New York* sought relief from a federal district court by filing a petition for a writ of habeas corpus, alleging the violation of his sixth amendment rights. The Eastern District of New York granted the writ<sup>296</sup> and the Second Circuit affirmed in part, holding that McCray had established a prima facie case of a sixth amendment violation, but remanded the case for a hearing to enable the state to rebut the showing.<sup>297</sup> The Second Circuit acknowledged that the defendant had no right to a petit jury of any particular composition, but reasoned that the sixth amendment prohibits a state from unreasonably restricting the possibility that the petit jury will comprise a fair cross section of the community.<sup>298</sup> The court then outlined a procedure for implementing its holding similar to those adopted in *Wheeler* and *Soares*.<sup>299</sup> The dissent objected that the result reached by the majority was both unworkable and unsupported by the Supreme Court's sixth amendment decisions.<sup>300</sup> In March of 1985 a majority of the Second Circuit Court of Appeals voted to deny rehearing in banc.<sup>301</sup>

Perhaps because *McCray* created a conflict between the circuits,<sup>302</sup> the Supreme Court finally voted to consider a sixth amendment attack on the racially discriminatory use of peremptory challenges; on April 22, 1985, the Court granted the defendant's petition for a writ of certi-

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295. 105 S. Ct. at 445.

296. *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983).

297. *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984).

298. 750 F.2d at 1128-29.

299. 750 F.2d at 1131-32.

300. 750 F.2d at 1136-39 (Meskill, J., dissenting).

301. *McCray v. Abrams*, 756 F.2d 277 (2d Cir. 1985).

302. Cf. *McCray v. New York*, 461 U.S. 961 (1983) (Stevens, J., concurring) (noting a lack of conflict between the circuits as one reason to postpone Supreme Court review).



orari in *Batson v. Kentucky*.<sup>303</sup> *Batson* is pending as this Article goes to press.<sup>304</sup>

These developments are encouraging, but it is easy to overestimate their significance for the black defendant. *Swain* itself is worse than useless in protecting the black defendant from racial prejudice, for it affirmatively sanctions the very practice that threatens equal justice: the elimination of black jurors *in cases involving black defendants*. In its focus on the rights of prospective black jurors, *Swain* neglects the more compelling interests of the black defendant; in its focus on the possibility of a pro-black bias on the part of black jurors, *Swain* ignores the existence of anti-black bias on the part of white jurors. Unfortunately, similar flaws also mar the reformers' proposals.

Because the *Swain* Court looked at the peremptory challenge issue through the lens of the jury venire exclusion cases, it saw no equal protection violation. In the jury exclusion cases, black citizens were being denied the right to participate in the administration of justice — and stigmatized as unfit to do so. Absent proof that the peremptory challenge was being used to prevent blacks from ever participating as jurors, the Court concluded that the analogy to the venire selection cases (and hence, the constitutional claim) must fail. This analysis forgot the interests of the person asserting that the Constitution had been violated. From the defendant *Swain's* perspective, the opportunity of black jurors to sit on other juries was of no interest at all; his sole concern was the racial composition of the jury determining *his* guilt or innocence. Ironically, Justice Brennan's criticism of *Swain's* equal protection reasoning does not depart from this focus on the prospective black juror. Instead, he refines the analysis of that perspective, noting that black jurors are stigmatized even if permitted to participate in other cases because the exclusion from cases involving black defendants presumes that black jurors are unable to be impartial toward persons of their own race.

To a lesser extent, the impartial jury/fair cross section of the community argument for overruling *Swain*, whether expressed in sixth amendment or state constitutional terms, also fails to focus on the defendant. The state court decisions have been clear that the right to a fair cross section of the community is not solely the defendant's right,

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303. 105 S. Ct. 2111 (No. 84-6263).

304. Also pending is the state's petition for certiorari in the *McCray* case. *McCray v. Abrams*, 53 U.S.L.W. 3671 (U.S. Mar. 19, 1985) (No. 84-1426). When the Court granted certiorari in *Batson*, the defendant-respondent in *McCray* moved for expedited consideration of the state's petition and consolidation with *Batson*, but this motion was denied. *McCray v. Abrams*, 105 S. Ct. 2318 (1985) (order denying motion to expedite consideration and consolidate).

but may be asserted by either party; really it is the *community's* right to a representative jury that is being protected. Despite some ambiguity, both Justice Marshall's dissent from the denial of certiorari in *McCray v. New York*<sup>305</sup> and the Second Circuit's opinion in *McCray v. Abrams*<sup>306</sup> suggest that a sixth amendment attack on the racially motivated case of the peremptory challenge would only be available to the defendant. But even if the sixth amendment argument prevails and the right is assigned only to the defendant, the focus is still blurred and a significant gap will be left in the protection of individual defendants. All formulations have described the fair cross-section right as the right to as fair a cross section *as a random draw produces*. This will certainly protect more defendants from the influence of racial bias than does *Swain*. For the individual defendant whose randomly drawn jury turns out to be unrepresentative, however, the racial prejudice documented in Part I still may affect the determination of his guilt; that *other* defendants will have representative juries is neither consolation nor compensation. Furthermore, in nearly all-white communities, even random draws that do produce a representative cross section of the community will not eliminate the effects of racial prejudice; for black defendants tried in such communities, a jury composed of a representative cross section provides no protection at all.

The second oversight in *Swain* is also worthy of comment, first, because it has served to justify *Swain* and is empirically wrong, and second, because the opponents of *Swain* attack the oversight but proceed upon empirically incorrect assumptions of their own. *Swain* justifies the use of peremptory challenges to eliminate black jurors from cases involving black defendants as based upon the prosecutor's suspicion — which the Court views as reasonable — that these jurors will be prejudiced in favor of black defendants. It is analogous, reasoned the Court, to striking persons of the same religion, nationality, occupation, or affiliation as the defendant; the question for the prosecutor is “not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.”<sup>307</sup> A

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305. Justice Marshall writes only of the defendant's right to question the prosecutor's use of his peremptory challenge, but he does note that the effect of excluding minorities is not limited to the individual defendant, but produces “injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.” *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting) (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

306. 750 F.2d 1113 (2d Cir. 1984). The Second Circuit also speaks only of the defendant's right to challenge the prosecutor's striking of minorities, but does not address the dissent's contention, 750 F.2d at 1138 (Meskill, J., dissenting), that its ruling will have a negative impact on the defense's use of peremptory challenges.

307. *Swain v. Alabama*, 380 U.S. 202, 220-21 (1965).

federal district court judge rephrased this position more graphically:

[I]f statistics were compiled on the basis of any particular religion, e.g., Jewish, Catholic, or any particular nationality, e.g., Italian or Chinese, similar results might be found, i.e., there is a pattern by state prosecutors to peremptorily challenge veniremen from the same genetic, religious or national background on the unstated grounds that such persons might be partial toward a defendant of like kin.<sup>308</sup>

Despite the superficial appeal of this comparison, it is inapt, for it ignores the extraordinarily vulnerable position of black Americans, a position not shared by religious, occupational, or white ethnic groups. The history of widespread and virulent prejudice against blacks can hardly be compared to the typical juror's sentiments about Italian Americans or about carpenters. As the empirical evidence reviewed in Part I demonstrates, white jurors discriminate *against* black defendants in the assessment of their guilt; one would not expect that white jurors of non-Italian ancestry who work in other occupations will discriminate against Italian American carpenters. Instead of acknowledging the virulence of anti-black sentiment among whites, the Court permitted the prosecutor to presume a pro-black bias among blacks. But the mock jury studies revealed no distorting pro-black bias; black jurors judged black defendants as white jurors judged white defendants. It may or may not be true that eliminating Italian American carpenters from an Italian American carpenter's jury will result in a more impartial jury, but, in any event, it is unlikely to result in a *less* impartial jury. For this reason, a prosecutor's action in striking Italian American carpenters from an Italian American carpenter's jury fits the Court's characterization of seeking a juror who is more likely to be impartial. But this description does not fit the action of striking a black juror from a black defendant's jury; the prosecutor hopes to replace the black juror with a white juror — who is *more* likely to be biased in the assessment of the defendant's guilt than was the black juror.<sup>309</sup>

All critics of *Swain* argue that black jurors will be as impartial to black defendants as will white jurors, but they do not point out that

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308. *McKinney v. Walker*, 394 F. Supp. 1015, 1018 (D.S.C. 1974).

309. The comparison is also inapt for its inattention to numerical considerations pertaining to the *victim's* group affiliation. If the defendant is a Swedish American and the victim is a Norwegian American, in most communities the prosecutor will use his peremptory challenges to eliminate Swedish Americans while the defense attorney will use his peremptory challenges to eliminate Norwegian Americans. This leaves none of the jurors with a sense of ethnic identification with either defendant or accuser. However, the black defendant with a white victim usually cannot counteract the effects of the prosecutor's challenges in this manner because there are so many more whites on the jury venire than blacks.

they are *more* likely to be impartial.<sup>310</sup> Moreover, the reformers sometimes suggest that black jurors as a whole will not differ from white jurors in their assessment of black defendants' guilt,<sup>311</sup> and this of course is incorrect. The advocates of a "cross section of the community" approach to overruling *Swain* have an additional empirical blind spot: they fail to recognize that prejudice against blacks differentiates use of the peremptory challenge to eliminate racial groups from use of the peremptory challenge against other kinds of cognizable groups. It might be argued that this indifference to the kind of group being excluded only results in broader protection for the defendant, but its broader "protection" doubtless stiffens resistance to the adoption of this approach. As a practical matter, it also precludes evolution from the currently advocated standard of "as representative a cross section of the community as a random draw provides" to a standard looking at the actual composition of particular juries.

Neither *Strauder* and *Swain* nor their likely successors protect the black defendant from the racial prejudice prevalent among white jurors. While this "failure" is in part attributable to unsupported and unsupportable empirical assumptions, it is also an inevitable consequence of the intended function of these doctrines, assuring *representative* juries. The goal of assuring representative juries only partially coincides with the goal of protecting minorities from prejudicial assessment of their guilt. For this reason, the possible successors to *Swain* could improve the prospects of an unbiased determination of guilt for many black defendants, but such an improvement would not approach comprehensive protection against racial prejudice for all black defendants.

### B. *Eliminating Biased Jurors*

Perhaps it is not so surprising that the procedures required to assure a representative jury do not provide much protection to the mi-

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310. Quarrels with terminology are possible here. One might say that black jurors are partial toward black defendants and that white jurors are partial toward white defendants rather than that black jurors are impartial only toward black defendants and that white jurors are impartial only toward white defendants. This dispute rehashes the question of whether disparities in the tendency to convict result from inappropriate lenience toward own-race defendants or inappropriate harshness toward other-race defendants. As explained in Part I, for the purposes of an equal protection argument, the interpretation of the disparity makes no difference. It is of some importance in argument based upon the right to an impartial jury, but here I think it is necessary to deem the white jury judging the white defendant as the standard for impartiality, rather than lenient partiality; otherwise we must say that the overwhelming majority of defendants are judged by partial juries, and this conclusion seems at odds with the intention behind the use of the word "impartial" in the sixth amendment.

311. See notes 294-95 *supra* and accompanying text.

nority race defendant. What is much more surprising is that the procedures designed to eliminate biased jurors — voir dire of individual jurors and change of venue — provide even less protection. These procedures have never been adequate to the task of eliminating racially prejudiced jurors and recent developments in the voir dire area are particularly discouraging, for the Supreme Court has virtually eliminated any constitutional right to question jurors concerning their racial prejudice.

### 1. *Voir Dire of the Venire*

The primary purpose of voir dire is to uncover biases in jurors that would prevent their impartial evaluation of the facts and application of the law to these facts. When such a bias is uncovered, the juror will be dismissed by the court "for cause." Voir dire also serves to facilitate the use of peremptory challenges; the prospective juror may reveal facts that do not establish a disqualifying bias, but suggest to one party or the other an unsympathetic attitude. That party will then exercise one of its peremptory challenges to strike the juror in question. Neither purpose of voir dire can be fulfilled, however, unless sufficient questions are asked to probe relevant attitudes. In the federal courts, these questions are usually asked by the judge, following the submission of proposed questions by each party.<sup>312</sup> In most state courts, voir dire is conducted by the parties themselves, but is subject to limitations imposed by the judge.<sup>313</sup> Regardless of who conducts the questioning, two issues may arise: first, what questions must be permitted, and second, what answers to those questions establish bias as a matter of law and thus require dismissal for cause. In some kinds of litigation, such as death penalty cases, the second issue has provoked the most controversy,<sup>314</sup> but in recent cases concerning jurors' racial prejudice, disputes over what questions must be allowed overwhelmingly predominate.<sup>315</sup>

In the earliest Supreme Court case on point, *Aldridge v. United*

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312. FED. R. CRIM. P. 24(a) provides that the court has discretion either to conduct the voir dire itself or to permit counsel to do so.

313. Ten states follow the federal rule and about the same number permit examination only by the judge; twenty-two states provide for examination by both the judge and the attorney, and in the remaining states counsel conducts the examination. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1344 (5th ed. 1980); see also G. BERMANT & J. SHAPARD, *THE VOIR DIRE EXAMINATION, JUROR CHALLENGES, AND ADVERSARY ADVOCACY* 22 (fig.1) (1978).

314. See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

315. See notes 320-44 *infra* and accompanying text. For a review of the cases (most of which are quite old) concerning racially biased juror views that require dismissal for cause, see Annot., 94 A.L.R.3d 15, 47-51 (1979).

*States*,<sup>316</sup> the Court held that refusal to permit inquiry into racial prejudice was reversible error, at least where the defendant was black and the victim white.<sup>317</sup> The basis for the Court's ruling was unclear; the opinion merely cited state court cases recognizing the black defendant's right to question potential jurors about their racial prejudices<sup>318</sup> and reasoned that "[d]espite the privileges accorded to the negro, we do not think that it can be said that the possibility of [racial] prejudice is so remote as to justify the risk in forbidding the inquiry."<sup>319</sup> *Aldridge* was decided in 1931, and it was not until the Court's 1973 decision in *Ham v. South Carolina*<sup>320</sup> that the Court returned to the issue of voir dire about racial prejudice.<sup>321</sup> *Ham* concerned a bearded black civil rights worker convicted of possession of marijuana. Ham's defense was that law enforcement officials had framed him on the drug charge because of his civil rights activities. During voir dire, the trial judge asked general questions concerning the jurors' possible prejudices, but refused to inquire specifically into possible prejudice against the defendant due to his beard or race. The Supreme Court reversed, holding that under these facts the fourteenth amendment due process clause required the judge to question the jurors on the subject of racial prejudice, although it did not require a particular form or number of questions.<sup>322</sup> Justice Rehnquist's majority opinion distinguished inquiry about prejudice against people with beards, explaining that the inquiry regarding racial prejudice derived its constitutional status "from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment."<sup>323</sup>

Most state courts interpreted *Ham* as requiring questions concerning racial prejudice in all cases in which a black defendant requested such an inquiry<sup>324</sup> until the Supreme Court drastically curtailed *Ham*

316. 283 U.S. 308 (1931).

317. 283 U.S. at 311.

318. 283 U.S. at 311-13.

319. 283 U.S. at 314.

320. 409 U.S. 524 (1973).

321. In the interim, some state courts followed *Aldridge*. See, e.g., *State v. Higgs*, 143 Conn. 138, 120 A.2d 152 (1956); *Matthews v. State*, 276 A.2d 265 (Del. 1971); *Brown v. State*, 220 Md. 29, 150 A.2d 895 (1959). Others did not. See, e.g., *Commonwealth v. Lee*, 324 Mass. 714, 88 N.E.2d 713 (1949); *State v. Ham*, 256 S.C. 1, 180 S.E.2d 628 (1971), *rev'd sub nom.*, *Ham v. South Carolina*, 409 U.S. 524 (1973); *Preston v. State*, 157 Tex. Crim. 228, 242 S.W.2d 436 (1951), *cert. denied*, 343 U.S. 933 (1952).

322. 409 U.S. at 527.

323. 409 U.S. at 528. Justices Douglas and Marshall both dissented in part, arguing that Ham should have been permitted to inquire about prejudice against bearded people as well as about prejudice against blacks. 409 U.S. at 529 (Douglas, J., dissenting), 534 (Marshall, J., dissenting).

324. *State v. Marsh*, 168 Conn. 520, 522, 362 A.2d 523, 525 (1975); *Reid v. State*, 129 Ga.

only five years later in *Ristaino v. Ross*.<sup>325</sup> Over the dissents of Justices Marshall and Brennan,<sup>326</sup> the Court ruled that *Ham* did not announce a rule of "universal applicability,"<sup>327</sup> but "reflected an assessment of whether under all the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be [impartial]."<sup>328</sup> The Court explained that the nature of *Ham*'s defense and his prominence as a civil rights activist made race an issue in the conduct of his trial; the fact that *Ross* was a black man accused of committing violent crimes against a white man was not as likely to distort his trial as were the special factors present in *Ham*.<sup>329</sup> The Court then concluded that "[t]he circumstances . . . did not suggest a significant likelihood that racial prejudice might infect *Ross*' trial"<sup>330</sup> and that the demands of due process therefore were satisfied by the trial judge's general questions about impartiality.<sup>331</sup> Although the Court's grant of certiorari in *Turner v. Sielaff*<sup>332</sup> raises the possibility that *Ristaino* will be modified, the facts of *Turner* suggest that the most the Court will do is create a narrow exception to the *Ristaino* rule: the defendant in *Turner* is black, his victim was white, and the case was tried in a state where statistics show that the death penalty is disproportionately imposed on defendants with white victims.

The majority in *Ristaino* commented in a footnote that it thought that voir dire questioning directed at racial prejudice was generally "the wiser course" and could have been required of a federal court faced with the circumstances of *Ristaino* as a matter of the Supreme Court's supervisory power.<sup>333</sup> However, in *Rosales-Lopez v. United States*,<sup>334</sup> the Court upheld a federal trial court's decision to reject the defendant's request for voir dire on racial prejudice toward persons of Mexican descent in an illegal immigration case. The Court explained that the trial judge might be reluctant to inquire about racial prejudice

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App. 657, 658, 200 S.E.2d 454, 455 (1973); *People v. Wray*, 49 Mich. App. 344, 346, 212 N.W.2d 78, 79 (1973); *People v. Williams*, 41 A.D.2d 611, 611, 340 N.Y.S.2d 504, 504 (App. Div. 1973).

325. 424 U.S. 589 (1976).

326. 424 U.S. at 599 (Marshall, J., dissenting). Justice White concurred in the result only. 424 U.S. at 598 (*Ham* should not be applied retroactively).

327. 424 U.S. at 596.

328. 424 U.S. at 596.

329. 424 U.S. at 596-97.

330. 424 U.S. at 598.

331. 424 U.S. at 598.

332. 53 U.S.L.W. 3807 (U.S. May 13, 1985) (No. 84-6646).

333. 424 U.S. at 597 n.9.

334. 451 U.S. 182 (1981).

for fear of creating an impression that justice might turn upon skin color<sup>335</sup> and that unless there was a "reasonable possibility that racial or ethnic prejudice might have influenced the jury," this reluctance would not be deemed reversible error.<sup>336</sup> The plurality opinion cautioned that this "reasonable possibility" supervisory rule would, however, encompass cases where a defendant was accused of a violent crime against a victim of another race.<sup>337</sup> Justice Stevens, joined by Justices Brennan and Marshall, dissented.<sup>338</sup>

Although commentary on *Ristaino* and *Rosales-Lopez* has been universally negative,<sup>339</sup> the lower courts have viewed these decisions with enthusiasm. Very few state courts have recognized a universal state statutory or constitutional requirement for voir dire on racial prejudice,<sup>340</sup> and most do not recognize the right even under inflammatory factual circumstances. At least four states have already declined to adopt a rule requiring that black defendants accused of violent crimes against white victims be permitted to question jurors concerning racial prejudice,<sup>341</sup> two state appeals courts have upheld

335. 451 U.S. at 190.

336. 451 U.S. at 191.

337. 451 U.S. at 192. But see Justice Rehnquist's concurrence, joined by Chief Justice Burger, arguing that no flat rule should be pronounced. 451 U.S. at 194-95 (Rehnquist, J., concurring).

338. 451 U.S. at 195 (Stevens, J., dissenting).

339. Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice*, 48 U. COLO. L. REV. 525 (1977); Hicks, *Voir Dire on Racial Prejudice*, 4 AM. J. CRIM. L. 180 (1975-1976); Note, *Constitutional Law: The Right of an Accused to Question Prospective Jurors Concerning a Specific Prejudice at Voir Dire*, 20 HOWARD L.J. 527 (1977); Note, *The Right to Question Jurors on Racial Prejudice*, 37 OHIO ST. L.J. 412 (1976); Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959 (1982); see also Note, *Exploring Racial Prejudice on Voir Dire: Constitutional Requirements and Policy Considerations*, 54 B.U. L. REV. 394 (1974) (criticizing a predecessor of *Ristaino*, Commonwealth v. Ross, 363 Mass. 665, 296 N.E.2d 810, cert. denied, 414 U.S. 1080 (1973)).

340. See, e.g., *Swan v. State*, 268 Ind. 317, 321, 375 N.E.2d 198, 201 (1978) (dicta); *State v. Taylor*, 423 A.2d 1174, 1175 (R.I. 1980); see also *State v. Marsh*, 168 Conn. 520, 522-23, 362 A.2d 523, 525 (1975) (citing both state and federal constitutions); *Reid v. State*, 129 Ga. App. 657, 657-58, 200 S.E.2d 454, 455 (1973) (citing both *Ham* and a general statute permitting voir dire); cf., e.g., *Thornton v. State*, 31 Md. App. 205, 215, 355 A.2d 767, 772 (1976) (noting that Maryland does not always require voir dire on racial prejudice); *State v. Long*, 137 N.J. Super. 124, 131, 348 A.2d 202, 205-06 (1975) (voir dire on racial prejudice is required constitutionally only in "cases involving special circumstances pointing to the presence of racial overtones or prejudices.").

341. *Neal v. State*, 372 So. 2d 1331, 1341 (Ala. Crim. App.), cert. denied, 372 So. 2d 1348 (Ala. 1979) (robbery and murder); *Commonwealth v. Moffett*, 383 Mass. 201, 214, 418 N.E.2d 585, 595 (1981) (assault); *Commonwealth v. Bumpus*, 365 Mass. 66, 67, 309 N.E.2d 491, 493 (1974) (murder); *State v. Jones*, 268 S.C. 227, 234, 233 S.E.2d 287, 289-90 (1977) (rape and armed robbery); *State v. Gibbs*, 267 S.C. 365, 368, 228 S.E.2d 104, 105 (1976) (robbery); *Turner v. Commonwealth*, 221 Va. 513, 523, 273 S.E.2d 36, 42 (1980), cert. denied, 451 U.S. 1011 (1981) (brutal and wanton murder); *Lewis v. Commonwealth*, 218 Va. 31, 36, 235 S.E.2d 320, 323 (1977) (murder of white prison guard). But see *State v. Sims*, 140 N.J. Super. 164, 173, 355 A.2d 695, 700 (1976) (interracial murder requires voir dire on racial prejudice); *Commonwealth v.*



the conviction of a black defendant accused of raping a white woman despite the trial court's refusal to permit voir dire on racial prejudice.<sup>342</sup>

Moreover, even when trial courts permit questions concerning racial prejudice, questions are often limited to one or two,<sup>343</sup> and sometimes are directed at the entire venire panel rather than addressed to individual jurors.<sup>344</sup> Despite commentators' repeated pleas for more probing voir dire on all subjects,<sup>345</sup> no trend in that direction is likely; curtailing voir dire recently received a moral boost from the Supreme Court, which gratuitously criticized the length of the voir dire in a rape and strangulation killing of a fifteen-year-old white girl by a twenty-six-year-old black man with a prior conviction for forcible rape on an adolescent white girl.<sup>346</sup>

There are, then, several reasons why voir dire does not protect the black defendant from a racially biased determination of his guilt. The most obvious is that it is not required in every case involving a black

Holland, 298 Pa. Super. 289, 292, 444 A.2d 1179, 1181 (1982) (black defendant/white victim case requires voir dire of jury where all jurors are white).

342. *State v. Jones*, 268 S.C. 227, 234, 233 S.E.2d 287, 289-90 (1977); see *Braxton v. Estelle*, 641 F.2d 392 (5th Cir. 1981) (denying habeas corpus petition after unsuccessful appeal in Texas state court; the reported opinion in the state case does not discuss the voir dire issue, *Braxton v. State*, 528 S.W.2d 844 (Tex. Crim. App. 1975)). Two circuit courts have upheld state court determinations that refusal to allow voir dire into racial prejudice in interracial rape cases does not violate due process. *Braxton v. Estelle*, 641 F.2d 392, 395 (5th Cir. 1981); *Dukes v. Waitkevitch*, 536 F.2d 469, 470 (1st Cir.), cert. denied, 429 U.S. 932 (1976). But see *Commonwealth v. Sanders*, 383 Mass. 637, 640-41, 421 N.E.2d 436, 438 (1981) (in future trials involving interracial rape, jurors are to be examined with respect to interracial prejudice, but not reversible error in instant case).

343. See, e.g., *United States v. Clifford*, 640 F.2d 150, 153-54 (8th Cir. 1981) (two questions sufficient); *Johnson v. Maryland*, 425 F. Supp. 538, 540-41 (D. Md. 1976) (one question sufficient); see also *United States v. Bamberger*, 456 F.2d 1119, 1129 (3d Cir.), cert. denied, 406 U.S. 969 (1972), 413 U.S. 919 (1973); Annot., *supra* note 315, at 39-41 and cases cited therein. But see *Commonwealth v. Christian*, 480 Pa. 131, 137-40, 389 A.2d 545, 547-49 (1978) (defendant entitled to probe specific prejudices bearing on the case, such as juror's views regarding blacks' sexual drives in rape case).

344. See, e.g., *United States v. Clifford*, 640 F.2d 150, 153-54 (8th Cir. 1981); *United States v. Dixon*, 596 F.2d 178, 181-82 (7th Cir. 1979); *United States v. Starks*, 515 F.2d 112, 124-25 (3d Cir. 1975); *Johnson v. Maryland*, 425 F. Supp. 538, 540-41 (D. Md. 1976); *People v. Harrell*, 398 Mich. 384, 392, 247 N.W.2d 829, 832 (1976).

345. See, e.g., A. GINGER, *JURY SELECTION IN CRIMINAL TRIALS*, ch. 10 (1975); Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545 (1975); Bush, *The Case for Expansive Voir Dire*, 2 LAW & PSYCHOLOGY REV. 9 (1976); Soler, "A Woman's Place . . .": *Combating Sex-Based Prejudices in Jury Trials Through Voir Dire*, 15 SANTA CLARA LAW. 535 (1975); Note, *Juror Bias — A Practical Screening Device and the Case for Permitting Its Use*, 64 MINN. L. REV. 987 (1980).

346. *Press-Enterprise Co. v. Superior Court of Cal.*, 104 S. Ct. 819, 824 n.9 (1984); see also *People v. Crowe*, 8 Cal. 3d 815, 819, 506 P.2d 193, 195, 106 Cal. Rptr. 369, 371 (1973) ("excess rococo examination" endangers structure of trial). But see *Press-Enterprise*, 104 S. Ct. at 829-31 (Marshall, J., concurring) (criticizing as "gratuitous" the Court's comments on the length of voir dire).

defendant — and is not even required in white victim cases, which are likely to provoke a double dose of bias. The Court's view that such factual situations do not create a "significant likelihood" that racial prejudice will infect the defendant's trial can only be described as ludicrous in light of available empirical evidence.

But even if the Court were to reverse *Ristaino*, voir dire would still be ineffective in eliminating the effect of racial bias on jury deliberations. First, superficial questions concerning whether the jurors harbor prejudice against blacks that would prevent them from being impartial are extremely unlikely to provoke disclosure of such bias. General questions do not reach hidden inconsistent attitudes, which research has shown are now prevalent about race. Asking a general question about impartiality and race is like asking whether one believes in equality for blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that blacks are more prone to violence. Those attorneys who have been permitted to conduct extended voir dire report that it is only when numerous sensitive and specific questions are asked that prospective jurors reveal racial prejudice.<sup>347</sup> Furthermore, even if extensive questions were asked, jurors might not answer honestly. Most prejudiced attitudes are now highly disapproved, and jurors would naturally be reluctant to admit them, particularly since they know that social disapproval will be publicly expressed by dismissing them from the venire. This natural reluctance is probably exacerbated by the practice of questioning the entire venire as a group, for it is easier to stay quiet untruthfully than to respond untruthfully.<sup>348</sup> Even if extensive individual questioning were routinely permitted in black defendants' cases, fear of social disapproval would probably inhibit many individuals from expressing their true views.

Finally, even if the courts were to adopt the extremely time-consuming practice of extensive individual voir dire and arrange the setting to encourage disclosure of prejudice, voir dire could not eliminate all white jurors whose guilt assessments will be affected by the race of the defendant. Social scientists say it would be possible to encourage disclosure in several ways. For example, voir dire might be made private as well as individual; the process might be lengthened by a cordial

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347. See, e.g., NATIONAL JURY PROJECT, *supra* note 267, at § 10.03[4]; Ginger, *supra* note 33, at 434-38; Soler, *supra* note 345; see also notes 186-88 *supra* and accompanying text.

348. The jurors' natural reluctance to admit prejudice may be further exacerbated by judge-conducted voir dire. When the distinguished white-haired, black-robed judge seated above the jurors (and below the American flag) asks "Do you have any racial prejudice that will prevent you from rendering a fair verdict?" honest responses may be further inhibited.

chat with the potential juror; and the attorney might encourage expression of prejudice by disclosing his own (real or imagined) biases.<sup>349</sup> Of course, this would make voir dire even more expensive and time-consuming than it already is. Unfortunately, voir dire would still not be entirely effective in weeding out biased jurors, because the research suggests that most jurors are unaware of their bias; the process of race affecting guilt attribution is probably most often an unconscious one.<sup>350</sup>

## 2. *Change of Venue*

Defendants occasionally seek a change of venue to avoid the effects of prejudicial pretrial publicity. In *Irwin v. Dowd*,<sup>351</sup> the Supreme Court held that voir dire of individual jurors and the striking for cause of those who admitted bias was an inadequate assurance of impartiality when a "pattern of deep and bitter prejudice" [was] shown to be present throughout the community."<sup>352</sup> The Court reasoned that upon such a showing, the declarations of impartiality by individual jurors could be given little weight, and a refusal to grant a change of venue denied the defendant due process.<sup>353</sup>

Recent cases indicate that the standard for showing that a fair trial was precluded in a given community is quite difficult to meet,<sup>354</sup> but the exact dimensions of the right to a change of venue are irrelevant to most black defendants. Occasionally racial prejudice may be inflamed by pretrial publicity and a change of venue would therefore be mandated,<sup>355</sup> but the kind of bias documented in Part I would never support a change of venue motion. More to the point, a change of venue would probably be useless in these "ordinary" cases, since it is almost certain that the same kind of bias would affect the guilt determinations of white jurors in a neighboring county. Only if the change of venue

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349. Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 267 (1981) (reviewing the literature); see also NATIONAL JURY PROJECT, *supra* note 267, at § 10.01[3].

350. See notes 124-27 & 182-88 *supra* and accompanying text; cf. Efran, *supra* note 130 (93% of subjects thought attractiveness of defendant should play no role in judicial decisions, yet subjects' actual decisions showed a strong effect of attractiveness on certainty of guilt and severity of punishment).

351. 366 U.S. 717 (1961).

352. 366 U.S. at 727 (quoting local newspaper reports on the jury selection process).

353. 366 U.S. at 728.

354. See, e.g., Patton v. Yount, 104 S. Ct. 2885, 2889-91 (1984); *Murphy v. Florida*, 421 U.S. 794, 802-03 (1975).

355. See, e.g., *Hines v. State*, 384 So. 2d 1171, 1183-84 (Ala. Crim. App. 1980) (reversible error not to grant a second change of venue when atmosphere of community in which defendant was tried was racially polarized by publications concerning trial).

fortuitously resulted in a change of the racial composition of the jury would it be useful in combatting the effects of routine racial bias.

The difficulty, then, with relying upon either voir dire or change of venue for eliminating biased jurors, is that these techniques are designed to check extraordinary bias, bias peculiar to a person or locale.<sup>356</sup> If prejudice is narrowly conceived as open animosity toward blacks, these techniques offer significant protection to black defendants. If we focus instead on the forms of racial bias that are less overt and less hostile but much more prevalent, then attempting to eliminate all biased jurors is futile.

### C. *Controlling Jury Deliberations*

The last set of doctrines arguably bearing on racially biased verdicts are those relating to the control of the content of jury deliberations. Courts try to regulate the content of deliberations in three ways: first, by prohibiting inflammatory arguments (and those that have no foundation in the evidence); second, by instructing the jury as to the proper subjects of deliberation; and third, by reviewing allegations of juror misconduct. These techniques for controlling bias can be disposed of rather quickly, for their shortcomings are both obvious and not easily remedied.

#### 1. *Prohibiting Racially Inflammatory Arguments*

A closing argument that addresses irrelevant issues or contains an appeal to passion constitutes a federal constitutional violation if the argument "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process."<sup>357</sup> This due process standard, sometimes bolstered by state constitutional or statutory requirements, has been fairly strictly applied to arguments by the prosecutor tending to inflame racial animosity.<sup>358</sup> Although an isolated racial innuendo usually is not deemed reversible error if followed by instructions from

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356. Another technique aimed at extraordinary situations is removal of an action from state court to federal court under 28 U.S.C. § 1443 (1982). The statute provides that criminal proceedings commenced in state court may be removed if the defendant is denied or cannot enforce a right in the courts of such state under any law providing for the equal civil rights of United States citizens. Early liberal interpretations of the statute failed to survive and the right of removal is now sharply limited. See *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). See generally Note, *Racial Discrimination in a State Court as a Basis for Removal to a Federal Court*, 13 WAYNE L. REV. 456 (1967) (analyzing the Court's decision in *City of Greenwood* and other cases interpreting 28 U.S.C. § 1443).

357. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

358. See Annot., 45 A.L.R.2d 303 (1956), and cases cited therein.

the court to disregard it,<sup>359</sup> extreme or repeated racial slurs and arguments obviously designed to ignite racial tensions or promote racial fears are generally held to require a new trial.<sup>360</sup>

Certainly the lower courts' refusal to tolerate racially inflammatory remarks is a desirable development. The large number of cases in which prosecutors persist in making such arguments,<sup>361</sup> however, is less than encouraging, for prosecutors must believe that juries will respond to such appeals. Of course, the attitudes upon which those prosecutors are trying to get the jury to fixate are present regardless of whether or not an unprincipled advocate calls attention to them. As was made clear in Part I, the influence of race upon guilt attribution does not depend upon overt manipulation of racial hostility. Controlling prosecutors' arguments, therefore, can do nothing to interrupt those more subtle mental processes.

## 2. *Instructing the Jury to be Impartial*

The Supreme Court has imposed only modest jury instruction requirements: the judge must instruct the jurors that the defendant is presumed innocent until proven guilty;<sup>362</sup> he must instruct that the prosecution is required to prove the defendant's guilt beyond a reasonable doubt;<sup>363</sup> and he must avoid instructions that infringe upon the defendant's constitutional rights.<sup>364</sup> Nevertheless, virtually all courts provide some general or cautionary instructions as well as instructions concerning the specific offense with which the defendant is charged.

Model instructions commonly include an admonition to consider

359. *See Id.* at § 7; *see also id.* at §§ 8-9 (admonishment of, or retraction by, counsel sufficient to remove prejudice in some instances).

360. One notable exception is the repeated use of the word "colored" or "nigras" to refer to black defendants, despite defense objections. *See, e.g.,* *State v. Kirk*, 205 Kan. 681, 472 P.2d 237 (1970); *Rouse v. Commonwealth*, 303 S.W.2d 265 (Ky. 1957); *State v. Alexander*, 255 La. 941, 233 So. 2d 891 (1970), *revd. on other grounds sub nom.*, *Alexander v. Louisiana*, 405 U.S. 625 (1972); *State v. Crockett*, 421 P.2d 722 (Mont. 1967).

361. *See* *Later Case Service*, 45 A.L.R.2d 303 (1980); *Annot., supra* note 358, at 303.

362. *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978). *But see* *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (*per curiam*) (failure to give instructions on presumption of innocence does not violate federal constitution if other instructions adequately convey the principle).

363. *Cf. In re Winship*, 397 U.S. 358, 364 (1970) (prosecution must prove every element of offense beyond a reasonable doubt). The federal courts of appeals have held that failure to instruct the jury regarding the prosecution's burden is reversible error if properly objected to. *See, e.g.,* *United States v. Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978); *United States v. Corrigan*, 548 F.2d 879, 883-84 (10th Cir. 1977).

364. *See, e.g.,* *Griffin v. California*, 380 U.S. 609 (1965) (forbidding comments by the prosecution or instructions by the court that suggest that silence of the accused can be taken as evidence of guilt).

the evidence in the case "without prejudice, fear, or favor,"<sup>365</sup> or some equivalent phrase.<sup>366</sup> Model instructions generally do not provide for a specific admonition regarding racial prejudice,<sup>367</sup> although some judges may choose to include such an instruction at their discretion. Even if use of instructions were to become more widespread, though, the black defendant facing an all-white jury would gain little protection against racial bias. One reason to doubt the efficacy of racial bias instructions is that general research indicates that jurors often do not comprehend or attend to jury instructions.<sup>368</sup> A second reason is specific to the problem of race and guilt attribution: because the process involved is probably unconscious for most jurors, instructing them to put racial prejudice out of their minds or to ignore the defendant's race in assessing the evidence is unlikely to be productive. Jurors who believe they *are* being fair will not be affected by even the sternest warnings that they must be fair. Finally, there is some evidence from mock jury studies that instructing jurors to disregard a fact results in greater emphasis being given to that fact.<sup>369</sup> Thus, instructing jurors to ignore the defendant's race might exacerbate the effect of race upon guilt attribution.

### 3. *Reviewing Juror Allegations of Misconduct*

The general rule that jurors may not impeach their verdicts is very old<sup>370</sup> and widely accepted.<sup>371</sup> In 1966 the Supreme Court carved out a narrow exception to that rule, holding that where jurors alleged that a bailiff had, in effect, become a witness against the defendant, this violated the defendant's sixth and fourteenth amendment right to be confronted with witnesses against him and required reversal.<sup>372</sup>

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365. SEVENTH CIRCUIT JUDICIAL CONFERENCE COMMITTEE ON JURY INSTRUCTIONS, *MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES* § 2.03 (1965).

366. *See, e.g.*, COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASSOCIATION OF THE FIFTH CIRCUIT, *PATTERN JURY INSTRUCTIONS 2A* (1979) ("without prejudice or sympathy").

367. *See* sources cited at notes 365-66 *supra*.

368. *See* A. ELWORK, B. SALES & J. ALFINI, *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* (1982); Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 *JUDICATURE* 478, 480-82 (1976).

369. Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 *J. APPLIED SOC. PSYCHOLOGY* 345 (1973); Wolf & Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgment of Mock Jurors*, 7 *J. APPLIED SOC. PSYCHOLOGY* 205 (1977).

370. *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915); *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785).

371. *See* 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 606[03], at 606-22, 23 (1982); Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 *NEB. L. REV.* 920, 924-25 (1978).

372. *Parker v. Gladden*, 385 U.S. 363 (1966).

One lower federal court has extended the exception to allegations that extraneous racial issues were improperly introduced into deliberations by a juror, reasoning that introduction of those issues violated the defendant's sixth amendment right to an impartial jury.<sup>373</sup> This reasoning would seem to swallow the entire rule against jurors impeaching their own verdicts, since virtually all allegations of juror misconduct involve a denial of the right to an impartial jury. Most courts have not thus far adopted this view of the Constitution's requirements and seem unlikely to do so.<sup>374</sup> A few jurisdictions have, however, ruled that statutory language permitting juror testimony on an "outside influence" affecting jury deliberations encompasses testimony concerning racial prejudice expressed by one of the jurors.<sup>375</sup>

The concerns of finality and protecting jurors from harassment make it unlikely that the rule against jurors' impeachment of a verdict will totally give way to the desire to inhibit expression of racial prejudice in the jury box. But even if a racial prejudice exception to the rule were widely adopted, very few cases of biased adjudication of guilt would be affected. In part this is due to the fact that the jurors who participated in the biased deliberations are the only source of information, and it would be surprising if very many of them came forward. More importantly, current social patterns make it unlikely that overt expressions of bias would often be manifested. Jurors who are aware of anti-black sentiments are unlikely to voice them for fear of social disapproval, and most jurors will not be aware of any hostile feelings. That bias is not openly manifested is no assurance that it does not affect outcomes.

Thus, like the prohibitions against racially inflammatory arguments and the giving of instructions concerning impartiality, review of jurors' statements during deliberations is of limited help in eliminating the effect of the defendant's race upon his chances of conviction. All three means of controlling the content of jury deliberations focus on

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373. *Tobias v. Smith*, 468 F. Supp. 1287, 1289 (W.D.N.Y. 1979).

374. *See, e.g., United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971), 401 U.S. 943 (1971); *State v. Folck*, 325 N.W.2d 368, 371-73 (Iowa 1982); *State v. Sheldon*, 301 N.W.2d 604, 614 (N.D. 1980), *cert. denied*, 450 U.S. 1002 (1981); *State v. Finney*, 337 N.W.2d 167, 168-69 (S.D. 1983).

375. *State v. Callender*, 297 N.W.2d 744, 745-46 (Minn. 1980); *see also People v. Leonti*, 262 N.Y. 256, 258, 186 N.E. 693, 694 (1933) (affidavit admissible to show juror lied during voir dire and verdict therefore was null); *cf. State v. Levitt*, 36 N.J. 266, 271-72, 176 A.2d 465, 467-68 (1961) (religious prejudice); *After Hour Welding v. Laneil Management Co.*, 108 Wis. 2d 734, 738-40, 324 N.W.2d 686, 689-90 (1982) (religious prejudice in a civil case). *Contra Smith v. Brewer*, 444 F. Supp. 482, 489-90 (S.D. Iowa 1978); *Cherensky v. George Washington—East Motor Lodge*, 317 F. Supp. 1401, 1403-04 (E.D. Pa. 1970); *see also Johnson v. Hunter*, 144 F.2d 565, 567 (10th Cir. 1944).

conscious and deliberate injection of the defendant's race into the decisionmaking process. Because racial prejudice in the 1980s rarely takes this form, these doctrines do little to eliminate its effects.

### III. DEVELOPING COMPREHENSIVE PROTECTION FOR MINORITY RACE DEFENDANTS

Of the existing techniques for eliminating racially biased adjudications of guilt, none even approaches comprehensive protection. Each of these procedures could be improved to provide more effective protection, but even liberal (and unlikely) changes will not cure their inadequacies, because all of the surrounding doctrines evolved to control somewhat different kinds of bias. Nonetheless, that overruling *Swain* and *Ristaino* would not provide complete protection for the black defendant does not argue against doing so. The equal protection analysis in *Swain* is fundamentally flawed by its failure to consider the use of peremptory challenges from the defendant's viewpoint and its erroneous assumptions regarding the partiality of white jurors; the due process reasoning of *Ristaino* is contradicted by empirical findings on the prevalence of prejudice. Thus, the *minimal* accommodation to the realities of racial prejudice would seem to be the overhaul of peremptory challenge and voir dire doctrines. The more difficult question is whether the equal protection clause requires more than largely passive accommodations, and if so, what measures might be suited to the task of providing the black defendant with comprehensive protection against racial bias.

#### A. *The Equal Protection Argument that Further Safeguards Are Required*

To determine whether further safeguards are required, one begins by asking whether the status quo violates the assurance of equal protection of the laws. This question may be divided into three parts. First, do equal protection constraints apply to the activity in question? Second, assuming that equal protection constraints do apply, what level of scrutiny do they impose on the classification at stake? Third, can that classification survive the appropriate level of scrutiny?

##### 1. *The Pertinence of Equal Protection Constraints*

The equal protection clause of the fourteenth amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>376</sup> Equal protection constraints

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376. U.S. CONST. amend. XIV, § 1.



therefore do not impinge upon purely private activities;<sup>377</sup> governmental action is a prerequisite to equal protection scrutiny.<sup>378</sup> When a government employee acts in his official capacity, there is no doubt that governmental action has been taken. Although this obvious form of state action is not present when jurors — ordinary citizens — determine the guilt or innocence of a defendant, such determinations nevertheless do constitute state action and hence compel equal protection review.

The state cannot evade the fourteenth amendment's mandates simply by delegating discrimination to private individuals. When individuals perform traditionally public functions,<sup>379</sup> or when the state actively encourages or participates in the questionable activity,<sup>380</sup> action taken by private individuals will be deemed state action. In recent years the Supreme Court has taken a restrictive view of earlier state action decisions,<sup>381</sup> but even under the newer cases the jury's determination of a defendant's guilt would constitute state action. The Court has limited the public function strand of state action doctrine to those few functions "traditionally exclusively reserved to the State,"<sup>382</sup> but even the narrowest reading of that phrase would include the adjudication of *criminal* liability. Moreover, the jurors' deliberations and verdicts might also meet the alternative test for the involvement strand of state action doctrine. The Court's requirement of "significant involvement"<sup>383</sup> and even its hint that only a "symbiotic relationship"<sup>384</sup> would suffice is easily satisfied here; the state calls together the individ-

377. *The Civil Rights Cases*, 109 U.S. 3 (1883).

378. The fourteenth amendment by its language does not reach action by the federal government, but the Court has interpreted the fifth amendment's due process clause to include an equal protection component. Although the Court has not explicitly compared the reach of the fourteenth and fifth amendment equal protection requirements, they appear to be coextensive. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944).

379. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944).

380. *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

381. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507 (1976) (shopping center not within public function strand of state action doctrine); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (termination of service policies by heavily regulated utility not state action despite state approval of termination provision where provision never the subject of regulatory body's hearings or scrutiny); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (operation of state liquor regulation scheme did not sufficiently involve state in discriminatory guest policies of licensed private clubs so as to make those policies state action).

382. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)).

383. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (citing *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)).

384. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972).

uals that form the jury, instructs them as to their task, and then relies upon their conclusions to determine whether imprisonment or fines may be imposed upon the defendant. Because the sixth amendment prevents the state from trying criminal offenses without the participation of a jury, the state is totally dependent upon the action of jurors for the enforcement of its criminal laws. It is hard to imagine more significant benefit to the state from the activity of private individuals.<sup>385</sup>

## 2. *Determining the Appropriate Level of Scrutiny*

That guilt determinations are made by jurors does not insulate them from equal protection scrutiny, but not all equal protection scrutiny is stringent. In assessing an equal protection claim, a court "must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected."<sup>386</sup> Although the individual interests affected by verdicts — freedom from stigma, incarceration, and monetary penalties — are of great importance, they have never been deemed "fundamental interests" for equal protection purposes. For this reason, most criteria for determining guilt need only bear "some fair relationship to a legitimate public purpose."<sup>387</sup> This minimal scrutiny would seem to be satisfied through ordinary evidentiary requirements that facts given to the jury for consideration must bear some probative relationship to the issues in dispute.<sup>388</sup> Imposing a more stringent standard of review *based upon the individual interest affected* would subject all decisionmaking criteria (all facts submitted to the jury) to a heavy burden of justification, probably making proof of guilt impossible.

Thus, not all factors that enter into a jury's decision require close review, but some do. Classifications that disadvantage a suspect class, such as a racial minority, must be "precisely tailored to serve a compelling governmental interest."<sup>389</sup> If a racial classification is used to

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385. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) states that normally *non-neutral* involvement in the discriminatory activity (which is not present here) is required, but makes an exception where the result of neutral involvement "would be . . . to enforce a concededly discriminatory private rule," as barred by *Shelley v. Kraemer*, 334 U.S. 1 (1948), and that exception is applicable here.

386. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974) (citations omitted); see *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

387. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (describing standard to be used in reviewing most forms of state action).

388. See, e.g., FED. R. EVID. 401-02.

389. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

determine guilt, this greater burden of justification should be imposed on the government. The question then becomes whether verdicts influenced by racial prejudice are racial classifications.

Were judges to instruct jurors that some weight should be given to the defendant's race because black defendants are more likely to be guilty, there would be no question that a racial classification had been employed. That race was to be only one factor in the jury's verdict would not alter the equal protection analysis; if an explicit racial classification contributed to the decision to impose a substantial unpleasant consequence, strict scrutiny would be required.<sup>390</sup> Similarly, if a prosecutor argued that race should be a factor in the determination of guilt, or jurors acknowledged that it had been a factor influencing deliberations, strict scrutiny's heavy burden of justification would be imposed. But in most cases no explicit racial classification is at issue. Race appears to influence guilt determinations primarily through an unconscious process, and even when the process is conscious, the prospect of social disapproval renders disclosure of that process unlikely.

That a policy or action is facially neutral with respect to race, however, does not preclude a finding that a racial classification has been used.<sup>391</sup> The black defendant's claim is that these apparently legitimate determinations of guilt are discriminatory in effect. In other such "disproportionate impact" cases, the Supreme Court has stressed that "the invidious quality of a [governmental action] claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."<sup>392</sup> *Thus, the level of scrutiny that should be applied to white jurors' determinations of the guilt of black defendants depends upon whether the empirical findings discussed in Part I establish a racially discriminatory purpose.*

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,<sup>393</sup> Justice Powell's majority opinion, "without purporting to be exhaustive,"<sup>394</sup> summarized some "subjects of proper inquiry"<sup>395</sup> in the determination of racially discriminatory purpose. An "important starting point," declared Powell, would often be the

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390. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (if race is a motivating factor in decision, then choice presumed to be illegitimate).

391. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

392. *Washington v. Davis*, 426 U.S. 229, 240 (1976); see *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* 429 U.S. 252, 265-66 (1977); *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944).

393. 429 U.S. 252 (1977).

394. 429 U.S. at 268.

395. 429 U.S. at 268.

impact of the official action.<sup>396</sup> He explained:

Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.<sup>397</sup>

This passage contains two interesting footnotes. In the first, Powell acknowledged that several of the jury selection cases fell into the "clear pattern" category despite the fact that the statistical pattern did not approach the extremes of *Yick Wo* or *Gomillion*, for the "nature of the jury-selection task" led to a finding of unconstitutional discrimination.<sup>398</sup> The other relevant footnote explained why less extreme statistical patterns usually were insufficient proof of purposeful discrimination: "In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the Nation's population."<sup>399</sup>

If the conclusions of Part I are accepted and the external validity of the mock jury studies discussed in Part I therefore acknowledged, the evidence that racial bias is a factor in guilt adjudication would seem to fall within the "clear pattern, unexplainable on grounds other than race" category, even though the studies do not display the extreme statistical pattern described as the norm for "clear pattern" evidence. Not all white jurors find all black defendants guilty or acquit all white defendants; nevertheless, the "clear pattern" standard should be deemed satisfied for a reason analogous to that found in the jury selection cases.

The "nature of the jury-selection task" demands a lesser statistical disparity because ordinarily it relies upon random chance; if the state has not interfered with random chance, a substantial underrepresentation of minorities on the jury venire would be extremely unlikely. In contrast, in most governmentally made decisions, many factors are evaluated and considered; it is quite likely that correlations between race and other decision outcomes are spurious, or, in the Court's phrase, the consequence of "the 'heterogeneity' of the Nation's population." The results of the mock jury studies are, like the jury selection cases, "unexplainable on grounds other than race," albeit not because random chance should have determined the jurors' decisions.

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396. 429 U.S. at 266.

397. 429 U.S. at 266 (footnotes omitted).

398. 429 U.S. at 266 n.13.

399. 429 U.S. at 266 n.15 (citations omitted).

In the laboratory experiments, it is careful control, rather than random chance, that eliminates noninvidious explanations. Although many factors were evaluated and considered by the mock jurors, none of these factors can account for the correlation between race and the final decision. Because all of the other factors were held constant, spurious correlations between race and guilt attribution were not possible. In these studies, the "heterogeneity of the Nation's population" could not create the *appearance* of reliance on race when it did not exist, for the mock trials were not heterogeneous but identical with respect to all factors except the defendant's race. Under these circumstances, the risk of erroneously inferring discrimination on the basis of race disappears; any intelligible version of the purposeful discrimination requirement has been met.

Moreover, several of the factors deemed relevant in *Arlington Heights* to proving purposeful discrimination absent a "clear pattern" showing are present here. The historical background of the decisions, "particularly if it reveals a series of official actions taken for invidious purposes,"<sup>400</sup> is one of these factors. In a broad sense, the long history of deliberate exclusion of blacks from jury venires in southern states is an example of this factor, and the cooperation of law enforcement officials in vigilante lynchings and farcical trials is another.<sup>401</sup> The second factor suggested by Powell, the "specific sequence of events leading up to the challenged decision,"<sup>402</sup> does not heighten suspicion in these cases, but the third, "[d]epartures from the normal procedural sequence,"<sup>403</sup> is arguably present in the repeated use of peremptory challenges to eliminate black jurors.<sup>404</sup> The mock jury studies and the capital sentencing data provide evidence in the fourth category mentioned in *Arlington Heights*, substantive departures from routine decisions.<sup>405</sup> Finally, "contemporary statements by members of the

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400. 429 U.S. at 267.

401. See T. EMERSON, D. HABER & N. DORSEN, 2 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1357, 1371 (3d ed. 1967); R. GINZBURG, *supra* note 2.

402. 429 U.S. at 267.

403. 429 U.S. at 267.

404. In cases that challenge a single governmental decision (such as *Arlington Heights*) departures from the normal procedural sequence are gauged by comparing the decision at issue with all prior decisions. In contrast, when a group of decisions are challenged (such as in *Yick Wo* or *Washington v. Davis*) the meaningful comparison is between the procedures used in most instances and those used in the disputed decisions. Thus, we should compare the procedures used in cases with black defendants with the procedures used in all other cases, rather than look for historical changes in the treatment of black defendants.

405. 429 U.S. at 267. Here the relevant substantive departure is not a historical one, as it would have been in *Arlington Heights*; the appropriate comparison is between the outcomes in cases involving black defendants and outcomes in all other cases. See note 404 *supra*.

decisionmaking body,"<sup>406</sup> in this case jurors' statements describing biased deliberations, provide sporadic evidence of discriminatory purpose.<sup>407</sup>

Critics of the purposeful discrimination requirement have often argued that proving purposeful discrimination is virtually impossible under *Arlington Heights*.<sup>408</sup> Some have stressed that those who wish to discriminate will hardly be stupid enough to leave evidence of the *Arlington Heights* variety,<sup>409</sup> while others have pointed out that because bias often operates at the margins of consciousness, even forthright decisionmakers will rarely supply litigants with indications of their true purposes.<sup>410</sup> This subconscious bias is precisely the obstacle confronting the *individual* black defendant. Whether or not race has been a factor in the determination of his guilt, he will almost never be able to demonstrate its influence. It is the presence of aggregate data that makes his case. Perhaps this is not so surprising; claimants who have been successful in proving purposeful discrimination despite facially neutral classifications have always relied on aggregate data.<sup>411</sup> To take an extreme example, Yick Wo could never have prevailed without showing how many other Chinese Americans had been denied laundry permits.<sup>412</sup> *Even at that time*, the only tracks left by the discriminating body were statistical. That black defendants have a claim depends upon the happenstance of social scientists being interested in investigating race and guilt attribution, not upon the actual existence of discrimination in the guilt adjudication process. Should the Court refuse to accept the mock jury studies and the other empirical evi-

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406. 429 U.S. at 268.

407. See notes 33 & 373-74 *supra* and accompanying text.

408. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961; Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

409. Eisenberg, *supra* note 408, at 47-48, 115; Perry, *supra* note 408, at 551; Schwemm, *supra* note 408, at 1031; Simon, *supra* note 408, at 1070.

410. See, e.g., Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978).

411. Compare *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and cases cited in notes 194-207 *supra*, with *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

412. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Permits to operate laundries in wooden buildings were granted to all but one of the non-Chinese applicants, but to none of about 200 Chinese applicants. There were over 300 laundries in the city and all but about ten were constructed of wood. Two hundred forty had Chinese owners. *Yick Wo* and more than 150 other persons of Chinese descent had been arrested for violating an ordinance prohibiting the operation of laundries in wooden buildings without a permit, but all of the 80 or so noncomplying laundries owned by Caucasians had been left alone.

dence, the equal protection claim would collapse and could not be revived.

Even if this evidence were accepted, and despite the fact that the *Arlington Heights* "clear pattern" standard appears to have been met, one might still object that discrimination that is the result of a primarily unconscious process — which is what the empirical evidence points to here — cannot be denominated "purposeful." However, in this context the adjective "purposeful" may be a misnomer and certainly is misleading,<sup>413</sup> for subconscious reliance on race also triggers strict scrutiny.

The cornerstone of the purposeful discrimination requirement is the underlying policy of the equal protection clause that "all persons similarly circumstanced shall be treated alike."<sup>414</sup> The term "purposeful discrimination" was coined to differentiate de facto discrimination from de jure,<sup>415</sup> not to differentiate between conscious and unconscious reliance on race in decisionmaking. De facto discrimination, or disproportionate impact, standing alone does not implicate equal protection concerns because the persons differently treated may not be "similarly circumstanced" with respect to other relevant attributes or policies. In contrast, the victim of unconscious racial discrimination, exactly like the victim of conscious discrimination, is treated differently by the decisionmaker despite being "similarly circumstanced" with respect to all relevant criteria. The focus is not on the badness of the decisionmaker, but on the fairness of the decision.<sup>416</sup> If a state were to delegate hiring decisions to a personnel officer who always found black applicants to be "incompatible" or "unattractive," the honest statement of that officer that he believed his decisions were

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413. Terminology has always been difficult in equal protection doctrine; witness the confusion engendered when the Court stated in *Palmer v. Thompson*, 403 U.S. 217 (1971), that racial "motivation" alone did not render state action constitutionally suspect. The Court's explanation that "the focus [in prior cases that alluded to discriminatory motive] was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did," 403 U.S. at 225, led many lower courts to hold that "de facto" discrimination invoked strict scrutiny. See *Washington v. Davis*, 426 U.S. 229, 244 & n.12, 245 (1976) (citing and disapproving these cases).

414. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (striking down state tax law favoring local corporations that did no local business); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (classification violates equal protection mandate if it "make[s] unjust and illegal discriminations between persons in similar circumstances").

415. *Washington v. Davis*, 426 U.S. 229, 239-41 (1976).

416. This, I think, is the only reasonable interpretation of *Palmer v. Thompson*, 403 U.S. 217 (1971). The reason that the racial animus that motivated the decision to close the Jackson, Mississippi, swimming pools did not invoke strict scrutiny was that the record showed "no state action affecting blacks differently from whites." 403 U.S. at 225. While the Court's conclusion that blacks in the *Palmer* case were not affected differently than whites is certainly open to dispute (at the very least, stigma flowing from the decision was not equally distributed), the Court's premise that different *treatment* must be the basis of an equal protection claim seems correct.

never affected by the applicant's race certainly would not allow the state to avoid the heavy burden of justification imposed by all racial classifications.<sup>417</sup> Likewise, when we know that the defendant's race will probably affect the decisions of white jurors, their honest but inaccurate assertions to the contrary should not preclude strict scrutiny.

### 3. *Applying the Strict Scrutiny Standard*

At least in theory, not all racial classifications violate the Constitution; they are subject to strict scrutiny but may be justified by a compelling state interest and narrowly tailored means.<sup>418</sup> Thus, one last issue must be resolved before we can reach a conclusion concerning whether racially biased determinations of guilt are violating the fourteenth amendment's equal protection mandate: Can the use of race as a factor in guilt determination be justified under the strict scrutiny standard?

I would hope the answer to this question is self-evident. It is hard to imagine a more *offensive* use of race than as a factor deemed probative of guilt of a criminal offense. Nevertheless, it might be argued that offensive or not, it is *rational* for jurors to incorporate their knowledge that blacks commit proportionately more crime than do whites.<sup>419</sup> This argument fails for two reasons: first, this use of race to escalate the likelihood of guilt probably is not rational, and second, even if it were rational, mere rationality does not satisfy strict scrutiny.

Jurors might assume from their familiarity with newspaper reports of crime or crime statistics that a black (or Hispanic or Native American) is more likely to engage in common law crimes than is a white person; at a subconscious level, this is probably what they *do* assume. But such an assumption is erroneous for several reasons. First of all, arrest records are not accurate indicators of disproportionate involvement; to some extent they reflect selection biases in the criminal justice system.<sup>420</sup> Consequently, experts disagree on the extent to which

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417. In a somewhat analogous situation, the Supreme Court has held that a jury commissioner's honest statement that he did not know any blacks qualified to serve on juries and for this reason, rather than prejudice, did not select any blacks to fill the jury rolls, carries little weight in assessing whether an equal protection violation has occurred. See *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Hill v. Texas*, 316 U.S. 400 (1942).

418. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

419. Some courts have accepted similar reasoning in probable cause determinations. For example, in *United States v. Place*, 660 F.2d 44, 48 (2d Cir. 1981), the Second Circuit Court of Appeals approved the Drug Enforcement Administration's use of "Hispanic background" as a factor increasing the likelihood that the suspect is a drug courier. For a criticism of this decision and others permitting the use of race as a factor in detention decisions, see Johnson, *Race and the Decision to Detain a Suspect*, 93 *YALE L.J.* 214 (1983).

420. See Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 *AM. SOC. REV.* 93, 94-97 (1978) (discussing numerous studies). Self-report studies show negligible racial



arrest rates should be attributed to differential involvement or differential processing.<sup>421</sup> Although most experts would agree that disproportionate involvement explains some of the arrest statistic differential, the problem remains that there is no way of knowing *how much* more likely it is that a black person will commit a common law crime than that a white person will do so. Jurors who read crime statistics will overestimate the differential involvement; those who read newspapers will grossly overestimate the differential involvement.<sup>422</sup>

Even if the differential involvement could be accurately assessed and jurors were familiar with such an assessment, factoring that assessment into the likelihood that a defendant on trial has committed a crime of which he is accused would be irrational. Although it may be that, knowing *nothing* about a person but his race, it is more likely that a black person committed a common law crime than that a white person did so,<sup>423</sup> it does not follow that it is more likely that a black defendant accused of such a crime is more likely to be guilty than a white defendant similarly accused. More blacks are arrested and brought to trial than are whites; earlier processes — the gathering of evidence and the decision to bring charges — have already swallowed any predictive power that the race of an individual may have. Only if we thought that arrest rate differences underestimated racial differences in criminal activity would it be rational to factor race into the determination of guilt.<sup>424</sup>

Even if using race as a factor in the determination of guilt were rational, this would not satisfy strict scrutiny. Only once has the Supreme Court sustained a nonremedial<sup>425</sup> racial classification after applying the strict scrutiny test,<sup>426</sup> and this decision has been widely

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differences in criminal involvement, thus suggesting a selective processing interpretation of arrest statistics. *Id.* at 96-97. Victim surveys show disproportionate black involvement, but a smaller disproportion than is reflected in arrest statistics. *Id.* at 97-99 (summarizing studies).

421. Compare McNeely & Pope, *Race and Involvement in Common Law Personal Crime: A Response to Hindelang*, 8 REV. BLACK POL. ECON. 405 (1978), with Hindelang, *supra* note 420.

422. J. Mayas, *supra* note 162, at 49, 56.

423. Certainly if all criminal activity, including white collar crime, is considered, the proportionate involvement of any group is entirely speculative. This is because whites are much more frequently involved in white collar crime than are blacks and the extent of white collar crime is largely unknown. See generally C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 41-47 (1978).

424. Because we know that arrest rates overestimate differential involvement to some extent, it would actually be more rational to assume that, *ceteris paribus*, a white defendant on trial is more likely to be guilty than is a black defendant. See notes 421-21 *supra* and accompanying text.

425. The Court upheld a remedial classification in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), but the classifications at issue here are certainly not remedial.

426. *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Hirabayashi v. United States*,

criticized.<sup>427</sup> Certainly the arguments for permitting jurors to consider the defendant's race do not come close to meeting the requirements of a compelling state interest and narrowly tailored means.<sup>428</sup>

"Convicting the guilty" could be viewed as a compelling state interest, at least in the abstract. But even if the interest in convicting the guilty were held to satisfy the ends requirement, the use of race as a factor in guilt adjudication is not a necessary or precisely tailored means to the accomplishment of that end. As discussed above, it is probably not even a rationally related means; certainly it is unnecessary, for the state could produce other, far more reliable indicators of guilt.<sup>429</sup>

### B. *A Miranda-Model Proposal*

That the use of race as a factor in guilt determinations is depriving black defendants of the equal protection of the laws may be clear, but this does not automatically imply that relief must be granted to the recipients of unequal treatment. Even if the right to a racially neutral adjudication of guilt is recognized, it can be argued that when the right is *covertly* violated, there can be no remedy. This would not be because there is no appropriate remedy; the appropriate remedy would be reversal of the conviction and a new trial by unbiased jurors. The difficulty is instead in recognizing when the right has been violated. Because the proof that violations are occurring comes entirely from aggregate data (including the mock jury studies) it is not possible to ascertain whether a violation has occurred in a particular case.

This argument is probably correct with regard to individual remedies.<sup>430</sup> To reverse all convictions of black defendants tried by white juries because some of them are tainted by a constitutional violation is

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320 U.S. 81 (1943) (upholding earlier West Coast military curfew on persons of Japanese ancestry without explaining the standard of review).

427. See, e.g., M. GRODZINS, *AMERICANS BETRAYED* (1949); Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945); cf. Freeman, *Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law*, 28 CORNELL L.Q. 414 (1943) (criticizing military evacuation of Japanese Americans from certain west coast areas). But see DeFunis v. Odegaard, 416 U.S. 312, 339 n.20 (1974) (Douglas, J., dissenting) (defending *Korematsu*).

428. See *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (stating in dicta that the defendant's race is an impermissible factor in the sentencing process).

429. See FED. R. EVID. 404(b), which provides that evidence of the *defendant's* prior crimes is inadmissible to show propensity to commit crime — the evidence is considered more prejudicial than probative. Consideration of crimes committed by *other same race people* would be even less probative of whether a specific defendant committed a specific crime.

430. See, e.g., *Virginia v. Rives*, 100 U.S. 313 (1880) (upholding denial of motion to have one-third of the venire be composed of blacks).

extreme.<sup>431</sup> Moreover, reliance on individual remedies may create endless circles: conviction, reversal, new trial, conviction, and so on. Any feasible remedy must be a group remedy and any attractive remedy must be prophylactic. At this point, the analogy of *Miranda v. Arizona*<sup>432</sup> comes to mind.

### 1. *The Need for Prophylactic Measures*

The parallels between the problem confronting the Court in *Miranda* and the one at issue here are instructive. Prior to *Miranda*, the Court had been engaged in case-by-case attempts to determine which police methods rendered a defendant's confession involuntary.<sup>433</sup> One of the frustrations of this approach was that an infinite variety of complex factual patterns was possible, which rendered the precedential value of earlier cases — to police and to the lower courts — quite limited. But the primary impetus to *Miranda* was the majority's sense that vigilance on the voluntariness front was not sufficient to protect the defendant from compelled self-incrimination. The Court noted first that because interrogation takes place in private, it is difficult to know exactly what has occurred.<sup>434</sup> The opinion also stressed "that the modern practice of in-custody interrogation is psychologically rather than physically oriented."<sup>435</sup> The switch from physically coercive methods to psychologically coercive methods made line drawing extremely difficult; at what point should a psychological ploy be deemed compulsion rather than "enlightened and effective" police detective work?<sup>436</sup> After reviewing some of the interrogation techniques recommended by experts, the Court expressed its concern that "[e]ven without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of

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431. If we knew that all of the convictions were obtained through unconstitutional procedures, the fact that most of them would have been obtained even if proper procedures had been employed would not argue against wholesale reversal of all the tainted convictions. For example, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel required in all felony cases), was properly given full retroactive effect. Here, however, not all of the convictions were obtained through an unconstitutional procedure (biased guilt determination), although some were.

432. 384 U.S. 436 (1966).

433. See, e.g., *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Spano v. New York*, 360 U.S. 315 (1959); *Leyra v. Denno*, 347 U.S. 556 (1954); *Ashcraft v. Tennessee*, 322 U.S. 1192 (1944); see also Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 102-03 (1966) (arguing that the Court's workload precluded adequate review of voluntariness cases).

434. 384 U.S. at 445, 448.

435. 384 U.S. at 448.

436. 384 U.S. at 449.

individuals.”<sup>437</sup> Finally, the Court concluded that “without proper safeguards” the process of custodial interrogation contained “inherently compelling pressures” that undermined the privilege against self-incrimination.<sup>438</sup> The “proper safeguard” imposed by the Court consisted of a prophylactic measure designed to counteract the “inherently compelling pressures,”<sup>439</sup> namely, the now famous “*Miranda* warnings.”<sup>440</sup>

As with custodial interrogation, earlier doctrinal paths focusing on case-by-case analysis of the presence of unconstitutional factors have failed to solve the problem of the influence of racial bias in jury deliberations.<sup>441</sup> The reasons for the failure of this individualized approach are also similar. First of all, jury deliberations, like custodial interrogation, are conducted in private. Actually, jury deliberations are even less accessible to analysis than is custodial interrogation because with custodial interrogation, unlike jury deliberations, a witness for the other side (the defendant) is present and all witnesses are deemed competent to testify concerning their observations.

The second reason for the failure of the individualized approach to juror bias also parallels a factor stressed by the *Miranda* Court: the replacement of blatant forms of unconstitutional action with more subtle violations. Just as interrogation techniques have shifted from the physical to the psychological, the manifestation of prejudice has shifted from the overt, and often hostile, to the covert, and often unconscious. Techniques, such as voir dire, that may have aided in the elimination of the openly prejudiced from the jury are largely futile with their modern counterparts. The Court’s description of the new interrogation techniques as “trading on the weaknesses of individuals” is also an oddly apt characterization of the process of white jurors evaluating the evidence against a black defendant; it is not the malevolence of white jurors that threatens constitutional values, but their susceptibility to culturally dictated distortions of judgment. But of course this historical shift from animosity to unconscious stereotyping does not diminish the harm wrought by racial bias; as with psychological

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437. 384 U.S. at 455 (footnote omitted).

438. 384 U.S. at 467.

439. 384 U.S. at 467-74.

440. [The defendant] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479. The Court also required that the exercise of these rights be “scrupulously honored,” 384 U.S. at 479, and described the government’s burden of proving that the defendant waived these rights as “heavy.” 384 U.S. at 475.

441. See Part II *supra*.

pressure in custodial interrogation, “a heavy toll on individual liberty” is the consequence.

The Supreme Court’s reasoning in *Miranda* that prophylactic measures were required to counteract the inherent compulsion of custodial interrogation thus would seem to require prophylactic measures to counteract the inherent bias arising when white jurors are assigned to determine the guilt of black defendants. The most obvious counterbalance to the bias of white jurors is the mandatory inclusion of black jurors in the decisionmaking process. Before turning to the details of such a counterbalance, however, I will digress a moment to consider the objection that choosing *Miranda* as a model is building one’s house upon sand.

*Miranda* has been widely criticized, both from the right and from the left,<sup>442</sup> and the Supreme Court continues to chip away its edges.<sup>443</sup> But whether or not *Miranda* was rightly decided, the Court’s underlying logic is unassailable — or at least, unassailed: When serious breaches of constitutional norms frequently occur in a setting where they cannot be discovered (and thus cannot be remedied after the fact), prophylactic protection of those norms is appropriate.<sup>444</sup> Actually, *Miranda* is not the only case that proceeds on this logic,<sup>445</sup> but I chose it as a model because its reasoning on the necessity for prophylactic measures is more explicit than that found in most cases and because the steps in that reasoning have close parallels in the problem of racial bias and guilt adjudication.

Criticism of *Miranda* has focused not on its underlying logic, then, but on its doctrinal and empirical premises. Some critics dispute the

442. See notes 446-49 *infra*; see also 18 U.S.C. § 3501 (1968) (congressional effort to overrule *Miranda* by authorizing the admissibility of all confessions that are “voluntarily given”).

443. See, e.g., *Oregon v. Elstad*, 105 S. Ct. 1285 (1985) (failure to give *Miranda* warnings to defendant questioned while in custody in his home did not bar admissibility of subsequent station house confession immediately preceded by *Miranda* warnings); *New York v. Quarles*, 104 S. Ct. 2626 (1984) (*Miranda* warnings requirement is subject to a “public safety” exception); *Harris v. New York*, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* may be used to impeach defendant’s credibility).

444. For a recent affirmation of that logic, see *Oregon v. Elstad*, 105 S.Ct. 1285, 1292 (1985) (“Thus, in the individual case, *Miranda*’s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.”).

445. Most commonly, prophylactic remedies have been imposed to safeguard the rights of criminal defendants. See *United States v. Leon*, 104 S. Ct. 3405 (1984) (exclusionary rule imposed to deter fourth amendment violations); *United States v. Wade*, 388 U.S. 218 (1967) (imposing requirement of counsel at post-indictment line-ups to combat potential of suggestiveness); *Chewning v. Cunningham*, 368 U.S. 443 (1962) (potential for prejudice for defendant tried on recidivist charges requires assignment of an attorney); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (potential for prejudice in capital cases requires assignment of an attorney); *cf.* *Green v. County School Bd.*, 391 U.S. 430 (1968) (“freedom of choice” plan unconstitutional where plan did not result in a unitary school system). But see *United States v. Leon*, 104 S. Ct. at 3430 (Brennan, J., dissenting) (exclusionary rule imposed to avoid implicating judiciary in constitutional violations).

premise that the fifth amendment privilege against self-incrimination is implicated by psychological pressure on the defendant, at least when the pressure is not applied in the courtroom.<sup>446</sup> Other critics argue that such psychological pressure rarely was brought to bear upon defendants and contend that the "evidence" provided by interrogation manuals was insufficient proof that constitutional violations occurred with any frequency.<sup>447</sup> Finally, critics have contended that the remedy imposed by *Miranda* will not have the counterbalancing effects hypothesized by the Supreme Court; those on the right have argued that *Miranda* only provides the guilty with more room to manipulate the criminal justice system,<sup>448</sup> while those on the left have protested that *Miranda* is doomed to be ineffective, in part because the warnings are underinclusive, and in part because the ruling relies upon the police, who create the pressure to confess, to counteract that pressure.<sup>449</sup> Obviously, none of these particular criticisms applies to the problem of racially biased jury deliberations or to a solution involving the inclusion of black jurors. The constitutional right to equal protection of the laws is well established and clearly applies to the criminal trial setting; the evidence that racial bias frequently affects criminal trials is strong; and the proposed remedy does not suffer either the defect of letting the guilty go free or of relying upon the violators of that right for the enforcement of the remedy. Thus, *Miranda* is good authority for the general proposition that prophylactic measures are necessary to prevent a constitutional violation such as racially biased determinations of guilt, although the question of whether any particular proposal is an appropriate and effective safeguard can only be answered by considering its advantages and disadvantages in some detail.

## 2. *The Defendant's Right to a Jury Including Racially Similar Jurors*

Although the United States Supreme Court has summarily rejected

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446. *Miranda v. Arizona*, 384 U.S. 436, 505-14 (1966) (Harlan, J., dissenting), 526 (White, J., dissenting); Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 926-37 (1979).

447. *Miranda*, 384 U.S. at 499, 501 (Clark, J., dissenting), 532-33 (White, J., dissenting).

448. *Miranda*, 384 U.S. at 500 (Clark, J., dissenting), 516-17 (Harlan, J., dissenting); Grano, *supra* note 446. *But see* Seeburger & Wettick, *Miranda in Pittsburgh — A Statistical Study*, 29 U. PITT. L. REV. 1, 19 (1967) (conviction rates of law enforcement agencies unaffected).

449. Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt To Implement Miranda*, 66 MICH. L. REV. 1347, 1394-98 (1968); Faculty Note, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300 (1967); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1549-79, 1612-14 (1967); *cf. Miranda*, 384 U.S. at 516 (Harlan, J., dissenting) (critic on the right noting that the new rules "do nothing to contain the policeman who is prepared to lie from the start").

a right to racially similar jurors,<sup>450</sup> acknowledging such a right is less innovative and less radical than it may sound. Several African countries, mindful of the realities of racial prejudice, have recognized some variation of this right.<sup>451</sup> For analogous reasons, English law for a time provided alien defendants with juries composed of six aliens and six citizens;<sup>452</sup> this practice was sporadically mimicked in the new world colonies, but eventually faded into obscurity.<sup>453</sup> At least two commentators have argued that the English practice should be revived in this country for minority race defendants.<sup>454</sup>

Because the aim is to prevent a wrong rather than to make a victim whole, the details of any system for mandatory inclusion of racially similar jurors are not inevitable. Any plan will be somewhat arbitrary, just as the exact content of the *Miranda* warnings is somewhat arbitrary. I am not wedded to any of the details that follow, for they are not crucial. What is crucial is commitment to some realistic plan for eliminating the effects of racial bias on the determination of guilt. I make the following proposal then, not in the belief that it is perfect, but with the hope that an outline of one possible system for including racially similar jurors will spawn further discussion.

The first issue to be confronted is what is meant by "racially similar." The meaning of this phrase is least problematic for black defendants: a black defendant has the right to some blacks on the jury panel.<sup>455</sup> The same right to "racially similar" jurors should be afforded to Native American and Hispanic defendants; although the empirical evidence concerning prejudice against Native Americans and Hispanics is less extensive, the available evidence does suggest that at least in some parts of the country, stereotypes of these groups are as

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450. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972) (brief statement that there is no right to the inclusion of racially similar jurors).

451. See Mittlebeeler, *Race and Jury in Nigeria*, 18 How. L.J. 88, 97 (1973) (right to mixed juries recognized for a time); Mittlebeeler, *Race and Jury in Rhodesia*, 15 How. L.J. 181, 196 (1969) (accused blacks tried by judge and two black assessors); see also Mittlebeeler, *Race and Jury in South Africa*, 14 How. L.J. 90, 94-95 (1968) (right to judge trial to avoid prejudice by white jurors).

452. See *Ordinance of the Staples*, 27 Edw. 3 st. 2, c. 8 (1353) and 28 Edw. 3, c. 13 (1354); see also *Trial by Jury; and the Abolition of de medietate linguae by s. 5 of the Naturalization Act, 1870*, 68 SOLIC. J. 949 (1924).

453. See LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 850-62 (1976); Potash, *Mandatory Inclusion of Racial Minorities on Jury Panels*, 3 BLACK L.J. 80, 93 (1973).

454. LaRue, *supra* note 453; Potash, *supra* note 453; see also D. BELL, RACE, RACISM AND AMERICAN LAW 273-74 (1980) (posing the split jury as a hypothetical for discussion).

455. Even here questions concerning classification may arise; they are best answered by referring to social definitions rather than fractions of ancestry.

strong as stereotypes of blacks.<sup>456</sup> Moreover, these stereotypes include some traits relevant to propensity to commit crime, and thus might be expected to affect guilt attribution.<sup>457</sup> "White" defendants should be granted a reciprocal right to some "white" jurors because the mock jury studies show that black jurors treat white defendants much the same way that white jurors treat black defendants. This leaves defendants of Asian ancestry. Here the question is a close one. Prejudice against Asian Americans appears to be much less intense and widespread than prejudice against other minority racial groups<sup>458</sup> and, even among the prejudiced, stereotypes of Asian Americans less commonly include propensity to commit crime.<sup>459</sup> On the other hand, a rule that accords the same rights to all racial groups is likely to seem fairer to the layperson, and therefore might generate fewer undesirable side effects. This consideration, coupled with the fact that in a few areas stereotypes of Asian American criminality may be made common, seems to tip the scale toward extending the right to defendants of Asian ancestry.<sup>460</sup>

I would not extend this right to individual white ethnic groups. The cost of doing so would be exorbitant, and the benefits are not apparent. Ethnicity, unlike race, is most often not apparent to jurors, and thus usually could not be the basis for distortion of judgment. More significantly, the empirical evidence provides no support for the claim that ethnicity alters the attribution of guilt.<sup>461</sup> It would be incorrect, however, to assume that because all "whites" should be lumped together, all "nonwhites" should also be treated as interchangeable. The phrase "nonwhite" in itself suggests racism; is the only distinction worth making whether one may be considered white? Moreover, such a bifurcation of the population does not accord with

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456. See, e.g., H. BLALOCK, *supra* note 155, at 21; Lipton, *supra* note 15; Smith & Dempsey, *supra* note 15, at 593, 594; J. Solernou, *supra* note 15, at 58, 72; see also note 16 *supra*.

457. See, e.g., H. BLALOCK, *supra* note 155, at 21; Lipton, *supra* note 15; J. Solernou, *supra* note 15; see also *United States v. Bear Runner*, 502 F.2d 908, 912 (8th Cir. 1974); W. DOUGLAS, *WE THE JUDGES* 399 (1956) ("Experience shows that liquor has a devastating effect on the North American Indian and Eskimo.").

458. H. BLALOCK, *supra* note 155, at 21; Smith & Dempsey, *supra* note 15, at 593.

459. H. BLALOCK, *supra* note 155, at 21.

460. In some cities, such as San Francisco, "Chinatown" gangs are widely feared, and may be the source of stereotypes about Asian American criminality. In more remote communities, any racially different person may be deemed more likely to commit a crime.

461. One might hypothesize that mere ethnicity would alter the attribution of guilt in a community where two white ethnic groups were engaged in intense competition. But to produce such competition, it is likely that the number of persons in each group would be quite large and this would make the elimination of all sympathetic or neutral jurors from the jury a very rare event. At least at this time, the risk of ethnic bias infecting guilt determination seems both speculative and small.



the relevant empirical data, which shows that minority group members replicate the majority's view of all racial minorities except their own.<sup>462</sup> Thus, granting a black defendant the right to some Hispanics on his jury would probably not diminish the likelihood of biased guilt adjudication.

The next question is the number of racially similar jurors to which a defendant should be entitled. Perhaps the obvious candidate is the historically split jury, which would entitle the defendant to six jurors of twelve, or half the total number of jurors in jurisdictions using smaller juries.<sup>463</sup> The disadvantage to the split jury is that six jurors of the defendant's race might be difficult to obtain in some areas. Moreover, a split jury requirement would provide an incentive for the state to elect the use of smaller juries, a change generally deemed undesirable.<sup>464</sup> The extreme response to practical difficulties is to limit the defendant's right to one racially similar juror. Unfortunately, this alternative would probably render the right meaningless. *Twelve Angry Men*<sup>465</sup> to the contrary, jury dynamics research shows that a single dissenting juror virtually never succeeds in hanging a jury, let alone reversing its predisposition.<sup>466</sup> Both laboratory and field studies show that without a minority of at least three jurors, group pressure is simply too overwhelming: one or two dissenting jurors eventually and inevitably accede to the majority's view.<sup>467</sup>

These findings suggest that a reasonable compromise between ex-

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462. H. BLALOCK, *supra* note 155, at 96; G. SIMPSON & J. YINGER, *RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 195-98* (1972); see also J. LEVIN & W. LEVIN, *supra* note 174, at 74-75 (studies show an unwillingness among Americans of diverse ethnic backgrounds to have close social relations with blacks, Japanese, Chinese, Hindus, and Turks, and a widespread preference for individuals of European descent).

463. The Supreme Court has approved juries as small as six. *Williams v. Florida*, 399 U.S. 78 (1970). *But see* *Ballew v. Georgia*, 435 U.S. 223 (1978) (five-member jury unconstitutional).

464. See, e.g., M. SAKS, *JURY VERDICTS 107* (1977); Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CALIF. L. REV. 1004 (1980); Saks, *Ignorance of Science Is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18; Zeisel, *Twelve Is Just*, TRIAL, Nov.-Dec. 1974, at 13; Zeisel, *The Waning of the American Jury*, 58 A.B.A. J. 367 (1972); see also *Ballew v. Georgia*, 435 U.S. 223, 231-39 (1978) (reviewing articles and studies critical of the six-person jury and refusing to uphold a five-person jury). *But see, e.g.*, Thompson, *Six Will Do!*, TRIAL, Nov.-Dec. 1974, at 12 (arguing that smaller juries expedite trial process and thereby fulfill guarantee of the right to a speedy trial).

465. *Twelve Angry Men* is a classic movie about jury deliberations. Eleven jurors initially vote for conviction, but the lone dissenter, played by Henry Fonda, convinces them all to reach a verdict of acquittal.

466. See H. KALVEN & H. ZEISEL, *supra* note 27, at 463; M. SAKS, *supra* note 464, at 16-18 (reviewing several studies); Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 748 (1959) (not a single jury hung with a minority of less than three on the initial vote); Simon & Marshall, *The Jury System*, in *THE RIGHTS OF THE ACCUSED* 211, 227 (S. Nagel ed. 1972); see also Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *GROUP DYNAMICS* 189, 190-93 (D. Cartwright ed. 1960).

467. M. SAKS, *supra* note 464, at 16-18; Broeder, *supra* note 466, at 748; Simon & Marshall,

pediency and effectiveness is to assure the defendant three racially similar jurors. It is true that were this proposal to operate as planned, hung juries (rather than verdicts of acquittal) would result in those cases where an all-white jury would have acquitted a white defendant. To render acquittal the predicted result, however, would require *ten* racially similar jurors. The likelihood that practical obstacles would then be deemed insurmountable makes it preferable to focus on preventing wrongful convictions. Furthermore, it seems likely that prosecutors would often choose not to retry the defendant in cases where subsequent interviews with jurors revealed racial polarization. Of course, one would expect that in *most* cases involving minority race defendants the strength or weakness of the evidence will result in a unanimous verdict just as it does in most cases involving white defendants; it is only in marginal evidence cases that we would expect to find some different verdicts than would be obtained under the current system.

The right to racially similar jurors would belong to the defendant and not to the prosecution or the public. The defendant could waive the right if he wished, but his decision to do so would have to meet the traditional standard of "an intentional relinquishment or abandonment of a known right or privilege."<sup>468</sup>

It seems prudent to leave open the door for experimentation with alternative remedies. The *Miranda* Court's reasoning on this point, too, is apposite:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.<sup>469</sup>

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*supra* note 466, at 227 (hung juries extremely rare unless initial minority was at least four jurors); see also H. KALVEN & H. ZEISEL, *supra* note 27, at 463.

468. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

469. 384 U.S. 436, 467 (1966). See also *United States v. Leon*, 104 S. Ct. 3405, 3413-14 (1984) ("The Court has . . . not seriously questioned, 'in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence . . . where a Fourth Amendment

A state might develop sophisticated voir dire techniques or other effective devices for screening out unconsciously biased jurors; a state might develop a comprehensive and demonstrably effective set of instructions; or a state might prove that its educational system had eliminated the relationship between race and guilt attribution among its citizens. Any of these developments would be preferable to the race conscious, inconvenient measures here proposed, but until the Court is shown "other procedures which are at least as effective," it should require the safeguards described above.

These requirements should not invalidate convictions obtained before their imposition, for two reasons. First, the proposed rules fall into the category of a "clear break with the past," and under the Court's current retroactivity doctrine, the impact of such a rule should be limited to subsequent cases.<sup>470</sup> Second, whether or not one agrees with this general view of retroactivity, it is probably a necessary compromise where truly prophylactic requirements are involved;<sup>471</sup> retroactivity of prophylactic requirements would impose enormous law enforcement and finality costs, most of which could not be justified as redressing identifiable constitutional violations.

### C. Meeting Theoretical and Practical Objections

The biggest obstacle to the acknowledgment of a right to racially similar jurors is inertia. That obstacle can be surmounted only by conviction, persistence, and time. Another kind of obstacle, however, consists of people interested in the problem of racial bias, but disturbed by the proposed remedy for specific reasons. Since these people can become allies, I will offer some tentative responses to the most likely objections.

#### 1. Equal Protection Concerns

Although the proposed right to racially similar jurors is intended to prevent equal protection violations, concern that the remedy may also violate the fourteenth amendment is foreseeable. An analogous

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violation has been substantial and deliberate. . . ." (emphasis added) (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)).

470. *United States v. Johnson*, 457 U.S. 537, 549 (1982).

471. See *Michigan v. Tucker*, 417 U.S. 433 (1974) ("prophylactic standards" of *Miranda* must be balanced against law enforcement costs where violation of standards occurred before their promulgation). I do not mean to indicate support of the *Johnson* standard in cases not involving prophylactic measures. For example, I think that if and when the Court reverses *Swain v. Alabama*, 380 U.S. 202 (1965), that decision should be retroactive, for where the prosecutor has used peremptory challenges in a racially selective manner, constitutional standards have been demonstrably violated.

objection is frequently raised regarding affirmative action programs and certainly has not been adequately resolved.<sup>472</sup> I would contend, however, that the two aspects of affirmative action that have caused so much difficulty have no counterparts in the mandatory inclusion of racially similar jurors.

The first difficulty presented by affirmative action is the question of the standard to be applied. Race conscious remedies do not always violate equal protection; the Court has upheld such remedies in the busing cases<sup>473</sup> and the redistricting cases.<sup>474</sup> With these two remedies, the strict scrutiny standard is deemed met and the controversy resolved.<sup>475</sup> Most members of the Court, however, believe that affirmative action measures generally fail strict scrutiny; shifting majorities are created as the three members who believe that affirmative action sometimes meets this most stringent standard<sup>476</sup> alternately ally themselves with those who believe it never can and that all such measures must be struck down<sup>477</sup> and with those who contend that a more lenient standard, heightened scrutiny, should be applied to affirmative action programs and can be quite often satisfied.<sup>478</sup>

This difficulty is avoided with a requirement of racially similar jurors because the strict scrutiny standard can be met. Avoiding the conviction of the innocent<sup>479</sup> is a compelling governmental interest.<sup>480</sup>

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472. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

473. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

474. See, e.g., *United Jewish Orgs. v. Carey*, 430 U.S. 144, 165 (1977).

475. For other examples of race-conscious remedies, see *James v. United States*, 416 F.2d 467, 472 (5th Cir. 1969) (purposeful inclusion of blacks in grand jury permissible to extinguish effects of earlier racially discriminatory practices), *cert. denied*, 397 U.S. 907 (1970); *Brooks v. Beto*, 366 F.2d 1, 24 (5th Cir. 1966) (same), *cert. denied*, 386 U.S. 975 (1967); *Long Warrior v. Peacock*, Civil No. 69-122 (W.D.S.D. filed Aug. 14, 1969) (ordering jury commissioners to take necessary steps, including identification of potential jurors' races, to insure fair representation of Native Americans on juries).

476. In *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980), Burger, C.J., writing for the Court, found that the affirmative action program survived even the strict scrutiny test articulated in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Powell, J., applied the strict scrutiny test in his concurring opinion. 448 U.S. at 498. Stevens, J., agreed that affirmative action programs might pass strict scrutiny, but applied a more stringent, "unquestionably legitimate" test, which the *Fullilove* program failed. 448 U.S. at 535.

477. Stewart and Rehnquist, JJ., dissenting in *Fullilove*, expressed their view that governmental racial classifications are never permitted by the Constitution. 448 U.S. at 522-32.

478. Brennan, White, Marshall, and Blackmun, JJ., believe that racial classifications may be justified by showing "an important and articulated purpose for its use." *Bakke*, 438 U.S. at 361. Marshall, Brennan, and Blackmun, JJ., also applied this "heightened scrutiny" test to the affirmative action program at issue in *Fullilove*. 448 U.S. at 519.

479. For a consideration of what should be encompassed by the term "innocent," see text following note 18 *supra*.

480. *But see Uzzell v. Friday*, 592 F. Supp. 1502 (M.D.N.C. 1984) (university practices requiring at least two minority race students to be appointed or elected to student legislature and

Remedying past economic discrimination (and prophylactically preventing future discrimination through the use of quotas?) is also a good candidate for a compelling governmental interest. But to call any affirmative action measure "necessary" or "narrowly tailored" stretches these phrases sorely and to many, stretches them beyond recognition, thus threatening the vitality of the strict scrutiny standard. Under affirmative action programs some minorities who have not been the victims of discrimination will receive benefits, and at a cost to some nonminorities who have not benefited from discrimination.<sup>481</sup> Moreover, the distribution of the compensation cannot be tailored to individual grievances; most victims of discrimination will not benefit at all from affirmative action programs and a few will benefit enormously. In contrast, granting defendants racially similar jurors is both necessary and narrowly tailored. The right is not bought at the expense of other possibly blameless individuals;<sup>482</sup> neither white defendants nor white jurors "lose" anything. The "amount" given to each defendant is the same, and is tailored to prevent wrongful conviction; no one gets "more" than he deserves. And, at least at the present time, there are no racially neutral measures available to accomplish the same end.<sup>483</sup>

The second difficulty with affirmative action programs is not, strictly speaking, an equal protection concern, but is closely connected to the values protected by the equal protection clause. It is often ob-

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giving student defendant in disciplinary proceedings the right to require a majority of the judges on his panel of the student honor court to be of his race denied white students right to equal protection in the absence of a showing that these practices were necessary to achieve a compelling state interest).

481. *But see* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2588 (1984) (limiting court-ordered preferential treatment to identified victims of discrimination); EEOC v. Local 638, 532 F.2d 821, 828 (2d Cir. 1976) (allowing preferential treatment only when its effect is not concentrated upon a relatively small ascertainable group of nonminority persons).

482. *See* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFF. 3, 8 (1974) (distinguishing busing cases from affirmative action cases on this basis).

It is possible that this system might impose additional burdens on black jurors, although that seems unlikely. What is more likely is that some black jurors who would have sat out their jury service waiting to be selected for a jury will instead serve as jurors and that some black jurors who would have sat on civil juries will instead serve on criminal juries. Should acknowledgment of this right occasionally serve to increase the burden of jury service upon black jurors, the validity of their complaints can be assessed. Perhaps overburdened black jurors should be viewed as are the black children selected for busing: innocent and unfortunate but necessary. Alternatively, some special compensation might be offered them.

483. Recognizing a right to a bench trial (which defendants do not now possess, *see* Singer v. United States, 380 U.S. 24 (1965)) would not accomplish the same goal. Judges too may factor race into their determinations of guilt, not consciously, but unconsciously. Even if we were sure that judges would not let race affect their verdicts, a bench trial is not a substitute for a racially neutral jury because the rate of acquittals in jury trials is substantially higher. H. KALVEN & H. ZEISEL, *supra* note 27, at 59. With bench trials as their only alternative, black defendants would still be disadvantaged due to their race.

jected that affirmative action programs do not promote, but actually retard, the goal of racial equality. Opponents argue that despite their laudable purposes, the programs inadvertently increase the level of hostility directed toward minority group members<sup>484</sup> and reinforce stereotypes of minorities as inferior.<sup>485</sup> Whether these empirical assumptions concerning the majority's reaction to the enactment of such programs are correct is open to question,<sup>486</sup> and whether they override other policy concerns is hotly debated.<sup>487</sup> In any event, these possible drawbacks clearly do not afflict a proposal to include racially similar jurors on criminal juries. Because the allocation of scarce goods is not at issue (as it is in affirmative action programs), one would not expect the acknowledgment of this right to increase hostility toward minorities; because minorities could not be seen as being "handed" special benefits instead of "earning" them, no implications concerning their abilities would be rational.

That this reform would draw the population's attention to the persistence of racial prejudice seems to me a desirable side effect, rather than one to be avoided. The goal of racial equality is unlikely to be reached absent awareness that it does not yet exist.

## 2. *Resistance to a Judicially Created Remedy*

Some critics might concede the desirability of the proposed inclusion of racially similar jurors, but object to any judicial role in bringing it about. It might be argued that my concession that the details are somewhat arbitrary is a concession that the job of fashioning a remedy is more properly left to legislators; compromises are their forte.

This position misses the fact that absent judicial action there will be no relief from ongoing constitutional violations. Legislative action *would* be less problematic, but it is extremely unlikely. The minority-race criminal defendant — unlike the minority-race entrepreneur, laborer, or student — has virtually no lobbyists. He can and will be forgotten by all but the courts, for very few will wish to be counted in

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484. See, e.g., Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 18 (1979); Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus*, 1979 SUP. CT. REV. 1, 12-13.

485. See, e.g., Bell, *supra* note 484, at 8, 18; Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 59 (1979); Kitch, *supra* note 484, at 13; see also Rice, *The Legality of De Facto Segregation*, 10 CATH. LAW 309, 320 (1964) (any consideration of racial balance in schools implies inferiority of black children).

486. See Jacobson, *The Bakke Decision: White Reactions to the U.S. Supreme Court's Test of Affirmative Action Programs*, 27 J. CONFLICT RESOLUTION 687 (1983).

487. Compare Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1043 (1979), with Kitch, *supra* note 484; compare Gegan, *De Jure Integration in Education*, 11 CATH. LAW 4, 14 (1965), with Rice, *supra* note 485, at 320.

his camp. Furthermore, although prophylactic remedies in general are better left to the legislature, the Court has often been forced to devise its own remedies in the criminal procedure sphere.<sup>488</sup> The alternative is the acceptance of repeated violation of the Constitution — a result no American court should be willing to tolerate.<sup>489</sup>

Furthermore, the proposed remedy does not foreclose legislative initiative.<sup>490</sup> It may even spur legislatures to consider alternatives. Until they do, a judicially created remedy is required to protect minority-race defendants from unconstitutional convictions.

### 3. *Reluctance to Rely upon Social Science Data*

The feeling that courts should not rely upon social science data may stem from several different sources.<sup>491</sup> A specific objection to relying upon social science data in a particular case may arise from lack of confidence in the proffered data. Social science reasoning was prominent in the Supreme Court's *Brown v. Board of Education*<sup>492</sup> opinion and this gave critics the opportunity to point out the sparsity of data supporting that case's reasoning.<sup>493</sup> Questions about the reliability of any kind of evidence are always legitimate, but in this case the empirical evidence, as discussed in Part I, is consistent and convincing.

A second source of reluctance to rely upon social science data inheres in the fear that litigants have misrepresented the implications of that data. Persons not trained in social science methodology may feel caught in a double bind: if they draw their own conclusions, they risk embarrassing errors, but if they rely on those with expertise for conclusions, they risk the incorporation of the experts' biases. Such fears are rational in many circumstances. For example, the Supreme

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488. See note 445 *supra* and accompanying text.

489. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also *United States v. Leon*, 104 S. Ct. 3405, 3430 (1984) (Brennan, J., dissenting) (exclusionary rule necessary because judiciary must avoid participation in constitutional violations).

490. Cf. *Roe v. Wade*, 410 U.S. 113 (1973), often criticized as usurping the legislature's role in balancing the rights of pregnant women and fetuses. See, e.g., Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84-87; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

491. See *McCleskey v. Kemp*, 753 F.2d 877, 887-90 (11th Cir. 1985) (en banc) (discussing the limitations inherent in social science research evidence), *petition for cert. filed*, No. 84-6811 (U.S. May 28, 1985).

492. 347 U.S. 483 (1954).

493. Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-58 (1955); Gregor, *The Law, Social Science, and School Segregation: An Assessment*, 14 W. RES. L. REV. 621 (1963); van den Haag, *Social Science Testimony in the Desegregation Cases — A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960); see also Goodman, *DeFacto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972) (reviewing more recent data).

Court's conclusion that reducing jury size to less than twelve does not affect the likelihood of acquittal<sup>494</sup> has been harshly criticized as an entirely illogical inference from the jury size experiments cited by the Court.<sup>495</sup> But this second source of reluctance to rely upon social science data also is inappropriate in considering whether to acknowledge a right to racially similar jurors. Here only the first step in reasoning to this remedy depends upon social science principles; once the external validity of the mock jury studies is established, the remainder of the argument for racially similar jurors depends largely upon legal principles. Because the argument concerning external validity is neither technical nor complicated,<sup>496</sup> the risk of a naive blunder is small.

The last reason lawyers often regard social science data with suspicion is that such data are subject to change as social conditions change. This fact may be disconcerting, for holdings based upon that data must then be revised, but it need not threaten the legitimacy of earlier decisions; doctrine is not properly viewed as unstable simply because its application to today's facts produces different outcomes than its application to yesterday's facts. Moreover, given the historical stability of racial prejudice, drastic changes in the social science data relevant to the right to racially similar jurors are quite unlikely. Certainly the cost of periodic reviews of holdings based upon social science data is preferable to immutable holdings premised on intuitive and erroneous assumptions about the nature of social reality.

#### 4. *Implementation Problems*

Finally, there will be those whose protest is based on practical considerations. How could such a right be implemented? Undoubtedly, assuring the inclusion of racially similar jurors would be somewhat inconvenient. In most cases, it would be no more than that, for crimes by minority-race defendants most often will occur where significant numbers of the minority group reside.<sup>497</sup> That surmounting ordinary implementation difficulties is unlikely to be an enormous burden is

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494. *Williams v. Florida*, 399 U.S. 78 (1970).

495. Kaye, *supra* note 464; Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); Zeisel & Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281 (1974); *see also* Saks, *supra* note 464; Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971).

496. *See* Part I. B. 2. *supra*.

497. *See* Note, *The Case for Black Juries*, 79 YALE L.J. 531, 548 (1970) (arguing that this fact should be used to advantage by drawing vicinage lines around racial communities).



suggested by the English and African experiences.<sup>498</sup> Occasionally a substantial problem of obtaining enough jurors of the defendant's racial background will arise. When it does, there are several alternatives. The prosecution might seek a waiver from the defendant, perhaps by offering the defendant additional peremptory challenges or extraordinary voir dire privileges, or perhaps by offering something uniquely suited to the particular case. Alternatively, states might seek to develop safeguards of other sorts that would be routinely implemented in such cases and hope to satisfy the courts that these measures were adequate protection against racially biased verdicts; one might expect that courts would view such substitutes more generously where provision of racially similar jurors had been attempted but proved impossible.

Substantial inconvenience has been suffered to prevent minorities from serving on juries, at one time by deviously excluding them from the jury rolls, and currently by exercise of the peremptory challenge. If the goal of racially unbiased juries is truly valued, substantially more inconvenience should be countenanced to assure its achievement than was expended to thwart its accomplishment.<sup>499</sup> Furthermore, the inclusion of racially similar jurors has desirable side effects that in part offset any inconvenience it creates. First, it obviates the need to respond to an increasing sense of dissatisfaction with the racially selective use of peremptory challenges. Although the California and Massachusetts courts have demonstrated that direct regulation of the peremptory challenge is possible, such regulation is more intrusive, more difficult, and more time-consuming to enforce than is a right to the inclusion of racially similar jurors. Second, the inclusion of racially similar jurors increases the likelihood of accurate assessment of the evidence. Racially similar jurors are more likely to interpret the demeanor of the defendant correctly than are racially different jurors<sup>500</sup> and may be able to supply relevant insights about neighborhoods and subcultural patterns that are unavailable to racially different jurors.<sup>501</sup> Finally, the inclusion of racially similar jurors is likely to increase perceptions of fairness, both by the defendant and by

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498. See notes 451-54 *supra* and accompanying text.

499. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (requiring consideration of substantially inconvenient remedies to correct past constitutional violations).

500. See LaFrance & Mayo, *Racial Differences in Gaze Behavior During Conversations: Two Systematic Observational Studies*, 33 J. PERSONALITY & SOC. PSYCHOLOGY 547 (1976); Turner, Beidel, Hersen & Bellack, *Effects of Race on Rating of Social Skill*, 52 J. CONSULTING & CLINICAL PSYCHOLOGY 474 (1984).

501. J. VAN DYKE, *supra* note 17, at 33; see also *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (opinion of Marshall, J., joined by Douglas and Stewart, J.J.), discussed in text at *supra* notes 214-17; Broeder, *supra* note 23, at 24, 30; Davis & Lyles, *Black Jurors*, 30 GUILD PRAC. 111,

courtroom observers. Confidence in the fairness of the criminal justice system is valuable in itself,<sup>502</sup> and it may also pay dividends in citizen cooperation with law enforcement.<sup>503</sup>

### CONCLUSION

The reader may suspect that the method of looking to other disciplines to gain understanding of how prejudice operates has applications beyond the realm of criminal trials. Does this approach presage a new form of argument for mandatory minority participation in other spheres? Should "*Black Aptitude and the White Teacher*," "*Black Merit and the White Manager*," or "*Black Sanity and the White Psychiatrist*" be anticipated?

Although the empirical evidence on the changing nature of prejudice provides an additional policy rationale for supporting affirmative action programs, I do not think that analogous constitutional arguments for including minorities will be compelling with respect to other decisionmaking positions. This is in part because the seriousness of the consequence at stake here argues more strongly for prophylactic intervention by the courts than do the prospects of lost job or scholarship opportunities, and in part because a remedy in this area does not have the same tailoring problems as does one in areas where scarce benefits must be assigned. Moreover, the empirical evidence demonstrating that bias alters judgment other than guilt attribution has not yet been systematically compiled. Perhaps it never will be. The content of stereotypes about racial minorities may make the effect of race on guilt attribution much stronger than the effect of race on judgments of competence or intelligence. Or, unconscious stereotypes may be reinforced by the setting of a criminal trial; jurors may have had latent biases concerning propensity to commit crime that are activated by the fact of a criminal accusation. Even if race has an equally strong impact on other decisions, the interest of social scientists in those other decisions may never be intense enough to generate convincing evidence of that impact.

In any event, the issues of whether prophylactic measures to prevent discrimination in other contexts are constitutionally compelled,

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113, 118, 119 (1973); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 *HASTINGS L.J.* 1417, 1418-1419 (1969).

502. Cf. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (community participation in the administration of criminal law, through jury service, critical to public confidence in the criminal justice system).

503. Certainly confidence in the *police* is widely thought to increase citizen cooperation. See, e.g., C. SILBERMAN, *supra* note 423, at 204.

and what such measures might be, can be left for another day. Action on the problem of racially biased guilt adjudication, however, need not and must not be postponed. It might be argued that more conservative measures ought to be tried first: *Swain* and *Ristaino* should be overruled and then the situation reassessed. But for the reasons discussed in the body of this Article, such modest reforms cannot eliminate the influence of racial bias on jury verdicts. Certainly they are more desirable than no action, but to propose them as adequate protection for the minority-race defendant is disingenuous. Further delay before the adoption of a comprehensive solution buys only more wrongful convictions. The dissent in *People v. Payne*,<sup>504</sup> an Illinois case rejecting the *Wheeler/Soares* doctrine, recounts a revealing story:

In *Cobb*, another capital case, the defendant's first two trials ended in hung juries. In jury selection at those trials the prosecution cumulatively exercised 28 out of 41 peremptory challenges against prospective black jurors and succeeded in limiting participation by black persons on each jury to one. At the third trial the prosecution used 8 out of 11 peremptory challenges against black people and finally succeeded in obtaining a conviction by an all-white jury.<sup>505</sup>

The dissenting judge is undoubtedly correct in his conclusion that this cannot be justice. Nevertheless, one wonders why he deems the actions of the prosecutor the central fact in this sequence of events. Suppose that black jurors participated in the defendant's first two trials, both of which ended in hung juries, but at the third trial, *by chance*, an all-white jury were selected and a capital conviction obtained. The process might be less wicked, but the result would not be more just.

Focus on the motives of the perpetrators of discrimination is misplaced. Just as the equal protection clause does not extend to a promise of equal results, it is not limited to an assurance of positive affect. The fourteenth amendment aims to eliminate unfair treatment. That there is less hostility toward minorities and less deliberate discrimination is a good sign, but it is not the end of the road. The road to equality of treatment is long, and the fact that we no longer stand at the beginning of that road is hardly a reason to call a halt.

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504. 99 Ill. 2d 135, 457 N.E.2d 1202 (1983).

505. 99 Ill. 2d at 153, 457 N.E.2d at 1211 (Simon, J., dissenting).