ARTICLES

FAIR AND IMPARTIAL JURY—CATCH AS CATCH CAN

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I. Introduction

The right to a jury trial is fundamental to the American scheme of justice and part of our constitutionally protected concept of due process.¹ The sixth amendment to the United States Constitution specifically provides the criminally accused the right to a speedy and public trial and the right to be judged by a fair and impartial jury.² The concern that jurors be impartial in fact as well as in appearance predates the American Constitution and was consistently an issue in the common law development of the jury trial. The provisions for jury trials in the Constitution incorporate many of the common-law jury traditions.

For example, the United States Supreme Court, in Dimick v. Schiedt,³ held that the seventh amendment incorporated the jury trial rights existing in England in 1791, the effective date of the Bill of Rights. The Court traditionally construed the sixth amendment to be consistent with the view that the jury was created to protect the accused from the perils of arbitrary judicial authority.⁴ For example,

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4. See Duncan v. Louisiana, 391 U.S. 145 (1968). The Supreme Court elaborated on the antiestablishment function of the American jury trial as contemplated by the constitutional framers:

The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary
courts excluded jurors for cause if the jurors were biased or predisposed for or against the parties or issues. Also excluded were jurors who had previously expressed biased views, or had a particular relationship to the parties or issues indicating a "presumption of bias." The constitutional concept of impartiality also precluded state-sponsored, systematic exclusion of distinctive groups if the resulting jury pools were not representative of the community or did not represent a "fair cross-section."

More than a concern for excluding factually biased jurors, the constitutional requirement that jurors be fair and unbiased represented a considered policy of protecting against even the appearance of bias, to maintain public acceptance and participant acceptance of the criminal justice process. Fair and unbiased juries also implement the policy of allocating decisionmaking authority to all distinct groups in American society.

The jury trial evolved from a rich common-law tradition steeped in principles of fairness and impartiality. Until recently, the Supreme Court protected traditional common-law rights to trial by jury. In the past decade, however, the Court began sharply altering the shape and function of the American jury, emphasizing utilitarian values of crime prevention and administrative convenience over the anti-establishment values of citizen protection. Initially, the Court permitted experimentation and deviation from common-law norms governing jury size and jury unanimity. Subsequently, in a few isolated decisions, the Court adopted an ad hoc approach to resolving jury partiality issues, treating the issues as factual issues rather than issues implicating broader principles of constitutional law. Since appellate courts usually defer to the trial court on factual issues, this approach has radically altered the role of the appellate courts in overseeing a uniform and consistent applica-

powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

391 U.S. at 156. See also Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (holding that the systematic exclusion of women from a jury panel violates the sixth amendment).


6. Id.


8. See generally Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436 (1980).


tion of the Constitution. Predictably, the ad hoc approach to issues of jury partiality has sown confusion and spawned additional litigation.

In 1986, the Supreme Court had an opportunity to resolve some of the confusion and to develop a cohesive view of fair jury rights. Within a two week period, the Court announced three significant opinions addressing the constitutionality of state jury trial practices. Unfortunately, the decisions perpetuated the confusion, continued an ad hoc type of approach to these problems, and invited even more litigation.

In *Batson v. Kentucky*, the most publicized case, the Court held that the Equal Protection Clause of the Constitution prohibited a prosecutor from exercising peremptory challenges to prospective jurors solely on account of race, or on the assumption that black jurors as a group cannot serve as impartial jurors. The Court’s opinion rested on equal protection grounds, even though the defendant chose not to argue equal protection, but premised his claim on the sixth amendment. Although, in *Batson*, the Court admitted it was overruling *Swain v. Alabama*, the Court incredibly maintained that it was simply applying principles espoused in *Swain* that have been “consistently and repeatedly” applied, and that the decision was only a modification of the procedural mechanism for establishing an equal protection violation. The Court did not fully develop the rationale of its decision, inviting additional litigation to determine the extent of this constitutional right. Foremost among the unresolved issues is whether, and under what circumstances, the use of peremptory challenges is consistent with the constitutional right to be judged by a fair and impartial jury.

In *Turner v. Murray*, the Court held that a defendant accused of an interracial, capital crime is entitled to have jurors questioned at *voir dire* on the issue of racial bias. Although the Court noted that there is some risk of racial prejudice influencing a jury in all crimes involving interracial violence, and that this risk can be easily minimized, the inquiry is required by the Constitution in capital cases only. The decision illogically concluded that the refusal to permit the inquiry violated the defendant’s right to a fair and impartial jury on the issue of the sanction, but not on the issue of guilt. The decision perpetuated the highly technical distinction between capital cases and noncapital cases, in which there is no constitutional right to inquire about a prospective juror’s racial prejudice, unless special circumstances call for such an inquiry. The *Turner* opinion does not reference or reconcile the 1985 opinion of *Wainwright v. Witt*, in which the Court stated that the quest for determining whether a juror is fair and impartial is the same

in capital and noncapital cases. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality."\(^{16}\)

Finally, in *Lockhart v. McCree,*\(^{17}\) the Court held that excluding prospective jurors who were opposed to the death penalty (a practice permitted in *Wainwright v. Witt* and referred to as "death qualification" of the jury) does not violate the sixth amendment, even assuming that jurors who believe in the death penalty are more conviction-prone than non-death-qualified jurors. The practice of excluding jurors who are opposed to the death penalty does not violate the fair cross-section requirement, because this group, defined only in terms of their shared attitude, is not a "distinctive group" (such as blacks, women, and Mexican-Americans). Nor is the practice of death-qualification inconsistent with the fair and impartial juror requirement, which requires only that the chosen jurors conscientiously apply the law and find the facts.

The three decisions do not present an integrated view of constitutional limitations on jury selection and function of the jury. Nor do the decisions resolve the confusion of prior holdings on the subject. Although the holdings in *Batson, Turner,* and *Lockhart* are narrowly framed, they invite more litigation to flesh out the appropriate role of the Constitution, and the role of federal and state courts in assuring defendants a trial by a fair and impartial jury. Any satisfactory resolution of the issues must include a comprehensive analysis of common-law traditions and the constitutional right to a fair and impartial jury. The Court must legitimately reconcile its concern for crime prevention with the strong common law and constitutional concerns that the jury stand as a community check on government, and that the operation of the jury system be above reproach, avoiding even the appearance of impropriety.

**II. THE PEREMPTORY CHALLENGE**

The right of the accused\(^{18}\) to challenge individual jurors peremptorily has long been recognized as an important feature of the common-law criminal trial.\(^{19}\) Originally, the accused was permitted thirty-five challenges,\(^{20}\) but the number of challenges was later reduced by stat-

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16. *Id.* at 852.
18. *See* 4 W. BLACKSTONE, COMMENTARIES *353. The King’s rights of peremptory challenge were limited in England by statute. The Crown, however, did not have to show cause for its challenged jurors until the entire panel was called. If a full jury was obtained, excluding those jurors challenged by the Crown, this jury was sworn in, and the Crown was never put to the task of showing cause. *Id.*
19. *Id.*
20. *Id.* at *354. See E. COKE, THE FIRST PART OF THE INSTITUTES OF THE
ute.\textsuperscript{31} Blackstone noted two justifications for peremptory challenges:

1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning [of] his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside.\textsuperscript{38}

The United States Supreme Court, which recognized the concerns expressed by Blackstone,\textsuperscript{38} has focused on the goal of an impartial jury as the primary justification for the peremptory challenge. According to the Court, “[e]xperience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge.”\textsuperscript{34} The availability of peremptory challenges permits vigorous \textit{voir dire} of prospective jurors to ascertain grounds for cause without fear of antagonizing a future decisionmaker.\textsuperscript{36} The peremptory challenge also permits the removal of jurors who may be biased in fact, but the basis for the bias is not demonstrated on \textit{voir dire}.\textsuperscript{36}

Although the Supreme Court has recognized that the peremptory challenge is “a necessary part of trial by jury,”\textsuperscript{37} “one of the most important of the rights secured to the accused,”\textsuperscript{38} and “essential to the fairness of trial by jury,”\textsuperscript{39} the Court has inexplicably maintained that

\textbf{Laws Of England: Or, A Commentary Upon Littleton, § 234, at 157 (1719).} Normally, 48 jurors appeared, thus at least 13 jurors could not be struck arbitrarily by the accused. \textit{See also} M. Bacon, A New Abridgment Of The Law 56 (H. Gwillim & C. Dodd 7th ed. 1832).

21. 4 W. Blackstone, \textit{supra} note 18, at *354. The statute did require thirty-five jurors in treason cases. M. Bacon, \textit{supra} note 20, at 570.

22. 4 W. Blackstone, \textit{supra} note 18 at *353.


24. Hayes v. Missouri, 120 U.S. 68, 70 (1887). \textit{See} Swain v. Alabama, 380 U.S. 202, 219 (1965) (“the function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise”).


26. \textit{id.}

27. \textit{id.} at 219.


the right of peremptory challenge is not secured by the Constitution.\textsuperscript{30} The Court relies on \textit{Stilson v. United States}\textsuperscript{31} to support this proposition. In \textit{Stilson}, the Court rejected the joint defendants' claim that the Constitution guaranteed each of them the right to ten peremptory challenges. The Court stated: "There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."\textsuperscript{32}

The Court's statement, made in reference to the \textit{number} of peremptory challenges, not the \textit{right} to peremptory challenges, stands for the established\textsuperscript{33} proposition that the state may limit the number of peremptory challenges, so long as an impartial jury is impanelled. The case\textsuperscript{34} does not directly hold that the state or Congress can totally eliminate the common-law right of peremptory challenges without violating the accused's constitutional rights. Nonetheless, in \textit{Batson}, the Court assumed that the peremptory challenge, although an important feature of the trial process, is not required by the Constitution.\textsuperscript{35} The concurring opinion of Justice Marshall\textsuperscript{36} and the dissent of Chief Justice Burger\textsuperscript{37} make it abundantly clear that the Court must eventually reconcile the peremptory challenge with the constitutional rights to a trial by a fair and impartial jury and equal protection under the laws.

III. Challenge For Cause

In a series of District of Columbia cases, the Supreme Court addressed the question of whether qualifications for jury service raise constitutional issues. In \textit{Crawford v. United States},\textsuperscript{38} the United States Supreme Court held that government employees\textsuperscript{39} were not qualified to

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\item 30. Rosales-Lopez v. United States, 451 U.S. 182, 188 n.6 (1981);
\item 32. 250 U.S. 583 (1919).
\item 33. \textit{Id.} at 586.
\item 34. \textit{See, e.g.,} Hayes v. Missouri, 120 U.S. 68 (1887) (state legislature has discretion to limit the number of peremptory challenges and the figure may vary depending on the community).
\item 35. Babcock argues the force of \textit{Stilson} is diminished because it was based on a "reading of history that has been subject to revision." Babcock, \textit{Voir Dire: Preserving Its Wonderful Power}, 27 STAN. L. REV. 545, 556 (1975). At one time, it was thought that the common law right to peremptory challenges existed only in capital felony cases. The Supreme Court in \textit{Swain} noted that peremptories were allowable in noncapital felonies as well. Swain v. United States, 380 U.S. 202, 212 n.9 (1965).
\item 36. 106 S. Ct. at 1724.
\item 37. \textit{Id.} at 1726 (Marshall, J., concurring).
\item 38. \textit{Id.} at 1731 (Burger, C. J., dissenting).
\item 39. 212 U.S. 183 (1909).
\item 39. The juror was not a salaried government employee but a druggist whose drug store also served as a subpostal station. \textit{Id.} at 192. Defendant was charged with
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sit on a jury in a criminal case. Although the Court did not base its decision on constitutional principles, it maintained that the issue was not a local issue but an "important question that might arise anywhere in the whole country." The Crawford Court based its ruling on the common law, which the Court concluded was not superseded by the Code of Laws for the District of Columbia. The Crawford case obviously made it difficult to obtain jurors in the District of Columbia, where many citizens are government employees. Congress responded by amending the Code of Laws to expressly permit salaried government employees to serve as jurors in criminal cases. The constitutionality of this statute was challenged in United States v. Wood.

Initially, the Wood Court disputed the notion that government employees were precluded from serving as jurors at common law. According to the Court, the practice of precluding government employees from serving as jurors in either England or the Colonies was not settled enough to be "embedded" in the sixth amendment.

In the alternative, the Court addressed the power of the legislature to alter common-law jury practices, an issue not raised in Crawford. Assuming for the sake of argument that the practice of excluding Crown servants from criminal juries had existed at common law, the Wood Court concluded that the legislature retained power to define who is qualified as a juror. The Court noted that although the jury holds a "firm place . . . in our history and jurisprudence," the Constitution preserved the substance but not the particular procedures or form of the jury trial.

The Court referred to previous cases that had allowed changes in common-law jury procedures, and to the many state statutes altering the common-law rule precluding relatives of the ninth degree from serving on a jury. According to the Court: "The ultimate question is not whether Congress has changed a common law rule but whether, in

conspiracy to defraud the United States, specifically the Post Office. Id. at 188.
40. Id. at 194.
41. Id. at 195-96. The Court relied on 3 W. Blackstone, Commentaries 363 (Cooley 4th ed.).
42. Section 215 of the Code of Laws for the District of Columbia set out minimum standards for juror competence, and section 217 provided that salaried government officers could be exempt from jury service. Id. at 193.
43. Ch. 605, 49 Stat. 682 (1935).
44. 299 U.S. 123 (1936).
45. Id. at 137. Nor did the Court find any basis for finding that the framers of the Constitution intended such a result. Id. at 138-39. The Court was assisted by a detailed research of common-law cases that was not provided to the Court in Crawford.
46. Id. at 142.
47. See, e.g., Patton v. United States, 281 U.S. 276 (1930) (parties could consent to trial by 11 jurors when one juror becomes incapacitated); Tynan v. United States, 297 F. 177 (9th Cir. 1924) (women qualified to serve as jurors).
reason, an absolute disqualification of governmental employees to serve as jurors in criminal cases is essential to the impartiality of the jury."

The Court carefully analyzed and rejected the premise that government employees are per se biased against the criminally accused and refused to impute bias.

The Court has reaffirmed its holding in Wood in two subsequent decisions. Thus, the Supreme Court has recognized that Congress has the power to establish qualifications for jury duty that differ from common-law requirements, but the Court will scrutinize the legislation to determine whether the statutory qualifications operate to violate the defendant's right to a trial by a fair and impartial jury.

Although the specific grounds of a challenge for cause may be a matter of local law, the right to challenge for cause appears to be protected by the Constitution. The common-law right of litigants to challenge individual jurors is well-settled. In fact, the expansion and growth of the law relating to juror challenges was responsible in part for the evolution of jurors from mere witnesses, chosen because of their community experience and knowledge of the facts, to the modern role of the juror as fact finder.

Two general categories of challenges existed at common law—challenges to the array and challenges to the polls. A challenge to the array questioned the propriety of the entire panel. The challenge could be a principal cause, which had to be grounded on manifest "partiality," or a challenge to the favor, which was left to the discretion of the triers. The challenge to the array could center on partiality of the jurors, of the sheriff, of the officer who arrayed the panel, or on some procedural error.

The litigants were also entitled to challenge individual jurors by a challenge to the polls. Coke grouped challenges to the polls into four

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49. Id. at 147-48.
52. 1 W. Holdsworth, supra note 51, at 332, 336-37; Moore, Voir Dire Examination of Jurors, 16 Geo. L. J. 438, 439 (1927).
54. See M. Bacon, supra note 20, at 552; E. Coke, supra note 20, at § 234.
55. Including partiality or consanguinity. E. Coke, supra note 20, at § 234.
56. W. Blackstone, supra note 53, at 796. For example, a challenge would stand at common law if a knight were not returned on a panel in a prosecution of a peer or if four persons from the gundrell (a subdivision of a county or shire) were not returned.
57. 3 W. Blackstone, supra note 53, at 793-94; E. Coke, supra note 20, at 157-58. See also 1 J. Chitty, supra note 53, at 540-50; Moore, supra note 52, at 441.
categories:

1) *Propter Honoris Respectum* (account of rank)—on the basis of rank, such as when a Lord of Parliament was empanelled.

2) *Propter Defectum* (account of incompetency)—on the basis of age, alien birth, insufficient estate, or sex.  

3) *Propter Affectum* (account of presumed or actual partiality)—as was the case with challenges to the array, *Propter Affectum* challenges to the polls could be asserted as challenges to the favor or principal challenges. To assert a *Propter Affectum* challenge as a principal challenge, the litigant had to show prima facie evidence of partiality, such as kinship within the ninth degree. Thus, if the juror had been an arbitrator for either side, had a pecuniary interest in the case, had been litigating with one of the parties, had taken money for his verdict, had formerly been a juror in the same case, or had been or was a party’s master, servant, counselor, steward, or attorney, or of the same society or corporation with a party, the litigant could assert a principal challenge against that juror. The principal challenge raised a question of law to be resolved by the judge and did not require a finding of actual bias. If circumstantial evidence of partiality was inconclusive, a challenge to the favor was appropriate to determine actual bias. A challenge to the favor would be tried as an unsworn factual matter to two triers.

4) *Propter Delictum* (on account of infamy)—for conviction of an infamous crime.

The procedural distinction between a principal challenge and a challenge to the favor has not been followed with regularity in the United States. The American practice is for the trial judge to resolve either type of challenge. Thus, courts frequently do not bother determining which challenge is being asserted at the trial level. Whether the trial judge is looking for actual bias, or implied bias, however, is still a live, critical issue. The extent to which the common-law distinctions are incorporated or preserved in the Constitution is also a vital and live issue.

Early Supreme Court decisions clearly indicated that the requirement of a fair and impartial jury precluded jurors presumptively bi-

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58. W. Blackstone, supra note 53, at 793.
59. Id. J. Chitty, supra, note 53, at 541-42; Moore, supra note 52, at 442.
60. Moore, supra note 52, at 441-42.
61. E. Coke, supra note 20, at § 234.
63. See United States v. Callender, 25 F. Cas. 239, 244 (D. Va. 1800) (No. 14,709) (“challenges for favor must be decided by triers”).
ased, as at common law, as well as those found to be actually biased.\textsuperscript{65} Over the years, the United States Supreme Court glossed over its earlier distinctions between presumptive bias, as recognized at common law, and actual bias. Revising some decisions and ignoring others, the Court's recent opinions suggest that juror bias is a question of fact, a simple issue of credibility.

Perhaps because of the recent view that issues relating to jury function raise factual, case-specific issues, rather than broader constitutional concerns, the Court has adopted an ad hoc approach to cases of juror bias, with little or no effort to reconcile each decision with past precedent or a cohesive view of constitutional jury trial rights. The predictable result has been chaos and increased litigation, while states, defendants, and lawyers struggle to divine a cohesive, sound view of constitutional jury trial rights from the Court's ad hoc holdings.

The cases addressing the issue of juror impartiality can be roughly grouped into four categories:

1) Prejudgment cases, in which jurors, because of pretrial publicity or other outside information, have formed a preconceived notion of the guilt or innocence of the accused.

2) Group affiliation cases, as in Woods and Crawford, in which a claim is raised that an affiliation with a particular group precludes a juror from serving.

3) Racial prejudice cases, which often feature an overlapping of prejudgment and group affiliation cases.

4) Death-qualified juror cases, which again may include aspects of all other categories, because jurors opposed to the death penalty are disqualified.

IV. PREJUDGMENT

Chief Justice Marshall's opinion as a presiding judge in the famous trial of Aaron Burr\textsuperscript{66} is perhaps the earliest decision of note dealing with the issue of pretrial publicity and juror prejudgment. According to Marshall, "fairness and impartiality" characterize our notion of trial by jury.\textsuperscript{67} As a matter of common law as well as constitutional law, jurors should be impartial and should base their verdict on the evidence in the case.\textsuperscript{68} Those jurors who have formed opinions about the issues in the case are "presumed" partial, as are those individuals


\textsuperscript{67} Burr, 25 F. Cas. at 50.

\textsuperscript{68} Id.
who are closely related to the parties or those with a clear prejudice. These individuals are "presumed" biased notwithstanding their protestations that they could be fair and impartial jurors, because "the law suspects [them], and certainly not without reason." 69

In Reynolds v. United States, 70 the Supreme Court added another dimension to the constitutional right to a fair and impartial jury by incorporating Lord Coke's statement that to be impartial the juror must be "indifferent as he stands unworn." 71 In Reynolds, the defendant maintained that two jurors were improperly seated over objection for cause. The defendant argued that the jurors had formed opinions about the issues tried. The challenges were for principal cause "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers." 72 The issue was essentially a question of law to be decided by the Court.

The Court noted, however, that not every opinion should be a disqualifying opinion; 73 the trial court must determine whether the "nature and strength of the opinion formed are such as in law necessarily to lead to the presumption of partiality." 74 Thus, the issue of juror partiality is a mixed question of law and fact and should not be reversed by a reviewing court absent a manifest error. 75

The Supreme Court has recognized the practical impossibility of assembling a group of lay jurors with absolutely no preconceived notions about the issues in litigation. The Court addressed this issue in Irvin v. Dowd. 76 In Irvin, the petitioner sought habeas corpus relief from a state court conviction on the ground that he was denied his fourteenth amendment rights to a trial by a fair and impartial jury. Irvin was tried for murder, stemming from a series of killings in Indiana. The murders and subsequent court proceedings received widespread publicity in Indiana, including press releases indicating that Irvin had confessed to the six murders. 77 The trial court granted defendant's first motion to change venue to an adjoining county, but denied a subsequent change of venue motion. 78

69. Id.
70. 98 U.S. 145 (1878).
71. Id. at 154 (quoting E. Coke, supra note 20, at § 234).
72. Reynolds, 98 U.S. at 154-55.
73. Id. at 155.
74. Id. at 156.
75. Id.
77. Id. at 719-20.
78. An Indiana statute purportedly precluded more than one change of venue. Ind. Code Ann., § 9-1305 (Burns 1956). Indiana courts, however, had recognized that a second change of venue should be granted if necessary to secure an impartial jury. Irvin, 366 U.S. at 721. For a specific example, see Gannon v. Porter Circuit Court, 159 N.E.2d 713 (Ind. 1959).
The Supreme Court reasserted the importance of providing a fair and impartial jury to those whose liberty or lives are in jeopardy. The Court recognized, however, that many of the citizens best qualified to serve as jurors will have some opinion or impression about the merits of an important case that has been widely reported. According to the Court, the constitutional requirement of a fair and impartial jury is satisfied "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." The Court emphasized the special role of the federal courts in enforcing this constitutional standard. As stated in Reynolds, the question of whether a juror's opinions render him incapable of being impartial is a mixed question of fact and constitutional law for the federal judge to adjudicate. It is, therefore, the duty of the court of appeals to independently evaluate the voir dire testimony of the impaneled jurors. The trial court, however, is accorded deference and should not be reversed absent manifest error.

The Supreme Court in Irvin noted the extensive pretrial publicity, creating a build-up of prejudice that was evident in the voir dire. Eight out of twelve jurors selected thought that Irvin was guilty. These jurors, nonetheless, testified that they could be fair and impartial jurors. The issue, however, was not simply one of credibility—whether the jurors were sincere in their protestations of impartiality—broader policy considerations underlying the constitutional right to a fair and impartial jury were at stake. According to the Court:

No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many [jurors], so many times, admitted prejudice, such a statement of impartiality can be given little weight. . . . With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.

Burr, Reynolds, and Irvin established the constitutional guarantee of a fair and impartial jury, and made federal courts the protectors of that constitutional right. Recent decisions by the United States Supreme Court, however, have altered the role of the federal courts in overseeing defendants' right to a fair and impartial jury trial. Specifically, Irvin v. Dowd was limited, if not effectively overruled, in Patton

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80. Id. at 723.
81. Id.
82. Id. at 723-24.
83. Id. at 728.
v. Yount. 84

In Patton, the defendant, Yount, was retried on the charge of brutally murdering an eighteen-year-old woman. Yount's conviction at the first trial was reversed because his confession had been improperly obtained. At the second trial, Yount unsuccessfully moved for a change of venue on the grounds of widespread dissemination of prejudicial information. After a second conviction, Yount sought habeas corpus relief, relying on Irvin v. Dowd. The federal district court denied the writ, 86 but the Court of Appeals for the Third Circuit reversed, holding that Yount had been denied a fair trial. 88 The appellate court independently examined the evidence, noting that all but two of the 163 veniremen questioned had heard of Yount's prior conviction, his prior confession, and his previous plea of temporary insanity. 87 Seventy-seven percent of the veniremen stated they would carry an opinion into the jury box. Eight of the fourteen jurors and alternates stated under oath that at some time they had formed an opinion as to the guilt of Yount. One juror and the two alternates indicated they would require some evidence to overcome their opinions. 88

The Supreme Court reversed the Third Circuit and sustained the conviction. Justice Powell, writing for the majority, separated the issues into two questions: 1) whether the jury as a whole was impartial, and 2) whether certain individual jurors were partial and should have been dismissed for cause. The Court admitted that the first question was a mixed question of law and fact, but maintained that the second issue was plainly an issue of historical fact.

To determine the question of whether the jury as a whole was biased, the Court purportedly applied Irvin v. Dowd, although its characterization of Irvin as "a leading authority at the time" 89 is perhaps an indication of just how far Patton v. Yount limited Irvin. The Court distinguished Irvin, primarily on the ground that in Patton v. Yount there was a four-year lapse between the first trial, when the "extensive adverse publicity and the community's sense of outrage were at their height," 90 and the retrial. Relying heavily on the findings of the trial judge, including the finding that there had not been "any great effect

85. The district court rejected a magistrate's recommendation that the petition should be granted. Id. at 1028.
In the second trial, the tainted confession was not admitted because petitioner neither pled temporary insanity nor appeared on the witness stand.
87. Patton, 467 U.S. at 1029. Out of a jury panel of 430 persons, 268 were excused for cause because they had fixed opinions. Nearly 90% of the prospective jurors had some opinion as to guilt.
88. Id. at 1030.
89. Id. at 1031.
90. Id. at 1032.
created by any publicity," the Court held that the trial judge did not commit manifest error. In a footnote, the Court noted that Irvin was decided before the presumption of correctness for state court factual findings was incorporated into the habeas corpus statute. The Court also hinted that the language in Irvin calling for independent, appellate court evaluation of the evidence was no longer the rule governing review of jury bias cases. Nonetheless, the Court purported to use the Irvin "manifest error standard," concluding that there may be little practical difference between that standard and the "fairly supported by the record" standard set forth in the habeas corpus statute.

In dealing with the second issue—whether individual jurors were biased—the Court revised the standard of review without bothering to overrule Irvin. The Court asserted that Irvin should apply only to the issue of whether the jury was biased as a whole, notwithstanding the fact that much of the analysis in Irvin was aimed at individual bias and that Irvin was based on Reynolds and Burr, both of which involved challenges to individual jurors.

The Patton Court declared that the issue of the partiality of an individual juror is "plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.... The determination is essentially one of credibility." In a footnote, the Court admitted that there is a legal issue of constitutional magnitude lurking about, but this constitutional issue is resolved by the trial judge's factual assessment of the sincerity and truthfulness of the juror's testimony that he or she could be an impartial juror. The reviewing court's limited role is to determine whether the presumption of correctness has been overcome and whether there is fair support in the record for the trial judge's factual conclusion.

The vast majority of defendants alleging unconstitutional juror partiality will be faced with a trial record featuring the juror's sworn, voir dire testimony that the juror will be fair and impartial. By treating the issue of juror impartiality as a question of fact—a matter of credi-

91. Id. at 1035. The dissent cast substantial doubt about the trial court's findings on the extent to which the passion had subsided and people had forgotten about the sensational murder in this rural county. The dissent noted the large number of news articles, many of which were banner headlines, and the actual voir dire experience as discussed above. The dissent was particularly concerned about the confession and the insanity plea reported from the first trial that were not to be considered by the jurors in the second trial. Id. at 1040-44.
92. Id. at 1031 n.7.
94. Patton, 467 U.S. at 1035.
95. Id. at 1036-38.
96. Id. at 1037 n.12.
bility and not of substance—the trial judge's determination of the accused's constitutional rights becomes practically unreviewable, and the appellate courts' role in enforcing an accused's right to a fair and impartial jury trial is minimized if not eliminated.

The Patton Court's use of precedent is creative, if not persuasive. In addition to rewriting Irvin, the Court distinguished Reynolds (and presumably Burr) on the grounds that it predated the statutory presumption of correctness for factual findings on habeas corpus review. Consequently, according to the Patton opinion, the Court in Reynolds did not attach the same significance to the phrase "a question of mixed law and fact" as courts do today.97 The Patton Court's claim that the distinction between law and fact on appellate review is a recently discovered concept is an argument unworthy of the Court. In Reynolds, the Supreme Court was obviously aware of how the distinction between law and fact affected appellate review.98

Furthermore, as a matter of legislative construction, it is unlikely that Congress, in passing the habeas corpus statute,99 attempted to alter the settled common-law distinction between factual determinations and legal, or constitutional, issues.100 More likely, Congress incorporated the established common-law distinctions of law and fact as part of this statute.101 In any event, the Patton Court admitted that the presumption of correctness may not be any different from the requirement that the trial court should be reversed only for manifest error.102 To suggest that the force of the Reynolds opinion has been weakened by the habeas corpus statute is disingenuous.

The Patton majority cited Burr as support for the notion that a properly conducted voir dire ferrets out juror bias.103 However, the Patton Court ignored Chief Justice Marshall's conclusion in Burr that, as a matter of law, a juror can be presumed biased notwithstanding the juror's protestations of fairness and impartiality.104

The Court also relied on Rushen v. Spain105 as analogous authority for the proposition that the question of impartiality is a factual issue. Rushen did not deal with the issue of whether a juror should be disqualified, but addressed the issue of whether improper ex parte con-

97. Id.
100. See supra notes 61-65, 83 and accompanying text.
102. Patton, 467 U.S. at 1031 n.7.
103. Id. at 1038.
tact between the court and a juror, which was conceded to be a constitutional violation,\textsuperscript{106} constituted harmless error. In \textit{Rushen}, the Court took a rather unusual and unwise position,\textsuperscript{107} that whether a constitutional error constituted harmless error was a factual determination to be decided by the trial judge after taking testimony from the jurors. The decision is unusual because, contrary to Federal Rule of Evidence 606(b) and past practice, it relies on juror testimony to determine the harmlessness of the constitutional error. The decision is unwise because it encourages post-trial hearings, which elicit testimony from jurors about the inner workings and decisionmaking process in the jury room. Treating the question of whether constitutional error is harmless as a factual issue resolved by juror testimony and demeanor raises substantial questions about the role of appellate courts in enforcing constitutional guarantees.

Both \textit{Patton} and \textit{Rushen} are summary affirmances of convictions. Both take substantial constitutional protections—traditionally safeguarded by the appellate courts, assuring uniformity and consistency in the application of the highest law of the land—and effectively treat those constitutional principles as factual matters to be resolved at the trial level. Together with other decisions by the Court, the cases signal a new if not radical approach to the responsibility of the United States Supreme Court, as well as other appellate courts, to safeguard citizens’ rights as set out in the Constitution.

\section*{V. Group Affiliation}

If a prospective juror has a particular relationship to the parties or the transaction, statutes in each jurisdiction set forth the grounds and procedures used to challenge that juror for cause.\textsuperscript{108} These statutes reflect the common-law categories giving rise to a principal challenge \textit{Propter Affectum}, which at common law raised a question of law for the trial judge.\textsuperscript{109} The Supreme Court’s opinions in \textit{Wood}\textsuperscript{110} and \textit{Crawford}\textsuperscript{111} address the extent to which the constitutional concept of a fair and impartial jury includes common-law jury principles. \textit{Wood} and

\begin{itemize}
  \item \textsuperscript{106} The state acknowledged that these contacts violated the accused’s right to counsel and right to be present at all critical stages. \textit{Id.} at 117-18 n.1.
  \item \textsuperscript{107} \textit{See} Thompson, \textit{Challenge to the Decision-making Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial}, 38 Sw. L.J. 1187, 1214-29 (1985).
  \item \textsuperscript{109} \textit{See supra} notes 57-64 and accompanying text.
  \item \textsuperscript{110} \textit{See supra} notes 38-50 and accompanying text.
  \item \textsuperscript{111} \textit{See supra} notes 39-51 and accompanying text.
\end{itemize}
Crawford suggest that the Constitution precludes a group of individuals who have a relationship with the parties or transaction from serving as jurors, if the moving party can establish a factual basis for imputing bias to the group. In Wood and Crawford, the moving party failed to establish the factual basis for imputing bias.

Recently, the Court cast substantial doubt on whether the common-law concept of implied bias is included in the constitutional concept of a fair and impartial jury. In Smith v. Phillips, a habeas corpus proceeding, the petitioner maintained he was denied due process when, during his trial, a juror filed a job application with the district attorney's office. The two prosecuting attorneys were aware of the application but did not respond to it, nor did they inform the court or opposing counsel. The district attorney first learned of the juror's application after the conviction and immediately investigated the matter, informing the trial court and defense counsel of what transpired. After taking testimony from the juror and the prosecuting attorneys, the trial judge concluded the letter of application was an "indiscretion," but it did not reflect a "premature conclusion as to [respondent's] guilt." Nor did the Court find evidence of a "sinister or dishonest motive" on the part of the prosecuting attorneys. After unsuccessful appeals, Phillips filed a successful federal writ of habeas corpus in the United States District Court for the Southern District of New York. The United States Court of Appeals for the Second Circuit affirmed, and the state filed a writ of certiorari with the Supreme Court. Although the central issue in Phillips was the alleged prosecutorial misconduct, the Court also addressed the question of whether the court should impute bias to a juror who applied for a job with the prosecutor during a trial. The Court suggested that the Constitution protected against actual bias only, and did not permit a court to impute bias. In reaching this conclusion, the Court purportedly relied on Dennis v. United States, and in particular the statement in Dennis that "a holding of implied bias to disqualify jurors because of this relationship with the government is no longer permissible." Dennis, however, does not support the proposition that the Constitution protects against actual bias and not implied or imputed bias. The Dennis Court held that the

113. Id. at 213.
114. Id. at 214.
119. Id. at 171-72. See also id. at 172-73 (Reed, J., concurring).
defendant failed to show that government employees could not impartially try a communist. The Dennis Court did not hold that the implied bias of jurors, a concept deeply imbedded in the common law and prior constitutional decisions, was no longer an element affecting the constitutional requirements of a fair and impartial jury.

The Phillips court also relied on Remmer v. United States, which at first glance provided better support for the proposition advanced in Phillips. The issue in Remmer was whether a jury tampering attempt, and a subsequent FBI investigation during the trial, prejudiced the defendant. The Supreme Court remanded the case to the trial court with instructions to hold a hearing to determine prejudice. In Phillips, Justice Rehnquist relied on Remmer as support for the notion that the constitutional remedy for a claim of juror bias is a hearing at which the jurors are questioned to determine actual bias as a matter of fact. This conclusion, however, is inconsistent with the subsequent history of Remmer. On remand, the Remmer trial court limited its review to the impact of the FBI investigations and concluded that no prejudicial error had occurred. The second time the Supreme Court reviewed the case, the Court concluded that the trial judge should have considered the impact of the attempted bribe, together with the subsequent FBI investigation in assessing prejudice. The Court, however, did not remand again for factual findings of actual bias based on the credibility and demeanor of the juror testimony. The Supreme Court reached an independent conclusion, based on the record, that:

neither [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror. . . . Proper concern for protecting and preserving the integrity of our jury system dictates against our speculating that the F.B.I. agent's interview with [the juror] . . . dispersed the cloud created by [the briber's] communication.

Thus, the Court treated the determination of prejudice in this case as a legal question appropriate for appellate decisionmaking, and not a factual question to be resolved by a trier of fact.

Justice O'Connor's concurring opinion in Phillips stated that, in extreme situations, the sixth amendment right to an impartial jury would require a determination as a matter of law that a particular ju-

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121. See supra notes 66-83 and accompanying text.
123. Phillips, 455 U.S. at 216.
127. Id. at 381 (emphasis added).
ror is impliedly biased. She cited as examples cases in which a juror is an employee of the prosecuting agency, a close relative of a participant in the crime or trial, or a witness or agent in the underlying transaction. Justice O'Connor did not explain why, as a constitutional matter, an employee of the prosecutor would be impliedly biased, while one who is seeking a job with the prosecutor would not be.

Justice Marshall, in a dissent joined by Justices Brennan and Stevens, argued that the implied bias standard was appropriate and that under these circumstances "highly suggestive of misconduct or conflict of interest, bias should be implied."

Thus, the Court has created confusion about whether the sixth and fourteenth amendments preclude only jurors who, by their responses to voir dire questions, exhibit actual bias toward the parties or issues, and do not preclude those prospective jurors who, despite their relationships with the parties or issues, evince as a matter of law the appearance of impartiality. The issue goes to the basic concepts of what constitutes a fair and impartial juror and what roles the federal and state appellate courts should play in interpreting and enforcing this constitutional protection. The resolution of this issue could shape the scope of appropriate voir dire and determine the necessity and propriety of peremptory challenges to insure a fair trial. To the extent that the constitutional standards of a challenge for cause is narrowly framed and based primarily on assessment of demeanor and credibility, extensive voir dire of individual jurors should be permitted to develop all aspects of suspected bias. Furthermore, if the scope of the challenge for cause is limited, the role of the peremptory challenge is crucial in assuring a fair trial and upholding the appearance of fairness in our justice system.

VI. RACISM IN THE JURY SYSTEM

The post-Civil War de facto and de jure governmental recognition and support of racist practices is an embarrassment to Americans who cherish the principles of equality and freedom espoused in the Constitution. As guardians of the Constitution, courts have struggled with conflicts between states' rights and individual rights, and the basic inconsistency between the principles of equality expressed in the Constitution and the actual practice of a white society imposing its will on a black minority. Though the thirteenth and fourteenth amendments

129. Id. at 222.
130. Id. at 231.
131. Id. at 224 (Marshall, J., dissenting). Marshall cited Leonard v. United States, 378 U.S. 544 (1964) (jurors are presumed prejudiced when they have heard about a prior jury verdict against defendant on similar charge); cf. Turner v. Louisiana, 379 U.S. 466 (1965) (improper for jury to try case after being committed to custody of deputy sheriff who had been a prosecuting witness).
theoretically ended any legal justification for state supported racism, achieving actual equality and actual justice are ongoing chores for society at large and for the judicial system.\textsuperscript{138} Because the jury as an institution expresses community values in our justice system,\textsuperscript{138} insuring a black or minority defendant a fair and impartial jury in a racially biased society has been a monumental problem.

The Supreme Court cases addressing racism in the jury system focus on two issues: (1) The propriety of state-sponsored racism excluding blacks from jury service; and (2) the litigant's\textsuperscript{134} rights at trial to protect against a racially biased jury. Both problems stem from widespread racism in American society, but the Court has generally kept the two issues separate and has found little in common in its approach to these issues.

A. Exclusion of Blacks from Jury Service

Racism is a well-documented force in the American justice system.\textsuperscript{138} The Court has addressed case after case featuring state-sponsored, systematic racism, precluding a fair representation of blacks and other minorities on juries.\textsuperscript{138} Despite its admonishments, the Court still finds vestiges of systematic, government-supported racism in the selection of juries.\textsuperscript{137}

As early as 1879, the Court made it clear, in \textit{Strauder v. West Virginia}, that the equal protection clause of the fourteenth amendment prohibits states from excluding blacks from serving on juries.\textsuperscript{138} How-

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134. The adverse impact of racial discrimination in the selection of juries is not limited to the participants at trial. All of society is harmed when the justice system reeks of a strong stench of prejudice against a particular race. See \textit{Note, The Case of Black Juries}, 79 \textit{YALE L.J.} 531 (1970). Furthermore, excluding an entire segment of society contradicts the constitutional requirement that jurors represent a cross-section of the community. See Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972).


136. See infra notes 140-42 and accompanying text.


ever, just as Brown v. Board of Education\textsuperscript{139} did not end segregation in public schools in the 1950s, racial discrimination has remained a part of America's jury system. Over the last hundred years, the Supreme Court has repeatedly addressed various ramifications of the basic principle that systematic exclusion of blacks from the grand jury,\textsuperscript{140} from petit jury panels,\textsuperscript{141} or from both,\textsuperscript{142} violates the fourteenth amendment. The Court has consistently demanded equality and required the states to justify their systems when the history or experience of a jurisdiction shows disproportionate\textsuperscript{143} exclusion of blacks from jury service.\textsuperscript{144}

The Court adopted a different approach in Swain v. Alabama,\textsuperscript{145} however, when ruling on the state's use of peremptory challenges to exclude blacks from the jury.\textsuperscript{146} The prosecutor struck all six blacks available for jury service. In addressing whether Swain's fourteenth amendment rights were violated, the Court engaged in a lengthy analysis of the historical development and importance of the peremptory challenge. The Court noted that the peremptory challenge, although not protected by the Constitution,\textsuperscript{147} had always been an important trial right, and that careful scrutiny of the reasons for each challenge would undermine its value.\textsuperscript{148} Furthermore, the Court suggested that challenges based on racial make-up were permissible, not because "a juror of a particular race or nationality is, in fact, partial, but [be...
cause] one from a different group is less likely to be."\(^{149}\) The Court maintained that racial issues not only were "widely explored during \textit{voir dire}."\(^{150}\) but that "the fairness of trial by jury requires no less."\(^{151}\) Thus, the Court held that the striking of blacks in a particular case is not a denial of equal protection of the laws.\(^{152}\)

In dictum, the \textit{Swain} Court suggested that the defendant could raise a different issue if he could show the prosecutor's systematic exclusion of blacks over a period of time. Despite the fact that no black had served as a juror in a criminal case in that county since 1950, the Court maintained that no such showing was present in \textit{Swain}.\(^{153}\) After \textit{Swain}, if the state systematically uses peremptory challenges to remove blacks from jury service over a long period of time, the practice might violate the fourteenth amendment. If the state uses the peremptory challenge in an individual case to remove black jurors simply because they are black, there is no fourteenth amendment violation.\(^{154}\)

The Court's purported remedy for systematic exclusion of blacks by a prosecutor has failed to ferret out invidious racial discrimination in our criminal justice system.\(^{155}\) Few jurisdictions maintain the records necessary to prove such a violation, and few participants have the resources to establish such a claim.\(^{156}\) Consequently, racially based peremptory challenges became a common and somewhat open practice undermining public confidence in the justice system, perpetuating the evils in perception and effect of state supported racism.

\textit{Swain} was not well received by commentators,\(^{157}\) and has been re-

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149. \textit{Id.} at 221.
150. \textit{Id.}
151. \textit{Id.}
152. \textit{Id.} at 221-22.
153. The Court found that the record did not establish that the prosecutor had habitually struck black jurors in the past. \textit{Id.} at 224.
154. This approach has been criticized by some members of the Court. See Justice Marshall's dissent to denial of certiorari in \textit{McCray} v. New York, 461 U.S. 961 (1983). "[I]t is difficult to understand why several must suffer discrimination . . . before any defendant can object." \textit{Id.} at 965 (Marshall, J., dissenting).
jected or distinguished by several state courts\textsuperscript{158} and lower federal courts.\textsuperscript{159} Other courts have faithfully followed the \textit{Swain} reasoning.\textsuperscript{160} In the 1982 term, the Supreme Court denied certiorari in several cases seeking reconsideration of these issues; but individual justices foreshadowed the demise of \textit{Swain}. In \textit{McCray v. New York},\textsuperscript{161} Justices Marshall and Brennan dissented from the denial of certiorari. Justice Stevens, joined by Justices Blackmun and Powell, concurred in denying certiorari, but encouraged reconsideration of \textit{Swain} after further experimentation by the state courts.\textsuperscript{162}

Thus, the Court's decision in \textit{Batson v. Kentucky},\textsuperscript{163} precluding racially based peremptory challenges came as no surprise. The remarkable aspects of the \textit{Batson} opinion center around what the Court did not decide.

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\textsuperscript{159} \textit{Swain} has been limited to equal protection claims and found not to be binding on claims brought under the sixth amendment. United States v. Leslie, 759 F.2d 366 (5th Cir. 1985) (en banc); \textit{Booker v. Jabe}, 775 F.2d 762 (6th Cir. 1985), \textit{vacated}, 106 S. Ct. 3289 (1986); \textit{McCray v. Abrams}, 750 F.2d 1113 (2d Cir. 1984). Courts have used supervisory power to prohibit the federal government's discriminatory use of peremptory challenges. See, e.g., United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976); United States v. McDaniel, 379 F. Supp. 1243 (E.D. La. 1974). See also United States v. Jackson, 696 F.2d 578 (8th Cir. 1982), \textit{cert. denied}, 460 U.S. 1073 (1983).


\textsuperscript{162} \textit{McCray}, 461 U.S. at 961 (Stevens, J., concurring in denial of certiorari).

\textsuperscript{163} 106 S. Ct. 1712 (1986).
Initially, the Batson Court did not decide the basic issue advanced by the defendant: whether the prosecutor's racially based use of peremptory challenges to exclude black jurors violates the sixth amendment guarantee of an impartial jury representing a fair cross-section of the community.\textsuperscript{164} Appellant did not seek reconsideration of Swain, which was an equal protection decision. Nonetheless, the Court premised its decision on the Equal Protection Clause, modifying or reversing Swain. After turning down opportunities to review several cases, apparently waiting for the right case and the right time for addressing the issue,\textsuperscript{166} the Court finally accepted Batson, resolving the case on grounds not advanced by the moving party.

In a concurring opinion, Justice Stevens attempted to justify the Court's action on the grounds that the State of Kentucky defended the judgment in part on equal protection grounds, and the issue was addressed by several amici curiae.\textsuperscript{168} In his dissent, however, Chief Justice Burger effectively cast doubt on the propriety of reversing a state court judgment on constitutional grounds not advanced or briefed by the moving party.\textsuperscript{167}

Secondly, the Batson Court did not address the key issue of defining the interplay between the peremptory challenge and the constitutional guarantees in the sixth and fourteenth amendments.\textsuperscript{168} The Swain Court had carefully analyzed the role and function of the peremptory challenge in the criminal trial. The Swain Court essentially concluded that discrimination in the use of peremptory challenges was not an equal protection violation because of the importance of the peremptory challenge, and because restrictions on its use would undermine the peremptory challenge.\textsuperscript{169} If a prosecutor's office systematically excludes blacks on every jury, however, the Swain Court suggested that this practice could violate the Constitution. In such a case, "the purposes of the peremptory challenge are being perverted."\textsuperscript{170} The challenges are unrelated to the outcome of a particular trial and not within the underlying purpose of the peremptory challenge. Thus, essential to the Swain decision was a careful analysis of the appropriate role and

\textsuperscript{164} See id. at 1729 (Stevens, J., concurring); see also id. at 1731 (Burger, C.J., dissenting).
\textsuperscript{165} See supra note 161 and accompanying text.
\textsuperscript{166} Batson, 106 S. Ct. at 1729-30 (Stevens, J., concurring).
\textsuperscript{167} Id. at 1731 (Burger, C.J., dissenting).
\textsuperscript{168} "The Court acknowledges, albeit in a footnote, the 'very old credentials' of the peremptory challenge and the 'widely held belief that peremptory challenge is a necessary part of trial by jury.' . . . But proper resolution of this case requires more than a nodding reference to the purpose of the challenge." Id. at 1734 (Burger, C.J., dissenting).
\textsuperscript{170} Swain, 380 U.S. at 224. See supra notes 153-54 and accompanying text.
function of the peremptory challenge. Whether decided on sixth amendment or equal protection grounds, the crucial and inevitable question that will be raised in future litigation is: Does the Constitution restrict the free and arbitrary use of peremptory challenges?

In his concurring opinion in Batson, Justice Marshall persuasively argued that the nature of the peremptory challenge is the crux of the problem.171 The history of prosecutorial abuse172 and the difficulty of proving intentional discrimination, along with the real risk of unintentional or subconscious discrimination, make the Batson majority's remedy ineffective. According to Marshall, "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."173 As a cornerstone for this opinion, Marshall concluded that the right of peremptory challenge is not a right of constitutional proportion and should be eliminated in order to halt this pernicious form of racial discrimination.

The majority avoided discussion of the appropriate role of the peremptory challenge by revising Swain while bastardizing traditional equal protection analysis.174 After the Court had gone out of its way to reconsider and, in fact, overrule Swain, it attempted to characterize its decision as essentially consistent with the longstanding principles recognized in Swain: that purposeful racial discrimination in excluding potential jurors was a violation of equal protection. Justice Powell, writing for the majority, suggested that the Court was simply modifying the portion of Swain that addressed the evidentiary burden placed on the criminal defendant who claims he has been denied equal protection.175 Instead of focusing on the underlying premise in Swain—that the nature and value of the peremptory challenge (which the Court

174. "Rather than applying straightforward equal protection analysis, the Court substitutes for the holding in Swain a curious hybrid." Batson, 106 S. Ct. at 1728 (Burger, C.J., dissenting).
175. Id. at 1721.
recognized included racially based decisions) outweighed the equal protection concerns advanced—the Court focused on the evils of racial discrimination denounced by the Court in other cases. Instead of addressing possible state interests in allowing a prosecutor to exercise a racially based peremptory challenge, the Court focused on recent decisions addressing the evidentiary burden for establishing purposeful racial discrimination in other contexts.\textsuperscript{176}

The \textit{Batson} Court concluded that the principles gleaned from these equal protection cases\textsuperscript{177} "support [the] conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial."\textsuperscript{178} The defendant is initially required to establish that he is a member of a "cognizable racial group" and that the prosecutor has used peremptory challenges to remove members of defendant’s race.\textsuperscript{179} The defendant may rely on the fact that the process of peremptory challenge permits "those to discriminate who are of a mind to discriminate,"\textsuperscript{180} but the defendant must, through all relevant circumstances, raise the inference of purposeful discrimination.

After a prima facie showing of purposeful discrimination, the burden shifts to the state to articulate a neutral justification. Again, the Court does not state what would be an appropriate or neutral justification for excluding black jurors. This, of course, would require an analysis of the appropriate scope and purpose of the peremptory challenge. The Court does state that a mere denial of a discriminatory motive, or assertion of good faith by the prosecutor would not rebut the prima facie case.\textsuperscript{181} Likewise, a claim that black jurors were struck because of the prosecutor’s judgment that black jurors would be partial toward a black defendant would be improper.\textsuperscript{182}

Presumably, \textit{Batson} stands at least for the proposition that when the defendant is black, the Equal Protection Clause prevents the state from excluding black jurors solely on the ground that black jurors would be partial to a black defendant. Beyond that, the opinion raises many questions and provides little guidance for the lower courts. Most


\textsuperscript{177} The Court also borrowed principles developed in Title VII cases. \textit{Batson}, 106 S. Ct. at 1722, n.19.

\textsuperscript{178} \textit{Id.} at 1722-23.

\textsuperscript{179} \textit{Id.} at 1723. The Court suggested that the questioning or statements by counsel or the pattern of strikes in the case could be considered, but ultimately left the issue for trial courts to resolve on a case by case basis.

\textsuperscript{180} \textit{Id.} (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{Id.}
of the issues center around the appropriate role of the peremptory challenge in the criminal trial, an issue the Court ignored. To what extent, for example, can counsel for the state, or for that matter, counsel for the defendant, exercise a peremptory challenge to excuse a juror based on an intuitive judgment or a sociological study indicating that jurors of a particular race, age, sex, religion, or whatever,\textsuperscript{183} might be less favorable to their client's position than another juror? How many black jurors must be excused before the accused's constitutional rights are violated?\textsuperscript{184} To what extent can the state consider race, along with other factors, such as education, place of residence, choice of reading materials, age, economic status, or dress in exercising peremptory challenges? Can the state object to the accused's use of peremptory challenges on racial basis? Can an accused white person object to the state excluding blacks from the jury? The Court also does not provide the lower courts with any guidance on appropriate remedies when a violation is found.\textsuperscript{185}

The dissent called for a reargument of \textit{Batson}. At the very least, the decision requires substantial litigation before many of these issues are resolved. The primary task facing the Court is to define the proper scope and use of the peremptory challenge in a manner consistent with sixth amendment fair trial rights and the Equal Protection Clause.

The relitigation of some of these basic issues has already begun. A major issue left unresolved in \textit{Batson} was whether the decision would be given retroactive effect. Although four justices\textsuperscript{186} thought \textit{Batson} should not be given retroactive effect, the remaining justices curiously refused to address the issue of retroactivity. Because \textit{Batson} was prompted primarily by concerns of racial discrimination, and only secondarily, by the accuracy of the decision; and because it reverses a past


\textit{Id.} at 1737 (Burger, C.J., dissenting).

\textsuperscript{184} "Prosecutors are left free to discriminate against blacks in jury selection provided they hold that discrimination to an acceptable level." \textit{Id.} at 1728 (Marshall, J., concurring).

\textsuperscript{185} The Court expressed no view about whether the trial court, upon a finding of an equal protection violation, should simply disallow the exclusions or should start over and select a new jury. \textit{Id.} at 1724 n.24.

\textsuperscript{186} Justices White, O'Connor, and Rehnquist and Chief Justice Burger.
Supreme Court decision, the decision should not be accorded retroactive effect based on traditional analysis.\textsuperscript{187} Subsequently, in the per curiam opinion of Allen v. Hardy,\textsuperscript{188} the Court gave a partial answer to the retroactivity issue. Over the dissent of Justices Marshall, Blackmun, and Stevens, the Court concluded that Batson should not be applied in federal habeas corpus proceedings in cases in which opportunities for direct appeals were exhausted and the time had expired for granting certiorari.\textsuperscript{189} The Court recognized that Batson would have some impact on the truth-finding process of the jury, since the opinion was written in part to protect defendants' interest in a neutral fact finder.\textsuperscript{190} The Hardy Court noted, however, that Batson served multiple purposes and that there were other procedures available to protect the criminal defendant's interest in a neutral fact finder.\textsuperscript{191} According to the Hardy Court, lower courts have relied on the standards enumerated in Swain for years, and retroactive application of Batson would disrupt the administration of justice. Ironically, the dissenters, who were willing to decide Batson on grounds not argued by the petitioner, maintained that Allen v. Hardy should not be decided summarily without the benefit of briefs and argument of counsel.

The other shoe dropped in Griffith v. Kentucky.\textsuperscript{192} The Court in Griffith held that Batson should be applied to all cases, state or federal, pending on direct review or not yet final at the time of decision. The court rejected the “clear break” rationale of its past decisions, which had held that new constitutional rules representing a “clear break” from past interpretations should not be given retroactive treatment. Because the per curiam opinion in Hardy was based in large part on the “clear break” rationale, Griffith encourages relitigation of Hardy. The Court also has summarily vacated judgments in Michigan v. Booker\textsuperscript{193} and Abrams v. McCray,\textsuperscript{194} which were argued on the ground that the prosecutor's racially discriminatory use of peremptory challenges violated the defendants' sixth amendment rights. The Booker case was remanded to the Court of Appeals for the Sixth Circuit for further


\textsuperscript{188} Allen v. Hardy, 106 S. Ct. 2878 (1986).

\textsuperscript{189} Id. at 2881.

\textsuperscript{190} Id. at 2880.

\textsuperscript{191} Id. at 2880-81.


\textsuperscript{193} 106 S. Ct. 3289 (1986).

\textsuperscript{194} 106 S. Ct. 3289 (1986).
consideration in light of Batson and Hardy. Batson, and for that matter Hardy, did not address the sixth amendment issue that formed the basis for Booker. Thus, the Sixth Circuit faces the formidable task of determining how, or if, Hardy and Batson should be applied to the sixth amendment challenge in Booker.

The Batson Court's decision to base its opinion on equal protection grounds, instead of the sixth amendment issue raised, might be explained in several different ways. First, the gist of the problem was not that the jurors who eventually tried Batson were partial, but that government agents routinely, if not brazenly, prevented a large segment of the population from exercising one of the basic rights of citizenship solely because of the color of their skin. Government-sponsored racial discrimination is offensive and damaging to our democracy, and implicates the core concerns of the Equal Protection Clause. Secondly, the Court has been reluctant over the years to equate sixth amendment partiality with group association. Had the Court in Batson determined that excluding a certain group of jurors resulted in a jury that was not fair and impartial, the decision would have had far-reaching implications affecting, among other matters, the issue of retroactivity. It also would have had a bearing on the issue of whether the exclusion in capital cases of the so-called "Witherspoon-excludables," i.e., jurors excluded because of their personal views on the morality of the death penalty, violated the sixth amendment.196 In addition, Justice O'Connor expressed a concern at the oral argument196 that decisions based on the sixth amendment would prevent the government, but not the defendant, from racially based use of peremptory challenges. The Batson decision did not address this particular concern, although Justice Marshall's concurring opinion and Chief Justice Burger's dissent assert that Batson will be construed to prohibit discrimination by the state as well as by defense counsel.

On the other hand, the driving force behind the dispute over the use of racially biased peremptory challenges centers directly on the sixth amendment, the right to jury trial, and the shape and function of the criminal jury. Community participation in the justice system, as a check on government tyranny, is one of the central concerns of the sixth amendment.197 Those values often conflict with any interest of the state in securing strict and accurate enforcement of the letter of the law. By resolving Batson on equal protection grounds, the Court did not address this underlying conflict. Even under an equal protection analysis, the Court must eventually balance the legitimacy of any state interest in the exercise of peremptory challenges against the defend-

195. See infra notes 246-58 and accompanying text.
197. See supra note 4.
ant's jury trial rights provided by the sixth amendment.

In determining whether the Equal Protection Clause applies only to racially based peremptory challenges, and whether a white defendant would have standing to raise an equal protection challenge, the Court must reconcile its prior decisions in *Taylor v. Louisiana*\(^{198}\) and *Peters v. Kiff*.\(^{199}\) In *Peters v. Kiff*, a white defendant asserted an equal protection claim when the state systematically excluded blacks from the grand jury and the petit jury. The Court noted, as did the *Batson* Court, that the historical concern expressed in *Strauder* was that when groups of citizens are deprived of the opportunity to serve on the jury because of their race, the discriminatory practice has an impact not only on the defendant, but on society.\(^{200}\) The *Peters* Court also stated that if the sixth amendment applied to this case,\(^ {201}\) the defendant would clearly have standing to challenge the systematic exclusion of blacks.\(^ {202}\) The *Peters* Court was unwilling to conclude that the removal of blacks from the jury was only a racial concern: "When any large and identifiable segment of the community is excluded from jury service the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."\(^ {203}\)

In *Taylor v. Louisiana*, the Court relied upon dicta in *Peters* and held that the systematic exclusion of women from the petit jury venire violated a male defendant's sixth amendment rights.\(^ {204}\) The Court found that the state must assert weightier reasons than mere rational grounds to justify this exclusion.\(^ {205}\) The Court went on to hold that the state failed to justify its practice. Thus, based on *Taylor* and *Peters*, discrimination on the basis of sex or race is impermissible in the jury selection process and can be asserted by a defendant even if the defendant is a member of the race or sex excluded.

Thus, *Batson* eliminated *Swain* as an exception to the Court's longstanding opposition to racial discrimination in the selection of the jury. It failed, however, to provide a positive analytical framework for resolving the difficult issues remaining.

\(^{198}\) 419 U.S. 522 (1975).


\(^{200}\) "[I]t stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority.'" 407 U.S. at 499 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

\(^{201}\) The trial took place prior to *Duncan v. Louisiana*, 391 U.S. 145 (1968).

\(^{202}\) *Peters*, 407 U.S. at 500.

\(^{203}\) *Id.* at 503.


\(^{205}\) *Id.* at 535.
B. Scope of Inquiry at Voir Dire

Although racism remains a documented force in American society, and for that matter, in the court system, the extent to which the Constitution provides a right to probe jurors on voir dire about racist views is limited. The premise of the Swain decision was that racial matters are an appropriate subject of voir dire and appropriate grounds for the exclusion of jurors. The Batson Court's undermining of Swain was foreshadowed by decisions placing limitations upon inquiry into racial prejudice at voir dire.

A series of cases beginning with Aldridge v. United States raised the question of whether a robust voir dire inquiry into racial prejudice is essential to the concept of a fair trial. In Aldridge, a black was convicted at a retrial, and sentenced to death for the murder of a white police officer. At the first trial, a white, female, southern juror indicated that the defendant's race might have had some influence on her deliberations. To ascertain potential racial bias among the jurors at the retrial, counsel for the defendant proposed voir dire questions on the issue. The trial court refused to ask the questions, and the Court of Appeals for the District of Columbia affirmed. The Supreme Court reversed without requiring a showing that any particular juror was actually biased. The Court noted the generally accepted practice among the states, namely, that questions about possible racial bias should be asked and that "fairness demands that such inquiries be allowed." Aldridge, however, has been limited in subsequent decisions.

In Ham v. South Carolina, the Supreme Court ruled that a black civil rights worker convicted of the possession of marijuana was denied a fair trial in violation of the Due Process Clause of the fourteenth amendment because the trial judge refused to permit voir dire inquiries on the issue of racial prejudice. The Court noted that, although the decision in Aldridge was not a constitutional decision, "[t]he inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of Aldridge and the numerous state cases." According to the Court, the fourteenth amendment was intended to insure these "essential demands of fairness" and to prohibit states from invidious racial discrimination. The fourteenth amendment requires that, upon defendant's request, the juror be asked about

206. 283 U.S. 308 (1931).
207. See, e.g., Pinder v. Florida, 8 So. 837 (Fla. 1891); Hill v. Mississippi, 72 So. 1003 (Miss. 1916); South Carolina v. Sanders, 88 S.E. 10 (S.C. 1916); Fendrick v. Texas, 45 S.W. 589 (Tex. Crim. App. 1898).
208. Aldridge, 283 U.S. at 313.
210. Id. at 528.
211. Id. at 526 (quoting Aldridge v. United States, 283 U.S. 308, 310 (1931)).
racial prejudice on voir dire. The Court left the trial judge with discretion about the form of the inquiry, but stated that the failure to make any inquiries was unconstitutional. Again, the Court did not require a showing that any of the jurors were actually biased.

The Court marched in a different direction some four years later in Ristaino v. Ross. Before the Ham decision, Ross was convicted in a Massachusetts state court of armed robbery, assault and battery with a dangerous weapon, and assault and battery with intent to murder. Ross, a black man, was convicted for the assault of a white security guard. The trial judge refused to make specific inquiries about racial prejudice. After exhausting his remedies in Massachusetts, Ross filed a habeas corpus petition alleging a violation of his constitutional rights as recently recognized in Ham. The Supreme Court rejected Ross' claim, distinguishing and limiting Ham. In Ham, the defendant argued that he had been framed because of his civil rights activities. "Racial issues therefore were inextricably bound up with the conduct of the trial." Although the Court admitted that the facts in Ross were similar to the facts in Aldridge, and that it would have been "the wiser course to propound appropriate questions designed to identify racial prejudice if requested by defendant," the Ross Court insisted that the questioning was not required by the Constitution. The decision purported to reaffirm Aldridge to the extent that the Court would exercise its supervisory power to require questioning in a federal prosecution. According to Ross, Ham required state judges to inquire about racial bias only if "there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be 'indifferent as [they stand] unsworn.'" The Court concluded that there was no violation of Ross' constitutional rights because "[t]he circumstances thus did not suggest a significant likelihood that racial prejudice might infect Ross' trial." Other than a professed interest in

212. Id. at 527.
213. Id.
214. Id. The trial judge also refused to inquire about prejudice against beards. Although the Supreme Court conceded that it was possible that some jurors would be prejudiced against those who wore beards, the Court refused to extend the fourteenth amendment to require such an inquiry. Id. at 527-28. Cf. Dennis v. United States, 339 U.S. 162 (1949) (opportunity to prove actual bias guarantees a defendant's right to an impartial jury).
216. Id. at 591-92.
217. Id. at 597.
218. Id. at 597 n.9.
219. Id. at 597-98.
220. Id. at 597 n.9.
221. Id. at 596 (quoting E. Coke, supra note 20, at § 234).
222. Id. at 598.
deferring to the trial judge's discretion on these issues, the Court gave little basis for its constitutional line-drawing. There is no explanation of how the Court's statement in Aldridge, that fairness demands such inquiries be made, and its statement in Ham, that the fairness of the trial by jury requires no less, can be squared with its holding in Ross that such questioning is discretionary with the state trial judge in most circumstances. The conclusion is that the Constitution will countenance unfairness to blacks and other minorities in the selection of jurors. The Constitution will permit a trial of a black person by a racially biased jury, unless race is implicated as one of the substantive issues in the case.

In Rosales-Lopez v. United States, the Court attempted to address distinctions between what is constitutionally required and what is simply an exercise of federal court supervisory power to insure the “fairness” of the trial process. The defendant, a Mexican resident, was convicted in federal court for bringing illegal Mexican aliens into the United States. He appealed on the ground that the trial judge refused to question prospective jurors on voir dire about possible prejudice against Mexicans. Rejecting the holdings in five other appellate courts, the Court of Appeals for the Ninth Circuit affirmed. Because of a conflict among the circuits, the Supreme Court granted certiorari.

In its decision affirming the lower court, the Supreme Court completed the rewriting of Aldridge and Ham and attempted to explain the arbitrary distinction between what is constitutionally required and what is imposed on federal trial judges by way of the Supreme Court's supervisory authority. According to the Rosales-Lopez Court, the inquiry about racial prejudice is constitutionally required only if there are substantial indications of the likelihood of racial or ethnic prejudice affecting jurors. The Court limited the application of the constitutional standard to special circumstances in which racial or ethnic issues are the substantive issues at trial, as in Ham. Otherwise, the Rosales-


224. The trial judge did inquire about particular “feelings” regarding aliens and in general whether there were any reasons why the veniremen could not serve as fair and impartial jurors. Rosales-Lopez, 451 U.S. at 186.

225. The other appellate courts that considered this issue concluded that, if requested by a member of a racial or ethnic group, a trial judge must inquire as to possible racial or ethnic prejudice. United States v. Bowles, 574 F.2d 970 (8th Cir. 1978); United States v. Robinson, 485 F.2d 1157 (3rd Cir. 1973); United States v. Carter, 440 F.2d 1132 (6th Cir. 1971); United States v. Gore, 435 F.2d 1110 (4th Cir. 1970); Frasier v. United States, 267 F.2d 62 (1st Cir. 1959).


Lopez Court admitted that trial judges should make the inquiry when requested, but any error would be harmless error, unless there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.\textsuperscript{228} The supervisory rule requires reversal when, as in \textit{Aldridge}, a defendant is accused of a violent crime against a victim of another race or ethnic group. The Court in \textit{Rosales-Lopez} viewed the crime as a victimless one, and after considering the totality of circumstances, determined that the trial court did not abuse its discretion by failing to make the inquiry.\textsuperscript{229} The harmless error language, juxtaposed with an abuse of discretion analysis, clouds the precise holding. On the one hand, the Court stated that the trial judge should make the inquiry when requested. On the other hand, the Court stated that it is not always an abuse of discretion to refuse to make the inquiry.

Again, the \textit{Rosales-Lopez} Court was unwilling to reverse a conviction without a showing of actual bias on the part of a particular juror. The opinion assumes that the constitutional concept of a fair and impartial jury requires a factual determination of actual bias, rather than a legal determination based on fundamental principles of due process. Thus, according to the majority, appellate courts should defer to trial judges who can gauge the demeanor of the jurors. Although the assumption that juror bias is simply a factual issue is historically incorrect,\textsuperscript{230} it has served repeatedly as the lynchpin for the Court's recent approach to juror bias issues. Even assuming that the bias of individual jurors is simply a factual issue resolved by the demeanor and credibility of witnesses, how can a judge gauge the credibility and demeanor of jurors regarding questions never asked or issues never addressed? In addition, although the opinion purported to recognize the importance of \textit{voir dire} in the effective exercise of peremptory challenges, the Court pointed out that the right of peremptory challenges is not protected by the Constitution.

As justification for the refusal to require inquiry about racial prejudice, the Court remarked that to permit this inquiry would likely give the impression "'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.' . . . Trial judges are understandably hesitant to introduce such a suggestion into their courtrooms."\textsuperscript{231} It is ironic that a judicial system which has repeatedly found state-supported racial bias is more concerned with the appearance of racial bias than with reducing the impact of actual racial bias on the fairness of the trial process.\textsuperscript{232}

\textsuperscript{228} \textit{Id}. at 192.
\textsuperscript{229} \textit{Id}. at 194.
\textsuperscript{230} See supra notes 60-65, 67-84 and accompanying text.
\textsuperscript{231} \textit{Rosales-Lopez}, 451 U.S. at 190 (quoting Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976)).
\textsuperscript{232} This concept also appears inconsistent with the view expressed in \textit{Rushen v.}}
In dissent, Justice Stevens lamented the majority's disregard for long established state and federal court precedent. Stevens argued that individual citizens "who harbor strong prejudices against all members of certain racial, religious, or ethnic groups" should not be permitted to serve as jurors if the accused is a member of that group. For example, Justice Stevens suggested that a member of a Nazi party should not be allowed to serve as a juror if the defendant is Jewish. According to Stevens, "settled law" requires inquiry about possible prejudice toward the defendant's minority group.

In *Turner v. Murray*, the Court once again addressed the issue of the defendant's constitutional right to inquire during *voir dire* about potential racial prejudice. The Court continued the ad hoc, highly technical sixth amendment analysis of the proper scope of *voir dire*. Turner, a black man, was convicted and sentenced to death for the murder of a white storekeeper. The Court concluded that the broad range of discretion given to jurors in imposing the death penalty provided a unique opportunity for venting undetected racial prejudice. Furthermore, the finality of the death penalty and the ease with which the defendant's inquiry could be handled at *voir dire* made the risk of racial prejudice unacceptable and a violation of the accused's right to a fair and impartial jury. The Court vacated only the sentence, however, not the conviction. In the Court's opinion, jurors exercise a more limited discretion in ascertaining guilt and innocence, and the risk of racial prejudice influencing the jury, although a real one, is not a constitutionally unacceptable risk.

Dissenting from the *Turner* majority's refusal to vacate the judgment of guilt, Justice Brennan questioned how the same procedure could violate the accused's right to a fair and impartial jury on the sanction element, but not the underlying conviction. Justice Brennan maintained that in noncapital cases racial bias can affect subjective judgments about credibility or *mens rea* as easily as it can affect the subjective judgments necessary to bring in a sentence of death. In light of the ease of inquiring about possible racial prejudice and the

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234. Id. at 196-97.
235. Id. at 197.
236. 106 S. Ct. 1683 (1986).
237. Id. at 1687.
238. Id. at 1688.
239. Id. at 1688 n.8.
240. Id. at 1690 (Brennan, J., dissenting).
241. Id. at 1691 (Brennan, J., dissenting).
real risk to the defendant of not doing so, Brennan would require that the trial judge make the inquiry when requested.

The impact of Turner is limited to death penalty cases and does not provide much guidance on how to deal with problems of racial bias in other contexts. As discussed in the next section, the death penalty cases are perhaps sui generis and not useful for extrapolating a cohesive view of jury trial rights in other contexts.

VII. DEATH QUALIFIED JURORS

The security and finality of the death penalty has had a tremendous impact on the development of both substantive criminal law and constitutional law. Historically, homicide jurisprudence has distinguished between first- and second-degree murder, creatively analyzing and allowing ameliorating defenses that reduce murder to manslaughter. Those developments manifest a desire to avoid or limit the harsh, if not cruel, and irrevocable death sentence. Despite opinion polls demonstrating broadbase public support for the death penalty, many judges, and even legislators, balk when confronted with the awesome responsibility for terminating the life of another human being. Thus, it is no surprise that lay jurors blanch when summoned from the comforts of day-to-day life to make a decision about whether a fellow citizen shall be put to death.

When states used mandatory death penalties for certain crimes, the prosecutors were interested in keeping people with strong beliefs against the death penalty from service as jurors in capital cases. Jurors’ strong views on the death penalty might influence their determinations of guilt or innocence. Consequently, many of these states passed statutes or made judicial determinations allowing individuals with strong religious or conscientious views about the death penalty to be challenged for cause. The move to the discretionary system of capital punishment, and even the use of a bifurcated trial, has not changed most of the states’ insistence on death-qualified jurors.

244. See White, supra note 243, at 355.
In 1968, the Supreme Court, in *Witherspoon v. Illinois* supra, imposed limitations on this practice. The Court found unconstitutional an Illinois statute supra that permitted challenges for cause to strike a juror who had "conscientious scruples against capital punishment or [who] is opposed to the same." supra In *Witherspoon*, nearly half of the prospective jurors were successfully challenged under this statute. While forty-seven veniremen were successfully challenged, only five explicitly stated that under "no circumstances would they vote to impose capital punishment." supra

*Witherspoon* relied on three unpublished studies supra in an attempt to establish that jurors not opposed to the death penalty tended to be biased in the prosecutor's favor. The Supreme Court concluded that the evidence was insufficient to establish that the exclusion of jurors opposed to capital punishment "results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." supra The Court, however, left the door open for the issue to be raised when additional proof could be produced.

Because the *Witherspoon* jurors were also asked to determine whether the death penalty was a proper sanction in the case, the Court found the practice of excluding those opposed to the death penalty unconstitutional, and reversed the capital sentence. According to the Court: "[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." supra Accordingly, a death sentence would be unconstitutional if the jury were chosen by excluding "veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." supra

The *Witherspoon* decision was not well grounded in precedent, and the opinion does not fully develop its rationale. Although the discussion focused on concerns addressed by the fair cross-section requirement of the sixth amendment, the sixth amendment was not applicable to the

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249. *Id.* at 514.
250. *Id.* at 517 n.10 (specifically, Goldberg, *Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases* (unpublished manuscript, Morehouse College, undated); Wilson, *Belief in Capital Punishment and Jury Performance* (unpublished manuscript, University of Texas, 1964); H. Zeisel, *Some Insights Into the Operation of Criminal Juries* (unpublished manuscript, University of Chicago, 1957)).
252. *Id.* at 519.
253. *Id.* at 522.
states at the time of the opinion. Justice Douglas, in a separate opinion, used the fair cross-section analysis to point out that the middle ground chosen by the Court, affirming the conviction but reversing the sanction, could not be justified. According to Douglas, the constitutional issue was simply whether the jury "must be impartially drawn from a cross-section of the community." Douglas concluded that "[exclusion of those opposed to the death penalty] result[ed] in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment."

The breadth of the Court’s opinion must be gleaned from the now famous footnote twenty-one, which provided in part:

[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.

Despite the sparse justification in rationale or precedent, the opinion, until recently, has been widely cited for the following propositions in death penalty cases:

1. Excluding jurors for cause, based on their views of the death penalty, raises constitutional legal issues as opposed to factual issues or issues of credibility.
2. Excluding jurors for cause solely because of scruples against the death penalty was unconstitutional.
3. The discretion of trial judges was limited, and exclusion of jurors would be permitted only where the voir dire unambiguously indicated that the venireman would vote against the imposition of the death penalty without regard to the evidence or the judge’s instruction.

In Wainwright v. Witt, however, the Court revised (or, as the Court put it, “clarified”) Witherspoon. The Court concluded that the issue of ascertaining juror bias in death penalty cases is no different than in nondeath penalty cases. According to Witt, the trial judge

256. Id. at 528 (Douglas, J., dissenting).
257. Id. at 522 n.21.
260. Id. at 852.
must determine whether the juror’s views would “substantially impair the performance of his duties as a juror.”

That bias need not be proven with “unmistakable clarity” and is essentially a factual matter committed to the discretion of the trial judge, not a constitutional legal issue. As a factual matter, the standard of review on appeal is quite narrow, and the standard of review in a habeas corpus petition is practically insurmountable.

The Witt opinion is remarkable. The Court purported to justify its rejection of Witherspoon on several grounds. Initially, the Court maintained that Witherspoon had been changed markedly by Adams v. Texas. In Adams, however, Justice White, writing for the Court, made it unmistakably clear that the Adams Court was applying Witherspoon, not modifying it. The holding could not be stated any clearer: “We hold that there were exclusions that were inconsistent with Witherspoon.”

Justice Rehnquist, the author of the opinion in Witt, ignored the holding of Adams, focusing instead on the following isolated language to support the claim that Adams modified Witherspoon: “This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”

According to Justice Rehnquist, that language merged the two-pronged Witherspoon test, and eliminated the high standard of proof that exclusion was proper only when the juror’s disqualifying beliefs are unmistakably clear. The Witt Court noted that voir dire may be insufficient to establish such bias in an unmistakably clear fashion and that some jurors “may not know how they will react . . . or be able to articulate, or may wish to hide their true feelings.” According to the Court, the trial judge, theoretically applying the Adams standard, should be free to excuse jurors in these instances.

It is clear from the rationale as well as the holding that Adams in no way backed off from the stringent Witherspoon test. According to the Court in Adams, jurors could not be excluded simply because they

261. Id.
262. Id. at 852-53.
265. “This capital case presents the question whether Texas contravened the sixth and fourteenth amendments as construed and applied in Witherspoon.” Adams, 448 U.S. at 40.
266. Id.
267. Id. at 45.
269. Id. at 853.
would be "affected" by the possibility of the death penalty, or "because they were unable positively to state whether or not their deliberations would in any way be 'affected.'" The Court further stated:

Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase . . . if they aver that they will honestly find the facts and answer the questions . . . yet who frankly concede that the prospects of the death penalty may affect . . . their honest judgment of the facts . . . or . . . reasonable doubt.

Justice Rehnquist wrote a dissenting opinion in Adams, inviting the Court to reexamine the underpinnings of Witherspoon. Clearly, Witt is a reconsideration and rejection, not a clarification of Witherspoon as the Court claims. The rationale advanced by Justice Rehnquist in Witt is premised on his dissent in Adams, not on the decision of the Court in Adams.

To the Court's credit, once freed from adherence to precedent, it does set forth a persuasive rationale for the decision in Witt. The Court maintained that the concern at voir dire in a capital case is the same interest present in all criminal trials, that of obtaining a fair and impartial jury. Thus, death penalty cases should be treated no differently than other cases dealing with issues of juror bias. The Court's argument may be a meritorious one. The irreversibility and the moral implications of the death penalty may affect certain individuals in such a way that they could not be fair and impartial jurors. In noncapital cases, other factors such as the nature of the alleged crime (e.g., criminal abortion, rape, or mercy killing) or notoriety of the victim might have a similar effect on individual jurors. The concern in all criminal cases is to secure a fair and impartial jury. Arguably, the standard for assuring that the jury is fair and impartial should be the same in capital and noncapital cases, although the particular factors that might cause bias will vary from a capital case to a noncapital case.

Although the Court's rationale may be sound, it has a hollow tone when espoused by this particular Court. This Court is not above summarily discarding precedent and relying on sound analysis when it suits its purpose. Aside from the total disregard for the holdings and rationale of Witherspoon and its progeny, the notion that this death penalty issue should be treated as any other issue of juror bias deviates from the longstanding view of the Court that death penalty cases raise special concerns because of the unique and irrevocable sanction.

270. Adams, 448 U.S. at 49.
271. Id. at 50.
272. Id.
273. Id. at 52 (Rehnquist, J., dissenting).
274. Id. at 53 (Rehnquist, J., dissenting).
275. See Witt, 105 S. Ct. at 872 (Brennan, J., dissenting). For example, in Rum-
Once the Court elected to treat this as a simple issue of ascertaining bias on voir dire, it was a short step to the Court’s conclusion that bias on voir dire is a factual issue of demeanor and credibility. Thus, the “unmistakably clear” standard in the Witherspoon line of cases was rejected. What was a legal issue concerning basic principles of constitutional law, to be carefully screened and protected by trial and appellate courts, becomes essentially a trial court issue determined on a case-by-case judgment of the trial judge based on an assessment of the credibility and demeanor of the venireman. Again, the Court hauled out the presumption of correctness in deferring to the trial judge’s determination, relying on Patton and Rushen which, as discussed previously,276 ignore the historical role of the trial and appellate courts in assessing juror bias. Nonetheless, these and other cases have in essence become the new truth with respect to juror bias issues.

Lockhart v. McCree277 finished the story on Witherspoon. The Court of Appeals for the Eighth Circuit had ruled, contrary to other circuit courts, that excluding “Witherspoon excludables” from the guilt phase of the trial resulted in a conviction-prone jury.278 The Eighth Circuit held that this process violated the defendant’s sixth amendment right to a jury selected from a fair cross section of the community. The Supreme Court reversed.279 In a tidy footnote, the Court disposed of any remains of Witherspoon, concluding that after Adams “[t]he term ‘Witherspoon-excludable’ is something of a misnomer.”280 The Court completed the circle later in the opinion when it stated: “[T] hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of

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276. See supra notes 83-106 and accompanying text.
279. Grigsby, 758 F.2d at 229. The Court did not decide the alternative ruling of the district court, Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), aff’d, 758 F.2d 226 (8th Cir. 1985) (en banc), rev’d, 106 S. Ct. 1758 (1986), that the practice also violated the juror impartiality requirement of the sixth and fourteenth amendments.
280. Grigsby, 106 S. Ct. at 1761 n.1.
Thus, the burden of persuasion has now shifted, and the trial judge is encouraged to exclude death-scrupled jurors unless the juror "states clearly" a willingness and presumably an ability to follow the Court’s instruction as to the law.

In response to the Witherspoon opinion, McCree presented numerous studies demonstrating that death-qualified juries are significantly more likely to return a conviction than juries that include individuals unalterably opposed to the death penalty. The majority, however, refused to accept the lower court’s finding on this issue and proceeded to attack the reliability and relevance of the individual studies. Perhaps in deference to the near unanimity in result reached by these studies, or perhaps because the results of these studies correspond with intuitive judgments of scholars and participants in the criminal justice system, the Court “assumed” for the purposes of the opinion that the studies “establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death qualified’ juries.”

Even assuming the validity of the lower court findings, the Court concluded that there was no violation of the fair cross-section or impartiality provisions of the Constitution.

Without much explanation, the Court noted that the cross-section requirement had not yet been applied to the petit juror and announced that to do so would be “unworkable and unsound.” Assuming the fair cross-section requirement was applicable, the Court concluded that “Witherspoon excludables” were not a distinctive group for fair cross-section purposes. In reaching its definition of a distinctive group, the Lockhart Court recognized the purposes of the cross-section requirement, which are set forth in Taylor v. Louisiana. They include:

1. ‘guard[ing] against the exercise of arbitrary power’ and ensuring that the ‘commonsense judgment of the community’ will act as a hedge against the overzealous or mistaken prosecutor,
2. ‘preserving public confidence in the fairness of the criminal justice system,’ and
3. ‘implementing our belief that sharing in the administration of justice is a phase of civil responsibility.’

Instead of focusing on those principles, the Lockhart Court distinguished “Witherspoon excludables” from the groups traditionally protected under the Equal Protection Clause and the sixth amendment. Unlike blacks, Mexican Americans, and women, “Witherspoon exclud-
ables" have control over their status. Furthermore, they are not totally deprived of the right to serve on juries, since they can serve in noncapital cases. Instead of focusing on the traditional role of the jury as a check on government power, and as an exercise in community decision-making, the Court focused on the interest of the government in limiting access to the jury to those who will not be influenced by their view of a law they believe is unjust or immoral. Thus, the Court concluded that "Witherspoon excludables" are not a distinctive group for fair cross-section purposes.

Next, the Lockhart Court concluded that there was no violation of a right to an impartial jury. Initially, the Court noted that there was no claim that the jurors chosen were partial. Relying heavily on language in Witherspoon and Adams, McCree argued that the jury selection procedures resulted in a conviction-prone jury. The Court responded to this argument by again focusing on the state's interest in using a single jury, free from bias caused by views on the death penalty, to decide all the issues in any given case. The Court contrasted the broad discretionary sentencing decision vested in juries with the function of determining guilt. According to the Court, Witherspoon and Adams do not have broad applicability outside of the context of capital sentencing. 286

Thus, the Court continued to treat fair jury issues relating to capital sentencing as different from fair jury issues relating to issues of guilt. In a negative way, the Court provided some definition of what would, or in this case would not, constitute a cognizable group for fair cross-section analysis. A group chosen solely because of shared values or attitudes does not constitute such a group. Furthermore, the concept of a fair and impartial jury does not contemplate any particular mix of attitudes or beliefs among the members of the jury.

VIII. Conclusion

The Court's approach to issues relating to fair jury rights has been inconsistent and sporadic. Rather than focusing on the underlying policy behind the constitutional jury trial rights as an organizing concept in developing a consistent, cohesive, and rational means for resolving the issues, the Court has adopted a case by case approach. The Court has focused more on the factual peculiarities of each case rather than on the broader policy issues, which are the proper domain of the highest court of the land. The Court has not reconciled recent juror bias decisions with long-recognized practices, precedent, and policy; nor has the Court developed a consistent view of the jury trial rights guaranteed by the Constitution.

To some extent the Court's preoccupation with factual issues,

286. Id. at 1770.
rather than the broader policy issues at stake, is consistent with the Court’s utilitarian concerns and its preoccupation with crime prevention. As a general rule, only the accused can appeal in a criminal case, thus, the more issues that can be shunted off as factual issues committed to the discretion of the trial judge, the less opportunity for stringent appellate review of a conviction. Those utilitarian concerns, however, conflict sharply with the antiestablishment, libertarian, values that permeate the historical purpose and function of the American jury. Thus, the decisions reflect a radical departure from the common law and constitutional approach to the American jury trial. While the English jury was originally a tool of the Crown and was used to assist in enforcing the laws, the American jury, as preserved in the sixth amendment, was established as a check on abusive government power.

The Court’s inability or refusal to develop a sound and consistent constitutional policy toward fair jury rights has predictably spawned substantial litigation, inconsistent results, and, to some extent, adverse public perception and a lack of confidence in our justice system. The American public rarely shows concern over deviations from traditional constitutional protections or precedent when the deviations insure that the guilty remain convicted. The public often perceives the very constitutional provisions limiting governmental intrusion on private lives—the same provisions that distinguish the American democracy from more totalitarian forms of government—as technicalities that ought not to stand in the way of the government when the government is out to capture citizens whom the public perceives to be genuine criminals. Thus, the public usually does not become aroused if the government uses the fruits of an illegal search or confession to convict a citizen. Jury trial rights, however, are important to the public perception of justice. If, for example, a particular segment of the public perceives that it is being deprived of a historic role in the decisionmaking process of the jury, then that perception foments distrust, disillusionment, and outright violence. Thus, the Court’s recent decisions treating the basic question of bias in the jury process as a local matter to be resolved on a case-by-case factual analysis by a local trial judge, rather

287. 1 W. HOLDSWORTH, supra note 51 at 312-13, 317.
288. See supra note 49.
289. For example, the conviction of a popular black former school superintendent, after the prosecutor used peremptory challenges to exclude all black veniremen, is generally attributed as a precipitating cause of the race riots in Miami, Florida, in May of 1980. 7 NAT. L.J. p. 6, col. 1 (March 25, 1985). See also Bell, supra note 132; San Fran. Chron., May 22, at 1, col. 1; and San Fran. Chron., May 23, at 1, col. 1. Violence erupted in San Francisco’s gay community following the manslaughter verdict against Dan White who was accused of murdering San Francisco Mayor George Moscone and homosexual supervisor Harvey Milk. In that trial there were no homosexuals on the jury panel. Defense counsel used peremptory challenges to exclude the only two avowed homosexuals on the panel. San Fran. Chron., May 1, at 2, col. 4.
than as a fundamental principle of fairness protected by the Constitution, which is to be uniformly preserved and protected throughout the nation, is a matter of concern to the American people.

The Court had an opportunity to redress this adverse public perception this past term. To some extent, the Batson decision reflected a concern for the public perception of the jury system. The Court recognized that "public respect for our criminal justice system and the rule of law will be strengthened if we insure that no citizen is disqualified from jury service because of his race." Unfortunately, the decision in Batson added to the confusion and insured repeated litigation that will perhaps cause additional public concern for the justice system. The Court shunted the direction of future litigation on this issue into an equal protection analysis, which will indirectly implicate the key fair jury concerns. The Turner opinion perpetuated the ad hoc approach to fair jury issues. Although the Court recognized that racism is a distinct possibility in all prosecutions against blacks, a defendant is entitled to inquire on voir dire about racism as a constitutional matter only in capital cases or other cases involving "special circumstances." Instead of adopting the argument of Witt that the concept of a fair and unbiased jury does not vary when the death penalty is implicated, the Court again treats the death penalty as a special case. In nondeath penalty cases, absent special circumstances, the accused has no constitutional right to inquire into potential bias.

The Lockhart decision also calls for reconsideration. In light of the historic role of the jury as a group chosen to express community sentiment and guard against government tyranny, it is difficult to understand the justification for permitting the government, through challenges for cause, to exclude from the jury an identifiable segment of the population on the ground that these citizens disagree with the law sought to be enforced by the government.

Furthermore, it is difficult to reconcile the Court's apparent interest in giving the state broad voir dire rights to inquire into death penalty views, yet deprive the defendant of equally broad voir dire rights.


294. In Lockhart, Justice Rehnquist commented:

McCree concedes that the State may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence. Ipso facto, the State must be given the opportunity to identify such prospect-
to ferret out racial bias. The institution of the jury was created to protect the citizen, not the state, yet the Court clearly is more concerned about the state's interest in securing conviction in capital cases than in insuring that a black defendant is tried in an atmosphere free of racism.

To develop a cohesive policy, the Court must step back from the minute facts of each case and reflect on how its decisions affect the jury trial process as we know it, and the jury trial process as contemplated by the Constitution. The Court must recognize that a decision on the scope of voir dire has an impact on other aspects of the trial. For example, if the Court limits the scope of voir dire, counsel attempting to protect his or her client from racism must, of necessity, rely on arbitrary hunches based on group characteristics, including race, religion or age in exercising peremptory challenges. Furthermore, if parties are not afforded an opportunity to detect racial bias during voir dire, to what extent should that affect the finality of the judgment and post trial hearings when it is discovered that racial bias played a role in the decision? If peremptory challenges are limited, what impact does this have on the scope of the challenge for cause?

In determining how to address the question of bias in the jury system, the Court must recognize the illusive nature of bias, the limitations of voir dire, and the overriding concern for the appearance of fairness in the trial process. Certain prejudgments are simple misconceptions based on erroneous information. These prejudices can be rectified once correct information is provided, assuming the individual is honestly willing to reevaluate. Thus, to determine whether a prospective juror can overcome such a misconception may involve a direct assessment of that individual's credibility and willingness to consider the evidence. It may be appropriate to defer to the trial judge on issues relating to such prejudgments based on misconceptions. The invidious nature of a true prejudice, however, is that it is resistant to contrary evidence and may be unconscious. If the prejudice is unconscious, questions of credibility and demeanor are not implicated. When facts indicate an appropriate basis for imputing a prejudice, the trial judge is in no better position than the appellate court in assessing this type of prejudice. In fact, the appellate courts are in a better position to address the concern for the appearance of fairness and community acceptance of our judicial system by setting forth clear standards to be followed by the lower courts.

tive jurors by questioning them at voir dire about their views of the death penalty.

106 S. Ct. at 1763 n.7.

296. See supra note 232 and accompanying text.
In many contexts, the Supreme Court has recognized the illusory nature of a true prejudice and the limitations of the voir dire to demonstrate bias as a factual certainty. These distinctions were made at early common law when principal challenges were treated as legal questions and challenges to the favor were factual issues. The Court's recent decisions treating these issues as factual decisions to be resolved at the trial level, and not legal constitutional issues to be supervised more closely by the appellate courts, represent an unwise departure from centuries of common law and constitutional jurisprudence.

Ultimately, the Court must come to grips with the appropriate constitutional role of the voir dire and the peremptory challenge. Recent decisions, deferring to trial court discretion on these issues, break sharply from well-established common law and constitutional precedents. The Court must establish minimal principles of fairness, equality, and impartiality in jury trial procedures. Those principles, provided for in the Constitution, must be applied uniformly throughout the country, and not left to the individual discretion and understanding of each and every local trial judge.

298. See, e.g., Murphy v. Florida, 421 U.S. 794, 800-01 n.4 (1974) ("[w]e must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory" (citation omitted)).

299. See, e.g., Smith v. Phillips, 455 U.S. 209, 221-22 (1981) (O'Connor, J., concurring) ("[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it").

300. See supra notes 52-61 and accompanying text.