

## **BATSON REVISITED IN AMERICA'S "NEW ERA" OF MULTIRACIAL PERSONS**

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Since two bloods course within your veins,  
Both Jam's and Japhet's intermingling;  
One race forever doomed to serve,  
The other bearing freedom's likeness.<sup>1</sup>

It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the government of the United States, which gives to bigotry no sanction — to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.<sup>2</sup>

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<sup>1</sup> Poem from Jacob Steendam to his multiracial son, *reprinted in* A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* 102 (1978) (citation omitted) [hereinafter *MATTER OF COLOR*].

<sup>2</sup> Letter from President George Washington to the Hebrew Congregation of

I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.<sup>3</sup>

#### INTRODUCTION

From the time of this country's founding, America has always been a multiracial society.<sup>4</sup> In the coming decades, America's racial and ethnic diversity will continue to increase.<sup>5</sup> The 2000 Census

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Newport, Rhode Island (Sept. 9, 1790), *reprinted in* OUR SACRED HONOR: WORDS OF ADVICE FROM THE FOUNDERS IN STORIES, LETTERS, POEMS, AND SPEECHES 331 (William J. Bennett ed., 1997) [hereinafter OUR SACRED HONOR]. The irony of this statement, given Washington's status as a slave owner and the nation's tolerance of race-based slavery, is not lost on the author. The messenger's faults, however, do not degrade or invalidate the wisdom and truth of the ideals contained in the message. Washington's own moral discomfort with his slave-owner status may be seen in the contents of his will and the fact that he manumitted all of his slaves upon his death. See George Washington, Last Will and Testament (July 9, 1799), *reprinted in* OUR SACRED HONOR, *supra*, at 359-60.

<sup>3</sup> Letter from Thomas Jefferson to Thomas Paine (1789), *available at* <http://etext.virginia.edu/jefferson/quotations/jeff1520.htm> (last visited Oct. 27, 2001). Jefferson's message, like that of Washington's, is still valid despite his status as a slaveholder. His own moral discomfort about the institution of race-based slavery is evident in this passage:

I tremble for my country when I reflect that God is just: that his justice cannot sleep forever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest. But it is impossible to be temperate and to pursue this subject through the various considerations of policy, of morals, of history natural and civil. We must be contented to hope they will force their way into every one's mind. I think a change is perceptible, since the origin of the present revolution. The spirit of the master is abating, that of the slave rising from the dust, his condition mollifying, the way I hope preparing, under the auspices of heaven, for a total emancipation, and that this is disposed, in the order of events, to be the consent of the masters, rather than by their extirpation.

Thomas Jefferson, Notes on the State of Virginia, Query XVIII (1787), *reprinted in* OUR SACRED HONOR, *supra* note 2, at 352. Yet, Jefferson freed very few of his slaves. It is also more likely than not that those slaves he did free were his own offspring from a relationship with one of his own slaves, Sally Hemings. See generally ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997); ROGER WILKENS, JEFFERSON'S PILLOW 99-102 (2001); *Jefferson-Hemings DNA Testing: An On-Line Resource*, at <http://www.monticello.org/plantation> (last visited Sept. 8, 2002).

<sup>4</sup> See Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1171 (1997); see also Viet D. Dinh, *Races, Crime, and the Law*, 111 HARV. L. REV. 1289, 1290-91 (1998).

<sup>5</sup> See Dinh, *supra* note 4, at 1290 ("Our present society is multiracial, and it will

evidences the present and coming racial complexity.<sup>6</sup> Mandated by the Constitution, this decennial census, for the first time allowed individuals to chose more than one race in identifying their racial heritage.<sup>7</sup> The preliminary results of the 2000 Census show that the number of individuals claiming multiracial status is not insignificant.<sup>8</sup> As many as 2.4 percent of our nation's citizens consider themselves multiracial;<sup>9</sup> and in California, the nation's most populace state, the percentage is 4.7.<sup>10</sup>

Given our society's historical penchant for discrimination against minority racial groups, persons of multiracial backgrounds do and will continue to face many of the same problems related to racial discrimination that other minority racial groups in our country have historically faced.<sup>11</sup> These problems include, employment discrimination, housing discrimination, and discrimination in the administration of our criminal justice system. Due to the difficulty often associated with distinguishing which racial groups multiracial individuals belong to or derive from, the problems of discrimination

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likely be increasingly so in the future.”).

<sup>6</sup> See <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf> (last visited Aug. 23, 2002).

<sup>7</sup> *A New Look at Race in America*, N.Y. TIMES, March 10, 2001, at A10 (“[T]he 2000 questionnaire was the first that allowed people to choose more than one race.”). Whether the 2000 Census would have a “multiracial” category generated an intense debate and vociferous resistance by groups, particularly in the black community, opposed to such a category. See Hickman, *supra* note 4.

<sup>8</sup> See U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA SUMMARY FILE, Table PL1; see also [http://www.census.gov/PressRelease/www/2001/tables/st00\\_1.pdf](http://www.census.gov/PressRelease/www/2001/tables/st00_1.pdf) (last visited Aug. 23, 2002).

<sup>9</sup> John Ritter, *California Racial Data Shifts*, U.S.A. TODAY, Mar. 30, 2001, at 1A. This means that California alone has almost 1.6 million inhabitants of multiracial descent. The author uses the terms “multiracial” and “mixed-racial” interchangeably throughout this Article so as to imply no preference for either term. As to other terms referring to race, the following expressions of Joel Williamson sum up the weaknesses of the use of any such terms:

I hope the reader will indulge me in the use of the terms ‘white,’ ‘black,’ ‘mulatto,’ and ‘Negro.’ Admittedly, they are very loose and laden with powerful emotional charges. But most who read this book will know their weaknesses and recognize their strengths as necessary symbols in talking about these subjects.

JOEL WILLIAMSON, *NEW PEOPLE* xii (1984).

<sup>10</sup> Ritter, *supra* note 9, at 1A. The percentage of multiracial persons in the country's urban centers may be even greater because urban centers have a much greater percentage of persons from various ethnic groups. Sarah Cohen & D’Vera Cohn, *Racial Integration's Shifting Patterns: Enclaves Persist, but Black-White Divide Shrinks*, WASH. POST, April 1, 2001, at A1.

<sup>11</sup> See generally Michael C. Thornton, *Is Multiracial Status Unique? The Personal and Social Experience*, in *RACIALLY MIXED PEOPLE IN AMERICA* 324 (Maria P.P. Root ed., 1992).

will present these people with unique, and often unrecognized and unaddressed problems.<sup>12</sup> This Article will address one of these potential problems, which is associated with the administration of the criminal justice system: discrimination based on race in the use of peremptory challenges during the selection of jurors.

This country has an extensive history of racial discrimination in the context of the jury selection process.<sup>13</sup> Although both the courts and legislatures have attempted to deal with the problem of racial discrimination in the jury selection process,<sup>14</sup> the solutions provided do not solve the problem for those persons of multiracial descent who may not be readily identified or perceived as racial minorities. In particular, it is a challenge for society to prevent the racially discriminatory use of peremptory challenges in the jury selection process, if only one side in the litigation recognizes a multiracial potential juror as being multiracial and discriminates based on that person's racial makeup. What if a juror is dismissed from the jury pool by one side due to his or her racial heritage, but neither the other side nor the judge recognizes the discrimination because the racial makeup of the juror is not readily apparent to either?

The present jury selection process, mandated by *Batson v. Kentucky*<sup>15</sup> to address racial discrimination in the use of peremptory challenges, depends upon the ability of the judge and the attorneys for both sides to perceive the racial makeup of the potential juror. Only then will one party be on notice of the possibility of racial discrimination and raise the proper challenge. If this party does not recognize the dismissed person as being of multiracial descent, then the constitutional violation goes undiscovered and unremedied.

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<sup>12</sup> Professor Randall Kennedy touched on one aspect of the unique problems multiracial persons pose to the criminal justice system in his discussion about the racial composition of juries. Professor Kennedy stated the following:

In an increasingly multiracial society, controversies over racial classifications will become even more complex, frequent, and vexing. What does the judge do about the person who is part Asian and part black? Is such a defendant entitled to a minimum quota of Asian-Americans or a minimum quota of African-Americans? Is an Afro-Asian juror racially similar to a 'plain' African-American?

RANDALL KENNEDY, RACE, CRIME, AND THE LAW 244 (1997); *see also* Jordan Lite, *Please Ask Me Who, Not 'What,' I Am*, NEWSWEEK (July 16, 2001), at 9.

<sup>13</sup> *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 663-66, 684-790 (6th ed. 2000); JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99-112 (1994); AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 271-73 (1998).

<sup>14</sup> ABRAMSON, *supra* note 14, at 117; *see also* Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq. (amended 2001).

<sup>15</sup> 476 U.S. 79 (1986).

Therefore, *Batson*, as it is presently structured and enforced, may not, and most likely will not solve the problem of racial discrimination in the use of peremptory challenges to exclude multiracial persons from juries.

In Part I, the Article will review the legal and societal history of racial discrimination against multiracial individuals in our country. Part II will then examine the historical problem of racial discrimination in the context of the jury selection process and describe the present judicial remedy used to address this problem. In Part III, the Article will discuss the results of the 2000 Census, the implications of this data with regard to the racial make-up of juries, and how these data and anecdotal evidence suggest the existence of a unique problem of racial discrimination against multiracial individuals in the jury selection process. Finally, Part IV will suggest some potential remedies for this "vexing" problem.

#### I. THE HISTORY OF DISCRIMINATION AGAINST MULTIRACIAL AMERICANS

Race is a strange and flexible concept, with an endless capacity to confound.<sup>16</sup>

In earlier days we believed in magic, possession, and exorcism, in good and evil supernatural powers, and until recently we believed in witchcraft. Today many of us believe in 'race.' 'Race' is the witchcraft of our time. The means by which we exorcise demons. It is the contemporary myth. Man's most dangerous myth.<sup>17</sup>

Since Europeans first settled on this continent, our society has comprised several different ethnic and racial groups.<sup>18</sup> Both the Articles of Confederation and the Constitution reference individuals of different races.<sup>19</sup> Given the predilection of human beings,

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<sup>16</sup> ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD* 1 (1997). For an excellent discussion of race and myths surrounding race, see Naomis Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, at <http://interracialvoice.com/zack.html> (last visited Oct. 8, 2002).

<sup>17</sup> COSE, *supra* note 16, at 11 (quoting ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* (6th ed. 1998)). The idea of dividing human beings into different groups based on the concept of race originated in the seventeenth century. The concept of categorizing humans by skin color started with Johann Friedrich Blumenbach and continued on into this century. See *Race*, at [http://www.encyclopedia.com/html/section/race\\_RaceClassificationandRacism.asp](http://www.encyclopedia.com/html/section/race_RaceClassificationandRacism.asp); see also *THE IDEA OF RACE* (Robert Bernasconi & Tommy L. Lott eds., 2000).

<sup>18</sup> See generally SCOTT L. MALCOMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE* (2000).

<sup>19</sup> The Articles of Confederation states the following:

[A]ll charges of war and all other expenses . . . shall be defrayed out of

multiracial persons were the inevitable result of a multiracial society.<sup>20</sup> Thus, multiracial people have always been a part of America's social fabric.<sup>21</sup>

Nevertheless, the law and the legal status of multiracial people

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the common treasury, which shall be supplied by the several States in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude, and three-fifths of all other Persons not comprehended in the foregoing description, except Indians, not paying taxes . . .

ARTICLES OF CONFEDERATION, art. VIII, *amended by* Act of Congress (April 18, 1783). This appears to be the first use of the euphemism "three-fifths" by the central government when referring to black slaves. The official federal government's first use of the three-fifths term to reference black slaves was in the United States Constitution, which states the following:

Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons . . . and excluding Indians not taxed, three-fifths of all other persons.

U.S. CONST. art I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII. For a history and description of the reasons for the use of this fraction and euphemism, see WILLIAM LEE MILLER, *THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING* 119-29, 171-77 (1992).

<sup>20</sup> See JAMES AXTELL, *THE EUROPEAN AND THE INDIAN: ESSAYS IN THE ETHNOHISTORY OF COLONIAL NORTH AMERICA* 152 (1981) ("One form of temptation — perhaps among people of different color the most elemental — was sexual."); see also JAMES H. JOHNSTON, *RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH: 1776-1860*, 165-66 (1970) (quoting R.W. SHUFELDT, *THE NEGRO: A MENACE TO AMERICAN CIVILIZATION* 60 (1907)) ("The crossing of the two races commenced at the very out-start of the vile slave trade that brought them thither; indeed, in those days many a negress was landed upon our shores already impregnated by someone of the demoniac crew that brought her over.").

<sup>21</sup> JOHNSTON, *supra* note 20, at 165. In 1630, a white male was punished severely for apparently having some sort of sexual relations with a black woman. AUGUST MEIER & ELLIOT RUDWICK, *FROM PLANTATION TO GHETTO* 42 (3d ed. 1976). Such punishment was also accorded those who apparently engaged in sexual relations with multiracial persons. See Hickman, *supra* note 4, at 1172 ("As early as 1632, a mere fourteen years after the first Blacks arrived in Jamestown, Captain Daniel Elfrye was reprimanded by his employer for 'too freely entertaining a mulatto.'") (quoting WINTHROP D. JORDON, *WHITE OVER BLACK* 166 (1968)); see also 1 HELEN CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 78 (1925). The same sort of treatment for interracial relations was visited upon White and Native Americans who had sexual relations. In 1631, the Massachusetts General Court sentenced a young white man to be whipped for soliciting a Native American woman. See AXTELL, *supra* note 20, at 154. In the Plymouth colony during this period, several cases involved interracial sexual encounters between Whites and Native Americans. *Id.* Discrimination in how these cases were handled is evident by the different penalties placed upon the white person and the Native American. In one such case, the white female was whipped and had to wear a scarlet badge. In another, a Native American male was whipped and expelled, but was not put to death, which was the normal sentence for rape, because "he was but an Indian, and therefore in an incapacity to know the horribleness of the wickedness of this abominable act . . ." *Id.* at 155 (quoting Plymouth Colony Records 1:132, 6:98 (Shurtleff ed.)).

have not always reflected an attitude of tolerance. The same types of discrimination visited upon other racial minority groups were and are practiced by our society against those of multiracial descent.<sup>22</sup> With this history of discrimination against persons of multiracial heritage and their ever-increasing numbers in our society, vigilance with regard to the criminal justice system and how it treats these persons is critical.

The earliest apparent case of legally sanctioned discrimination against a multiracial person is *In Re Mulatto*.<sup>23</sup> Although the case comprises a mere sentence: “Mulatto held to be a slave and appeal taken,” it is the first indication of the unequal and discriminatory fashion with which the United States legal system would treat persons of multiracial descent for at least the next 300 years.<sup>24</sup> In an effort to address the problems created by the intersection of interracial sexual encounters and a slave system based increasingly on race, the Virginia House of Burgesses enacted a statute in 1662, reversing the English common law rule that children follow the status of the father. In direct refutation of the English common law, the statute stated :

WHEREAS, some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or free, *be it therefore enacted*, that all children borne in this country shall be held bond or free only according to the condition of the mother, And that if any Christian shall commit fornication with a negro man or woman, he or she soe offending shall pay double the fines imposed by the former act.<sup>25</sup>

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<sup>22</sup> “Unfortunately, oppression is sometimes the common denominator in shared identity. Historically, oppressed people share close bonds. The reality that multiracial people of numerous racial combinations have been unable to embrace their entire heritage has, indeed, strongly banded them together as a very distinct category.” Susan Graham, *Review of Federal Measurements of Race and Ethnicity*, in JON MICHAEL SPENCER, *THE NEW COLORED PEOPLE: THE MULTIRACIAL MOVEMENT IN AMERICA* 36 (1997). Contrary to critics who argue that a multiracial person is discriminated against due to being associated with the perceived “subordinate” or minority race, “what seems to bind multiracial people is not race or culture, but living with an ambiguous status . . . .” Michael C. Thorton, *Is Multiracial Status Unique? The Personal and the Social Experience*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 11, at 324; *see also* Oates v. Runyon, 1997 EEOPUB LEXIS 785 (Mar. 13, 1997) (describing the plaintiff’s race as mixed and the hue of her skin as “light brown”); Hill v. Runyon, 1996 EEOPUB LEXIS 3187 (May 28, 1996) (alleging racial discrimination due to multiracial descent).

<sup>23</sup> *See* CATTERALL, *supra* note 21.

<sup>24</sup> *Id.*

<sup>25</sup> The Slave Code of Virginia, Act XII (1662) (emphasis in original), *reprinted in* THE POISONED TONGUE: A DOCUMENTARY HISTORY OF AMERICAN RACISM AND PREJUDICE 26 (Stanley Feldstein ed., 1972) [hereinafter POISONED TONGUE]. It is a supreme irony that this sort of classification system is still used in twenty-first century America to classify biracial or multiracial children. “In cases like these [of biracial children],

This new statute changed the law regarding multiracial children to mirror that reserved for animals under English law.<sup>26</sup> This change was significant for several reasons. First, it allowed fathers to disavow their common law and financial responsibilities toward their multiracial children.<sup>27</sup> Second, multiracial children so conceived increased the capital stock of the slave holders if their mothers were slaves.<sup>28</sup> Thus, the law actually created a perverse incentive that encouraged interracial sexual encounters between white men and black slave women, and the rape of black slave women by white slave owners.<sup>29</sup>

Three decades later, in 1691, Virginia enacted a new law aimed at stopping the births of that “abominable mixture and spurious issue,” a degrading reference to mulattoes or children of mixed descent.<sup>30</sup> This multiracial statute provided for the banishment of

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we always know who the mother is and not always the father.” COSE, *supra* note 16, at 6 (quoting an unnamed census official). By way of contrast, it should also be noted that under the rules of orthodox Judaism, a person is defined as Jewish through his mother for the very reason stated by this census official. Of course this method of delineation was created in the absence of sophisticated DNA testing for paternity.

<sup>26</sup> A. LEON HIGGENBOTHAM, JR., *SHADES OF FREEDOM* 34 (1996) [hereinafter *SHADES OF FREEDOM*].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* 48 (1991). There are, however, anecdotal accounts of slave masters and their mistresses living in what some have deemed loving or caring relationships. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 418 (1974); HENRY LOUIS GATES, JR., *COLORED PEOPLE: A MEMOIR* 71 (1995); GORDON-REED, *supra* note 3. For an excellent historical account of one family’s interracial relationships in the south as a result of the institution of slavery, see EDWARD BALL, *SLAVES IN THE FAMILY* (1998).

Not long after the statute described above was enacted, Virginia enacted a law that let Whites sooth their Christian conscience while simultaneously retaining their human property. *SHADES OF FREEDOM*, *supra* note 26, at 47-48. In 1667, the legislature pronounced that the act of baptism did not alter the condition of the person, either slave or indentured. *Id.* at 47. Prior to this law, baptism generally seemed to preclude a Christian person, regardless of race, from being owned. See *MATTER OF COLOR*, *supra* note 1, at 36-37.

<sup>30</sup> Many titles have been created to apply to the various degrees of ethnic mixture in a given person. Mulatto is derived from the Spanish language and means hybrid. DAVIS, *supra* note 29, at 5. Someone of seven-eighths African descent was deemed a “mango” or “sacatra.” *Id.* at 36. A person of three-fourths African descent was considered a “sambo” or “griffe.” *Id.* The terms “quadroon” and “octoroon” generally referred to a person of one-fourth and one-eighth African descent, respectively. *Id.* at 36-37. “Mustee,” derived from the Spanish term *mestizo* (of mixed European and Indian extraction), was used when referring to an octoroon but also was applied to one of Indian and African descent. *Id.* In America, most of these terms did not catch-on, leading to confusion and imprecision in categorizing individuals by racial makeup. For a comical and satirical look at some definitions of mulatto, see Danzy Senna, *The Mullato Millennium*, in *HALF AND HALF: WRITERS ON*

Whites who intermarried with Blacks or mulattoes.<sup>31</sup> The same law also imposed a fine of fifteen pounds on any free English woman who had a "bastard child by a Negro," and forced the multiracial child into slavery until the age of thirty, regardless of the status of the white mother. In the case of an English woman who was an indentured servant, her child still suffered the same fate.<sup>32</sup>

A number of states, including Pennsylvania, enacted similar laws.<sup>33</sup> Maryland passed a statute that was even more draconian, enslaving white women who married Blacks, as well as their multiracial children.<sup>34</sup>

In 1705, Virginia amended the 1691 Act, but retained the language describing why such an Act was necessary:

And for a further prevention of that abominable mixture and spurious issue, which hereafter may increase in this her majesty's colony and dominion, as well as by English, and other white men and women intermarrying with negroes or mulattoes, as by their unlawful coition with them, Be it enacted, That whatsoever English, or other white man or woman, being free, shall intermarry with a negroe or mulatto man or woman, bond or free, shall, by judgment of the county court, be committed to prison, and there remain, during the space of six months, without bail or mainprize; and shall forfeit and pay ten pounds current money of Virginia, to the use of the parish as aforesaid.<sup>35</sup>

The modification of the 1691 Act did, however, accomplish several things. First, it eliminated any ambiguities regarding the status of multiracial children by ensuring that all mixed race children would be held in bondage until the age of thirty-one.<sup>36</sup> The law further clarified the term "mulatto" under the statute by defining one as the child of an Indian, or child, grandchild, or great-grandchild of any African descent.<sup>37</sup> Additionally, it precluded mulattoes, Blacks, Indians, and criminals from holding any ecclesiastical, civil, or

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<sup>31</sup> SHADES OF FREEDOM, *supra* note 26, at 42.

<sup>32</sup> SHADES OF FREEDOM, *supra* note 26, at 30.

<sup>33</sup> NAOMI ZACK, RACE AND MIXED RACE 79 (1993).

<sup>34</sup> WILLIAMSON, *supra* note 9, at 10-11; JOHNSTON, *supra* note 20, at 167.

<sup>35</sup> An Act Concerning Servants and Slaves (1705), *reprinted in* POISONED TONGUE, *supra* note 25, at 28.

<sup>36</sup> SHADES OF FREEDOM, *supra* note 26, at 35.

<sup>37</sup> *Id.* The reason for the apparent acceptability of people of mixed Indian ancestry may relate to the protection of the descendants of John Rolfe and Pocahontas. *Id.* at 225.

military office, or any other position of public confidence or power.<sup>38</sup>

The Virginia legislature again amended the law regarding the status of multiracial persons in 1723. The new law stated that children born to a female mulatto or to an Indian indentured servant, who were themselves serving until the age of thirty-one, were also required to serve the mother's master for thirty-one years.<sup>39</sup> The 1723 law also deprived mulattoes of the right to vote and limited their possession of firearms.<sup>40</sup> Free mulatto women were subject to taxation.<sup>41</sup>

In 1785, the Virginia legislature once again revised its multiracial legislation, this time significantly narrowing the applicable population. It changed the definition of mulatto to include only those persons with one black grandparent.<sup>42</sup> This new definition meant that many persons of African descent were now categorized as "white," making this the only historical instance of Virginia law where the category of "white" became more inclusive with reference to persons of African descent.<sup>43</sup> The change also affected those people of significant Indian ancestry, since the statute no longer mentioned Indians at all.<sup>44</sup> The law may have been prompted by the belief that had the category been more inclusive, many prominent individuals in the community would have been classified as mulatto.<sup>45</sup> At least one commentator has also hypothesized that in rewriting the law, Whites were really attempting to limit any possible alliance between persons

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<sup>38</sup> *Id.* at 38.

<sup>39</sup> *Id.* The latter scenario does not appear to be farfetched given that there are cases documenting such instances. In *Gwinn v. Bugg*, 1769 Va. LEXIS 3 (Va. 1769), a black male sued for his freedom, claiming among other things that his master did not legally own him. The facts of his claim were as follows: (1) his grandmother, a white woman, had his mother with a black male; (2) his mother was indentured until age thirty-one; (3) before the black male was born his mother's servitude ended; and (4) he was never bound by the churchwardens, yet was sold by his alleged master to his owner. SHADES OF FREEDOM, *supra* note 26, at 36.

<sup>40</sup> ZACK, *supra* note 33, at 80.

<sup>41</sup> *Id.*

<sup>42</sup> JOHNSTON, *supra* note 20, at 192.

<sup>43</sup> SHADES OF FREEDOM, *supra* note 26, at 39. In 1910, Virginia adopted a one-sixteenth rule to define who was black, and later in 1930 finally went to the one-drop rule. DAVIS, *supra* note 29, at 55.

<sup>44</sup> The exclusion of persons of mixed Indian descent changed in 1866 when the law defined a person of one-quarter Indian descent as a mulatto. SHADES OF FREEDOM, *supra* note 26, at 40. Later, an Indian, while on the reservation, was defined as any person with at least one-fourth of Indian descent and less than one-sixteenth of African descent. However, off the reservation, such a person of African descent was defined as Black. See DAVIS, *supra* note 29, at 9; ROBERT SICKELS, RACE MARRIAGE AND THE LAW 65 (1972).

<sup>45</sup> SHADES OF FREEDOM, *supra* note 26, at 39.

of mixed-descent now considered "white" under the new law, and Blacks and mulattoes who had limited, if any, civil rights.<sup>46</sup> By categorizing these persons of limited African descent as "white" and allowing them to receive the benefits of this legal status, multiracial persons would have every incentive to support the system of race-based slavery rather than oppose it. In this way, Whites may have thinned the ranks of potential agitators who might have caused an uprising against race-based slavery.

North Carolina and Tennessee followed Virginia's example of defining race by statute.<sup>47</sup> Under North Carolina law, an individual with one black great-great-grandparent was defined as a mulatto.<sup>48</sup> While no other states appear to have specifically defined who was to be legally considered a mulatto, many states did regulate the activities of individuals classified as mulattoes, often subjecting them to the same or similar restrictions as Blacks in the community. In Boston, Massachusetts, mulattoes were not allowed to keep hogs or swine without a master's consent.<sup>49</sup> Additionally, mulatto servants like Blacks, had a 9:00 p.m. curfew.<sup>50</sup> In New York City, mulattoes could not sell oysters, and in the State of New York, mulattoes could not enjoy, hold, or possess certain forms of real property.<sup>51</sup> In South Carolina, a mulatto could sue for freedom before a common pleas court, but only if represented by a guardian.<sup>52</sup> In addition, all mulattoes within the state were presumed slaves.<sup>53</sup> In Georgia, a mulatto could not serve as a constable, and could not vote.<sup>54</sup> In 1765, however, Georgia passed a law to encourage mulattoes to move to the state by providing them with the rights of any person born of British

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<sup>46</sup> *Id.* This change in the law caused some strange and interesting legal anomalies to occur. In the case of *Dean v. Commonwealth*, a white criminal defendant made the argument that two of the witnesses against him were incompetent to testify against him because they were mulattoes. GORDON-REED, *supra* note 3, at 53-54. At this time, mulattoes could not testify against whites. *Id.* The court deemed this argument unpersuasive because it found both witnesses as being white due to the fact that each was less than one-fourth black, meaning, under the statute, each witness was legally white. *Id.* Strangely, the witnesses' grandfathers would have been considered mulatto, and therefore incompetent to testify against this defendant. SHADES OF FREEDOM, *supra* note 26, at 40.

<sup>47</sup> JOHNSTON, *supra* note 20, at 193.

<sup>48</sup> *Id.* at 38.

<sup>49</sup> MATTER OF COLOR, *supra* note 1, at 80.

<sup>50</sup> *Id.* at 77.

<sup>51</sup> Hickman, *supra* note 4, at 1181.

<sup>52</sup> MATTER OF COLOR, *supra* note 1, at 194.

<sup>53</sup> *Id.* at 195.

<sup>54</sup> *Id.* at 265.

parents, excluding the rights to vote and sit in the Assembly.<sup>55</sup> Yet, by 1769, the State imposed a special fifteen-shilling tax on free mulattoes over the age of sixteen.<sup>56</sup> By contrast, most mulatto children in Louisiana were free and took the status of their father, due to that state's initial use of the Napoleonic Code.<sup>57</sup> The State did preclude mulattoes from marrying either Whites or Blacks, a fact that seemed to imply official recognition of mulattoes as a buffer race.<sup>58</sup> Yet, the laws regarding the status of children changed in 1832 as Louisiana courts, following the example of neighboring states, began to identify a child with the status of the mother.<sup>59</sup>

Throughout the years, other states also enacted laws specifying how persons of multiracial descent were to be treated under the law.<sup>60</sup> Although mulattoes in many regions were more often than not relegated to the status of Blacks, many people of multiracial descent achieved a level of local prominence and prosperity prior to 1850, particularly in the Deep South. In states such as South Carolina, Louisiana, and possibly Alabama,<sup>61</sup> mulattoes seemed to have acted almost as a buffer race, falling somewhere between white and black in the legal and social spectrum.<sup>62</sup> Around 1850, the environment for mulattoes in these areas changed drastically for the worse, due in most part to the confluence of three social phenomena: (1) the ascent of cotton in the southern economy, (2) the fear of the abolition movement in the north, and (3) the Civil War, Reconstruction, and their aftermath.<sup>63</sup> The change in attitude toward mulattoes in these southern areas was reflected by attacks like the one made by Henry Hughes of Mississippi: "Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest."<sup>64</sup>

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<sup>55</sup> SHADES OF FREEDOM, *supra* note 26, at 39-40.

<sup>56</sup> MATTER OF COLOR, *supra* note 1, at 264.

<sup>57</sup> ZACK, *supra* note 33, at 81.

<sup>58</sup> DAVIS, *supra* note 29, at 36.

<sup>59</sup> ZACK, *supra* note 33, at 81.

<sup>60</sup> See EDWARD REUTER, THE MULATTO IN THE UNITED STATES 111 (1918).

<sup>61</sup> Hickman, *supra* note 4, at 1182; see also DAVIS, *supra* note 29, at 35.

<sup>62</sup> DAVIS, *supra* note 29, at 35; see also ZACK, *supra* note 33, at 81.

<sup>63</sup> ZACK, *supra* note 33, at 81; see also DAVIS, *supra* note 29, at 41.

<sup>64</sup> HENRY HUGHES, TREATISE ON SOCIOLOGY 31 (1860), reprinted in EUGENE D. GENOVESE, ROLL, JORDON, ROLL 419 (1974). The use of the term "amalgamation" in reference to multiracial persons is a curiously American institution. The term comes from metallurgy and means the mixture of any metal with mercury. ZACK, *supra* note 33, at 78.

Despite such sentiments, mulattoes in the South attempted to defend their special status and even formed a regiment in 1861 to protect Louisiana.<sup>65</sup> Southern white officers disarmed the regiment.<sup>66</sup> Ironically, in 1862, when this same group attempted to defect and join the Union Army they were also poorly treated.<sup>67</sup> These events caused mulattoes to identify more and more with Blacks and less with Whites, regardless of their personal affiliations as Northerners or Southerners.<sup>68</sup>

By the start of the 1860's and continuing into the twentieth century, many states began to drop the numerical, heritage based definition used to define a person of multiracial descent, and began to define anyone with black ancestry as colored or black. The landmark case of *Plessy v. Ferguson*,<sup>69</sup> involved the prosecution of a person of mixed descent for violation of Louisiana's Separate Car Act, which prohibited race mixing in railroad seating.<sup>70</sup> Homer Plessy had purchased his train ticket for the all-white section and was subsequently arrested. He was only one-eighth black, and although he told the conductor that he was a Negro when he entered the train car, he argued to the United States Supreme Court that he was white for purposes of the statute.<sup>71</sup> Before the Court, Plessy argued that his status as "white" in the community was a property right, and to deny him a seat in the white section was to withhold that property right from him.<sup>72</sup> In upholding the constitutionality of the separate-but-equal doctrine, the Court stated that whether Plessy actually violated the law depended on how Louisiana defined a person of color.<sup>73</sup>

This idea of "hypo-descent,"<sup>74</sup> or what is commonly now known as the "one-drop rule," became part of the law in many states.<sup>75</sup>

<sup>65</sup> DAVIS, *supra* note 29, at 42.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). *Plessy* was not really the test case for this law. In an earlier case, another person of mixed-descent, Daniel Desdunes, was arrested for violating the law. SHADES OF FREEDOM, *supra* note 26, at 111-12. He pled not guilty and his plea was sustained on the ground that the law did not apply to interstate travel. *Id.*

<sup>70</sup> COSE, *supra* note 16, at 17.

<sup>71</sup> SHADES OF FREEDOM, *supra* note 26, at 112.

<sup>72</sup> COSE, *supra* note 16, at 17.

<sup>73</sup> *Plessy*, 163 U.S. at 552 (citations omitted). Plessy seems to have had the last say about his race, because historians note that he later registered to vote in the state as a white male. COSE, *supra* note 16, at 17.

<sup>74</sup> "Hypo-descent" means that a person of mixed-descent takes on the status of a socially subordinate group. DAVIS, *supra* note 29, at 5.

<sup>75</sup> "It is a fact that, if a person is known to have one percent of African blood in

Georgia's law reflected the notion of race by defining people of color as:

All negroes, mulattoes, mestizos and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any persons having either Negro or African, West Indian, or Asiatic Indian blood in his or her veins shall be known in this state as persons of color.<sup>76</sup>

Alabama<sup>77</sup> and Arkansas<sup>78</sup> employed a general characterization, defining Negro as any person of African descent. The idea behind the one-drop rule became uniformly accepted in white communities by 1915, and in the black communities by 1925.<sup>79</sup>

Other states, however, continued the numerical system of defining a person by their heritage,<sup>80</sup> even though outward appearance seemed to have been the decisive factor in delineating one's race. Certain states, like South Carolina, opposed the one-drop rule and its application in terms of anti-miscegenation laws for fear that it would prevent many marriages among white families, since so many of these families had black ancestry.<sup>81</sup> Legislator G. Tillman of South Carolina argued that many of these families had contributed men to the Confederate cause and it would be "unjust and

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his veins, he ceases to be a white man. The ninety-nine percent of Caucasian blood does not weigh by the side of the one percent African blood. The white blood counts for nothing. The person is a Negro every time." BOOKER T. WASHINGTON, *THE FUTURE OF THE AMERICAN NEGRO* 158 (1900). This idea persists almost one hundred years later as evidenced by the following quote from the pop musician Lenny Kravitz, whose mother was black and father is white: "Accept the blessing of having the advantage of two cultures, but understand that you are Black. In this world, if you have one spot of Black blood, you are Black. So get over it." COSE, *supra* note 16, at 18 (quoting from Lynn Norment, *Am I Black, White, Or In Between?*, *EBONY*, Aug. 1995, at 112). Not all multiracial people agree with this ideal. *See generally* COSE, *supra* note 16, at 4; *HALF AND HALF*, *supra* note 30. The one-drop rule is so ingrained in our nation's conscience that the mother of a biracial child, while acknowledging her son's multiracial heritage, also stated that she was preparing him for his struggles as a "black" male in our society. *See* Felicia Lee, *My Battle for My Son*, *PARENTS*, July 2001, at 102.

<sup>76</sup> *See* STATES' LAWS ON RACE AND COLOR 90 (Pauli Murray ed., 1997) (citing GA. CODE ANN. § 79-103 (1935)).

<sup>77</sup> *Id.* at 22.

<sup>78</sup> *Id.* at 38 (citing ARK. CODE ANN. § 41-808 (1911)).

<sup>79</sup> DAVIS, *supra* note 29, at 76-77. Not everyone in the Black community accepted those of mixed-descent as being Black. For example, Marcus Garvey, leader of the famous black separatist movement in the 1920s, did not accept mulattoes as being sufficiently black, and demanded that mulattoes be segregated from full-blooded Blacks. *Id.* at 134.

<sup>80</sup> *See generally id.*

<sup>81</sup> *Id.*

disgraceful to discredit them by declaring them of black ancestry."<sup>82</sup> These arguments proved persuasive in South Carolina, and in 1895 the state enacted a law that defined a Negro as a person of one-eighth African descent.<sup>83</sup>

Most, if not all of the statutes defining race were aimed at one goal: continued subordination of the black community by criminalizing miscegenation. At one point or another, some thirty-eight states had such laws.<sup>84</sup> These laws were used as a method of supporting and bolstering Jim Crow laws that continued to suppress the black community.<sup>85</sup> Jim Crow laws prohibited mixed marriages, so the multiracial children born of these illegal marriages shouldered the punishment because they were considered illegitimate.<sup>86</sup> Laws classifying multiracial persons also applied to persons of other ethnic descent. Between 1870 and 1900, Louisiana reclassified persons of mixed Chinese and non-Chinese descent as Chinese, black, and white.<sup>87</sup> In the Washington and Oregon Territories in the 1870's, children of white males and Native American women were classified as "half-breeds."

The United States Supreme Court finally deemed anti-miscegenation laws unconstitutional under the Fourteenth Amendment's Equal Protection and Due Process Clauses in the 1967 case, *Loving v. Virginia*.<sup>88</sup> At the time *Loving* was decided, sixteen

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<sup>82</sup> *Id.*

<sup>83</sup> STATES' LAWS ON RACE AND COLOR, *supra* note 76, at 407 (citing S.C. CONST. art III, § 33 (1895)); DAVIS, *supra* note 29, at 45.

<sup>84</sup> SICKELS, *supra* note 44, at 64.

<sup>85</sup> See Letter from J. Thomas Heflin, Alabama Senator, to Mr. Sam H. Reading (Oct. 15, 1929), in POISONED TONGUE, *supra* note 25, at 206-08. During the Reconstruction many states repealed their anti-miscegenation laws, but later resurrected them under Jim Crow. DAVIS, *supra* note 30, at 43.

<sup>86</sup> See generally STATES' LAWS ON RACE AND COLOR, *supra* note 76. There is anecdotal evidence that suggests some white parents lied about their race on the birth certificates of their multiracial children, claiming to be Black. This may have been done in order to prevent their children from being deemed illegitimate. See, e.g., Telephone interview with Angela Guidetta (May 30, 2001); Birth Certificate of Angela Guidetta (on file with author).

<sup>87</sup> COSE, *supra* note 16, at 25.

<sup>88</sup> 388 U.S. 1, 11-12 (1967). It is noteworthy that at this time the sentiment against interracial marriages still ran high even when such marriages involved persons of distinction from both races. In 1967, the daughter of then Secretary of State Dean Rusk was to marry a Black Air Force Captain at the chapel of Stanford University. SICKELS, *supra* note 44, at 124. The wedding was held away from Washington D.C. in order to avoid potential embarrassment due to boycotts by various dignitaries with discriminatory racial opinions. *Id.*

For an account of the history and rationale of antimiscegenation laws, see <http://www.africanaonline.com/miscegenation.htm>. Although unconstitutional for decades, it was not until November 2000 that the last state's antimiscegenation law

states, including Virginia, still had such laws on the books.<sup>89</sup>

Despite *Loving*, states continued to define people by race through the law, either by percentage of ancestry or hypo-descent.<sup>90</sup> This practice of race delineation persisted in various states despite the fact that states could not constitutionally discriminate based on a person's race.<sup>91</sup> In *Jane Doe v. State*,<sup>92</sup> members of a family argued that the State should be required to change the status of "colored" given to them on their birth certificates to that of "white" because their parents were white.<sup>93</sup> The family members also challenged the constitutionality of a repealed law that designated any individual as colored or black if they were more than one-thirty-second of African descent. The case had its origins in the fact that Mrs. Susie Guillory Phipps was denied a passport because she marked "white" on the application even though her birth certificate stated "colored."<sup>94</sup> She argued that she thought of herself as white, had married two white men, and had lived in the community as a white woman.<sup>95</sup> The trial court found that she was at least three-thirty-second black, and therefore "colored" for purposes of the statute in force at the time of her birth.<sup>96</sup>

The Louisiana Court of Appeals upheld the trial court's

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was removed from the books. See Jeff Amy, *Voters strike ban on interracial marriage*, MOBILE REGISTER, Nov. 8, 2000.

Employment discrimination against persons based on their marriage to, relationship with, or child with a person of another race is actionable under Title VII. See, e.g., *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588-89 (5th Cir. 1998) (finding that Title VII prohibits discrimination in employment practices premised on an interracial relationship), *opinion vacated*, 169 F.3d 215 (5th Cir.), *opinion reinstated except for issue of punitive damages*, 182 F.3d 333 (5th Cir. 1999); *Tetro v. Elliot Popham Pontiac*, 173 F.3d 988, 994 (6th Cir. 1999) (involving a Title VII claim by a plaintiff who was fired for fathering biracial a child); *Parr v. Woodman of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (involving a Title VII claim by a white job applicant against an employer due to her being in an interracial marriage); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361-62 (9th Cir. 1987).

<sup>89</sup> The California Supreme Court was the first high state court to overturn an anti-miscegenation law on equal protection grounds. See *Perez v. Sharp*, 198 P.2d 17 (1948).

<sup>90</sup> DAVIS, *supra* note 29, at 51-80.

<sup>91</sup> See *Brown*, 347 U.S. at 483 (1954).

<sup>92</sup> 479 So. 2d 369 (La. Ct. App. 1985), *aff'd*, 485 So. 2d 60 (La.), *cert. dismissed*, *Doe v. Louisiana Dep't of Health and Human Res.*, 479 U.S. 1002 (1986) (dismissing for lack of a substantial federal question).

<sup>93</sup> *Id.* at 371.

<sup>94</sup> DAVIS, *supra* note 29, at 10. The history of the plaintiff's racial heritage dates to 1770, when a French planter, Jean Gregoire Guillory, had a slave mistress, Margarita. *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

determination. The Court of Appeals ruled that the family members had no right to challenge the designation of their parents, and even if they did have such a right, they failed to prove that their parents' designation as "colored" was incorrect.<sup>97</sup> The Court also held that the repealed statute in question was not relevant to the case because the designation was made not by a public official, but by a midwife without the aid of the statute.<sup>98</sup> The Louisiana Supreme Court affirmed the decision of the Court of Appeals,<sup>99</sup> and the United States Supreme Court dismissed the case on appeal.<sup>100</sup> Because the Supreme Court dismissed the case on appeal, academics have argued that the one-drop rule gained official sanction by the judicial system.<sup>101</sup>

Notwithstanding the fact that laws defining persons of mixed descent no longer exist or are not enforceable, their absence has not completely erased the discrimination and social stigma visited upon multiracial persons. Persons of mixed-descent, and particularly those of mixed black and white descent, have suffered varying degrees of discrimination by various racial groups.<sup>102</sup> Many critics argue that it is not the multiracial aspect of the person that precipitates such discrimination, but rather his or her association with the perceived subordinate minority group.<sup>103</sup> This, however, does not account for the early laws specifically aimed at multiracial persons, nor the discrimination practiced against such persons by majority and minority racial groups.<sup>104</sup>

Books such as *Life on the Color Line*,<sup>105</sup> *The Color of Water*,<sup>106</sup> and

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<sup>97</sup> *Doe*, 479 So. 2d at 371-72.

<sup>98</sup> *Id.* at 372.

<sup>99</sup> 485 So. 2d 60 (La. 1986).

<sup>100</sup> *Doe v. Louisiana Dep't of Health and Human Res.*, 479 U.S. 1002 (1986).

<sup>101</sup> DAVIS, *supra* note 29, at 9-11. The one-drop rule has never really been legally authorized or applied in this country to any multiracial people, other than those of Native American descent. *Id.* at 12. At least one author has decried the one-drop rule as unconstitutional because it inherently treats people of part Black descent differently from other mixed-race persons. See M.R. Franks, *Seeing in Black and White*, 144 NEW L.J. 1287, Part II (1994), available at <http://www.exstellis.org> (last visited Oct. 12, 2002).

<sup>102</sup> DAVIS, *supra* note 29, at 142-74; SPENCER, *supra* note 22, at 36; Hickman, *supra* note 4, at 1182 n.88.

<sup>103</sup> See generally SPENCER, *supra* note 22; Hickman, *supra* note 4.

<sup>104</sup> See *Hansborough v. City of Elkhart Parks & Recreation Dep't*, 200 F. Supp. 199, 201 (N.D. Ind. 1992) (holding intraracial discrimination actionable under Title VII); *Walker v. Sec'y of the Treasury*, 713 F. Supp. 403, 404 (N.D. Ga. 1989) (involving a lawsuit against the IRS alleging that the plaintiff's termination was really because her dark-skinned supervisor was hostile towards her due to her light skin tone).

<sup>105</sup> GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995) (describing the discrimination the

*Who is Black*,<sup>107</sup> are testaments to the fact that multiracial persons are the subjects of racial discrimination by both the majority and minority communities.<sup>108</sup> In addition to its description in books, societal discrimination against multiracial persons can be witnessed in such racially insensitive statements as those made by golfer Fuzzy Zoeller about Tiger Woods,<sup>109</sup> and the uproar of the black community after Woods declared himself of mixed descent rather than solely black.<sup>110</sup>

This portion of the article, which predominately focuses on the historical legal discrimination against persons of mixed black and white descent, should not be construed as “a bichromatic focus on race relations”<sup>111</sup> involving only Blacks and Whites. Rather, the legal history of discrimination against multiracial persons necessarily lends itself to such a focus and, but for the one-drop rule, such discrimination would not be construed as having only bichromatic hue.<sup>112</sup> Instead of simply suggesting a “bichromatic” tilt, the focus of this section on the legal history of racial discrimination against multiracial persons, regardless of what mixture, supports the conclusion that such discrimination existed in our society, and that vigilance against discrimination is still necessary today. Vigilance is justified when parties in our justice system attempt to use peremptory challenges to discriminate based on race. Such discrimination undercuts the ideal that our justice system is fair to all.

## II. RACIAL DISCRIMINATION AND JURIES

As in other facets of this country’s social legacy, the criminal justice system has not been immune to the insidious effects of racial discrimination. From the time of this country’s founding,<sup>113</sup> race has played a part, formally or informally, in how the criminal justice

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author withstood by both Blacks and Whites do to his mixed heritage).

<sup>106</sup> JAMES MCBRIDE, *THE COLOR OF WATER* (1998).

<sup>107</sup> DAVIS, *supra* note 29.

<sup>108</sup> *See id.*; *see also* CLARENCE PAGE, *SHOWING MY COLOR: IMPOLITE ESSAYS ON RACE AND IDENTITY* 283-302 (1996); KATHY RUSSELL ET AL., *THE COLOR COMPLEX* (1992).

<sup>109</sup> *See* CNN Interactive, *Golfer Says Comments about Woods ‘Misconstrued’* (April 21, 1997), *available at* <http://www.cnn.com/US/9704/21/fuzzy>.

<sup>110</sup> *See* PAGE, *supra* note 108, at 285; Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 *UCLA L. REV.* 1705, 1738 n.149 (2000); *see also* Janita Poe, *Tiger Woods Spotlights Multiracial Identity*, *CHICAGO TRIBUNE*, 1997, *available at* [www.texnews.com/tiger/pride042197.html](http://www.texnews.com/tiger/pride042197.html) (last visited Sept. 8, 2002).

<sup>111</sup> Dinh, *supra* note 4, at 1289.

<sup>112</sup> *Id.* at 1289 n.2.

<sup>113</sup> *See generally* DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992).

system functions and dispenses justice.<sup>114</sup> This has been most evident in the selection and empanelling of a jury.

The jury selection process is dictated by statute in every jurisdiction in this country.<sup>115</sup> Despite differences in some details, a general process is followed in each jurisdiction.<sup>116</sup> The process begins when the proper officials compile a list of eligible jurors.<sup>117</sup> Before trial, individuals randomly selected from this list are provided with notice that they are to appear for possible jury service.<sup>118</sup> This group of individuals is commonly known as the venire.<sup>119</sup> Prior to trial, the venirepersons are questioned by the judge, the attorneys for both sides, or both in a voir dire.<sup>120</sup> Voir dire is essentially the process by which judges and/or lawyers question the potential jurors in an attempt to select a jury "free of prejudice and capable of rendering a free and fair verdict based on the trial proceedings."<sup>121</sup>

During the voir dire, a venireperson may be removed from the venire by two methods: (1) for cause, or (2) by peremptory challenge.<sup>123</sup> A potential juror may be removed "for cause" if he or she provides answers and/or acts in a manner that indicates an inability to be impartial in the case or is otherwise unfit or unable to serve on the jury. When a juror is removed "for cause," the attorney requesting the removal must provide the judge with a reason sufficient to justify removal. The number of challenges "for cause" are generally unlimited.<sup>124</sup>

As opposed to challenges "for cause," peremptory challenges do not normally require an attorney to provide a reason for the challenge to the judge. Although all jurisdictions in this country

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<sup>114</sup> *Id.*

<sup>115</sup> Michael J. Raphael & Edward J. Ungvasky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 MICH. J. L. REFORM 229, 230 (1993).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* For a detailed explanation of how racial bias can and has effected the system before the venire is formed, see KENNEDY, *supra* note 12, at 169-92. For a severe critique of Kennedy's book, see Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and Law*, 111 HARV. L. REV. 1270 (1998), and Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306 (1998).

<sup>120</sup> Raphael & Ungvasky, *supra* note 115, at 230.

<sup>121</sup> Honorable David Baker, *Civil Case Voir Dire and Jury Selection*, 1998 FED. CTS. L. REV. 3 (1998); *see, e.g.*, FED. R. CRIM. P. 24(a) ("The court may permit the defendant's attorney and the attorney for the government to conduct the examination of the prospective jurors or may itself conduct the examination.").

<sup>122</sup> *Id.*; *see, e.g.*, FED. R. CRIM. P. 24(a).

<sup>123</sup> KENNEDY, *supra* note 12, at 181.

<sup>124</sup> Raphael & Ungvasky, *supra* note 115, at 230.

allow for peremptory challenges,<sup>125</sup> the number of peremptory challenges each side may utilize is limited by statute, and varies depending on whether the case is criminal or civil.<sup>126</sup>

There is no constitutional requirement for peremptory challenges.<sup>127</sup> Originating in Roman law,<sup>128</sup> the peremptory challenge in the American legal system owes its existence to its following of English common-law traditions.<sup>129</sup> Soon after the country's founding, Congress mandated the use of peremptory challenges in the federal courts,<sup>130</sup> and the states followed suit.<sup>131</sup> The peremptory challenge is now a part of the trial process, both civil and criminal, in every state in the nation.<sup>132</sup>

#### A. *The History of Racial Discrimination in the Jury Selection Process*<sup>133</sup>

The Sixth Amendment to the Constitution mandates that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .”<sup>134</sup> Despite this mandate

<sup>125</sup> See, e.g., 28 U.S.C. § 1870 (1994) (providing for peremptory challenges in federal civil actions); FED. R. CRIM. P. 24(b) (providing for peremptory challenges in federal criminal prosecutions).

<sup>126</sup> For a list of the number of peremptory challenges permitted state by state, see JON M. VAN DYKE, JURY SELECTION PROCEDURES 282-84 (1977). See also FED. R. CRIM. P. 24(b) (limiting the number of peremptory challenges for the government in criminal cases that may result in imprisonment for more than one year to ten for the defendant, but to three for each side if the offense will not result in more than one year).

<sup>127</sup> *Stilson v. United States*, 250 U.S. 583, 586 (1919); see also U.S. CONST. art. III, § 2, cl. 3 (providing for the right to trial by jury, but saying nothing about peremptory challenges). Although one early draft of the Sixth Amendment appears to reference challenges for cause by the defendant, the final Sixth Amendment language contained no such right. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 823-24 (1997).

<sup>128</sup> See W. FORSYTH, HISTORY OF TRIAL BY JURY 175 (1852); Hoffman, *supra* note 127, at 814-15.

<sup>129</sup> See JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 148 (1977). Parliament did away with peremptory challenges in 1988 because they believed it gave the defense an unfair advantage at trial. See HALSBURY'S STATUTES 504 (4th ed. 1991); James J. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528, 530 (1989).

<sup>130</sup> Act of Mar. 1, 1790, ch.9, § 30, 1 Stat. 119 (1790) (codified at 28 U.S.C. § 424 (1994)).

<sup>131</sup> Hoffman, *supra* note 127, at 826-27.

<sup>132</sup> *Id.* at 827.

<sup>133</sup> For an in-depth look at the history of discrimination in the jury process in both the selection of grand and petit juries, see KENNEDY, *supra* note 12, at 168-256.

<sup>134</sup> U.S. CONST. amend. VI. The right to a jury trial in civil suits at common law is

of impartiality, the language of the Amendment left much room for maneuvering by both courts and legislatures in terms of defining the qualifications for jury service in criminal trials, and how juries would be empanelled.<sup>135</sup> As a result of this leeway, the jury selection process has a long history of discrimination against minorities.

Before the advent of the Civil War, all but one state, Massachusetts, essentially disallowed Blacks from serving on juries.<sup>136</sup> Although during the Post-war Reconstruction period some jurisdictions within the South allowed black males to serve on juries, most states continued to bar racial minorities from jury service.<sup>137</sup> Often, this discriminatory exclusion of minorities from juries "was open, formal, and unapologetic."<sup>138</sup> As of 1873, at least one state, West Virginia, enacted a statute that limited jury service to white males over the age of twenty-one.<sup>139</sup>

In what appears to be a response to the exclusion of Blacks from juries, Congress enacted a law that criminalized racial discrimination in the jury selection process. The 1875 law provided as follows:

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000.<sup>140</sup>

"This provision, however, has never been effectively enforced [and] [t]he case law offers only one instance of a prosecution under this

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also preserved by the Seventh Amendment. *See* U.S. CONST. amend VII ("In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

<sup>135</sup> Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 53 (1999). During the pre-Civil War period, discrimination in the jury selection process existed in both the federal and state courts because the federal courts used the selection process of the states in which they were located. *Id.*

<sup>136</sup> KENNEDY, *supra* note 12, at 169.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; *Strauder v. State of West Virginia*, 100 U.S. 303, 305 (1879) ("All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided."). The statute and its state of origin appears incongruous since West Virginia was admitted to the Union as the thirty-fifth State in 1863 after it refused to endorse succession by Virginia in 1861. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 2030 (3d ed. 1996).

<sup>140</sup> 18 U.S.C. § 243 (1994).

statute.”<sup>141</sup>

1. *Strauder v. West Virginia* and *Neal v. Delaware*: The Supreme Court Finally Steps In

In 1879, the United States Supreme Court stepped into the fray and began to issue opinions that resolved many of the legal issues regarding Blacks and their ability to serve on juries.<sup>142</sup> In *Strauder v. West Virginia*,<sup>143</sup> the plaintiff, a black male convicted of murder by an all white jury in West Virginia, appealed to the Supreme Court and argued that the Fourteenth Amendment provided him with a Constitutional right to be tried by a jury “selected and impaneled without discrimination against his race or color, because of race or color.”<sup>144</sup>

The Court agreed that West Virginia’s law violated the Fourteenth Amendment observing that:

[the Fourteenth Amendment] contain[s] a necessary implication of positive immunity, or right, most valuable to the colored race, the right to exemption from unfriendly legislation against them distinctly as colored, exemption from the legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.<sup>145</sup>

In examining the statute, the Court noted two distinct harms due to the prohibition. First, the prohibition in essence branded Blacks as inferior and increased racial prejudice.<sup>146</sup> Second, it deprived the black criminal defendant of the chance to have those of his own race judge his action.<sup>147</sup>

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<sup>141</sup> KENNEDY, *supra* note 12, at 172; see An Act To Protect All Citizens In Their Civil And Legal Rights, ch.114, sec. 4, 18 Stat. 336-37 (1875) (codified as amended at 18 U.S.C. § 243 (1994)).

<sup>142</sup> KENNEDY, *supra* note 12, at 169.

<sup>143</sup> 100 U.S. 303 (1879).

<sup>144</sup> *Id.* at 305.

<sup>145</sup> *Id.* at 307-08.

<sup>146</sup> *Id.* at 307-09. The Court was willing to go only so far at this point in interpreting what constituted state action as it related to discrimination in the jury selection process. In *Virginia v. Rives*, the Court held that simply because no black person had served on a grand jury or petit jury, the Fourteenth Amendment is not offended; nor is it state action when a private individual, working for the state, violates the law by not placing black jurors in the pool or on the venire. 100 U.S. 313 (1880); see also *Ex Parte Virginia*, 100 U.S. 339 (1880); LOIS B. MORELAND, WHITE RACISM AND THE LAW 48-58 (1970) (analyzing the Court’s decisions in *Strauder*, *Rives*, and *Ex Parte Virginia*).

<sup>147</sup> *Strauder*, 100 U.S. at 307-09.

Although the unconstitutionality of the statute in *Strauder* was easily determined because race was plainly stated in the text of the law, some states' statutes were far less obvious. In *Neal v. Delaware*,<sup>148</sup> the discrimination based on race was subtle and not discernable based solely on the language of the statute. The defendant in *Neal*, a black male, was charged with rape and convicted by an all-white jury in Delaware.<sup>149</sup> State officials conceded that no Blacks had ever served on a jury in Delaware.<sup>150</sup> At issue in *Neal* was whether Delaware officials had purposefully excluded black jurors or whether there was another explanation for why an all-white jury tried the defendant.<sup>151</sup> The Delaware Supreme Court held that there was no Fourteenth Amendment violation.<sup>152</sup> The court noted that the all-white jury was not selected because of discrimination, but because of a lack of Blacks qualified to sit on juries.<sup>153</sup>

The United States Supreme Court disagreed and held that the State's actions did constitute racial discrimination in jury selection.<sup>154</sup> The Court noted that although between 1870 and 1890 Delaware had a black population of no less than twenty thousand, no black persons had ever been summoned to sit on a jury.<sup>155</sup> According to the Court:

[i]t is . . . under the circumstances, a violent presumption which the State Court indulged in, that such uniform exclusion of [Blacks] from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity, to sit on juries.<sup>156</sup>

Because the State provided no plausible explanation for these circumstances, the Court inferred discrimination against Blacks in the jury selection process.<sup>157</sup>

After the decisions in *Strauder* and *Neal*, the Supreme Court abandoned the issue of racial discrimination in the context of juries until 1935. In that year, the Court decided *Norris v. Alabama*,<sup>158</sup> a case that dealt with the Scottsboro Boys prosecutions. *Norris* and other

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<sup>148</sup> 103 U.S. 370 (1880).

<sup>149</sup> *Id.* at 371-72.

<sup>150</sup> *Id.* at 381.

<sup>151</sup> *Id.* at 387.

<sup>152</sup> *Id.* at 383-84.

<sup>153</sup> *Id.*

<sup>154</sup> *Neal*, 103 U.S. at 397.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> 294 U.S. 587 (1935).

similar cases suggested that the Court was no longer willing to simply defer to the factual findings of the state courts. Some later decisions, however, indicated that if state officials did not permit jury pools to be completely devoid of minorities, the Court would not find a Constitutional violation.

2. *Swain v. Alabama*: The Supreme Court Ineffectively Addresses Racial Discrimination in Peremptory Challenges

The Supreme Court considered the use of peremptory challenges when eliminating jurors based solely on race in *Swain v. Alabama*.<sup>159</sup> Robert Swain, a black male, was convicted of rape by an all white jury and sentenced to death in 1962 in Taladega County, Alabama.<sup>160</sup> Although Swain's venire started with eight black jurors, two were exempt from service, and the prosecutor used six peremptory challenges to strike the rest.<sup>161</sup> After the Alabama Supreme Court affirmed the conviction, Swain petitioned for certiorari to the United States Supreme Court on the ground that the prosecutor's alleged use of peremptory challenges to strike all of the black veniremen violated the Equal Protection Clause of the Fourteenth Amendment.<sup>162</sup>

After citing *Strauder* and *Neal*, and various other cases in which the Court held that racial discrimination violated the Equal Protection Clause, the Court, in *Swain*, reversed course and stated that the Constitution did not require an examination of the prosecutor's motives for exercising his peremptory challenges in a certain case.<sup>163</sup> The Court reasoned that requiring an analysis of prosecutorial intent would "establish a rule wholly at odds with the peremptory challenge system as we know it."<sup>164</sup> Further, the court stated that "it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying . . . ."<sup>165</sup>

The Court then developed the standard that a defendant must meet in order to prove that a prosecutor acted with discriminatory

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<sup>159</sup> 380 U.S. 202 (1965).

<sup>160</sup> *Id.* at 203.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 203-04.

<sup>163</sup> *Swain*, 380 U.S. at 221-22.

<sup>164</sup> *Id.* at 222.

<sup>165</sup> *Id.* at 223.

intent when removing jurors. The defendant must show that the prosecutor, “case after case, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors . . . with the result that no Negroes ever serve on petit juries.”<sup>166</sup> The Court held that the record did not present sufficient evidence to overcome this burden.<sup>167</sup> By focusing on the long history of the peremptory challenge as a litigation tool, the court allowed prosecutors to use race as a criteria for the disqualification of jurors. In doing so the Court ignored the longstanding use of the peremptory challenge for racial discrimination<sup>168</sup> and focused on tradition and administrative ease. *Swain* demonstrates the extent to which the Court will defer to state court decisions.

In the aftermath of *Swain*, several federal and state courts attempted to circumvent the insurmountable requirements of *Swain*. In *United States v. Robinson*,<sup>169</sup> Judge Jon Newman, through the power of the federal bench, attempted to force prosecutors to reform their use of peremptory challenges to exclude jurors based on race. *Robinson* involved the prosecution of co-defendants, one of whom was black, for embezzlement and conspiracy.<sup>170</sup> Defense counsel objected when the prosecutor used all four of his peremptory challenges to excuse all four of the black jurors from the venire.<sup>171</sup> When Judge Newman offered the prosecutor a chance to provide a race neutral reason for the strikes, the prosecutor declined.<sup>172</sup>

Judge Newman then allowed defense counsel the opportunity to analyze the records relating to the venire in Connecticut federal cases during the previous two-year period.<sup>173</sup> Defense counsel found that although eighty-two Blacks sat as veniremen, the prosecutor used fifty-seven peremptory challenges to strike black jurors.<sup>174</sup> In cases involving black or Hispanic defendants, the exclusion rate jumped to almost eighty-five percent compared to the overall average of almost seventy percent.<sup>175</sup> Given the statistical findings, Judge Newman stated “the pattern of government peremptory challenges of Black

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 224.

<sup>168</sup> *Id.* at 223.

<sup>169</sup> 421 F. Supp. 467 (D. Conn. 1976).

<sup>170</sup> *Id.* at 468.

<sup>171</sup> *Id.* at 469.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Robinson*, 421 F. Supp at 469.

<sup>175</sup> *Id.*

veniremen has now reached an excessive point that calls for the exercise of this Court's supervisory power over the conduct of criminal trials in this District."<sup>176</sup> The Judge then ordered that the four black veniremen be reinstated to the panel.<sup>177</sup> He further ordered that the United States Attorney's office keep a record of each criminal trial, including the number of black veniremen included on the final panel and the number of peremptory challenges used by the prosecutor against Blacks with no explanation.<sup>178</sup>

Judge Newman's apparent victory for justice and racial equality was short-lived. In *United States v. Newman*,<sup>179</sup> the Second Circuit Court of Appeals reversed *Robinson*. The Second Circuit held that the defendants' did not have any actionable due process claims under *Swain*, and that Judge Newman had no authority to modify the jury selection process.<sup>180</sup> The Second Circuit vacated Judge Newman's orders and remanded the case.<sup>181</sup>

Next, state courts began to address the issue of racial discrimination in the use of peremptory challenges, in light of *Swain*. In *People v. Wheeler*,<sup>182</sup> the California Supreme Court decided that the "use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury . . . under article I, section 16, of the California Constitution."<sup>183</sup> In criticizing the reasoning in *Swain*, the California Supreme Court stated that "[i]t demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right."<sup>184</sup> The *Wheeler* court held that *Swain* was inapplicable on state law grounds because the California Constitution covered the issue of racial discrimination in the use of peremptory challenges.<sup>185</sup>

Shortly thereafter, the Supreme Judicial Court of Massachusetts also declined to follow *Swain* in *Commonwealth v. Soares*,<sup>186</sup> where the defendants were convicted of first-degree murder. The court held that article 12 of the Massachusetts' Declaration of Rights proscribed

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<sup>176</sup> *Id.* at 473.

<sup>177</sup> *Id.* at 474.

<sup>178</sup> *Id.*

<sup>179</sup> 549 F.2d 240 (2d Cir. 1977).

<sup>180</sup> *Id.* at 250-51.

<sup>181</sup> *Id.*

<sup>182</sup> 22 Cal. 3d 258 (1978).

<sup>183</sup> *Id.* at 276-77.

<sup>184</sup> *Id.* at 287.

<sup>185</sup> *Id.*

<sup>186</sup> 387 N.E.2d 499 (Mass. 1979).

the use of peremptory challenges to “exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community.”<sup>187</sup> The Court reasoned that diversity is part and parcel of a panel’s impartiality, and that “[n]owhere is the dynamic commingling of the ideas and biases of such [diverse] individuals more essential than inside the jury room.”<sup>188</sup>

Despite the antipathy of some state courts to the holding in *Swain*, most state courts did not follow *Wheeler* and *Soares* in their condemnation of *Swain* and its requirements. In *State v. Wiley*,<sup>189</sup> *Fields v. People*,<sup>190</sup> *State v. Stewart*,<sup>191</sup> *Commonwealth v. Henderson*,<sup>192</sup> and *Nevius v. State*,<sup>193</sup> various state courts either questioned or criticized *Wheeler* and took the more conservative approach to the problem as enunciated in *Swain*.

### 3. *Batson v. Kentucky*: The Supreme Court Tries Again

Twenty years after *Swain*, the Court revisited the issue of the discriminatory use of peremptory challenges in *Batson v. Kentucky*.<sup>194</sup> Although the Court ostensibly accepted the case to resolve a Sixth Amendment issue of jury impartiality, the Court decided the case on an issue not briefed by either side: the application of the Equal Protection Clause.<sup>195</sup> The underlying facts of *Batson* mirror those of its predecessors. The defendant in *Batson* was a black male convicted by an all-white jury of burglary and receipt of stolen goods.<sup>196</sup> The prosecutor used four of his six peremptory challenges to remove all four of the prospective black jurors.<sup>197</sup> On appeal, the Kentucky

<sup>187</sup> *Id.* at 515.

<sup>188</sup> *Id.*

<sup>189</sup> 698 P.2d 1244 (Ariz. 1985).

<sup>190</sup> 697 P.2d 749 (Colo. Ct. App. 1984).

<sup>191</sup> 591 P.2d 166 (Kan. 1979).

<sup>192</sup> 438 A.2d 951, 952-55 (Pa. 1981).

<sup>193</sup> 699 P.2d 1053 (Nev. 1985).

<sup>194</sup> 476 U.S. 79 (1986). For an overview of *Batson* and its progeny, see RALPH CHANDLER ET AL., CONSTITUTIONAL LAW DESKBOOK: INDIVIDUAL RIGHTS 387-93 (2d ed. 1993 & Supp. 2001). See also TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY & SCIENCE § 23-1 et seq. (3d ed. 2000); Jay M. Zitter, *Use of Peremptory Challenges to Exclude Ethnic and Racial Groups, Other than Black Americans, From Criminal Jury—Post-Batson State Cases*, 20 A.L.R.5th 389 (1994); George F. Gabel, *Use of Peremptory Challenges to Exclude Ethnic and Racial Groups, Other than Black Americans, From Criminal Jury—Post-Batson Federal Cases*, 110 A.L.R. FED. 690 (1992).

<sup>195</sup> Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 508 (1999).

<sup>196</sup> *Batson*, 476 U.S. at 82-83.

<sup>197</sup> *Id.* at 83.

Supreme Court declined to follow *Wheeler* and affirmed the conviction.<sup>198</sup>

Although suggesting that it was merely affirming *Swain*, the United States Supreme Court changed the process by which a criminal defendant went about proving racial discrimination in the jury selection process.<sup>199</sup> Under the Court's holding the defendant would no longer have to prove a long history of racial discrimination by the prosecutor. Instead, the *Batson* court set up a three-tiered test for determining racial discrimination in the use of peremptory challenges. First, a defendant has to make out a prima facie case of racial discrimination in the prosecutor's use of his peremptory challenges.<sup>200</sup> To do so, the defendant must show that he is a member of a cognizable racial group and that the prosecutor had used peremptory challenges to rid the venire of persons of that racial group.<sup>201</sup> Second, the defendant has to point to facts and circumstances, which raise the inference that the prosecutor used his peremptory challenges in a racially discriminatory fashion.<sup>202</sup> If a trial judge is satisfied that the defendant has made a prima facie case, then the burden shifts to the prosecutor to provide a race-neutral reason for his use of peremptory challenges.<sup>203</sup> The third step requires the trial judge to determine whether, based on all the facts and circumstances, the defendant has shown that the prosecutor used the peremptory challenges to exclude veniremen based on their race.<sup>204</sup>

#### 4. *Batson*: Mutations and Legacy

The decision in *Batson* in no way ended the controversy surrounding racially discriminatory peremptory challenges in the jury selection process. The issue of whether the Sixth Amendment's "impartial jury" language could be used to challenge the exclusion of a juror because of race remained undecided. It was also unclear whether the injury to the defendant or the injury to the potential juror should predominate when a party allegedly discriminates based on race through the use of peremptory challenges.

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<sup>198</sup> *Id.* at 84.

<sup>199</sup> *Id.*

<sup>200</sup> *Batson*, 476 U.S. at 93.

<sup>201</sup> *Id.* at 96.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 98. This last step was specifically enunciated in *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (plurality opinion), although it seems implicit in *Batson*'s holding.

The Court's decision in *Holland v. Illinois*<sup>205</sup> seemed to end the debate on whether a defendant can object to an apparently racially motivated peremptory challenge on Sixth Amendment grounds. In *Holland*, a white criminal defendant contested the prosecutor's use of two peremptory challenges to exclude the only black jurors from the venire under the Sixth Amendment's fair-cross-section venire requirement.<sup>206</sup> In a stiff rebuke the Court stated that the fair-cross-section requirement does not extend past the venire to the actual petit jury and that the Sixth Amendment guarantees nothing more than an impartial jury, not a racially representative one.<sup>207</sup>

Whether the race of the *Batson* challenger and that of the dismissed juror needed to coincide also remained an open issue. In *Powers v. Ohio*,<sup>208</sup> the Court rid the *Batson* framework of the requirement that the defendant and the venireperson be of the same cognizable racial group.<sup>209</sup> The defendant in *Powers*, a white male, objected to the prosecution's use of peremptory challenges to remove six black venirepersons from the panel.<sup>210</sup> The Court indicated that regardless of the defendant's race, he has standing to challenge a juror's removal due to race.<sup>211</sup> The Court explained that interests of the criminal defendant and those of the excluded juror in eliminating racial discrimination in the jury selection process coincided.<sup>212</sup> The Court further emphasized that if a court allowed a juror to be dismissed due to race it would impeach the democratic process and cast communal doubt on any verdict.<sup>213</sup> The nature of the decision seemed to shift the emphasis and focus away from the equal protection rights of the criminal defendant and on to the equal protection rights of potential jurors.<sup>214</sup>

As in *Holland* and *Powers*, the Court's decision in *Georgia v. McCollum*<sup>215</sup> again extended the *Batson* prohibition to the use of racially motivated peremptory challenges; this time to those used by the criminal defendant. Under *McCollum*, the Court focused less on who raised the challenge, and more on the potential juror's equal

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<sup>205</sup> 493 U.S. 474, 478 (1990).

<sup>206</sup> *Id.* at 483.

<sup>207</sup> *Id.* at 480-81.

<sup>208</sup> 499 U.S. 400 (1991).

<sup>209</sup> *Id.* at 416.

<sup>210</sup> *Id.* at 403.

<sup>211</sup> *Id.* at 416.

<sup>212</sup> *Id.* at 413-14.

<sup>213</sup> *Id.* at 406-13.

<sup>214</sup> Cavise, *supra* note 195, at 510.

<sup>215</sup> 505 U.S. 42 (1992).

protection rights as a trump to all other considerations.<sup>216</sup>

Further expanding the reach of *Batson*, the Court in *Edmonson v. Leesville*<sup>217</sup> held that racial discrimination in the use of peremptory challenges in civil cases violated the Equal Protection Clause.<sup>218</sup> As in *Powers* and *McCollum*, the ruling in *Edmonson* solidified the principle that it is the potential juror's equal protection rights that are at issue in a *Batson* challenge, not those of the criminal defendant.

The application of *Batson* and its progeny have proven less robust than initially anticipated.<sup>219</sup> The concerns laid out in Justice Marshall's prescient concurrence have in fact come to fruition.<sup>220</sup> The ease with which a prosecutor can devise a race-neutral reason for a peremptory challenge is clear. A prosecutor can claim to use their challenge because of age, occupation, unemployment, religion, demeanor, relationship with a trial participant, lack of intelligence, socioeconomic status, residence, marital status, previous involvement with the criminal justice system, or jury experience.<sup>221</sup> In the most recent study of the efficacy of *Batson* challenges, four out of five *Batson* respondents provided race-neutral reasons acceptable to the court.<sup>222</sup> Given the Court's ruling in *Purkett v. Elem*,<sup>223</sup> that a reason need not make sense to withstand step two of *Batson*, trial courts will be forced to delve deeper into the facts- something most appear hesitant, if not loath to do.<sup>224</sup> *Batson's* application has also proven problematic because in different jurisdictions it is often drastically inconsistent.<sup>225</sup>

With *Batson's* inherent structural flaws and the disparity in which it is applied in various jurisdictions, the peremptory challenge in the

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<sup>216</sup> *Id.* at 50.

<sup>217</sup> 500 U.S. 614 (1991).

<sup>218</sup> *Id.* at 616.

<sup>219</sup> See *People v. Hernandez*, 500 U.S. 352 (1991) (holding that language skills are not an impermissible reason to use a peremptory challenge). *But see* Sheri Lynn Johnson, *The Language and Culture (not to say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993) (criticizing the holding in *Hernandez*).

<sup>220</sup> *Batson v. Kentucky*, 476 U.S. 79, 102-09 (Marshall, J., concurring).

<sup>221</sup> Raphael & Ungvarsky, *supra* note 115, at 237-66 (listing the reasons a prosecutor can have to use a peremptory challenge and cases that involved such reasons).

<sup>222</sup> Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 461-62 (1996).

<sup>223</sup> 514 U.S. 765, 769 (1995).

<sup>224</sup> Melilli, *supra* note 222, at 466-83; Raphael & Ungvarsky, *supra* note 115, at 237-66.

<sup>225</sup> Melilli, *supra* note 222, at 465-70; *see also* Cheryl A.C. Brown, Comment, *Challenging the Challenge: Twelve Years After Batson, Courts Are Still Struggling To Fill In The Gaps Left By The Supreme Court*, 28 U. BALT. L. REV. 379 (1999).

jury selection process will continue to be abused. The use of peremptory challenges against persons of mixed descent whose heritage may not be readily identifiable to one of the parties is an example of just such a situation. The present trend in demographics indicates that the number of multiracial persons is increasing.<sup>226</sup> Given this increase and the particular challenge of multiracial persons in the jury selection process, *Batson* may prove untenable in our evolving society unless it is modified.

### III. MULTIRACIAL PERSONS, THE 2000 CENSUS, RACIAL IDENTITY, AND *BATSON*

The 2000 Census is the first time the United States has attempted to quantify how many citizens are multiracial.<sup>227</sup> The 2000 Census has only served to confirm the fact that the number of multiracial persons in our society is growing.<sup>228</sup> This trend is supported by civil rights decisions of the Supreme Court in the 1950's and 1960's. Prior to the Supreme Court's decision in *Loving*, "fewer than half of one percent of married couples were interracial."<sup>229</sup> In *Loving*, the Court held that it was unconstitutional for states to prevent interracial marriages.<sup>230</sup> After the decision in *Loving*, the number of interracial couples grew and by 1990 this number had risen to three percent. The growth in the number of such marriages does not appear to be abating.<sup>231</sup> This growth in interracial marriages has contributed to a concomitant increase in the number of multiracial children/persons.<sup>232</sup> By 1990, almost two million children lived in multiracial families, and these children comprised four percent of all children living in households.<sup>233</sup>

The 2000 Census enabled citizens to designate their own ethnic status. The results indicated that 2.4 percent of the nation's populace self-identified as multiracial. This figure is misleading, though,

<sup>226</sup> Dinh, *supra* note 4, at 1290; *see also supra* notes 5-10 and accompanying text.

<sup>227</sup> *See supra* note 7 and accompanying text.

<sup>228</sup> Dinh, *supra* note 4, at 1290; *see also supra* notes 5-8 and accompanying text.

<sup>229</sup> COSE, *supra* note 16, at 5; *see also* DIVERSITY AND ITS DISCONTENT, 104-27 (Neil J. Smelser and Jeffrey C. Alexander eds., 1999); Jewelle Taylor Gibbs & Alice M. Hines, *Negotiating Ethnic Identity: Issues for Black-White Biracial Adolescents*, in RACIALLY MIXED PEOPLE IN AMERICA 223 (Maria P.P. Root ed., 1992).

<sup>230</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>231</sup> *Id.*; *see also* SPENCER, *supra* note 22, at 5; Steve Olson, *The Genetic Archaeology of Race*, THE ATLANTIC MONTHLY, April 2001, at 69, 80.

<sup>232</sup> Gibbs & Hines, *supra* note 229, at 223.

<sup>233</sup> U.S. CENSUS BUREAU, QUESTIONS AND ANSWERS FOR CENSUS 2000 DATA ON RACE 4-5, at <http://www.census.gov/Press-Release/www/2001/raceqandas.html> (last visited June 27, 2001).

because of a disparity between the number of people who identify as multiracial and those who actually are multiracial. Despite the 2000 Census figures, studies indicate that as many as seventy-five percent of the black community has some white or European ancestry.<sup>234</sup> Similarly, in the white population, estimates indicate that one to five percent have some African ancestry.<sup>235</sup> Additionally, persons who are of mixed descent but with some Native American ancestry are underrepresented because many tribal leaders “encouraged their members to check only American Indian on the census form so they wouldn’t dilute numbers that can be used for appropriating federal funds.”<sup>236</sup> This suggests a dramatic undercount of the total number of multiracial citizens in the United States.

In addition to the undercount of multiracial persons based on self-selection, which skews the actual number of multiracial persons, the percentage of persons under eighteen who consider themselves multiracial is four percent, while the percentage of persons eighteen and older is two percent. The percentage of African-Americans eighteen years and younger who consider themselves to be of more than one race is eight percent.<sup>237</sup> These figures are a better indication of where the country is headed in terms of the scope of our society’s multiracial makeup, because they show that persons in the next generation are more likely to identify themselves as multiracial. This willingness to self identify as multiracial will result in a more accurate count of multiracial individuals in the future.

An individual’s preference for how he views himself may not, however, accurately indicate how others perceive and treat him. Whether a person considers himself “mixed,” biracial, or multiracial, the potential ambiguity in that person’s outward appearance can create a situation in which others are not sure of or even fail to recognize his entire racial makeup.<sup>238</sup>

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<sup>234</sup> DAVIS, *supra* note 29, at 21; SHIRLEE TAYLOR HAZLIP, *THE SWEETER THE JUICE: A FAMILY MEMOIR IN BLACK AND WHITE* 15 (1994); F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 180 (1996) (estimating that black Americans may get as much as 25% of their genes from “white” sources).

<sup>235</sup> DAVIS, *supra* note 29, at 21; *see also* HAZLIP, *supra* note 234, at 15; Madison J. Grey, *A Founding Father and His Family Ties*, N.Y. TIMES, Mar. 3, 2001, at B1 (ostensibly “white” families find out that they are related to Thomas Jefferson through one of his male offspring probably conceived with his slave Sally Hemings).

<sup>236</sup> Carol Morello, *Native American Roots, Once Hidden, Now Embraced*, WASHINGTON POST, April 7, 2001, at A01.

<sup>237</sup> Clarence Page, *Census Numbers Show Complex Racial Picture*, ASSOCIATED PRESS, March 14, 2001, at 2.

<sup>238</sup> This unique situation has deep roots in our country. The social phenomenon of “passing” is one manifestation of the inability of many in our society to recognize multiracial persons simply by sight. Passing in this country has historically meant

The ambiguity of a multiracial person's phenotype creates a problem of recognition. At its core, the multiracial *Batson* problem lies in the disparity between persons who can perceive the racial makeup of a person and those who cannot. Because the ability to recognize a person who has a multiracial background is not uniform, it can lead to unrecognized *Batson* violations. For example, when a multiracial person is impermissibly dismissed through peremptory challenges because of his or her racial make-up it can be more difficult to prove the challenger's motivation. Given that *Batson*'s protections can easily be overcome by a fabricated reason for exclusion, the problem of identifying and rooting out racial discrimination in the use of peremptory challenges will only grow more difficult with the ongoing increase of multiracial citizens.<sup>239</sup>

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that an African-American held himself out as, or was perceived and treated as, white by the white community. For articles on this social phenomenon, see Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL'Y REV. 297 (2000), and Randall Kennedy, *Frank R. Strong Law Forum Lecture: Racial Passing*, 62 OHIO ST. L.J. 1145 (2001). The idea that people are unable to clearly recognize the racial background of those of a different race is supported by studies, which suggest that cross-racial facial identification is less than perfect. See T. Anthony et al., *Cross-racial facial identification: A social cognitive integration*, in 18 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 296-301 (1992); R. Richard Banks, *Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 U.C.L.A. L. REV. 1075, 1101-04 (2001); see also HAZLIP, *supra* note 234, at 64 ("During [the turn of the century], many Washingtonians passed for white on a part-time basis, mostly for economic and sometimes for social or cultural reasons. . . . Usually, their temporary race change was successful. For a while, however, theaters and concert halls hired Negro "spotters" to point out racial imposters. Many a colored socialite of Washington was humiliated in the process. To their credit, the Negro newspapers published the names of spotters so that the community could deal with them in its own way, usually by social ostracism."); see also MARK TWAIN, PUDD'NHEAD WILSON (1894) (describing the fictional life of two children, one "mixed" passing as "white" and one "white" being mistaken as "black").

<sup>239</sup> Anecdotal evidence suggests that this problem is already manifesting itself. See Mark Curriden, *One Jury's Journey*, THE DALLAS MORNING NEWS, Dec. 17, 2000 (one multiracial juror believed she was kept on jury due to her Asian heritage, and paper classifies her as Asian-American although her father is Irish and mother is Japanese); *People v. Barber*, 245 Cal. Rptr. 895 (Cal. Ct. App. 1988) (upholding a lower court's *Batson* ruling and indicating that the prosecutor claimed to be unaware that one of the persons she removed by peremptory challenge was Hispanic); *Clarke v. Kmart Corp.*, 559 N.W.2d 337, 383 (Mich. Ct. App. 1996) (involving a *Batson* challenge in which the trial court recognized one of the dismissed jurors as "biracial"); *Green v. State*, 862 P.2d 1271 (Okla. Crim. App. 1993) (reversing the lower court's ruling despite confusion over whether a juror was black, Hispanic, or white, because the defendant and the juror do not need to be of the same cognizable race to succeed in a *Batson* challenge).

A. United States v. White: *Biracial/Multiracial Jurors and Batson*

*United States v. White*<sup>240</sup> presents a glimpse of the problems multiracial persons pose to the jury selection process in the context of peremptory challenges and *Batson*. Danny L. White, a young black male, was indicted on September 8, 1999, in the Western District of Michigan for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).<sup>241</sup> On November 20, 2000, the court began the voir dire process.<sup>242</sup> After posing various questions to the jury, the judge asked the jurors if they could be fair and impartial given that the defendant was a black male.<sup>243</sup> The judge noted that of all the prospective jurors only one appeared to be African-American, Ms. Jackson.<sup>244</sup> At that point, one of the jurors, Ms. Kirk, stated that she wanted the judge to know that she was African-American.<sup>245</sup> The judge thanked her for her candor, and stated that he would not have recognized her as African-American and he believed that not many others would have recognized her as being African-American.<sup>246</sup>

After questioning the jurors, the prosecutor and defense counsel began to use their peremptory challenges to dismiss jurors. The prosecutor dismissed the only visibly black juror and defense counsel made a *Batson* motion.<sup>247</sup> In accordance with *Batson*, the prosecutor offered its racial-neutral reasons for dismissing the juror.<sup>248</sup> Defense counsel then presented rebuttal arguments. The judge ruled in favor of the defendant and granted the *Batson* motion, and Ms. Jackson was placed back in the venire.<sup>249</sup>

The prosecutor raised two issues with the court upon returning from the weekend. First, the prosecutor requested clarification on the court's *Batson* ruling on Ms. Jackson.<sup>250</sup> According to the prosecutor, her proffered reasons for dismissing Ms. Jackson were race-neutral, satisfying *Batson*.<sup>251</sup> Defense counsel responded to the

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<sup>240</sup> No. 1:00-CR-81-01 (W.D. Mich. 2000).

<sup>241</sup> 18 U.S.C.A. § 922(g)(1) (West 2001).

<sup>242</sup> Record at 158, *United States v. White*, No. 1:00-CR-81-01 (W.D. Mich. 2000).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* Although Ms. Kirk designated herself as African-American, the hue of her skin and her features suggest that she is of mixed-descent.

<sup>246</sup> *Id.* at 158-59. Later in the proceedings, the prosecutor indicated that she may not have known Ms. Kirk was of African descent. *Id.* at 227.

<sup>247</sup> *Id.* at 175.

<sup>248</sup> Record at 177-78, *United States v. White*, No. 1:00-CR-81-01 (W.D. Mich. 2000).

<sup>249</sup> *Id.* at 178-83.

<sup>250</sup> *Id.* at 226-27.

<sup>251</sup> *Id.*

motions by asserting that the court did reach the issue of pretext and found that based on the circumstances, the prosecutor's reasons for dismissing Ms. Jackson were pretextual.<sup>252</sup>

The prosecutor then requested that Ms. Kirk be removed for cause based on the fact that her brother was prosecuted by one of the assistant United States attorneys from her office and had been convicted and sentenced to life in prison.<sup>253</sup> Defense counsel argued that the challenge for cause did not appear justified because the prosecutor was attempting to use challenges to dismiss the only two black jurors on the panel.<sup>254</sup>

The court agreed with defense counsel and declined both requests by the prosecutor.<sup>255</sup> The court stated that, in its opinion, the race-neutral reasons for challenging Ms. Jackson were pretextual.<sup>256</sup> As for the challenge against Ms. Kirk, the court noted that the prosecutor knew all of this information about Ms. Kirk prior to the weekend and that the only really new piece of information was the name of the prosecutor in her brother's case and this information was not a valid reason to remove Ms. Kirk for cause.<sup>257</sup> The court also stated that this late attempt to remove Ms. Kirk, the only other African-American, for cause based on what the court considered immaterial information only served to underscore and support his earlier *Batson* ruling on Ms. Jackson.<sup>258</sup>

Although this case did not explicitly involve a *Batson* problem with a person who acknowledged themselves as being of mixed-descent, the circumstances are an indicator of the potential problem posed by persons whose racial heritage is not readily ascertainable by the attorneys and the judge. If Ms. Kirk had not disclosed her racial makeup and either the prosecutor or the defense attorney, but not both, recognized her as being of African descent and successfully used a peremptory challenge against her because of her racial makeup, a *Batson* violation could have occurred and gone unchallenged by the other party.

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<sup>252</sup> *Id.* at 230-37.

<sup>253</sup> *Id.* at 228-37.

<sup>254</sup> Record at 228-37, *United States v. White*, No. 1:00-CR-81-01 (W.D. Mich. 2000).

<sup>255</sup> *Id.* at 239-44.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 244.

B. *The Game of "Who is What"*<sup>259</sup>

As ethnically and racially mixed relationships and marriages continue to produce children, the scenario described in *White* will only increase the number of hypothetical racial mixtures that might make up a prospective juror and the concomitant number of racially discriminatory reasons one might have for dismissing such a juror through the unconstitutional use of a peremptory challenge are endless.

Imagine a criminal trial of a Korean defendant in federal court in urban California where the voir dire has commenced with forty-five persons on the venire. Based on the 2000 Census and the studies of race in this country, the racial makeup of the hypothetical venire is fourteen Whites (some of whom may or may not be of mixed descent), sixteen Blacks (eleven of whom are most likely of mixed descent), seven Asians (several of whom may be of mixed descent), five persons of some other ethnic or racial group (all of whom may be of mixed racial background), and three self-designated, racially-mixed persons.<sup>260</sup> At least ten persons in this group are Hispanic.<sup>261</sup> This kaleidoscope of racial and ethnic backgrounds makes it possible that none to all of the jurors may be of mixed descent and may not be readily identifiable in terms of their race or ethnicity to everyone. For purposes of this hypothetical, the reader can assume that approximately fifteen percent of the venire is not readily identifiable as to race or ethnicity: one ostensibly black or white venire person, one Asian venire person, one venire person of unidentified race/ethnicity, one venire person claiming Hispanic descent, and the three venire persons of self-designated multiracial descent (one person of black and white descent, one person of Asian and white descent, and one person who is black, Asian, and Hispanic).

The questioning of the panel is complete and the attorneys begin the use of their peremptory challenges. The prosecutor believes one of the six mixed jurors is of Korean descent, will identify

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<sup>259</sup> The imaginary scenario described in this hypothetical is just that, imaginary. None of the assumptions about the motives of the hypothetical Assistant United States Attorney or Defense Counsel are meant to imply a predilection for such actions or beliefs by either group or institution. While all of the racial and ethnic stereotyping described in this Part are both offensive and based on inaccurate generalizations about individuals' beliefs based upon the color of their skin, such stereotyping is a part of the human condition in this country.

<sup>260</sup> These hypothetical figures are based on the 2000 Census taken in Oakland, California. See <http://quickfacts.census.gov/qfd/states/06/06001.html> (last visited September 25, 2002).

<sup>261</sup> *Id.*

or have a biased sympathy towards the defendant, and uses a peremptory challenge to remove him. Or, equally likely, Defense Counsel thinks that this same person is of Japanese descent and removes the juror with a peremptory challenge based on the belief that the historical animosity between Koreans and Japanese resulting from World War II atrocities will harm his client. For a *Batson* violation to occur under these circumstances, one of the two parties must be unaware of the mixed-descent of the removed juror.

Defense Counsel is ready to use a second peremptory challenge. Council believes that one of the multiracial persons on the venire is of African descent. Given the perceived animosity that has developed between Blacks and Koreans in the aftermath of the Rodney King verdict and subsequent Los Angeles riots, Defense Counsel uses a peremptory challenge to remove this juror. The prosecutor believes that one of the multiracial jurors is of Vietnamese descent and based on his belief that such individuals are suspicious of the police or any authority figure because of certain cultural biases, he removes this juror with his second peremptory challenge.

The end result of this hypothetical is that each side could potentially remove several or all of the multiracial jurors through the use of peremptory challenges and be in violation of *Batson*, yet such unconstitutional actions remain unknown to the other side. Even more frustrating is the scenario in which a juror is removed by one side based on the belief that the juror is of a certain racial background and the juror is in fact not of that racial/ethnic background. Has a *Batson* violation occurred based on the unconstitutional motive of the attorney or must the removed person's race actually be the race/ethnicity that the attorney thought he/she was for a *Batson* violation to occur?

With the increasing population of mixed persons in this country, the hypothetical described above may have already occurred in any number of urban courts in this country. Based on the 2000 Census and the evidence that suggests the racially discriminatory use of peremptory challenges has not disappeared, the frequency of this sort of problem will expand and *Batson*, as it presently stands, is simply unequipped to deal with it. This plausible situation leads to ineluctable conclusion that in twenty-first century America, *Batson* (and its "guess whose coming to dinner" framework) is simply a relic, unable to ensure that discrimination based on race in the use of peremptory challenges does not take place.

IV. TWO REMEDIES<sup>262</sup>

Given the collision of *Batson* with the increase in the population of multiracial persons, there are two remedies that can be used to combat the problem of racial discrimination in the use of peremptory challenges to strike jurors of multiracial backgrounds: (1) abolish peremptory challenges, or (2) question the jurors about their racial heritage during voir dire.

A. *Abolishing Peremptory Challenges*

Critics of the peremptory challenge have argued that the ideal of the peremptory challenge is inconsistent with the desire to have the composition of juries represent the whole of society.<sup>263</sup> Peremptory challenges reflect an improper distrust of jurors, cause an improper shift of focus from the individual to the group, and inject unnecessary hostility into the jury selection process.<sup>264</sup> Others have argued that the Thirteenth Amendment prohibits the use of any peremptories to remove black jurors if the defendant is black.<sup>265</sup> The best argument may simply be that of Justice Marshall in his concurrence in *Batson*:

Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case"? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory. . . . [O]nly by banning peremptories entirely can such [racial] discrimination be ended.<sup>266</sup>

The rationale behind the genesis of the peremptory challenge in England in the thirteenth century has lost its validity in the twentieth and twenty-first century making the peremptory challenge an

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<sup>262</sup> Changing procedural aspects of our justice system, especially our criminal justice system, based upon considerations of racial injustice is not without considerable precedent. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

<sup>263</sup> See, e.g., Stephen BATES, CANTIGNY CONFERENCE SERIES SPECIAL REPORT, THE AMERICAN JURY SYSTEM 24 (2000); ABRAMSON, *supra* note 14, at 131-39.

<sup>264</sup> Hoffman, *supra* note 127, at 851-71.

<sup>265</sup> Douglas L. Cobert, *Challenging the Challenge: Thirteenth Amendment as Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1 (1990).

<sup>266</sup> *Batson*, 476 U.S. 79, 105-06, 108 (1986) (Marshall, J., concurring) (internal citations omitted).

anachronism.<sup>267</sup> Indeed, the argument that the peremptory challenge is necessary as a means for ensuring an impartial jury is not supported by the rationale for its creation in thirteenth century England;<sup>268</sup> Moreover, it is used in the context of present-day litigation to empanel a jury partial to one's side, not for its ostensible goal of empaneling an impartial jury.<sup>269</sup> The rise of the peremptory challenge to such a venerable position in the American justice system may be due to the very reason it should no longer be allowed: its use as a means of removing potential black jurors in the post-Reconstruction, Jim Crow south.<sup>270</sup>

The judicial recognition that the peremptory challenge, despite *Batson*, is in direct conflict with this country's desire to eradicate racial discrimination and possibly even the Fourteenth Amendment's Equal Protection Clause seems to support the calls by critics for the institution's abolition.<sup>271</sup> In addition, many of those same judges have recognized that the make-up of our society is changing in such a fashion as to make *Batson* simply untenable because courts will be forced to "play a diverting ethnological parlor game called 'Who is What and How Do We Know It?'"<sup>272</sup>

Yet the Supreme Court and various attorneys and legal groups still cling to the notion that the peremptory challenge is an essential part of our justice system. Because the United States Supreme Court does not appear receptive to abolishing the peremptory challenge,<sup>273</sup> the next best solution is to find out the racial makeup of the venire persons prior to the use of peremptory challenges by either side.

### B. Questioning the Venire

With the Court firmly against abolishing the peremptory

<sup>267</sup> See *Wamget v. Texas*, 2001 Tex. Crim. App. LEXIS 64, at \*27-\*31 (Tex. Crim. App. Sept. 12, 2001) (Meyers, J., concurring); *Hoffman*, *supra* note 127, at 819-22.

<sup>268</sup> See *Wamget*, 2001 Tex. Crim. App. LEXIS 64, at \*27-\*33.

<sup>269</sup> *Id.*; see also Albert Schuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 203 (1989).

<sup>270</sup> See *Hoffman*, *supra* note 127, at 827-28.

<sup>271</sup> See *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 183-85 (S.D.N.Y. 1996); *Alen v. State*, 596 So. 2d 1083, 1086 (Fla. Dist. Ct. App. 1992) (Hubbart, J., concurring); *Chew v. State*, 527 A.2d 332, 350 (Md. Ct. Spec. App. 1987); *People v. Hernandez*, 75 552 N.E.2d 621, 625 (N.Y. 1990) (Titone, J., concurring), *aff'd.*, 500 U.S. 352 (1991); *Wamget*, 2001 Tex. Crim. App. LEXIS 64, at \*22-\*43; see also *Hoffman*, *supra* note 127; *People v. Brown*, 97 N.Y.2d 500, 509 (Kaye, C.J., concurring) (suggesting elimination or curtailment of peremptory challenges).

<sup>272</sup> *Mejia v. State*, 599 A.2d 1207, 1208 (Md. Ct. Spec. App.), *vacated*, 616 A.2d 356 (1992).

<sup>273</sup> See *Purkett v. Elem*, 514 U.S. 765, 769 (1995).

challenge, the only way to prevent multiracial persons from being removed from the venire based on race is to have them disclose their racial makeup to the parties and the judge.

Questioning potential jurors about race is not without foundation. Federal law requires that juror qualification forms have a question regarding the potential juror's race with a statement "that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service."<sup>274</sup> Federal courts have also interpreted the Jury Selection and Service Act as allowing the defendant in a criminal case an unqualified right to inspect the jury list,<sup>275</sup> but not necessarily the individual questionnaires,<sup>276</sup> and not to help in the voir dire process.<sup>277</sup> As such, challenges are generally to determine whether there is systemic discrimination in obtaining a fair cross-section of the community for the venire under the Sixth Amendment. The timing of the challenges does not allow an attorney to get information about an individual juror's race during the critical timeframe: the voir dire process.

Given that federal courts have jurors fill out a questionnaire asking about race, it does not seem inappropriate to have the jurors disclose this information again during the voir dire process in order to accomplish the same goal as the questionnaire: to enforce nondiscrimination in the jury selection process. While the questions posed in the questionnaire are required under the statute and are an attempt to comply with the Sixth Amendment's impartial jury requirement, the same rationale exists under the Fourteenth Amendment for purposes of peremptory challenges and the enforcement of nondiscrimination in the jury selection process.

This disclosure of a venire person's racial makeup could take one of two forms: either orally to a question posed by the judge or the attorneys, or a written answer that would be provided to the judge and the attorneys.<sup>278</sup> Both methods will provide the judge and the parties with the information necessary to assist each in determining

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<sup>274</sup> 28 U.S.C.S. § 1869(h) (2001); *see also* CONN. GEN. STAT. § 51-232(2002); WIS. STAT. ANN. § 756.04 (2002).

<sup>275</sup> *United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996).

<sup>276</sup> *United States v. Schnieder*, 111 F.3d 197 (1st Cir. 1997); *United States v. Davenport*, 824 F.2d 1115 (7th Cir. 1987); *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984).

<sup>277</sup> *Jewel v. Artic Enterprise, Inc.*, 801 F.2d 11 (1st Cir. 1986).

<sup>278</sup> One critic has called for an entire voir dire to be conducted by written questionnaires. *See* Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 285 (1999).

when a potential *Batson* violation has taken place.

While both methods may provide the same result for purposes of *Batson*, a written question is supported by precedent and may provide more privacy to the individual being questioned.<sup>279</sup> For example in the O.J. Simpson trial, the seventy-five page long questionnaire given to potential jurors included a question about the person's race.<sup>280</sup> The answers were shared with the judge and attorneys, yet were not disclosed to the public, thereby conferring some level of privacy. In most cases, extensive questionnaires are not necessary and the written questions posed to the venirepersons could be confined to those normally asked in addition to one about the potential juror's race.<sup>281</sup> Federal law requires federal courts to question potential venirepersons about their race through a written questionnaire, but states are not required to follow the federal process. While some states question potential venireperson about this information,<sup>282</sup> many do not.<sup>283</sup> The lack of uniformity among the states on this issue, despite the uniform rule required by the Sixth Amendment, implies that there are probably disparities in the way state courts address the issue. This disparity may translate into *Batson* violations. Given that states already apply *Batson* in an unequal fashion, the ability of state courts to deal individually with the problem of multiracial persons is questionable. A uniform requirement that venirepersons be questioned about race, either in written or oral form, would guarantee that, at a minimum, the information is available for inspection by the parties, the trial court, and any subsequent

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<sup>279</sup> See Baker, *supra* note 121, at §2.8.

<sup>280</sup> See DONNER & GABRIAL, *supra* note 194, at § 16-15. The questionnaire also included questions about interracial relationships and the person's feelings and attitudes regarding such relationships. *Id.* at § 16-37. These questions may have been posed because one of the victims, Nicole Brown Simpson, former wife of the defendant, was white and the defendant is black, and there are still hostile attitudes towards such relationships in both the white and black communities. See Olson, *supra* note 231, at 80; see also WAITING TO EXHALE (20th Century Fox 1992); JUNGLE FEVER (Universal Pictures 1991).

<sup>281</sup> See Juror Questionnaire, United States District Court, Western District of Michigan (on file with author).

<sup>282</sup> See, e.g., Summons For Jury Service, Superior Court of Delaware. Courts do recommend that judges ask if the race of the parties, the attorneys, or the witnesses will affect a juror's judgment. See <http://www.courtinfo.ca.gov/rules/2001> (last visited September 25, 2002). But this is not the same as asking a juror his or her racial makeup.

<sup>283</sup> See, e.g., Juror Questionnaire, Colorado; Juror Questionnaire, Alaska; Kings County, NY, Juror Qualification Questionnaire; Juror Questionnaire, New York (on file with author). California has no set juror questionnaire and does not mandate a question regarding race. See email from Cajuror@jud.ca.gov to John Rosenthal (March 18, 2001) (on file with author).

appellate court.

#### CONCLUSION

The racial makeup of America is changing and multiracial persons will continue to increase proportionately in our population. Since the racial heritage of such persons may not be readily apparent, the disparity in the ability of individuals to ascertain a person's racial background has grave implications, specifically regarding a court's ability to apply *Batson* effectively. Two solutions to this problem are available: abolish the peremptory challenge or question jurors about their racial makeup during voir dire. Either solution will provide the parties and the courts with the ability to better discern racial discrimination in the use of peremptory challenges and will reinforce the constitutional dictates of *Batson* and the Fourteenth Amendment. To do nothing is to leave the rights of those of multiracial descent to sit on a jury and participate in our system of justice to the whim and will of would-be discriminators and to emasculate *Batson* for coming generations of multiracial person.