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NOTES

HOLLAND V. ILLINOIS: A SIXTH AMENDMENT ATTACK ON THE USE OF DISCRIMINATORY PEREMPTORY CHALLENGES

The sixth amendment to the United States Constitution guarantees a defendant in a criminal proceeding the right to trial by an impartial jury.¹ This guarantee requires that the procedure used to select a jury panel provide a fair possibility that the jury will represent a cross section of the community.² To achieve the “fair possibility,” the Supreme Court has held that the jury venire must reflect a fair cross section of the community.³ The Court, however, has not interpreted the sixth amendment as requiring that the petit jury, comprised from the venire, necessarily contain a fair cross section of the community.⁴

While the sixth amendment mandates that a jury be comprised of a representative group, the requirement that each juror be impartial limits the pool

1. U.S. CONST. amend. VI.
2. Lockhart v. McCree, 476 U.S. 162 (1986); see also Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (right to a jury composed of a representative segment of the community); Williams v. Florida, 399 U.S. 78, 100 (1970) (six person jury is not unconstitutional because there exists the possibility that the panel will represent a fair cross section).
3. Taylor, 419 U.S. at 530. The requirement of a fair possibility of a cross section on the jury venire (the group of members from the community summoned randomly to comprise the jury pool) is based on the constitutional goal of securing a petit jury (the actual panel chosen) that reflects the judgment of the community. A statute precluding women from jury service denied the possibility of a fair cross section of the community on the jury venire and thus violated the sixth amendment. Id. at 530-31. See Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (a jury of peers provides the defendant an “inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge”); see also Sullivan, Deterring the Discriminatory Use of Peremptory Challenges, 21 AM. CRIM. L. REV. 477, 501 (1984) (“the purpose of the fair cross section requirement [is] to maximize the interaction of community values, perspectives, and beliefs”). Thus, if a jury venire does not reflect a fair cross section of the community, the defendant may assert a sixth amendment claim because the fair possibility of a cross section of the community on the petit jury is precluded.
4. Lockhart, 476 U.S. at 183-84. The defendant has no sixth amendment claim if the petit jury, after having been selected from a jury venire comprised of a fair cross section, does not itself contain a fair cross section. A jury which is selected from a fair cross section is impartial “regardless of the mix of individual viewpoints actually represented on the jury.” Id. at 184.
of viable candidates. To eliminate extremes of partiality or bias from the jury and to help ensure that a verdict will be based solely upon the evidence presented at the trial, the American criminal justice system provides counsel with both challenges for cause and peremptory challenges to prevent certain persons from serving on a jury. Thus, if voir dire reveals that a prospective juror possesses a bias that is likely to predispose the juror to a particular outcome, counsel for either the defense or the prosecution may move the court to excuse that juror for cause. Alternatively, counsel may exercise a peremptory challenge to remove a particular juror from the panel. Counsel use peremptory challenges strategically to structure a jury that will be more sympathetic to their client's position.


6. Members of a community are randomly selected for jury service. A pool of prospective jurors is then summoned to an individual courtroom. Of these prospective jurors, some will be dismissed by the judge for specific hardship reasons. Then, counsel may state a reason to exclude a particular juror for cause and the judge will determine whether the reason stated satisfies "cause" to exclude that juror. If the proffered "cause" is found insufficient, counsel may then use a peremptory challenge to exclude a juror without stating a reason. See J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Jury Panels, 85-147 (1977) (discussing the jury selection process).

7. Voir dire is the questioning of prospective jurors to determine their ability to decide a particular case impartially. The voir dire examination may be conducted by counsel or the presiding judge. See Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 Stan. L. Rev. 545, 545-49 (1975) (explaining the voir dire process).

8. 28 U.S.C. § 1866(c)(2) (1988). The court may exclude a prospective juror if the juror is unable to render impartial service. See Adams v. Texas, 448 U.S. 38, 45 (1980) (the proper constitutional standard for juror exclusion is if the juror's views would "prevent or substantially impair" his duties as a juror); Hopt v. Utah, 120 U.S. 430, 433 (1887) (listing reasons for excuse for cause, including "[h]aving formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offence charged"); see also Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries, 86 Yale L.J. 1715, 1733 n.78 (1977) (challenges for cause are not sustained when they are based solely on group affiliation).


10. See Note, supra note 8, at 1718 n.19. The Supreme Court recognized the importance of the peremptory challenge as early as 1887 in Hayes v. Missouri, 120 U.S. 68 (1887). In Hayes, the Court noted that impartiality requires freedom from bias. The Court found that:

Experience has shown that one of the most effective means to free the jury-box from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted.

Id. at 70.
Until recently, the peremptory challenge did not require showing of cause under any circumstances. Counsel could exercise the peremptory challenge without articulating a reason for the challenge, without submitting to inquiry, and without judicial oversight. Attorneys have exercised the peremptory challenge based upon no more substantive reasons than the prospective juror’s appearance and gestures. Because the function of the peremptory challenge is to help assemble an impartial jury, the Supreme Court has recognized the peremptory challenge as one of the most important rights present in a criminal trial and allows counsel wide latitude in making these challenges. Thus, while the Constitution does not require courts to allow peremptory challenges, the sixth amendment right that a criminal defendant be tried by an impartial jury provides a basis for them to do so.

Yet, some commentators have questioned the uninhibited discretion afforded counsel in exercising the peremptory challenge. They argue that complete discretion in the use of peremptory challenges violates the sixth amendment by allowing counsel to employ the challenge in a discriminatory manner. Thus, a claim against a jury selection procedure may arise if the selection procedure is inherently discriminatory either in the selection of the jury venire or the petit jury.


12. Lewis v. United States, 146 U.S. 370, 376 (1892). In Lewis, the Court also noted that the right of challenge has always been held essential to the fairness of trial by jury. Id.


14. Swain, 380 U.S. at 219. The roots of the peremptory challenge have been traced to common law England. Id. at 213. The Federal Rules of Criminal Procedure establish the number of peremptory challenges that each party may exercise in federal court, but is silent as to the manner in which peremptories may be exercised. FED. R. CRIM. P. 24(b).

15. “In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury of the State and district wherein the crime shall have been committed ...” U.S. CONST. amend. VI.


17. See Note, The Case for Abolishing Peremptory Challenges in Criminal Trials, 21 HARV. C.R.-C.L. L. REV. 227, 230 (1986) (the American justice system should rely on challenges for cause and extended voir dire rather than peremptory challenges, which allow the prosecutor to eliminate minorities, and thus eliminate the possibility of a trial by an impartial jury). Id.

The Supreme Court has held that the fourteenth amendment provides one constitutional basis for attacking the discriminatory use of peremptory challenges. In *Batson v. Kentucky*, the Court held that the use of peremptory challenges to exclude African Americans from a petit jury solely because of their race violated the equal protection of the fourteenth amendment. For the first time, the Court allowed inquiry into counsel's reasons for exercising a particular peremptory challenge. Although the defendant in *Batson* alternatively attacked the use of peremptory challenges as a violation of the sixth amendment right to an impartial jury, the Court did not address that claim.

Subsequently, the Supreme Court did address whether peremptory challenges can be attacked on discrimination grounds under the sixth amendment in *Holland v. Illinois*. In *Holland*, the defendant sought to extend the application of the fair cross section requirement of the sixth amendment to the petit jury by urging the court to oversee the use of peremptory challenges. The issue in *Holland* was complicated by the fact that the defendant, a white man, objected on the basis of racial discrimination to the prosecutor's use of peremptory challenges to preclude African Americans from the petit jury.

The petit jury selection. A showing of discrimination in petit jury selection poses a more difficult problem. For example, if all African Americans or all women are statutorily excluded from jury service, discrimination in the selection of the venire would be evident. See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (statute which excluded African Americans from serving on a jury held unconstitutional). Grounds for a claim of discrimination become less clear, however, if African Americans or women are excluded from the jury panel through the use of peremptory challenges.

*Batson* claimed that the prosecutor's peremptory exclusion of African Americans violated his right to an impartial jury drawn from a cross section of the community. *Id.* The Court refused to express any view on the merits of the sixth amendment claim, stating that the claim properly turned on the fourteenth amendment equal protection issue. *Id.* at 84 n.4.

*Holland* claimed that the prosecutor's use of peremptory challenges to exclude all African Americans from his jury prevented a distinctive group from being represented on his jury, thereby violating his sixth amendment right to a petit jury composed of a fair cross section of the community. *Id.*

According to the testimony, the state prosecutor used his peremptory challenges to preclude the only two African Americans represented in the forty member venire.
Daniel Holland was charged with aggravated kidnapping, rape, deviant sexual assault, armed robbery, and aggravated battery of a police officer. The jury found him guilty on all but one charge, and the court sentenced Holland to eighty years imprisonment. Holland appealed and the Illinois Appellate Court reversed the conviction based on a violation of the defendant's Miranda rights. The State appealed to the Supreme Court of Illinois. Holland reasserted his claim that the State violated the Batson ruling by using its peremptory challenges to exclude African American jurors from the panel solely on the basis of race. The Supreme Court of Illinois refused to address that issue, holding instead that a white defendant lacked standing to assert a fourteenth amendment claim. Holland alternatively argued that the exclusion of African Americans from his petit jury violated his sixth amendment right to a jury that represented a fair cross section of the community. The Supreme Court of Illinois found that the peremptory exclusion of African Americans or other minorities does not violate the fair cross section requirement of the sixth amendment. The court reinstated Holland's convictions, and the defendant subsequently petitioned from the petit jury. People v. Holland, 147 Ill. App. 3d 323, 326, 497 N.E.2d 1230, 1233 (1986).

28. People v. Holland, 121 Ill. 2d 136, 140, 520 N.E.2d 270, 272 (1987). The charges were based on a sexual assault of a female teenager and the resulting confrontation with two intervening police officers. Id.

29. Id. at 141, 520 N.E.2d at 272.

30. Holland, 147 Ill. App. 3d at 324, 497 N.E.2d at 1232. The primary issue raised by Holland to the Illinois appellate court was that his waiver of his Miranda rights was invalid. Id. Holland also raised the following issues: (1) that the State used its peremptory challenges to exclude black jurors in violation of Batson v. Kentucky; (2) that his trial counsel was ineffective; (3) that his conviction for armed robbery was improper because the State failed to prove that he took the complainant's property by force or threat of force; (4) that imposition of an extended-term sentence for aggravated kidnapping was improper; and (5) that imposition of consecutive sentences was improper. Id. (citation omitted).

31. Id. at 326, 497 N.E.2d at 1233.

32. Holland, 121 Ill. 2d at 142, 520 N.E.2d at 272.

33. Id.

34. Id. at 157, 520 N.E.2d at 279. The court reasoned that because the defendant was white, he could not prove that members of his race were excluded impermissibly. Id. Batson was available only to a defendant who contended that the prosecutor had used his peremptory challenges in a discriminatory manner to exclude members of the defendant's race. This Note does not address the issue of standing. But see Holland v. Illinois, 493 U.S. 474, 488 (1990) (Kennedy, J., concurring) (proposing that white defendants have standing to assert a Batson claim). In a subsequent case, the Supreme Court held that a defendant has a fourteenth amendment claim against race-based exclusions, regardless of whether the defendant is of the same race as the excluded juror. Powers v. Ohio, 111 S. Ct. 1364 (1991).

35. Holland, 121 Ill. 2d at 158, 520 N.E.2d at 280.

36. Id.
the United States Supreme Court for writ of certiorari. The Supreme Court granted the writ solely to review Holland's sixth amendment claim.

The Supreme Court affirmed Holland's convictions and refused to extend the fair cross section requirement to the petit jury. Writing for the majority, Justice Scalia held first that a petitioner need not be a member of the group excluded from jury service to have standing to assert a sixth amendment claim. The majority, however, rejected Holland's claim that the exclusion of all African Americans from the petit jury through the use of peremptory challenges established a prima facie sixth amendment violation. Rather, the majority stated that the sixth amendment guarantees only the inclusion of all cognizable groups on the jury venire. Thus, the Court held that the sixth amendment fair cross section requirement did not restrict the use of peremptory challenges because it does not apply to the petit jury. The Court based its holding on the text of the sixth amendment, which guarantees a defendant an impartial jury rather than a representative jury. To further support the holding, the Court also relied on the tradition and importance of the peremptory challenge as a means of "assuring the selection of a qualified and unbiased jury."

Justice Kennedy wrote a concurring opinion agreeing that the fair cross section requirement does not apply to the petit jury. He wrote separately, however, to assert that Holland had a valid fourteenth amendment equal protection claim against peremptory challenges excluding African Americans even though Holland was white. In his opinion, Justice Kennedy condemned the racially based exclusion of jurors under the fourteenth amendment.

The dissenting opinion, delivered by Justice Marshall, advocated the extension of the fair cross section requirement of the sixth amendment to the

38. Holland v. Illinois, 493 U.S. 474, 486 n.3 (1990). The Court refused to review Holland's equal protection claim because Holland did not seek review of that issue before the Court. Id.
39. Id. at 487.
40. Id. at 477.
41. Id. at 478.
42. Id.
43. Id. at 480.
44. Id.
45. Id. at 484 (quoting Batson v. Kentucky, 476 U.S. 79, 91 (1986)) (emphasis in original).
46. Id. at 488 (Kennedy, J., concurring).
47. Id. at 489.
48. Id.
Discriminatory Peremptory Challenges

Discriminatory Peremptory Challenges

petit jury. Justice Marshall argued that in reaching its “startling result,” the majority misinterpreted the purposes of the fair cross section requirement, characterized the difficulty in prohibiting racial discrimination in jury selection as near impossible, and ignored Court precedent. The dissent reasoned that the exercise of peremptory challenges solely to exclude African Americans from a jury panel violates the sixth amendment right to an impartial jury because it eliminates the possibility of a fair cross section of the community on the petit jury. The dissent challenged the majority’s reasoning as contradicting precedent, which the dissent found to justify its proposed limit on the peremptory challenge. The dissent concluded that the use of peremptory challenges to remove members of a cognizable group from the jury panel constitutes a prima facie violation of the sixth amendment and should not be permitted.

Justice Stevens, in a separate dissenting opinion, argued that the use of discriminatory peremptory challenges violates the sixth amendment fair cross section requirement. Justice Stevens reasoned that any jury selected by discriminatory means cannot be impartial. Justice Stevens concluded that neutral selection is the best means to insure a jury decision reflective of community mores.

This Note examines the use of the peremptory challenge and its relation to the fundamental rights guaranteed under the sixth amendment. This Note traces the similarities of the fourteenth amendment challenge to the peremptory exclusion of jurors from the petit jury as a precursor to the sixth amendment challenge addressed in Holland v. Illinois. This Note then analyzes the judicial trend regarding the sixth amendment fair cross section requirement and whether it extends to the petit jury. This Note next reviews the majority, concurring, and dissenting opinions in Holland and concludes that the majority’s holding is well grounded in precedent and fairly balances constitutional goals with procedural considerations. Finally, this Note suggests that the decision, by refusing to allow scrutiny of an attorney’s reasons for exercising the peremptory challenge under the sixth amendment, prevents administrative problems that would adversely affect the jury selection procedure and secures the effectiveness of the peremptory challenge as a mechanism to ensure an impartial jury.

49. Id. at 490 (Marshall, J., dissenting).
50. Id.
51. Id. at 493.
52. Id. at 495.
53. Id. at 500.
54. Id. at 504 (Stevens, J., dissenting).
55. Id. at 515.
56. Id.
I. CHALLENGES TO DISCRIMINATION IN JURY SELECTION PROCEDURES

A. Fourteenth Amendment Analysis: The Initial Attack on the Peremptory Challenge

The fourteenth amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. As applied to peremptory challenges, the fourteenth amendment can be used to limit peremptory challenges that exclude jurors based on race or color.

*Strauder v. West Virginia* was the first attack before the United States Supreme Court on discriminatory jury selection proceedings under a fourteenth amendment equal protection argument. Strauder, an African American, was found guilty of murder by a jury composed entirely of white males. Strauder appealed the conviction, contending that he could not enjoy the full and equal benefit of the laws as enjoyed by white citizens if members of his race were statutorily excluded from jury service. The Supreme Court held that the state law denying African Americans the right to serve on a jury violated the equal protection mandate of the fourteenth amendment and reversed the conviction.

That same year, however, in *Virginia v. Rives*, the Court held that under the fourteenth amendment a criminal defendant was not entitled to a proportional number of representatives of his race on either the petit jury or the jury venire. In *Rives*, two African American defendants were convicted of

57. U.S. CONST. amend. XIV, § 1. The amendment commands that:

[all] persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

59. Id. at 304.
60. Id.
61. Id. at 309. The Court emphasized that it cannot be said “that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former.” Id. The Court reasoned that the state law denied the defendant an essential element of trial by jury which was a jury “composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” Id. at 308.
62. 100 U.S. 313 (1880) (denying defendant’s motion that an all white jury venire be modified to allow one-third to be composed of colored men), *overruled by Greenwood v. Peacock*, 384 U.S. 808 (1966).
63. Id. at 322-23.
murder by a jury drawn from a venire composed entirely of white males.\textsuperscript{64} The defendants appealed the convictions, claiming a fourteenth amendment right to have the jury venire include a proportionate number of African Americans.\textsuperscript{65} The Court found that "[a] mixed jury in a particular case is not essential to the equal protection of the laws."\textsuperscript{66} The Court reasoned that it had no authority to modify a venire which had been drawn according to law.\textsuperscript{67} Therefore, while the \textit{Strauder} Court acknowledged that criminal defendants have the right to a jury impanelled without the taint of discrimination,\textsuperscript{68} the \textit{Rives} decision established that the failure to produce an accurate racial cross section does not violate the equal protection clause.\textsuperscript{69}

In both \textit{Strauder} and \textit{Rives}, the Court addressed whether the fourteenth amendment applied when the State was comprising the venire. The Court did not address the use of peremptory challenges. In fact, nearly a century passed before the Court addressed the issue of whether the discriminatory use of peremptory challenges to strike members from the petit jury violated the fourteenth amendment. In \textit{Swain v. Alabama},\textsuperscript{70} the Court confronted this issue. Swain, an African American, was convicted of rape.\textsuperscript{71} Swain appealed his conviction on equal protection grounds because the prosecutor, through the use of peremptory challenges, prevented African Americans on the venire from becoming petit jurors.\textsuperscript{72} Although the Court acknowledged

\begin{itemize}
\item \textsuperscript{64} Id. at 314-15.
\item \textsuperscript{65} Id. The motion in the trial court to modify the venire to contain one-third African Americans was denied on the ground that the court had no authority to modify a venire which had been drawn according to law. Id. at 315. No Virginia law at that time excluded African Americans from jury service. Id. at 334.
\item \textsuperscript{66} Id. at 323.
\item \textsuperscript{67} Id. at 315.
\item \textsuperscript{68} \textit{Strauder v. West Virginia}, 100 U.S. 303, 305 (1880), \textit{overruled by} \textit{Taylor v. Louisiana}, 419 U.S. 522 (1975); \textit{see also} \textit{Hernandez v. Texas}, 347 U.S. 475 (1954) (intentional exclusion of any identifiable group in the community which has been the subject of prejudice is unconstitutional), \textit{overruled by} \textit{Taylor v. Louisiana}, 419 U.S. 522 (1975); \textit{Cassell v. Texas}, 339 U.S. 282, 286 (1950) ("[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race"); \textit{Smith v. Texas}, 311 U.S. 128 (1940) (discrimination resulting in racial exclusion from jury service is at war with the concepts of a democratic society).
\item \textsuperscript{69} \textit{Rives}, 100 U.S. at 322.
\item Nor did the refusal of the court . . . to allow a modification of the \textit{venire}, by which one-third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States.
\item Id. (emphasis in original).
\item \textsuperscript{70} 380 U.S. 202 (1965).
\item \textsuperscript{71} Id. at 203.
\item \textsuperscript{72} Id. at 205. Six African Americans remained on the venire after counsel had exercised their challenges for cause. The prosecutor excluded all of them with his peremptory challenges. Id.
that the intentional exclusion of an otherwise qualified member of a recognized minority group violated the fourteenth amendment, the Court denied Swain's claim. Instead, the Court emphasized that the peremptory challenge is a necessary part of a jury trial which eliminates extremes of partiality and ensures that the petit jury render a decision based on the evidence presented at the trial and not on hidden biases. Therefore, the Court held that there exists a presumption that the prosecutor used his peremptory challenge in an effort to obtain a fair and impartial jury and not for discriminatory purposes. To rebut this presumption, the Court announced, a defendant must prove that the particular prosecutor systematically and consistently excluded members of the particular racial group.

In 1986, the Court decided Batson v. Kentucky, which partially overturned Swain. Batson was an African American convicted for second degree burglary and receipt of stolen goods. At the trial, the prosecutor exercised his peremptory challenges to strike all four African Americans from the venire. Batson appealed the conviction, arguing that the prosecutor's use of peremptory challenges violated his sixth amendment right to a jury drawn from a fair cross section of the community and his fourteenth amendment right to equal protection of the laws. The Court addressed the fourteenth amendment claim but expressed no view on the sixth amendment claim. The majority held that a defendant may assert an equal protection claim whenever the prosecutor eliminates minority jurors of the defendant's race through peremptory challenges, even in the absence of a showing of a consis-

73. Id. at 208. The Court also noted that a defendant cannot demand a proportionate number of his race on the venire or the petit jury. The Court concluded that "[n]either the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group." Id. The Court reasoned that the variety of races and nationalities in society would make a requirement of proportional representation impossible. Id.

74. Id. at 219. The Court also noted that the peremptory challenge is a necessary means to exclude jurors for a real or imagined partiality which may not be demonstrated by the proposed juror. Id. at 220; see also Lewis v. United States, 146 U.S. 370, 378 (1892) (peremptory challenge fails its full purpose if not exercised with full freedom).

75. Swain, 380 U.S. at 227.

76. Id. (citing Hernandez v. Texas, 347 U.S. 475 (1954)); see also Smith v. Texas, 311 U.S. 128 (1940) (racial discrimination resulting in excluding otherwise qualified groups from the jury venire "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government"). Id. at 130 (footnote omitted).

77. 476 U.S. 79 (1986).

78. Id. at 82.

79. Id. at 83.

80. Id. at 83-84.

81. Id. at 84 n.4.
tent practice of racial exclusion. \(^{82}\) Modifying *Swain*, the *Batson* Court held that a defendant need only show that the prosecutor violated the fourteenth amendment in the present case, rather than showing that the prosecutor had consistently discriminated in prior cases. \(^{83}\) *Batson* thus reduced the burden of proof placed on the defendant attacking peremptory challenges.

Accordingly, under the fourteenth amendment a defendant may attack racially motivated peremptory challenges. For a defendant to make a prima facie showing of discrimination under *Batson*, he need only show that he is a member of a cognizable racial group, that the prosecutor used peremptory challenges to exclude members of that same group, and that there are circumstances which raise the implication of discrimination. \(^{84}\) Once the defendant has made such a prima facie showing, the burden shifts to the state to provide a neutral explanation for having excluded the particular jurors. \(^{85}\)

**B. Sixth Amendment Analysis: The Alternative Attack on the Peremptory Challenge**

The sixth amendment requires that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. \(^{86}\) Similar to the

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\(^{82}\) Id. at 96.

\(^{83}\) Id.

\(^{84}\) Id.; see The New and Improved Peremptory Challenge, supra note 16, at 1210 (explaining the impact of *Batson* and the uncertainty which accompanies it).

\(^{85}\) *Batson*, 476 U.S. at 97. The Court emphasized that the trial judge should consider the relevant circumstances when determining whether the defendant has established a prima facie case. The Court stated, "[w]e have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." Id.

The prosecutor may not rebut the showing merely by stating that the minority jurors would be partial to the defendant who was a member of their race or by affirming his good faith in the particular challenge. Rather, the prosecutor must provide a " 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." Id. at 98 n.20 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)). This requirement of providing an explanation for the use of a particular peremptory challenge limits counsel's discretion in the exercise of a peremptory challenge when the defendant and the excluded juror are of the same race.

\(^{86}\) U.S. CONST. amend. VI. In 1968, the Court held that the sixth amendment guarantee of an impartial jury was applicable to the states, and therefore provided a defendant new constitutional protection against discriminatory jury selection proceedings in state courts. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The right to trial by jury in all criminal cases was extended to the states through the due process clause of the fourteenth amendment. Id. at 154. That same year, Congress passed the Jury Selection and Service Act of 1968 (Act) which allowed litigants in federal courts to have the right to a grand and petit jury selected at random from a fair cross section of the community. Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. § 1861 (1988))). This Act also prevented discrimination in jury selection by providing that "[n]o citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. § 1862.
equal protection claims against peremptory challenges, the attack on peremptory challenges based on racial discrimination under the sixth amendment arose in the jury venire context. 87

In Taylor v Louisiana, 88 the United States Supreme Court determined that the defendant's sixth amendment right to an impartial jury is satisfied as long as the venire from which the jury was selected was comprised of a fair cross section of the community. 89 A jury drawn from a venire comprised solely of males convicted Taylor of aggravated kidnapping. 90 A Louisiana statute excluded women from serving on jury venires. 91 Taylor appealed his conviction on the grounds that the absence of females on the jury venire deprived him of his constitutional right to "a fair trial by jury of a representative segment of the community." 92 The Court held that the statute which excluded women from jury service violated the defendant's right to an impartial jury. 93 The statutory requirements, the Court reasoned, virtually precluded a significant sector of the community from jury service and thereby violated the fair cross section requirement of the sixth amendment. 94 The Court reached its holding after summarizing its prior opinions on the

The Court has interpreted these objectives through sixth amendment cases involving discrimination and the violation of the fair cross section requirement.

The House of Representatives report on this Act stated the aim of the Act was "to assure to all litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified citizens will have the opportunity to be considered for jury service." H.R. REP. No. 1076, 90th Cong., 2nd Sess. 8, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1792, 1792. The General Statement section of the report emphasized the necessity of challenges for cause and peremptory challenges as an effective mechanism to eliminate all forms of jury incompetence. H.R. REP. No. 1076 AT 7, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 1797. Finally, the report examined the cross sectional goal as a means to obtain a judgment based on community views. Without the cross section requirement, the report concluded, juries will be biased in that they will not necessarily reflect community views. Id. 87. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975) (statute which excluded women from participating on a jury venire violated the sixth amendment).

89. Id. at 530.
91. Id. at 497.
92. Taylor, 419 U.S. at 524. The Supreme Court of Louisiana reasoned that it was not impermissible for a State, "acting in pursuit of the general welfare," to relieve a woman from jury service unless the woman determined that such service would not impede her responsibilities. State v. Taylor, 282 So. 2d at 497.
93. Taylor, 419 U.S. at 525.
94. Id. at 531-533. The Louisiana statute provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to do so. The testimony indicated that in the defendant's parish, 53% of persons eligible for service were women, yet the actual jury wheel contained only 10% women. Id. at 523-24. In this particular case, there were no females present on the jury venire. Id. at 524.
role of the sixth amendment in jury selection. Those cases indicated that “selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.” The Court in *Taylor* held that excluding identifiable segments of the community from the jury venire denied the defendant an impartial jury and, therefore, was inconsistent with the sixth amendment. The Court also held that while the source of the petit jury must contain a fair representation of the community, the petit jury itself need not. The Court thus emphasized that “in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”

In *Duren v Missouri,* the Court affirmed *Taylor* and held that systematic exclusion of women from the jury venire violated the fair cross section requirement of the sixth amendment. The *Duren* Court, however, further defined *Taylor* by establishing criteria for a defendant to prove a prima facie violation of the sixth amendment fair cross section requirement. In *Duren*, the defendant was convicted of murder and first degree robbery. The jury that convicted Duren contained no women because a Missouri law

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95. Id. at 526-28; see Glasser v. United States, 315 U.S. 60 (1942) (affirming the proposition that a jury be a body representative of the community); Smith v. Texas, 311 U.S. 128 (1940) (tradition mandates that a jury be truly representative of the community). The Court further noted that the fair cross section requirement ensures that all segments of the community will satisfy their civic responsibility to share in the administration of justice. *Taylor*, 419 U.S. at 530-31.

96. *Taylor*, 419 U.S. at 528. Also supporting the Court’s holding were congressional directives found in the Jury Selection and Service Act of 1968 and the accompanying legislative history which indicated that a litigant has a right to a jury “selected at random from a fair cross section of the community.” Id. at 529 (quoting Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861).

97. Id. at 530; see also Peters v. Kiff, 407 U.S. 493, 503-04 (1972), where the court stated: When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . . It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id.


99. Id. The Court also added that there exists no right to a particular composition on the jury. Id. (citing Fay v. New York, 332 U.S. 261, 284 (1947)).


101. Id. at 360.

102. Id. at 364.

granted women an automatic exemption from jury service.\textsuperscript{104} Duren appealed his conviction on the grounds that the statute denied him his right to trial by a jury chosen from a fair cross section of the community.\textsuperscript{105} The Supreme Court reversed Duren's conviction, setting forth a three part standard for establishing sixth amendment violation. The Court held that the prima facie elements of a sixth amendment violation included: whether the group excluded from the venire is a distinct group;\textsuperscript{106} whether the representation of the distinct group on the jury panel is unreasonably below its ratio in the community;\textsuperscript{107} and whether such underrepresentation is due to systematic exclusion in the process of jury selection.\textsuperscript{108} The Duren Court held that once the defendant makes this prima facie showing, the state then bears the burden of demonstrating that a significant state interest outweighs the fair cross section requirement.\textsuperscript{109} While a significant state interest may allow certain exemptions,\textsuperscript{110} the Court held that any exemption of a broad category of persons from jury service will likely violate the sixth amendment.\textsuperscript{111} Still, the Court did not seek to extend the Duren test beyond the venire phase of jury selection.

The Supreme Court reaffirmed that only the source of petit juries, and not the petit jury itself, must contain a fair or representative cross section of the community in Lockhart v. McCree.\textsuperscript{112} In Lockhart, the Court explained that disqualifying a distinct group for a reason related to their ability to serve as

\textsuperscript{104} Id. at 13-14. The statute allowed for the automatic exclusion of women from venires resulting in approximately 14\% women on an average venire. Duren, 439 U.S. at 367. The Supreme Court of Missouri reasoned that exemptions from jury service were allowed to promote the "orderly and efficient" operation of the overloaded judicial system. State v. Duren, 556 S.W.2d at 14.

\textsuperscript{105} Duren, 439 U.S. at 360.

\textsuperscript{106} Id. at 364. The Court found that women are a sufficiently distinct group and cannot be systematically excluded from jury panels without violating the fair cross section requirement. \textit{Id}.

\textsuperscript{107} Id. The defendant must demonstrate that the group’s percentage in the community related to its representation in the jury pool proves underrepresentation, “for this is the conceptual benchmark for the sixth amendment fair-cross-section requirement.” \textit{Id}. Duren presented a census measurement to show that women comprised 54\% of the community in which he lived and the Court held that this established adequate prima facie evidence for this prong of the test. \textit{Id}. at 364-66.

\textsuperscript{108} Id. at 364. The defendant must demonstrate that the underrepresentation was systematic and inherent in the jury selection process used, for example, by statute precluding that group’s participation. \textit{Id}. at 366. Duren demonstrated that this underrepresentation occurred consistently for over a year to establish this prima facie element. \textit{Id}. at 366-67.

\textsuperscript{109} Id. at 368.

\textsuperscript{110} Id. at 370. For example, exemptions based on special hardship, incapacity, or community needs constitute significant state interests. \textit{Id}.

\textsuperscript{111} \textit{Id}.

\textsuperscript{112} 476 U.S. 162 (1986).
impartial jurors on a particular case did not violate the fair cross section requirement.\textsuperscript{113} Lockhart was convicted of capital felony murder.\textsuperscript{114} The trial judge, during voir dire, removed for cause prospective jurors who admitted that they could not impose the death penalty under any circumstances.\textsuperscript{115} The defendant appealed his conviction, contending that the removal for cause of jurors opposed to the death penalty was improper.\textsuperscript{116} The Supreme Court of Arkansas denied this claim.\textsuperscript{117}

Upon review, the United States Supreme Court held that the sixth amendment presupposes that a fair cross section requirement on the venire will ensure that the jury is impartial, "so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."\textsuperscript{118} The Court cautioned that when jurors are excluded for reasons unrelated to their ability to serve impartially, the jury might be "arbitrarily skewed"\textsuperscript{119} in a way that could deny the defendant the "benefit of the common-sense judgment of the community."\textsuperscript{120} The Court made clear, however, that the fair cross section requirement does not apply to the petit jury.\textsuperscript{121} While the \textit{Lockhart} Court addressed challenges for cause rather than peremptory challenges, \textit{Lockhart} can be read as the Court's refusal to limit peremptory challenges.

Accordingly, both \textit{Taylor} and \textit{Lockhart} imposed limitations on the fair cross section requirement. In \textit{Taylor}, the Court emphasized that although petit juries were to be drawn from a venire composed of a fair cross section of the community, the sixth amendment does not require that the petit jury proportionately reflect all distinctive groups in the community.\textsuperscript{122} Likewise, the \textit{Lockhart} Court denounced a broad application of the fair cross section requirement for the petit jury and held that the requirement should not be used to invalidate the use of either for-cause or peremptory challenges to prospective jurors.\textsuperscript{123} The Court reasoned that "[t]he limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the

\textsuperscript{113} Id. at 184 (the Court stated that "the Constitution presupposes that a jury selected from a fair cross section of the community is impartial").
\textsuperscript{114} McCree v. State, 266 Ark. 465, 467, 585 S.W.2d 938, 939 (1979).
\textsuperscript{115} Id. at 470-71, 585 S.W.2d at 941-42.
\textsuperscript{116} Id. at 470, 585 S.W.2d at 941 (citing Witherspoon v. Illinois, 391 U.S. 510 (1968) (death sentence could not be carried out if the jury panel was chosen by excluding veniremen for cause because they objected to the death penalty)).
\textsuperscript{117} Id. at 473-74, 585 S.W.2d at 942.
\textsuperscript{118} Lockhart v. McCree, 476 U.S. 162, 184 (1986).
\textsuperscript{119} Id. at 175.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 174.
\textsuperscript{122} Taylor v. Louisiana, 419 U.S. 522, 528 (1975).
\textsuperscript{123} Lockhart, 476 U.S. at 173-74. The Court stated:
practical impossibility of providing each criminal defendant with a truly 'representative' petit jury.'

While the Supreme Court failed to resolve the constitutionality of the discriminatory use of peremptory challenges under the sixth amendment, some lower courts had extended the fair cross section requirement to petit juries—thereby limiting the peremptory challenge. For example, the United States Court of Appeals for the Second Circuit, in *McCray v. Abrams*, held that a prosecutor must explain the reason for his use of peremptory challenges when a cognizable group is disproportionately excluded from the petit jury. The California Supreme Court, in *People v.*

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We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large . . . . We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound . . . .

*Id.* (citations omitted) (footnote omitted)

124. *Id.*; see also United States v. Childress, 715 F.2d 1313, 1320 (8th Cir. 1983) (en banc) (sixth amendment does not restrict the use of the peremptory challenge to remove African American prospective jurors), *cert. denied*, 464 U.S. 1063 (1984).

125. The Supreme Court refused to address the proposal to extend the sixth amendment guarantees to include a right to a fair cross section of the community on the petit jury in *Batson v. Kentucky*, 476 U.S. 79, 84 n.4 (1986), and *Teague v. Lane*, 489 U.S. 288, 299 (1989). In *Batson*, although the Court had granted certiorari on the sixth amendment issue, the case was decided solely on the fourteenth amendment issue. 476 U.S. at 112 (Burger, C.J., dissenting) (*Batson* is an exception to the rule that only questions set forth in the petition will be considered by the Court). In *Teague*, the Court refused to address the sixth amendment claim stating that a decision on the issue was not necessary to the outcome of the case. 489 U.S. at 316. In the dissenting opinion in *Teague*, only two Justices expressed the view that a petit jury cross section requirement was compelled by precedent. *Id.* at 340-44 (Brennan, J., dissenting).

126. See *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984) (prosecutor may not unreasonably restrict the possibility that petit jury will comprise fair cross section of the community), *vacated*: 478 U.S. 1001 (1986); *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1979) (use of peremptory challenge to exclude African American jurors solely because of group association violated defendant's rights to a jury drawn from a fair cross section of the community); *State v. Neil*, 457 So. 2d 481 (Fla. 1984) (new trial granted where it could not be determined whether prospective juror had been excused solely because of his race); *People v. Payne*, 36 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982) (reasoning that the aim of the interaction of cross section of the community is only effectuated at the petit jury stage and thus racial discrimination through peremptory challenges renders the fair cross section requirement a nullity); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, (right to jury of one's peers violated when prosecutor uses peremptory challenges in a discriminatory manner), *cert. de ied*, 444 U.S. 881 (1979).

127. 750 F.2d 1113 (2d Cir. 1984).

128. *Id.* at 1115. In *McCray*, the prosecutor used eight of her eleven peremptory challenges to exclude African American and Hispanic individuals from the venire. The court held that this violated the defendant's rights under the sixth amendment and that each petit jury should contain a fair cross section of the community. *Id.* at 1118.
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Wheeler,129 likewise held, under a state constitutional article similar to the sixth amendment, that the prosecutor’s use of peremptory challenges to discriminatorily exclude African Americans from the venire violated the defendant’s right to a petit jury drawn from a fair cross section of the community.130 It was not until Holland v. Illinois131 that the Court confronted the issue directly.

II. Holland v Illinois: Refusal to Extend Fair Cross Section to the Petit Jury Selection Process

In Holland v. Illinois,132 the United States Supreme Court finally addressed whether the sixth amendment guarantee of a fair cross section of the community extends to the petit jury as well as the jury venire so as to limit peremptory challenges.133 In Holland, a five member majority134 held that a defendant does not have a sixth amendment claim against a prosecutor’s use of peremptory challenges to exclude members of a distinct group from the petit jury.135 The dissent disagreed, arguing that the use of peremptory challenges to exclude persons solely on the basis of race contravenes a defendant’s sixth amendment right to trial by a jury composed of a fair cross section of the community. Moreover, the dissent contended that this constitutional guarantee applies to the petit jury as well as the venire.136 The tension between the majority and dissenting opinions was based on whether the sixth amendment’s fair cross section requirement prevents counsel from exercising peremptory challenges to exclude cognizable groups from the petit jury.137

A. No Sixth Amendment Qualification on Peremptory Challenge

Writing for the Court, Justice Scalia began by analyzing Holland’s argument that the prosecutor’s use of peremptory challenges to strike all African American prospective jurors prevented a distinct group from being repre-

130. Wheeler, 22 Cal. 3d at 272, 583 P.2d at 761-62, 148 Cal. Rptr. at 892.
132. Id.
134. Justice Scalia wrote the majority opinion, which Chief Justice Rehnquist and Justices White and O’Connor joined. Justice Kennedy filed a separate concurring opinion. Justice Marshall wrote a dissent joined by Justices Blackmun and Brennan. Justice Stevens filed a separate dissenting opinion.
136. Id. at 494 (Marshall, J., dissenting).
137. Id. at 478.
sented on his jury and thus violated his sixth amendment right. Holland claimed that the lack of African Americans on his jury denied him a "fair possibility" of a representative cross section of the community on his jury. In essence, Justice Scalia noted, Holland sought to apply the fourteenth amendment equal protection test developed in \textit{Batson} to his sixth amendment claim.

Justice Scalia flatly rejected Holland's contention that the sixth amendment should be employed to limit the prosecutor's use of peremptory challenges because the challenges deny the defendant a "fair possibility" of a representative jury. Although the majority admitted that it had referred to a "fair possibility" requirement in the past, the requirement had been limited to the venire. Accordingly, the Court held that Holland's argument urging a prohibition on the prosecutor's ability to exclude certain groups from the petit jury through peremptory challenges had neither a "conceivable basis" in the text of the Constitution nor support from the Court's prior opinions. Further, Justice Scalia asserted that extending the fair possibility requirement to the petit jury could actually impede the sixth amendment's guarantee of an impartial jury.

The majority then distinguished its fourteenth amendment cases on limiting peremptory challenges from the sixth amendment claims. Justice Scalia recognized that under the fourteenth amendment peremptory challenges aimed at racial groups can be attacked. The Court reasoned that in those instances, however, the unique goal of the fourteenth amendment—to eradi-

\begin{itemize}
    \item 138. \textit{Id.} at 476.
    \item 139. \textit{Id.} at 478.
    \item 140. \textit{Id.} Under Holland's approach, any defendant would have standing to assert a sixth amendment violation when African Americans are excluded from his jury through peremptory challenges. The prosecutor would then have to provide a nondiscriminatory explanation for his exclusion. \textit{Id.}
    \item 141. \textit{Id.}
    \item 142. \textit{Id.} The Court cited \textit{Taylor v. Louisiana, Duren v. Missouri, and Lockhart v. McCree} to support its analysis that cognizable groups may not be excluded from the venire but may, through peremptory challenges, be excluded from the petit jury. \textit{Id.; see also} Ballew v. Georgia, 435 U.S. 223 (1978) (to satisfy the "possibility" of a fair cross section on the jury, the jury must also contain at least six persons); Williams v. Florida, 399 U.S. 78, 100 (1970) (finding that a jury comprehends a "fair possibility for obtaining a representative cross-section of the community").
    \item 143. \textit{Holland}, 493 U.S. at 478. While there is no basis for the requirement that the jury venire include a fair cross section of the community evident in the text of the sixth amendment, the Court has held the fair cross section requirement as necessary to ensure an impartial jury. See \textit{Taylor v. Louisiana}, 419 U.S. 522, 535-36 (1975).
    \item 144. \textit{Holland}, 493 U.S. at 478.
    \item 145. \textit{Id.}
    \item 146. \textit{Id.} at 478-79.
\end{itemize}
cate racial discrimination—necessarily applies to both the venire and the petit jury selection.\textsuperscript{147}

The Court then turned to the sixth amendment issue. The majority agreed that the sixth amendment imposes a fair cross section requirement on the venire, but not on the petit jury.\textsuperscript{148} The Court acknowledged that the fair cross section requirement is not specifically required by the text of the sixth amendment, but stems from the “traditional understanding” of how an impartial jury is selected.\textsuperscript{149} Relying on \textit{Taylor}, the Court reasoned that the “traditional understanding” only requires a representative venire so that the jury will be drawn from a cross section of the community.\textsuperscript{150} But, the Court continued, the “traditional understanding” has never included that the state cannot exercise peremptory challenges.\textsuperscript{151}

The Court supported its position by drawing a distinction between the sixth amendment guarantee of an impartial jury rather than a representative jury.\textsuperscript{152} It held that the sixth amendment only ensures a fair possibility of an impartial jury and that the fair possibility is achieved once all cognizable

\begin{itemize}
\item \textsuperscript{147} \textit{Id.} at 479.
\item \textsuperscript{148} \textit{Id.} at 480.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} The Court analyzed the historical purpose of peremptory challenges and concluded that because peremptory challenges have been used since the founding of the nation, the phrase “impartial jury” in the sixth amendment must be read to allow the “unbroken tradition” of peremptory challenges. \textit{Id.; see Lewis v. United States, 146 U.S. 370, 378 (1892)}. The Court suggested that one could argue that the requirement of an impartial jury compels peremptory challenges, but this requirement cannot be interpreted to directly or indirectly prohibit peremptory challenges. \textit{Holland, 493 U.S. at 480.}

\item \textsuperscript{152} \textit{Holland, 493 U.S. at 480.} The Court reasoned that absent the impartiality requirement, a state could selectively place jurors of a particular group or belief on the venire and thereby limit the petit jury to an impartial group. \textit{Id.} If so, the Court continued, peremptory challenges would be meaningless. Therefore, according to the Court, requiring that the venire contains a fair cross section of the community ensures that the prosecution and defense will start from an equal position when forming a jury. But, the Court stressed that a representative cross section on the venire does not mean that each side may not eliminate potential jurors that they believe would unduly favor the opposing side. \textit{Id. at 481.} Because a representative venire provides both sides with a “fair hand,” both can compete equally through peremptory challenge to form a jury advantageous to its side from an equally competitive starting point. \textit{Id.} The Court rejected the argument that counsel could not attempt to “stack the deck” to favor his position once a venire is representative. \textit{Id.}

The Court acknowledged that its holding in \textit{Holland} follows the same principle the Court announced in \textit{Lockhart}. \textit{Id. at 483.} In \textit{Lockhart}, the Court rejected arguments that allowing challenges for cause to remove jurors opposed to the death penalty violated the fair cross section requirement. \textit{Id.} The Court reasoned that disqualifying a group because it could not serve impartially in a particular case, and that the state’s interest in achieving an impartial jury overrides the representativeness requirement. \textit{Id.} Likewise, in \textit{Holland}, the Court recognized that the legitimate state interest in achieving an impartial jury overrides the claim that the jury is not representative. \textit{Id.}
groups are included on the venire.\textsuperscript{153} Because Holland's venire contained a representative sample of the community, his sixth amendment guarantee was met.\textsuperscript{154}

Finally, to support its holding, the Court concluded that its decision not to extend a representativeness requirement to petit juries is the only plausible reading of the sixth amendment.\textsuperscript{155} The goal of the sixth amendment, the Court reasoned, is jury impartiality for both the defendant and the state.\textsuperscript{156} To extend the representative cross section requirement to the petit jury, the Court predicted, would interfere with the fairness goal of the sixth amendment.\textsuperscript{157} The Court contended that the function of the peremptory challenge is to ensure impartiality and not a representative cross section on the petit jury.\textsuperscript{158} The Court explained that peremptory challenges hold an "important position" in criminal trial procedures because they allow counsel to eliminate partial jurors to achieve the constitutionally guaranteed unbiased jury.\textsuperscript{159}

Responding to Justice Marshall's dissenting opinion, Justice Scalia warned against the "misplaced optimism" of Justice Marshall's contention that limiting peremptory challenges would not affect the peremptory challenge system.\textsuperscript{160} Rather, Justice Scalia noted, many distinct groups which cannot be excluded at the venire stage due to the fair cross section requirement are regularly excluded peremptorily.\textsuperscript{161} Therefore, extending the sixth amendment guarantees to limit peremptory challenges would indeed eliminate commonly exercised bases for the peremptory challenge.\textsuperscript{162} The majority countered Justice Marshall's accusation that it ignored the principles set out in precedent\textsuperscript{163} by reiterating that \textit{Taylor}, \textit{Lockhart}, and \textit{Duren} specifi-
cally disclaimed the application of the fair cross section requirement to the petit jury.164

Justice Kennedy concurred in the Court’s opinion, citing no violation of the sixth amendment.165 Justice Kennedy, however, wrote a separate opinion to emphasize his belief that Holland had a valid fourteenth amendment claim under Batson.166 Justice Kennedy also expressly stated that a defendant who is not of the same race as the excluded juror has standing to assert a fourteenth amendment claim.167

B. Fair Cross Section on the Petit as Limit to Peremptory Challenge

Justice Marshall, dissenting, characterized the majority opinion as a “startling” result which “misrepresents” the values of the sixth amendment requirements and “ignores” precedent.168 Justice Marshall asserted that the fair cross section requirement is separate and distinct from the impartiality requirement169 and advocated the extension of the fair cross section requirement to the petit jury.170 Alternatively, Justice Marshall contended that the

164. Id. at 486. Justice Scalia also rejected the dissent’s contention that race is the underlying legal issue in Holland. Id. Justice Scalia warned the dissent that while it accuses the majority of insensitivity to race-based discrimination, the accusation will “lose its intimidating effect if it continues to be fired so randomly.” Id. Justice Scalia suggested that the sixth amendment claim would be just as strong if the jurors excluded were lawyers or clergymen rather than African Americans. Id. While the Court acknowledged that the discriminatory exclusion of African Americans violates the equal protection clause, the Court refused to expand the sixth amendment beyond its purpose of securing an impartial jury. Id. at 487.

165. Id. at 488 (Kennedy, J., concurring).

166. Id. Justice Kennedy agreed that a peremptory challenge based solely on race is a violation of the juror’s constitutional rights under the fourteenth amendment. Id.

167. Id. at 489-90 (stating that there is no reason a defendant’s race should “deprive him of standing in his own trial to vindicate his own jurors' right to sit”). Under the test adopted in Batson, the defendant must show that he is a member of a “cognizable racial group” and that the juror who was excluded is also a member of that same group. See Batson v. Kentucky, 476 U.S. 79, 96-98 (1986). The majority in Holland stated that, under the sixth amendment, such group identification is not needed to prove standing. Holland, 493 U.S. at 476-77.

Thus, under the sixth amendment, a defendant need not be a member of the group of the excluded juror to have standing. See Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (male has standing to object to the exclusion of women from the jury venire under the sixth amendment); Peters v. Kiff, 407 U.S. 493, 500 (1972) (any petitioner would have standing to challenge systematic exclusion of any identifiable group from jury service under the sixth amendment).

168. Holland, 493 U.S. at 490 (Marshall, J., dissenting) (“To reach this startling result, the majority misrepresents the values underlying the fair cross-section requirement, overstates the difficulties associated with the elimination of racial discrimination in jury selection, and ignores the clear import of well-grounded precedents.”).

169. Id. at 493. Justice Marshall and Justice Stevens agreed that even if impartiality were the only goal of the fair cross section requirement, the discriminatory exclusion of all African Americans from the jury venire is a per se violation of the impartiality requirement. Id. at 493 n.1.

170. Id. at 494.
peremptory exclusion of all African American jurors solely on the basis of race constitutes a violation of the impartiality requirement.\footnote{171}

Justice Marshall proposed that impartiality is but one of two components of the sixth amendment right to an impartial jury.\footnote{172} The fair cross section requirement is the second component and is grounded in the definition of a jury.\footnote{173} Justice Marshall cited \textit{Taylor, Duren,} and \textit{Lockhart} to support his view that the two guarantees of the sixth amendment should be analyzed separately.\footnote{174} Justice Marshall argued that \textit{Lockhart} held that the fair cross section requirement had a dual purpose: to ensure an impartial jury and to preserve public confidence and full participation of the community in the administration of justice.\footnote{175} Justice Marshall's dissent reasoned that these dual purposes are served only by assembling an impartial jury containing a fair cross section of the community.\footnote{176}

Justice Marshall also challenged the majority's analysis of \textit{Lockhart} for the holding that the fair cross section requirement does not apply to the petit jury.\footnote{177} Justice Marshall again emphasized that because the sixth amendment fair cross section requirement preserves public confidence and ensures full participation in the judicial system,\footnote{178} racially motivated peremptory challenges destroy the perception that the justice system is fair.\footnote{179} Justice Marshall therefore reasoned that racially motivated exclusion denies the goals of the sixth amendment whether it occurs during the selection of the jury venire or the petit jury.\footnote{180}

\footnote{171. \textit{Id.} at 502.}
\footnote{172. \textit{Id.} at 493.}
\footnote{173. \textit{Id.} Justice Marshall stated that “what is denominated a ‘jury’ is not a ‘jury’ in the eyes of the Constitution unless it is drawn from a fair cross-section of the community.” \textit{Id.}; see \textit{Ballew v. Georgia,} 435 U.S. 223 (1978) (five person jury insufficient to satisfy the Constitution's demand of a jury trial). Justice Marshall contended that the Court in \textit{Ballew} did not rely only on the impartiality requirement, but rather on the definition of “jury.” \textit{Holland,} 493 U.S. at 493.}
\footnote{174. \textit{Holland,} 493 U.S. at 494-95.}
\footnote{175. \textit{Id.} at 495. The purposes articulated in \textit{Lockhart v. McCree} are “(1) ‘guard[ing] against the exercise of arbitrary power’ and ensuring the ‘commonsense judgment of the community’ . . . (2) preserving ‘public confidence in the fairness of the criminal justice system,’ and (3) implementing our belief that ‘sharing in the administration of justice is a phase of civic responsibility.’” \textit{Lockhart,} 476 U.S. 162, 174-75 (1986) (citing \textit{Taylor v. Louisiana,} 419 U.S. 522, 530-31 (1975)).}
\footnote{176. \textit{Holland,} 493 U.S. at 495.}
\footnote{177. \textit{Id.} at 496.}
\footnote{178. \textit{Id.} at 496-97.}
\footnote{179. \textit{Id.} at 497.}
\footnote{180. \textit{Id.} In support of this contention, the dissent cited the holding in \textit{Batson} to show that “[a] defendant's interest in obtaining the 'commonsense judgment of the community' is impaired by the exclusion from his jury of a significant segment of the community; whether the exclusion is accomplished in the selection of the venire or by peremptory challenge is immate-
Next, Justice Marshall attacked the majority's claim that the peremptory challenge is essential to the impartiality requirement and that a fair cross section requirement would destroy the effectiveness of the peremptory challenge. Justice Marshall noted that, because the Court had ruled that a state could regulate the use of peremptory challenges, the challenge cannot be held to be essential to the impartiality requirement. Justice Marshall predicted that extending the sixth amendment's requirement to the petit jury would have no effect on the peremptory challenge system other than those already imposed by *Batson*. In fact, Justice Marshall stated that the practical effect of this result on the peremptory challenge would be "nil."

Justice Stevens wrote a separate dissenting opinion to acknowledge that a petit jury selected through racially discriminatory means violates the sixth amendment along with the fourteenth amendment. Justice Stevens contended that the fair cross section requirement mandates a neutral selection of a jury. Justice Stevens believed that only through entirely neutral selection will a jury be truly impartial and thus satisfy the mandate of the sixth amendment.

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181. *Id.* at 500.
182. *Id.* at 501 (referring to *Stilson v. United States*, 250 U.S. 583 (1919)).
183. *Id.*
184. *Id.* at 502.
185. *Id.* at 503. The dissent attempted to invalidate the majority's concern that an extension of the sixth amendment claim to the petit jury would mandate a jury which mirrors the population. Rather, the dissent stated that only if jurors are excluded on the basis of their membership in a distinct group would the defendant be denied the fair cross section guarantee. *Id.* at 498.

The dissent also argued that an exclusion based on race clearly denies the defendant the right to an impartial jury because the judgment imposed would not represent the judgment of the community. The dissent advocated a ruling that the burden of proof set out in *Batson* be applied to any sixth amendment claim. *Id.*

186. *Id.* at 504-06 (Stevens, J., dissenting). Justice Stevens contended that the two constitutional provisions overlap and that "the requirement of impartiality is, in a sense, the mirror image of a prohibition against discrimination." *Id.* at 506 n.4.

187. *Id.* at 512. Justice Stevens rejected proportional representation on the jury, arguing that "the focus on race would likely distort the jury's reflection of other groups." *Id.*

188. *Id.* at 515.
III. THE PEREMPTORY CHALLENGE: ALIVE AND WELL AFTER HOLLAND

A. Fair Cross Section on the Petit Jury Would Frustrate Effectiveness of Peremptory Challenge

Increased scrutiny of the peremptory challenge under the sixth amendment would undermine the function of the peremptory challenge as a method of ensuring the sixth amendment guarantee of an impartial jury. The peremptory challenge ensures impartiality by allowing attorneys to act on intuition to eliminate potentially biased jurors who would otherwise avoid exemption due to the difficult standard which the attorney must meet to excuse a juror for cause. Accordingly, the Court has consistently recognized the importance of the peremptory challenge. As early as 1965, the Court, in Swain, noted the “very old credentials” of the peremptory challenge system and upheld the practice as an essential part of trial by jury. Indeed, the Court has held the peremptory challenge to be one of the most important rights secured for the accused.

Allowing judicial scrutiny of the intent behind the use of a peremptory challenge would dramatically limit the effectiveness of the peremptory challenge. The peremptory challenge is used as a strategic tool to obtain a sym-

189. See generally Sullivan, supra note 3, at 478-81 (the two reasons given for allowing the peremptory challenge instead of relying solely on challenges for cause are that each side should be allowed to eliminate partial jurors and the requirement for proving the bias of a venire person might provoke the resentment of that possible juror).


191. Swain v. Alabama, 380 U.S. 202, 212 (1965). In fact, long before 1965, the Court emphasized the tradition and function of the peremptory challenge:

As was said by Blackstone... "[i]n criminal cases... there is... allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner... should have a good opinion of his jury...; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

Lewis v. United States, 146 U.S. 370, 376 (1892) (quoting 4 W. BLACKSTONE, COMMENTARIES *353) (emphasis in original).

192. Swain, 380 U.S. at 219 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).
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pathetic jury. The essential nature of the peremptory challenge is that it allows counsel to excuse a potential juror without offering any justification. Scrutinizing this process by demanding that counsel articulate a specific, non-discriminatory reason for excluding a juror would inhibit achievement of the peremptory challenge's goal of ensuring an impartial jury. To exercise a challenge for cause, counsel must convince the court that he has a legitimate basis for seeking the exclusion of a particular juror. Thus, requiring counsel to justify his exercise of the peremptory challenge as well would render the challenge a redundancy. Moreover, at least one commentator has noted that such an extension would "curtail the discretion necessary to the peremptory challenge's effectiveness." Justice Marshall can hardly contend that this effect would be "nil."

Extension of the sixth amendment guarantee to the petit jury selection procedure would also create an unmanageable standard for the courts. The equal protection clause was specifically enacted to combat racial discrimination and, therefore, the scope of the fourteenth amendment is correspondingly limited by that purpose. The sixth amendment, however, was enacted to prevent unfair trial proceedings and its protection extends to members of any cognizable groups. Because the sixth amendment's scope is not limited, as is the fourteenth amendment's, it would be difficult to determine where the bounds of the peremptory challenge would fall. Thus, extending the fair cross section requirement to the petit jury under the sixth amendment would inevitably limit peremptory challenges based on distinctions other than race. For example, other distinct groups could suddenly fall

193. See supra note 10 and accompanying text.
194. See Lewis, 146 U.S. at 378.
195. See Note, supra note 17, at 230; see also Alschuler, The Overweight Schoolteacher From New Jersey and Other Tales: The Peremptory Challenge After Batson, 25 CRIM. L. BULL. 57 (1989).
196. Note, Limitations on the Peremptory Challenge, supra note 16, at 1369 (reasoning that if a sixth amendment limitation test is to be given any effect, an explanation given for the particular use of the peremptory challenge must necessarily approximate the explanation required under a challenge for cause).
198. See Strader v. West Virginia, 100 U.S. 303 (1880). The fourteenth amendment was designed to protect a recently emancipated race: to give to it the equal protection of the laws and to deny any state the power to withhold these rights. Id. at 306.
under the sixth amendment fair representation requirement. As Justice Scalia noted, jurors opposed to the death penalty are treated as a distinct group as are doctors and lawyers. To establish that a group is distinct under the sixth amendment, the defendant would merely have to show that the group is defined and limited by some distinctive factor; that the group shares a common thread or basic similarity in attitudes, ideas, or experience; and that the group shares a community interest such that its interests cannot be represented adequately if the group is exempted from the jury selection process. It is difficult to conceive of any group that could not meet these requirements. Once a distinctive group is identified, counsel would have little leeway in eliminating anyone, and thus in forming an impartial jury through peremptory challenges.

The administrative problems of extending the scope of the sixth amendment would be significant. Extending the fair cross section requirement would flood the jury selection process with attacks on the use of the peremptory challenge on the basis of sex, religion, economic status, and any other distinctive group membership. A requirement that jury panels strictly mirror the community would compel the purposeful selection of jury lists rather than their selection at random. This is inherently inconsistent with the purpose of random selection as a method to secure an impartial jury. Although the dissent disclaimed any effect on the random selection process, the process would have to consider all characteristics in the community to allow for the representation of all groups on the petit jury. This would require a great deal of additional time and money. Not only is

201. Holland, 493 U.S. at 485.
203. See Holland, 493 U.S. at 485. Justice Scalia noted that race was not inherent in the Court’s opinion. “[The] sixth amendment claim would be just as strong if the object of the exclusion had been . . . postmen, or lawyers, or clergymen, or any number of other identifiable groups.” Id.
204. See Note, supra note 8, at 1729.
206. The dissent characterized the majority’s claim as resting on the consequences of accepting Holland’s argument:

[T]hat acceptance of Holland’s argument would be the first step down a slippery slope leading to a criminal justice system in which trial judges would be required to engineer each jury to reflect, in its few members, all of the myriad demographic groups of which American society is composed.

Id. at 498.
207. See King v. County of Nassau, 581 F. Supp. 493, 501 (E.D.N.Y. 1984) (“[a] great deal of time, effort and expense would be necessary to attempt to determine whether any given peremptory challenge is legal”). But see Comment, supra note 200, at 199 (the administrative
such a mandate unworkable and unsound, it would effectively deny a defendant his sixth amendment right to an impartial jury. The dissent’s reliance on Batson to support the proposed extension of the sixth amendment fair cross section requirement to the petit jury is misplaced. Batson involved the fourteenth amendment and dealt exclusively with racial discrimination. Based on the explicit anti-discrimination language in the fourteenth amendment, the case logically extended the limit on the use of discriminatory peremptory challenges to both the venire and the petit.\textsuperscript{208} The sixth amendment guarantee, however, has a different focus. The sixth amendment endeavors to ensure the accused a fair possibility that his jury will be composed of a representative cross section of the community.\textsuperscript{209} Therefore, as evidenced by the term “possibility,” the cross section requirement logically extends only to the venire. The two amendments seek to achieve different constitutional goals, and thus the disparate results of applying the sixth rather than the fourteenth amendment should not be surprising.\textsuperscript{210}

\textbf{B. Jury Selection Without the Peremptory Challenge}

As a consequence of Holland, actions for racial motivation in the use of peremptory challenges must be based on a fourteenth amendment violation, and the fair cross section requirement imposed by the sixth amendment is limited to the jury venire. More importantly, the holding ensures that the peremptory challenge will survive as a medium to guarantee defendants an impartial jury. Any other conclusion would adversely affect both a defendant’s rights and the entire jury selection process.

An extension of the fair cross section requirement to the petit jury would significantly enhance the role of the voir dire. A challenge for cause depends upon the information which is given during voir dire.\textsuperscript{211} If peremptory challenges must be substantiated, they are not distinguishable from challenges

\begin{itemize}
\item problems of representativeness identified by the proponents of the sixth amendment limitation are misdirected.
\item 208. Batson v. Kentucky, 476 U.S. 79 (1986); see Holland. 493 U.S. at 479.
\item 209. See supra notes 1-10 and accompanying text.
\item 210. The dissent also ignores the fact that the Court has repeatedly denied an extension of the fair cross section requirement to the petit jury. In Lockhart v. McCree, 476 U.S. 162 (1986), the Court stated that an extension of the fair cross section requirement to petit juries would be unworkable and unsound. \textit{Id.} at 178. In Taylor v. Louisiana, 419 U.S. 522 (1975), the Court again made clear that it imposed no requirement that petit juries must mirror the community and reflect the distinctive groups of the population. \textit{Id.} at 538. The Court has interpreted the sixth amendment to guarantee only a fair possibility that a fair cross section of the community for a jury venire will be obtained. The Court has further indicated that this fair possibility is created when the venire is composed of a representative cross section of the community. \textit{Id.} at 525.
\item 211. See Note, supra note 8, at 1720.
\end{itemize}
for cause and thus the importance and extent of voir dire increases. Without an effective peremptory challenge, the exclusion of possibly impartial jurors could only be accomplished through challenges for cause. Thus, voir dire would be used to reveal even subtle biases to substantiate a reason for the strike. In the process, voir dire would become overly extensive and burdensome. In United States v. Clark the United States Court of Appeals for the Seventh Circuit declined to impose limitations on the peremptory challenge for just this reason. The Seventh Circuit found that allowing such an attack would transform voir dire into a virtual Title VII proceeding. In order to substantiate a motion to excuse a particular juror for cause, counsel would be forced to expand voir dire and thus lengthen the selection process.

An extension of the fair cross section requirement, and thereby a more extensive voir dire, would pressure judges to lower their standards for excusing a juror for cause. Such an extension would also require judges to scrutinize the use of peremptory challenges in order to uncover any racial motivation. In turn, due to the possibility of attack on their intent, attorneys will be pressured when choosing which members to excuse with their peremptory challenge.

IV. CONCLUSION

Extending the fair cross section requirement to the petit jury as a means to provide a sixth amendment guarantee against racial discrimination is unnecessary. The fourteenth amendment already provides a device to challenge racially motivated use of peremptory challenges. The scope of the sixth amendment protection relates to jury impartiality. Impartiality requires that a defendant have the possibility that he will be judged by a jury selected from a representative cross section of the community. This possibility does not require a fair cross section on the petit jury.

212. See Hopt v. Utah, 120 U.S. 430, 433 (1887).
213. 737 F.2d 679 (7th Cir. 1984).
214. Id. at 682-83; Note, supra note 8, at 1733.
215. Clark, 737 F.2d at 682.
216. See McCleskey v. Kemp, 481 U.S. 279 (1987). In McCleskey, Justice Brennan articulates the rationale for the deference accorded peremptory challenges. "The rationale for this deference has been a belief that the unique characteristics of particular prospective jurors may raise concern on the part of the prosecution or defense, despite the fact that counsel may not be able to articulate that concern in a manner sufficient to support exclusion for cause." Id. at 337 (Brennan, J., dissenting); see also Note, supra note 8, at 1723 (proposing to decrease criteria for a challenge for cause under these circumstances).
217. See generally Comment, supra note 200, at 188.
Peremptory challenges ensure that the goal of impartiality will be accomplished. Limiting the peremptory challenge by extending the fair cross section requirement to the petit jury will eliminate an essential means to accomplish what the sixth amendment mandate—an impartial jury. The sixth amendment contains an internal tension. While it requires the fair possibility that the jury contain a representative cross section of the community, it also limits who may serve on the jury by eliminating partial jurors. In *Holland*, the Court properly balanced these competing goals.

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