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BATSON FOR THE BENCH? REGULATING THE PEREMPTORY CHALLENGE OF JUDGES

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Unfortunately, the discretion of officials in the criminal justice system can be exercised to discriminate on the basis of race. Awareness of this risk has produced widespread efforts to eliminate or contain that discretion. Restrictions on judicial discretion are perhaps most familiar. They range from the adoption of sentencing guidelines to the provision of remedies for discrimination in the selection of grand juries. Confined, too, have been administrative decisions such as those that determine the composition of jury pools or the release and punishment of inmates.¹ Litigants are now barred from invoking race in their arguments to juries² and from exercising peremptory challenges against jurors on the basis of race.³ Efforts to prevent discrimination have reached even into the jury room, with some courts instructing jurors that race is to play no role in their decision⁴ or stepping in to remedy verdicts that may have been the result of race-based choices by jurors.⁵

Bucking this march toward the containment of flexible procedures that leave room for racial discrimination are recent proposals to

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1. See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 188-92 (1997) (reviewing the evolution of limits on the selection of grand jury forepersons); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* §§ 26.3(e), 26.2(c) (2d ed. forthcoming 1998) (discussing sentencing guidelines, and procedural limitations on parole and good-time decisions); G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 *JUDICATURE* 216 (1996) (reviewing jury selection reform in the states).

2. See KENNEDY, *supra* note 1, at 256-77.

3. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

4. See 21 U.S.C. § 848(o) (1994) (instructions in federal death penalty cases must include admonition against consideration of race, color, religious beliefs, national origin, or sex of the defendant or the victim).

5. See Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 *MICH. L. REV.* 2673, 2718 n.178 (1996) (discussing cases in which race-based juror misconduct prompted judges to order new trials); see also *Fisher v. State*, 690 A.2d 917 (Del. 1996) (reversing defendant's conviction based on juror misconduct in considering improperly the issue of race); cf. *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357 (Fla. 1995) (finding racial statements made by members of an all-white jury about African-American plaintiffs sufficient "overt acts" to permit trial court investigation).

add the judicial peremptory challenge to federal code,⁶ following a practice well-established in at least fourteen states.⁷ The judicial peremptory challenge grants a litigant one change of judge, without having to specify a reason.⁸ At most, a litigant may be required to state in boilerplate fashion that the litigant believes that a “fair and impartial hearing” cannot be had before the judge⁹ and that the challenge is made “in good faith.”¹⁰

6. See Peremptory Challenge Act of 1997, H.R. 520, 105th Cong. (1997) (proposing to amend the United States Code to allow parties to a federal civil or criminal case to challenge judge without cause); Judicial Reform Act of 1997, H.R. 1252, 105th Cong. (1997) (proposing, prior to amendment on the House floor on April 23, 1998, to grant parties to a federal civil case one judicial reassignment without cause). The current proposals are not the first efforts to make it easier for federal litigants to avoid judges they do not want. Prior bills containing peremptory challenge provisions have failed to pass. See, e.g., Committee on Fed. Courts, New York City Bar Ass'n, *Committee Report: A Proposal for Peremptory Challenges of Federal Judges in Civil and Criminal Cases*, 36 RECORD 231 (1981) [hereinafter New York City Bar Ass'n Comm.]; Criminal Procedure Comm., Eastern Dist. of N.Y., *Report on the Assignment of Cases to Judges, Including Related Case Designations, and an Arraignment Function*, 111 F.R.D. 303 (1986). For examples of legislative proposals that have failed to pass, see Peremptory Challenge Act of 1983, H.R. 3125, 98th Cong. (1983); Peremptory Challenge Act of 1981, H.R. 1649, 97th Cong. (1981). See also Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1445 n.1 (1981) (discussing federal proposals dating back to 1971 and listing commentary on those proposals); Peter A. Galbraith, Comment, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109 (1974) (evaluating 1971 proposals).

One well-known federal judge has provided the judicial peremptory challenge to federal defendants in a narrow category of cases. See *United States v. Escobar*, 803 F. Supp. 611, 618 (1992) (Weinstein, J.) (holding that defendants in capital cases may challenge judge without stating a reason).

7. For a reasonably up-to-date listing of peremptory challenge rules and statutes, see RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 765-839* (1996) (state-by-state review of judicial disqualification statutes). Most states that presently afford litigants the ability to exercise a peremptory challenge against a judge in a criminal case have provided such a challenge since statehood. See LARRY C. BERKSON & SALLY DORFMANN, *JUDICIAL SUBSTITUTION: AN EXAMINATION OF JUDICIAL PEREMPTORY CHALLENGES IN THE STATES 17-18* (1986). A few have added the procedure since 1960. See *id.* at 19 (listing, as of 1985, initial adoption dates of judicial peremptory challenge statutes in eighteen states); see also ALASKA STAT. § 22.20.022 (Michie 1996) (enacting peremptory disqualification of judge statute in 1967); 725 ILL. COMP. STAT. 5/114-5 (West 1993) (enacting peremptory challenge statute in 1963 and extending it to allow prosecutors to request judge changes in 1987); WIS. STAT. § 971.20 (1996) (adopting criminal judge substitution statute in 1981); SUP. CT. R. 32.07 MO. REV. STAT. (1998) (repealing and reenacting provision authorizing the peremptory challenge of judges in criminal cases in 1995).

8. Litigants typically must exercise the challenge within a certain time after the judge is assigned. See, e.g., ALASKA STAT. § 22.20.022(c) (Michie 1996) (requiring litigant to file affidavit requesting substitution within five days after case is assigned to a judge); WIS. STAT. § 971.20 (1996) (request for substitution of judge must be filed at least five days before the preliminary examination); SUP. CT. R. 32.07(b) MO. REV. STAT. (1998) (requiring that application be filed not later than ten days after the initial plea is entered or, if later, not more than ten days after the designation of the trial judge); see also H.R. 520 (proposing that application to reassign case must be made no later than twenty days after the original notice of assignment).

9. E.g., OR. REV. STAT. §§ 14.250, 14.260(1) (1993).

10. E.g., S.D. CODIFIED LAWS § 15-12-26 (Michie 1996) (“[T]he party . . . has good reason to believe and does actually believe that such party cannot have a fair and impartial trial before the named judge . . .” and “recite[s] that the affidavit is made in good faith and not for the

There are many reasons to be concerned about the continuing interest in judicial peremptory challenge, most of which have nothing to do with racial fairness.¹¹ My intent in this article is to examine in particular the prediction offered by some critics of the judicial peremptory challenge that litigants will request a change of judge based on the race of the judge.¹² This concern is perhaps best exemplified by two recent cases from California, a state that has guaranteed one judicial challenge to each side in a criminal case since 1959.¹³ California's peremptory challenge requires a motion accompanied by an affidavit alleging prejudice on the part of the challenged judge.¹⁴ But any old allegation of prejudice will do.¹⁵ The moving party need not show any facts to support the allegations in the affidavit.¹⁶ Although California amended its judicial disqualification statute in 1984 to include a unique provision that states, "It shall not be grounds for disqualifica-

purpose of securing delay . . . "); N.D. CENT. CODE § 29-15-21(4) (Supp. 1997) ("The demand for change of judge must state that it is filed in good faith . . . "); see also ALASKA R. CRIM. P. 25(d)(2) (1997) ("A party may exercise the right to a change of judge by filing a 'Notice . . . ' [which] shall neither specify grounds nor be accompanied by an affidavit."); State v. Greenlee County Justice Court, 756 P.2d 939, 943-44 (Ariz. Ct. App. 1988) (holding that change of judge does not require affidavit supporting a good faith basis for challenge).

11. See, e.g., New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976, 981 (7th Cir. 1986) (noting Congress had not yet decided "that the costs of recusal on demand are worth bearing"); Stephen B. Burbank, *Unwarranted Distrust of Federal Judges*, 81 JUDICATURE 7, 41 (1997) (arguing judicial substitution proposal will "increase cost and delay and send precisely the wrong message about appropriate litigation behavior"); see also TERESA WHITE CARNS, ALASKA JUDICIAL COUNCIL, PEREMPTORY CHALLENGES TO JUDGES: SURVEY OF OTHER JURISDICTIONS 10-15 (1983) (listing efforts states had made in early 1980s to deal with administrative problems caused by judicial peremptory challenges). Compare *The Judicial Reform Act of 1997: Hearings on H.R. 1252 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1997), available in 1997 WL 10571357 (statement of Henry A. Politz, Chief Judge, United States Court of Appeals for the Fifth Circuit) (arguing that peremptory challenges to judges threaten the independence of the judiciary) [hereinafter *Hearings on Judicial Reform Act*], with *id.*, available in 1997 WL 10571353, 1997 WL 10571354 (statements of Daniel E. Lungren, Attorney General of California, and Arthur D. Hellman, Professor, University of Pittsburgh School of Law) (asserting that a peremptory challenge statute will enhance the accountability of judges and remedy occasional malfunctions of the judicial system).

12. See *Hearings on Judicial Reform Act*, supra note 11, available in 1997 WL 10571357 (statement of Politz) (stating that the current system for assigning judges ensures that the judge is selected impartially, without regard to race).

13. See CAL. CIV. PROC. CODE § 170.6 (West 1982) (noting that 1959 amendment brought criminal cases under statute).

14. See CAL. CIV. PROC. CODE § 170.6 (West Supp. 1997).

15. See, e.g., *Mayt v. Superior Court*, 39 Cal. Rptr. 240, 240-41 (Cal. Dist. Ct. App. 1964) (holding that prejudice is established by motion supported by affidavit that judge is so prejudiced that party believes he or she cannot have a fair and impartial hearing); *Simpson Team Alleges Bias, Dumps Judge Set for Civil Suit*, SAN DIEGO UNION-TRIB., July 18, 1996, at A-4 (noting O.J. Simpson's lawyer challenged judge's appointment with the declaration that the judge was "prejudiced against defendant in this action").

16. See *Solberg v. Superior Court*, 561 P.2d 1148, 1155 (Cal. 1977) ("[G]ood faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice not being required.") (quoting *McCartney v. Commission on Judicial Qualifications*, 526 P.2d 268, 281-82 (Cal. 1974)).

tion that the judge . . . [i]s or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group,"¹⁷ this prohibition does not appear to apply to California Civil Procedure Code Section 170.6, the peremptory challenge provision.¹⁸

The trial of Damian Williams and two other African-American men accused of being those captured on videotape beating a white truck driver during the Los Angeles riots in the spring of 1992¹⁹ provides the first example of what could be in store for a jurisdiction adopting the judicial peremptory challenge. The case initially was assigned by the presiding judge to Judge Roosevelt Dorn, the only African-American Superior Court judge trying criminal cases in the district.²⁰ The presiding judge was later quoted as saying that in addition to Judge Dorn's experience and qualifications, he "had the additional benefit, in my mind, of being a black man, one who I know to be well-respected in the community. It was my belief that assigning the case to him might offer some calming effect on the community."²¹ Following Judge Dorn's assignment, the prosecutor exercised his challenge to remove the judge.²² The action prompted a storm of criticism that the challenge was racist.²³ A white judge assigned to replace Judge Dorn was then challenged by the defense.²⁴ The presiding judge responded by appointing Judge John Reid, white and a former prosecutor, an action that generated more protests by the defense and the public.²⁵

A spokesperson for the prosecutor's office defended the challenge of Judge Dorn by declaring that "prosecutors all along had wanted a black judge . . . [and had] thought that by exercising their

17. CAL. CIV. PROC. CODE §170.2 (West Supp. 1997).

18. See *id.* (mentioning only disqualifications of judges, not peremptory challenges).

19. See generally *People v. Williams*, 54 Cal. Rptr. 2d 521 (Cal. Ct. App. 1996).

20. See *Judge in L.A. Beating Trial Denounces His Removal*, WASH. POST., Aug. 27, 1992, at A12.

21. Jim Newton, *Plea to Remove Judge in Denny Case Rejected*, L.A. TIMES, Sept. 1, 1992, at A1 (quoting Judge Cecil J. Mills) [hereinafter *Plea Rejected*]; see also Jim Newton, *Judge Attacks Reiner over Removal from Denny Case*, L.A. TIMES, Aug. 27, 1992, at A1 [hereinafter *Judge Attacks*].

22. See *Judge Attacks*, *supra* note 21.

23. See Jim Newton, *Reiner Proposes New Black Judge for Denny Case*, L.A. TIMES, Aug. 28, 1992, at A1.

24. See Jim Newton, *Reiner's Remarks Disputed by Judge*, L.A. TIMES, Aug. 29, 1992, at B1 [hereinafter *Reiner's Remarks Disputed*].

25. See Jim Newton, *Court Stays Assignment of Judge in Denny Case*, L.A. TIMES, Sept. 11, 1992, at B3; *All Things Considered: Denny Pre-Trial Accused of Racism* (NPR radio broadcast, Sept. 10, 1992); Leef Smith, *Black Judge Ousted from Denny Case; L.A. Prosecutors Use Peremptory Challenge*, WASH. POST., Aug. 26, 1992, at A3 (describing protests outside courthouse).

peremptory challenge to remove Dorn, the defense would disqualify the next judge in line, who is white, and they would end up with Judge Donald Pitts, who is black."²⁶ However, the presiding judge stated in press reports that there was no basis for the prosecutor's expectation.²⁷ He couldn't have assigned Judge Pitts, the only other African-American judge in the court, because Judge Pitts was out on sick leave.²⁸ Prosecutors claimed that they had challenged Judge Dorn because he was, in their opinion, too intemperate to handle such a controversial trial.²⁹ Judge Dorn, in the meantime, called a press conference to object to his displacement.³⁰ He accused the prosecutor of being "either misinformed . . . or . . . an out-and-out-liar."³¹ Stepping into the fray, the Court of Appeals granted the defendants an additional peremptory challenge with which they removed Judge Reid, who was then replaced by a third white judge.³² Six months later, defense attorneys were still arguing (without success) that an African-American judge should decide their challenge to the last in the line of judges to be assigned the case.³³

While this controversy was brewing, the California Court of Appeals handed down a decision in another case in which prosecutors were accused of striking an African-American judge because of his race. At his first trial Kenneth Williams, an African-American man accused of the murder, rape, robbery, and kidnapping of a white woman, moved to transfer his case to another county.³⁴ The trial judge denied the request,³⁵ but after the jury had convicted him, the Court of Appeals held the judge's denial was error because of the "unacceptably high" risk that "the jury would treat defendant—a young black man, a stranger to and friendless in the community" . . . as a dehuman-

26. *Prosecutors Now Seeking Black Judge to Try Riot Case*, REUTERS N. AM. WIRE, Aug 27, 1992, available in LEXIS, News Library, Reuna File (attributing comments to spokesperson); see also George de Lama, *Prosecutor, Black Judge Trade Charges in L.A. Riot Beating Case*, CHI. TRIB., Aug. 27, 1992, at 26 (same).

27. See *Reiner's Remarks Disputed*, supra note 24.

28. See *Plea Rejected*, supra note 21.

29. See *Reiner's Remarks Disputed*, supra note 24; *Judge Attacks*, supra note 21. And for those of you who were wondering, yes, even Judge Ito made an appearance in this case, presiding over an arraignment. See Jim Newton, *3 Plead Not Guilty in Denny Case; Black Trial Judge Removed*, L.A. TIMES, Aug. 26, 1992, at B3.

30. See *Judge Attacks*, supra note 21.

31. *Reiner's Remarks Disputed*, supra note 24.

32. See Edward J. Boyer, *Challenge to Judge in Denny Case Assigned to Orange County; State Judicial Council Makes Move After Prosecutors Reject a Defense Attempt to Have the Matter Decided by a Black Jurist*, L.A. TIMES, May 5, 1993, at B3.

33. See *id.*

34. See *People v. Williams*, 774 P.2d 146, 147 (Cal. 1989) (en banc).

35. See *id.*

ized stranger.”³⁶ The case was transferred to Sacramento County, but the second trial was aborted when the trial judge there determined that the prosecutor had used his peremptory challenges to exclude African-American women.³⁷ A third trial was derailed by “the inability of [defense] counsel to continue.”³⁸ Round four was assigned by the presiding judge, Judge James T. Ford, to Judge James L. Long, who was the only African-American judge sitting in the trial department of that court.³⁹ Using the peremptory disqualification provision, the prosecutor challenged Judge Long.⁴⁰ In an unusual response, Judge Ford refused to reassign the case.⁴¹ Noting the prosecutor’s abuse of peremptory challenges against jurors in the second trial, Judge Ford directed the prosecutor to disclose its reasons for disqualifying Judge Long.⁴² The prosecutor responded that he had prosecuted two cases prior to Judge Long’s ascent to the bench in which Long had represented the defendant, that in his opinion Judge Long could not be fair and impartial to the People, and that it might not be “feasible” to obtain proper instruction and proper rulings on evidentiary matters.⁴³ Judge Ford rejected these reasons, noted that no attorney, including the local prosecutor’s office, had ever challenged Long,⁴⁴ found that the defense had shown that the challenge was exercised on the basis of race, and did not reassign the case.⁴⁵ In a petition for extraordinary relief prosecutors protested this ruling.⁴⁶ After a lengthy opinion considering the issues, the California Court of Appeals concluded that the prosecutor’s challenge must be granted.⁴⁷

These two episodes carry the unmistakable suggestion that given the opportunity, some prosecutors and some defendants will shop for judges on the basis of race or ethnicity. Admittedly, these California

36. *Id.* at 157 (citation omitted) (quoting *Williams v. Superior Court*, 668 P.2d 799, 805 (Cal. 1983)); *see also id.* at 153, 156-57 (noting that African Americans made up 0.4% of the county’s population, that 35 of the 250 potential jurors drawn for trial knew the victim, her family, or her boyfriends, while not a single juror knew the defendant, and that the case involved sensational racial and sexual overtones).

37. *See People v. Superior Court (Williams)*, 10 Cal. Rptr. 2d 873, 875 (Cal. Ct. App. 1992).

38. *Id.*

39. *See id.* at 886 n.3.

40. *See id.* at 875.

41. *See id.*

42. *See id.*; *see also* Bill Ainsworth, *Refusal That Went Awry Renews Racial Bias Debate*, RECORDER, Oct. 30, 1991, at 1 (reporting that Ford’s decision to reject challenge was “the first denial of a request on account of racial bias”).

43. *See Williams*, 10 Cal. Rptr. 2d at 887.

44. *See Ainsworth, supra* note 42.

45. *See Williams*, 10 Cal. Rptr. 2d at 875.

46. *See id.*

47. *See id.* at 888.

cases may be unique, telling us little about the functioning of courts elsewhere. Even so, the sagas in these two cases conceivably could be replicated anywhere that judicial peremptories coexist with a racially diverse bench and racially sensitive cases.⁴⁸ The evaluation of this risk is part of the larger debate about the wisdom of providing litigants in criminal cases with the ability to challenge judges without cause.⁴⁹

I. WHY WORRY ABOUT RACE-BASED ABUSE OF THE JUDICIAL PEREMPTORY CHALLENGE?

While the problem of race-based judicial challenges has certainly not been as pervasive as the problem of race-based juror challenges, it is nevertheless a real concern that should trouble those who champion the peremptory challenge of judges. Past studies of the judicial peremptory challenge may reassure its supporters that the risk of race-based abuse is low. The most comprehensive study of every state utilizing such challenges reported in 1985 that ten percent of defense attorneys surveyed (or six of sixty-three) believed that challenges were exercised on the basis of race, and four percent of chief judges (or five of 128) agreed.⁵⁰ These responses are not insignificant, but

48. This risk has been noted by opponents of the federal proposals. See *Hearings on Judicial Reform Act*, *supra* note 11, available in 1997 WL 10571357 (statement of Politz). Among the arguments that ultimately defeated the unsuccessful federal proposals to institute peremptory challenges in the 1980s was the charge that the challenges would be used for the wrong reasons, including race. See John R. Bartels, *Peremptory Challenge to Federal Judges: A Judge's View*, 68 A.B.A. J. 449 (1982) (noting that dissenters to the 1981 proposals by the Association of the Bar of the City of New York to adopt the peremptory challenge in federal cases charged that the challenge would allow judge shopping and provide an "arbitrary weapon that would remove a judge from a particular case for any reason because of race, creed, color, or religion without specification"); see also Burg, *supra* note 6, at 1476-77 (noting that the peremptory challenge allows race and gender to be used as grounds for disqualification, and that the "inability to detect" such challenges weighs against their adoption).

49. Without empirical data, predictions about what attorneys will do with peremptory challenges are guesswork, of course. The discussion here may nevertheless help to focus the general debate upon more specific claims. A systematic survey of judges and attorneys such as the one conducted in the mid-1980s by Larry Berkson and Sally Dorfmann, BERKSON & DORFMANN, *supra* note 7, would be very useful.

50. See BERKSON & DORFMANN, *supra* note 7, at 142 tbl.VII-9 (excluding responses from California) (reporting also that one percent of the 311 prosecutors who responded said that challenges are exercised on the basis of race); see also *id.* at 140-41 (summarizing figures from table). About 10% of defense counsel and 4% of Chief Judges believed the judge's religion was sometimes the reason for the challenge, although fewer respondents believed that gender played a role. See *id.* at 142 tbl.VII-9. The authors characterized these findings by stating that "almost none" of the respondents believed that peremptory challenges were exercised on the basis of race, religion, or gender. *Id.* at 140. The authors also sent a letter of inquiry to 132 women judges and 49 African-American judges in 15 states asking about whether challenges were exercised on the basis of race or gender, but received responses from only six African-American judges (all from two states) and 37 women judges. See *id.* at 147 (failing to note how researchers categorized African-American women judges). "Only one black judge suggested that race might be a factor," *id.* at 147 n.22, and four women judges "indicated that gender is regularly a motivat-

they suggest that the problem was isolated or infrequent.⁵¹ There are several reasons to anticipate that the problem may be of greater dimension today.

First, the 1985 study and other existing data on the abuse of the judicial peremptory challenge was collected before the United States Supreme Court had taken action to control the race-based exercise of peremptory challenges of jurors in criminal cases, during a time when litigants' reliance on race was, if not accepted, at least familiar. Researchers and respondents to surveys about the judicial challenge may not have been as aware that exercising any peremptory challenge on the basis of race or sex is a serious and unconstitutional abuse of the power delegated by statute. Some did recognize the newly developing law in state courts restricting the race-based exercise of the jury peremptory challenge and raised this as an argument against judicial challenges.⁵²

Second, and more important, the opportunities for such abuse have increased. The regulation of race-based abuse of *juror* peremptories was delayed until significant numbers of African-American

ing force behind the exercise of peremptory challenges." *Id.* at 148. "Relatively few" prosecuting attorneys favored challenges for cause over peremptory challenges. *Id.* at 262. One prosecutor explained that when no claim of bias or prejudice is made, judges often suspect that the real reason for invoking the challenge is illegitimate. *See id.*

51. Several other empirical studies of the judicial peremptory challenge conducted earlier did not examine the possibility of race-based abuse. *E.g.*, *State v. Holmes*, 315 N.W.2d 703, 722 (Wis. 1982) (reporting study by Office of the Director of State Courts of cases filed in first three months of 1981); *Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary*, 93d Cong. 52-57 (1973) (describing study in California finding many judges reporting abuse of challenge for reasons other than race of judge); BERKSON & DORFMANN, *supra* note 7, at 86-89 (noting Idaho and Montana studies, conducted in 1982 and 1979 respectively, examining the frequency of challenges and their impact on judicial calendar management problems); *id.* at 94-97 (noting a 1971 survey of nine chief justices in states using judicial peremptory challenges and a 1975 survey of about 30 attorneys and several judges in California, both surveys finding general satisfaction with the procedures); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947) (surveying American practice); Kraig J. Marton, Note, *Peremptory Challenges of Judges: The Arizona Experience*, 1973 L. & SOC. ORD. 95 (mentioning as improper purpose only efforts to delay proceedings or to judge-shop, that is, select, rather than disqualify, a judge); Project, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 347 (1969) (not examining race issues); *see also* ALAN J. CHASET, FEDERAL JUDICIAL CENTER, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE 34-40 (1981) (compiling information as of 1981, including survey of chief judges in California who gave the challenge mixed reviews); Note, *Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms*, 38 IND. L.J. 289 (1962-63).

52. *See* New York City Bar Ass'n Comm., *supra* note 6, at 242-43 (reporting statements of two members dissenting from the Committee's recommendation to allow peremptory challenges of judges) (noting *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979), the precursors to *Batson*, and warning that the proposal "would allow a litigant to strike a judge for any reason at all, because of the judge's race or religion, his views on substantive legal issues, or because his caseload is current and the litigant wants delay").

jurors were even permitted to reach the jury box and be subject to challenge.⁵³ A similar pattern may develop for judges. Because the bench has consisted almost entirely of white judges until the last several years, only recently have litigants had the ability to shop for a judge of a particular race or ethnicity. In particular, there were very few, if any, judges of color on the bench in the predominantly western and mid-western states that authorized judicial peremptory challenges at the time when past studies were conducted.⁵⁴ According to one source, in 1980, there were no African-American judges in half of the states that allowed peremptory challenges, and only two of the remaining states (California and Illinois) had more than two African-American trial judges.⁵⁵ There are greater numbers of minority judges on the trial bench today.

Some jurisdictions that permit peremptory challenges of the judiciary now have a substantial number of judges of color presiding in felony trial courts for the first time. Today, eight of the district judges in Minneapolis and St. Paul are African-American.⁵⁶ The number of minority judges in Oregon increased from one to six between 1986 and 1996.⁵⁷ Eight African-American circuit judges sat in St. Louis and Kansas City as of 1997.⁵⁸ Milwaukee and Seattle, too, have added

53. See the historical discussion in *Batson v. Kentucky*, 476 U.S. 79, 85-88 (1986), and in *Swain v. Alabama*, 380 U.S. 202, 209-22 (1965).

54. See, e.g., Coalition of Concerned Black Americans, *A Preliminary Report of the Experiences of the Minority Judiciary in the City of New York*, 18 How. L.J. 495, 530 app.I (1975) (listing the number of African-American judges in 50 cities with the largest African-American populations as of 1970) (showing no African-American judges in some cities that were about 40% African-American, such as Birmingham, Ala.; Richmond, Va.; Gary, Ind.; Jackson, Miss.; and Savannah, Ga.; and only two African-American judges in several cities that were over 50% African-American, such as Atlanta, Ga.; East St. Louis, Ill.; and Compton, Cal.); see also *The Black Judge in America: A Statistical Profile*, 57 JUDICATURE 18, 18-19 & tbl.2 (June-July 1973) (reporting 286 African-American judges sitting in early 1972 and that, of those responding to the survey, over half of them sat in municipal courts and courts of limited jurisdiction).

55. See BERKSON & DORFMANN, *supra* note 7, at 109 (listing African-American judges by state, citing GEORGE W. CROCKETT, JR. ET AL., NATIONAL ROSTER OF BLACK JUDICIAL OFFICERS, 1980 (1980)). By "trial judge" I mean to include only those judges in trial courts of general jurisdiction, not municipal court judges.

56. See TASK FORCE ON MINORITIES IN THE JUDICIARY, AMERICAN BAR ASS'N, DIRECTORY OF MINORITY JUDGES OF THE UNITED STATES 68 (2d ed. 1997) [hereinafter ABA DIRECTORY]; see also NATIONAL BAR ASS'N, ELECTED AND APPOINTED BLACK JUDGES IN THE UNITED STATES 1991, at 46 (2d ed. 1991); Paul Gustafson, *Study: Racism is Rife in State's Legal System*, STAR TRIB., June 11, 1993, at 1A (reporting that five percent of Minnesota's judges were minority). Minnesota's African-American population has nearly tripled in less than two decades, from 50,000 in 1980 to about 140,000 in 1997. See John Biewen & Derek McGinty, *All Things Considered: Blacks in Minneapolis* (NPR radio broadcast Aug. 19, 1997).

57. See OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYS., PROGRESS REPORT OF THE OREGON SUPREME COURT IMPLEMENTATION COMMITTEE: A COMMITMENT TO FAIRNESS 88 (1996).

58. See ABA DIRECTORY, *supra* note 56, at 74.

several trial judges of color.⁵⁹ The diversification of the bench is evident in other jurisdictions as well.⁶⁰ In 1997, of the 645 authorized lifetime judicial appointments to the United States District Courts, sixty were held by African Americans, compared to only sixteen in 1976.⁶¹ Given this dramatic expansion in the opportunity to discriminate, past assurances of benign behavior would seem to carry little predictive power.

Along with the increased opportunity to discriminate between judges on the basis of race and ethnicity, the motive to do so remains. Many trial attorneys and litigants continue to believe that the race or ethnicity of the judge affects case outcome. Race-bias task force reports, for example, repeatedly stress the need for more diversity on

59. Compare NATIONAL BAR ASS'N, *supra* note 56, at 74 (listing two African-American Circuit Court judges in Milwaukee and four Superior Court judges in Seattle as of 1991), with ABA DIRECTORY, *supra* note 56, at 114-17 (listing three African-American Circuit Court judges in Milwaukee and nine Superior Court judges and commissioners in Seattle as of 1997).

60. Of 768 Superior Court judges in California in 1994, 81 (just over 10%) were African-American, Latino, or Asian-American. See RACIAL AND ETHNIC COMPOSITION OF THE CALIFORNIA TRIAL COURTS: A REPORT TO THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNIC BIAS IN THE COURTS app.C (1994). Of the 149 trial judges in Tennessee in 1997, eight were African Americans, seven of whom served Memphis, which has the largest percentage of African Americans of any city in the state. See TENNESSEE SUP. CT. COMM'N ON RACIAL AND ETHNIC FAIRNESS, FINAL REPORT 74-75 (1997) [hereinafter FINAL REPORT]. The number of African-American Circuit Court judges in Mississippi increased from one to nine from 1988 through 1997. See Marshal Ingwerson, *In New Tactic, Blacks Use Voting Rights Law to Gain Judgeships in the South*, CHRISTIAN SCI. MONITOR, Oct. 19, 1988, at 1 (noting one judge); ABA DIRECTORY, *supra* note 56, at 69-70 (noting nine Mississippi Circuit Court judges as of 1997).

61. See ABRAHAM L. DAVIS, BLACKS IN THE FEDERAL JUDICIARY: NEUTRAL ARBITERS OR JUDICIAL ACTIVISTS?, at vi (1989) (stating that there were only 16 African-American federal judges prior to President Carter's 1976 election); Sheldon Goldman & Elliot Slotnick, *Nontraditional Judges in Active Service*, 80 JUDICATURE 270 (1997) (providing 1997 figures, revealing that the number of Hispanic, Native American, and Asian-American judges remained about the same between 1992 and 1997 and that the bench gained one more Hispanic judge, one more Native American judge, but lost one Asian-American judge). But see A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1067 app.C (1993) (counting 18 African-American judges in 1976). See also REPORT ON THE FEDERAL JUDICIARY OF THE ALLIANCE FOR JUSTICE, cited in *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 202 (1996) (reporting that, as of July 1994, of 573 federal district judges, 8% were African-American, 5% were Hispanic, and less than 1% were Asian-American (all Asian-American men were in the Ninth Circuit)) [hereinafter *D.C. Circuit Task Force*]; Higginbotham, *supra*, at 1054 (comparing the number of African Americans appointed to the Federal bench by Presidents Carter (29), Reagan (6), and Bush (10)). The increase in women on the federal bench has also been notable, rising from 68 trial judges in 1992 to 112 in 1997. See Goldman & Slotnick, *supra*, at 270.

In many of the jurisdictions that presently permit peremptory challenges of judges, the felony trial bench remains entirely, or almost entirely, white. North and South Dakota and Montana still have no African-American judges, although North Dakota now has one Native American district judge and Montana one Hispanic justice of the peace. See ABA DIRECTORY, *supra* note 56, at v, 170, 239. Idaho has only one African-American and one Hispanic judge. See *id.* at v.

the bench,⁶² and include testimony from attorneys reflecting their belief that the judge's racial background is important to their clients.⁶³ Minority voters continue to bring lawsuits alleging vote dilution in judicial elections involving minority judicial candidates.⁶⁴ Perhaps the best evidence that litigants believe that the race of a judge matters can be found in published cases detailing efforts by litigants to disqualify a judge because of his or her race. Over twenty-five years ago, Judge Leon Higginbotham eloquently explained in *Commonwealth v. Local Union 542*⁶⁵ why it is essential to reject arguments that a judge's race

62. See Edward A. Adams, *State Commission Finds Racism in Courts: 70 Suggestions Proposed to Eliminate 2-Tier System*, N.Y. L.J., June 5, 1991, at 1 (reporting recommendations of the New York State Judicial Commission on Minorities to increase minority representation on the bench); *Verdict Reactions Show We Have a Long Way to Go*, ATLANTA J. & CONST., Oct. 5, 1995, at 18A (reporting that the Georgia Supreme Court Commission on Racial and Ethnic Bias recommended getting more African Americans into judgeships and screening potential judges for racial bias); FINAL REPORT, *supra* note 60, at 72-73.

63. See, e.g., ERICA DREWES, JUDICIAL COUNCIL ADVISORY COMMITTEE ON RACIAL AND ETHNICAL BIAS IN THE COURTS, 1991-92 PUBLIC HEARINGS ON RACIAL & ETHNIC BIAS IN THE CALIFORNIA STATE COURT SYSTEM 106 (1993) (quoting attorney who noted that reassignment to Latino judge was beneficial to client, stating the Latino judge "is much more sensitive, much more conscious of the culture, of the language, the problems that are in North County in San Diego"); Ingwerson, *supra* note 60, at 1, 9 (quoting attorney stating, "The system would be perceived in the black community as fairer with black judges on the bench It would make blacks feel easier.") (quoting another attorney saying, "Most of the black clients [in the county with the state's lone African-American trial judge] . . . like going before a black judge. They think he'll be fair."); *D.C. Circuit Task Force*, *supra* note 61, at 226-27 & n.112 (noting that the perception that D.C. Superior Court was fairer than federal court was due "in part to the demographics of the court," and that African-American attorneys "feel they get a better reception as minority professionals in the local courts, where there are more minorities among the staff, the bench, and the bar"). Judges, too, may believe race matters. In New York, researchers concluded that

[t]here are significant differences between the perceptions of white and minority judges regarding treatment of litigants. More than three quarters of the white judges reported that the biased behaviors about which they were queried "rarely/never" happen. Minority judges perceived biased behavior happening with considerably greater frequency; nearly three quarters felt that racial stereotypes play a role in the evaluation of many cases.

5 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES: APPENDIX—STAFF REPORTS AND WORKING PAPERS 28 (1991). Asked what role racial diversity should play in judicial selection, 53% of white and 99% of minority judges responded that diversity was important or very important, *see id.* at 45 tbl.13; 87% of minority judges, but only 70% of white judges thought cross-cultural sensitivity training was very or somewhat important for judges, *see id.* at 54 tbl.15; 19% of minority judges but only 2% of white judges indicated that the race of a judge greatly affects the treatment of judges by attorneys, *see id.* at 55 tbl.16; and 78% of white judges but only 24% of minority judges said that race has no relationship to how judges are treated by attorneys. *See id.*; *cf.* Chisom v. Roemer, 501 U.S. 380, 399 (1991) (noting the representative character of elected judges).

64. See generally Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997); Kirsten L. Izatt, Note, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act*, 1996 U. ILL. L. REV. 229.

65. 388 F. Supp. 155 (E.D. Pa. 1974).

is a basis for disqualification.⁶⁶ Litigants, however, continued to raise these claims. In *LeRoy v. City of Houston*,⁶⁷ the City moved to disqualify an African-American judge from adjudicating voting rights issues on the theory that, as an African-American voter, the judge stood to benefit from a decision favoring the plaintiffs.⁶⁸ Using a similar rationale, state's attorneys challenged the judge in *United States v. Alabama*,⁶⁹ alleging that his status as a parent of African-American children who may be affected by the decision in the desegregation case at issue created at least the appearance of bias.⁷⁰ Although race was rebuffed as a basis for disqualification in all of these cases,⁷¹ each was litigated in federal court, where bias or the appearance of bias sufficient for disqualification must be established with evidence by the challenging party.⁷² A peremptory challenge would have provided a barrier-free bypass for these and other litigants with such race-based suspicions, suspicions that appear with some frequency in criminal cases and seemed to have played a role in the California cases detailed earlier.⁷³ And with the small proportion of judges of color in most jurisdictions, attorneys can expect that any minority judge who is challenged probably will be replaced by a white judge. The substitution of a minority judge for a challenged white judge could be the object of a

66. *See id.* at 181. Judge Higginbotham wrote:

So long as Jewish judges preside over matters where Jewish and Gentile litigants disagree; so long as Protestant judges preside over matter where Protestant and Catholic litigants disagree; so long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree.

Id.

67. 592 F. Supp. 415 (S.D. Tex.), *aff'd*, 745 F.2d 925 (5th Cir. 1984).

68. *See id.* at 416-18.

69. 828 F.2d 1532 (11th Cir. 1987).

70. *See id.* at 1538-39; *see also* Charles Malarkey, *Judicial Disqualification: Is Sexual Orientation Cause in California?*, 41 HASTINGS L.J. 695, 695 (noting "[m]otions have been made to disqualify judges for [membership in a minority group]. Such a motion is damaging to the public confidence in the judiciary and insulting to the judge involved.") (quoting SENATE COMM. ON JUDICIARY, REPORT ON DISQUALIFICATION OF JUDGES, 1983-84 Regular Sess. 5 (Cal. 1984)) (alterations in original).

71. *See United States v. Alabama*, 828 F.2d at 1542 ("To disqualify minority judges from major civil rights litigation solely because of their minority status is intolerable.").

72. *See id.* at 1540.

73. In criminal cases, litigants may rely on stereotypes about racially based views concerning police credibility or behavior or the credibility of particular witnesses or testimony. Women judges, too, have been the target of disqualification motions due to their gender. *See* Nancy L. Farrer, *Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY'S L.J. 529, 551 n.126 (1997) (describing case in which defendant alleged that a woman judge could not judge impartially because she would be opposed to defendant's view that women must obey men); *see also* Malarkey, *supra* note 70, at 718 n.148 (reporting that "some of the attorneys who have filed motions for peremptory disqualification" against a San Francisco judge said that she "'sides with women and often comes out on the side of women plaintiffs in sexual harassment suits.'") (quoting *S.F. Judge Repeatedly Disqualified*, S.F. BANNER DAILY J., Feb. 3, 1989, at 6).

litigant's challenge, but, given the racial demographics of most trial benches, this result would be more difficult to achieve.⁷⁴

On the other hand, there are also reasons to conclude that attorneys will refrain from exercising judicial peremptory challenges on the basis of race. First, race, at least in the jury context, often has been used by litigants as a proxy for predicted belief and behavior, a guess about qualities litigants cannot or do not discover prior to trial. Litigants know more about individual judges than they do about jurors. Judges have track records—prior decisions made while on the bench, statements made in public forums, professional and political reputations years deep. With such a wealth of information about a judge's beliefs, litigants may rely less readily on crude predictors like race or gender.⁷⁵

Another factor that makes the abuse of judicial challenges much less likely than the abuse of the juror challenge is the comparative homogeneity of judges. Litigants may realize that judges—whatever their race—have much more in common with each other than do most jurors. Judges of color appear to be less affluent than white judges and more likely to come from public interest practice rather than private law firms,⁷⁶ but judges of all races have been to law school and have forged the political ties needed to secure appointment or election.⁷⁷ Judges, unlike jurors, are confined by rules requiring them to

74. Professor Richard McAdams suggested to me that after *Batson*, the race of the judge may matter even more in jury cases to litigants who suspect that the race of a judge may influence how sensitive that judge will be to race-based peremptory challenges of jurors. Email exchange with Richard McAdams, Professor of Law, Boston University School of Law (Dec. 22, 1997).

75. Terry Carns, of the Alaska Judicial Council, who has studied the use of peremptory challenges in Alaska, stated to me that it was her impression that the judicial peremptory challenge in Alaska was not exercised because of a judge's race or gender, but because of prior rulings or perceived political leanings. Telephone interview with Teresa White Carns, Senior Staff Associate, Alaska Judicial Council (July 17, 1997).

76. Cf. Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 259 tbl.2, 268 tbl.5 (1997) (comparing backgrounds of Clinton's first-term nontraditional (minority and female) and traditional judicial appointees to the district and circuit courts) (showing that nontraditional appointees are more likely to have a background in public interest work and less likely to have a background in private law firm work than are traditional appointees and, taking district and circuit court appointees together, nontraditional appointees tend to have a lower net worth than traditional appointees); Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276, 280 (1995) (explaining that Clinton's nontraditional judicial appointees are more likely to have come from public interest backgrounds than from private firms); Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68 (1994) (postulating that Clinton's nontraditional appointees are from less financially secure backgrounds because they attended less expensive law schools than did his traditional appointees).

77. Indeed, although it is not directly relevant for the purposes of predicting whether attorneys will use race to predict judicial behavior, what few studies there are that test this hypothesis suggest that other variables have much stronger predictive power than race. See, e.g., Thomas G.

justify their decisions in written opinions. In most states, judges stand for reelection or at least reappointment. These constraints may contribute to more uniform decisionmaking, regardless of personal characteristics.⁷⁸ In particular, a judge's discretion to set a sentence, which in the past has been a major catalyst for the use of the peremptory challenge in criminal cases,⁷⁹ has been drastically curtailed in many jurisdictions by guidelines, mandatory minimum sentences, and other presumptive sentencing schemes.⁸⁰ This in turn, has made the identity of the judge even less determinative of case outcome.

In addition, peremptory challenges of judges are less likely than juror challenges to be exercised at all, whatever the reason. The cost of exercising peremptory challenges against judges is much higher than in the jury context. Some attorneys probably are reluctant to challenge judges for any reason, much less race, because they may

Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 606-07 (1985) (comparing the rulings in criminal cases of 29 African-American judges with those of 56 white judges of the same gender and concluding "the differences were negligible," a finding consistent with "earlier studies of the sentencing process in local courts which have found little or no difference in the application of criminal law based upon the race or gender of the presiding judge"). In a 1988 study, researchers concluded that "black judges may slightly favor defendants of their own race when determining the overall harshness of a sentence, while white judges probably do not do so." Susan Welch et al., *Do Black Judges Make a Difference?* 32 AM. J. POL. SCI. 126, 133-34 (1988). A recent study of the decisions of 10 African-American judges and 10 white judges who were of the same gender, appointed by the same President, and of the same judicial district concluded that "black judges are significantly more supportive of issues relating to blacks and the black community than white judges," but "[n]o meaningful racial difference was found with regard to criminal rights . . . and personal liberties issues." Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279, 279 (1997).

78. Nor can judges as easily get away with nullifying the law, as jurors sometimes can. See CHASET, *supra* note 51, at 59-62 (noting differences between jurors and judges); see also Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1982-93 (1997) (describing judicial disobedience by one prominent district court judge).

79. As a thoughtful committee concluded before the Federal Sentencing Guidelines were enacted, "Ignorance of the sentencing judge's identity deters many prospective guilty pleas because of defense counsel perception that a few judges tend to sentence significantly above the average." See Criminal Procedure Comm., Eastern Dist. of New York, *supra* note 6, at 307 n.1; see also *Hornaday v. Rowland*, 674 P.2d 1333, 1333 & n.1 (Alaska 1983) (striking down order to transfer judge who had been rendered relatively useless in the community where he was presiding after he had been challenged in over 82% of his criminal cases by defense counsel following his announcement that he would lock up drunk drivers for significantly longer terms than other judges); Dwayne Bray, *Ex Jurist Criticizes D.A. for Disqualifying Judge*, L.A. TIMES, April 23, 1994, at B1 (noting district attorney had systematically disqualified judge from criminal cases following judge's decision to reduce a charge and impose the lowest possible prison term). Indeed, sentencing reform was proposed as an alternative to the judicial peremptory challenge as a means to cope with unusually lenient or severe sentences. See NEW YORK CITY BAR ASS'N COMM., *supra* note 6, at 242 (dissenting statement) ("Insofar as criminal cases are concerned, although widely disparate sentencing practices are objectionable, this problem can better be addressed by proposals for sentencing panels, appellate review of sentencing, or similar reforms.").

80. See LAFAVE ET AL., *supra* note 1, at § 26.3.

anticipate that the judge, or her fellow judges, will hold that challenge against the lawyer or his firm.⁸¹ Unlike jurors, who may never learn which party challenged them (or even that they had been challenged, should the challenges be successfully contested), a judge knows who has tried to replace her.⁸² For a lawyer active in litigation, the likelihood of again facing a challenged judge is high, while the probability of encountering a challenged juror again is extremely small.⁸³ Finally, attorneys who want to avoid a particular judge may rely on means of judge-shopping other than the peremptory challenge, including filing several cases simultaneously and dismissing all but the case before one's preferred judge.⁸⁴

While these latter points may reassure supporters of the challenge that the race-based challenge will never become the problem that it became in the jury setting, they do not eliminate the potential for abuse. Indeed, "blanket challenges" by prosecutors and defense attorneys in states with judicial peremptories occur with some frequency, indicating that attorneys for many criminal litigants are not deterred from using the challenge and continue to find it useful.

81. See CARNs, *supra* note 11, at 8-9 (reporting that the court administrator in Arizona remarked that attorneys there used the challenge infrequently "because it would make them unpopular with the judge"); FLAMM, *supra* note 7, at 64 nn.11-12; *People v. Superior Court (Williams)*, 10 Cal. Rptr. 2d 873, 888 (1992) ("It is an understatement to say that judges have vastly more power over an attorney's pursuit of his livelihood than prospective jurors . . .").

82. There is ample evidence that such chilling occurs in other contexts. For example, attorneys, particularly in the criminal justice system where the same attorneys appear over and over again before the same judge, have indicated that they are reluctant to object to improper and offensive judicial behavior for fear of alienating the judge. See DREWES, *supra* note 63, at 213-14.

83. As another commentator put it, "If you are going to shoot a judge, it does no good to wound him." See MALARKEY, *supra* note 70, at 695 (quoting Evan A. Davis & Alisa F. Levin, *Disqualifying Judges*, 7 LITIG. 11 (1981)).

84. See Kimberly Jade Norwood, *Shopping for Venue: The Need for More Limits*, 50 U. MIAMI L. REV. 267, 295-98 (1996) (describing random assignment systems and an incredible array of recent efforts by litigants to circumvent them, including a case in which lawyers were suspected of shopping for a Catholic judge); CRIMINAL PROCEDURE COMM., EASTERN DIST. OF N.Y., *supra* note 6, at 306-07 (spelling out ways in which prosecutors could try to manipulate existing judicial selection system to procure favorable judge, including efforts to file superseding indictment or other charges against the same defendant in hopes of getting better judge, and designating a case as related to one already before a favorable judge); Standing Comm. on Discipline v. Yagman, 856 F. Supp. 1384, 1392-93 (C.D. Cal. 1994) (describing repeated judge shopping by one attorney); cf. Claire Cooper, *New Prop. 209 Judge Urged*, SACRAMENTO BEE, January 18, 1997, at A5 (noting controversy over judge who took over case from another judge because of a rule about the assignment of related cases, including allegations that plaintiffs "commandeered" the suit).

II. ADDRESSING THE RACE-BASED ABUSE OF JUDICIAL PEREMPTORIES

Controlling the race-based abuse of judicial peremptory challenges would be difficult. One option available to those interested in preserving the peremptory challenge in the *jury* context while minimizing its abuse is to reduce the number of peremptories available to litigants, making the challenge a much less effective tool for manipulating jury demographics. Reducing the number of challenges, however, is not feasible for judicial challenges, which are typically available on a one-challenge-per-case basis. If not eliminated entirely, judicial challenges must be policed, as are juror challenges, in order to prevent violations of the Equal Protection Clause.⁸⁵ Yet the rules regulating jury challenges do not translate easily to judicial challenges. Applying *Batson* to the bench raises several difficult questions.

First, there is the problem of adequate proof of a constitutional violation. A claimant alleging that a judicial challenge violates equal protection must prove the challenger's intentional use of race. Litigants rarely admit that they are shopping for a judge of a particular race or ethnicity. As a result, the pivotal issue for allegations of racial discrimination here, as in other phases of the criminal justice system, is the showing that the person who claims discrimination took place must make in order to require a response from the alleged discriminator.⁸⁶ At one extreme, a court could require direct proof of discriminatory intent or, short of that, a detailed statistical showing that the particular litigant who has been accused of challenging a judge because of her race has done so repeatedly in the past, something like the showing the Court has required under *McClesky* or *Swain*.⁸⁷ Because the judicial challenge occurs only once per case, however, patterns are nearly impossible to come by. Thus a *Swain*-like standard, even for repeat-player litigants such as prosecutors' and defenders' offices, would be about as effective as no standard at all. Moreover, unlike the problem of selective prosecution, there is no countervailing concern about executive discretion or the separation of powers raised by judicial challenges that might warrant a convincing showing of in-

85. Conceivably, a state might decide to try to minimize abuse of the challenge by limiting the number of challenges any one litigant could exercise, rather than limiting the number of challenges per case. The most obvious method would be to allocate one challenge per predetermined number of cases. But the disparate effects of such a rule, not to mention the regulatory efforts needed to enforce it, would probably be prohibitive.

86. See, e.g., Richard McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

87. *McClesky v. Kemp*, 481 U.S. 279 (1987); *Swain v. Alabama*, 380 U.S. 202 (1965).

tent before requiring a race-neutral explanation.⁸⁸ At the other extreme, a court could require a litigant to advance a plausible race-neutral reason for the challenge in every case in which the challenge is employed. (Given the color-blind nature of present-day equal protection doctrine, it would not do to single out judges of one race for more or less protection under the Constitution by, for example, allowing challenges to white judges to slide through without justification, but demanding explanations for challenges to judges of color.⁸⁹) Yet, requiring a reason for the challenge in every case would deprive the peremptory challenge of its utility, "curing the disease but killing the patient," as Professor William Pizzi has stated.⁹⁰

What may be most promising for those who wish to maintain the uneasy compromise between the peremptory challenge and the Equal Protection Clause⁹¹ is a middle ground, where race-neutral reasons are required in some cases, but not others. *Batson* attempts to do this in the jury context by requiring a prima facie showing of discrimination before a litigant's challenge must be explained.⁹² A prima facie case of racial motivation for a judicial challenge is more difficult to establish. Many of the factors used in the jury context to identify potential discrimination (e.g., a pattern of strikes against jurors of one race or selective questioning of potential jurors of one race or ethnicity) are not particularly useful in the judicial challenge context.⁹³

88. *Cf.* *United States v. Armstrong*, 517 U.S. 456 (1996). *See generally* Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997) (describing justifications for court's reluctance to intrude on charging discretion, including concerns that intrusion would undermine prosecutorial effectiveness and interfere with the appropriate balance of power between the judiciary and the executive).

89. *See Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 226-27 (1995); *cf.* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994); *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (stating that "if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others").

90. William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 97. Some judges demand race-neutral explanations for juror strikes without requiring a prima facie case of discrimination. *See Tracy M.Y. Choy*, Note, *Branding Neutral Explanations Pretextual Under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577, 585 (1997).

91. There are those, of course, who have argued that any peremptory challenge is inherently arbitrary and therefore unconstitutional. *See, e.g., Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989).

92. *See Batson v. Kentucky*, 476 U.S. 79, 100 (1986).

93. Consider one list of the types of evidence that may raise the inference of discrimination: (1) statistics showing that race is the only common characteristic among the excluded jurors; (2) a "pattern of strikes against black jurors on the particular venire"; (3) "past conduct of the state's attorney"; (4) "type and manner of the state's attorney's questions and statements"; (5) "type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions"; (6) "[d]isparate treatment of members of the jury venire with

Without the voir dire process and multiple challenges, a litigant's likely intent must be assessed using the past record of the litigant's use of judicial challenges in other cases and the features of the individual case such as racial identity between the opposing litigant and the excluded judge⁹⁴ or the presence of racially sensitive issues,⁹⁵ factors that might lead a reasonable person to suspect that race motivated the challenge.⁹⁶

An analogous system is already in place in Illinois, where the State Supreme Court adopted a *Batson*-like procedure to curtail litigants' efforts to use the judicial peremptory challenge to delay proceedings or to thwart the chief judge's independence in assigning cases to the judges in his circuit.⁹⁷ If a litigant opposing his adversary's challenge demonstrates a prima facie case of improper purpose, the challenger must demonstrate that "there are facts or circumstances related to the particular case at hand which indicate that the judge is prejudiced."⁹⁸ A similar device is used in Oregon to curb challenges of particular judges in order to delay proceedings. A basis for a belief that the judge may not be a neutral impartial arbiter need not be stated initially, but if an explanation is demanded by the challenged judge, a hearing must be held at which the judge has the burden of proving the challenge was made in "bad faith."⁹⁹ An obvious cost of

the same characteristics, or who answer a question in the same or similar manner"; (7) "[d]isparate examination of members of the venire"; (8) disparate impact statistics that demonstrate that most of the challenges were used to strike African Americans from the jury; and (9) the state's use of peremptory challenges to remove all or most African-American jurors in the case. *Ex parte Branch*, 526 So. 2d 609, 622-23 (Ala. 1987); see also Choy, *supra* note 90, at 585-86 (summarizing the *Branch* factors).

94. *Cf.* *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (describing greater ease of making prima facie case of discriminatory peremptory challenge of juror where defendant and juror are of the same race).

95. See Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 86-90 (1993) (listing case attributes judges consider when gauging the presence of discriminatory motive or the effects of racially charged argument, including the presence of African-American attorneys or witnesses).

96. Every judge has a race, one might argue, so that every peremptory challenge is conceivably race-based—the challenge of the white judge is just as suspect as the challenge of a minority judge. The same argument has not prevented judges from continuing to distinguish between circumstances that suggest jury discrimination and circumstances that do not, however.

97. See *People ex rel. Baricevic v. Wharton*, 556 N.E.2d 253, 259 (Ill. 1990); see also *People v. Ross*, 614 N.E.2d 182, 189 (Ill. App. Ct. 1993) (interpreting *Wharton* to mean that when a defendant objects to a prosecutor's challenge, defendant has the burden of alleging facts which, if true, would require a hearing and finding no such basis for ordering a hearing in the instant case).

98. *Wharton*, 556 N.E.2d at 260.

99. *State ex rel. Kafoury v. Jones*, 843 P.2d 932, 938 (Or. 1992) ("[I]n rare cases, 'bad faith' may be proved where the movant's sincere belief is so irrational that allowing the motion would amount to 'an outright hindrance' of the court's ability to adjudicate the case.").

such a system, however, is the added burden for the trial judge who is forced to intervene in someone else's case.

Assuming that a court is able to distinguish which peremptory challenges require explanation and which do not, there is the additional task of defining the type of explanations that would be sufficient. The Supreme Court's decision in *Purkett v. Elam*¹⁰⁰ suggests that any old race-neutral reason, even an irrational or subjective reason or a reason that would have applied equally to support the challenge of any judge, will provide adequate support for a finding of no intentional discrimination. However, these standards, taken from the jury context, may be inappropriate for judicial challenges. Presently, courts require better explanations for suspicious juror challenges in military trials, where a litigant is afforded only one peremptory challenge per case and where decisionmakers on the jury consist of those who are equal or senior to the accused in rank or grade and who are "best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament."¹⁰¹ Conceivably, the same reasons that support requiring a "reasonable" race-neutral basis for disqualifying a juror of the accused's race in that context also support requiring better reasons for suspicious judicial peremptories as well. Alternatively, some of the guidelines that state courts have adopted for assessing whether to credit a litigant's claimed reason for challenging a juror should also be applied to judicial substitution. These guidelines include: (1) whether the reason for the challenge relates to the particular case, (2) whether, in similar cases, the litigant has exercised challenges against persons of other races who met the same criteria, and (3) whether the reason for challenge is based on objective evidence or merely on subjective judgment.¹⁰²

It is not uncommon for a judge to become the subject of a refusal or disqualification motion due to his or her pre-bench political activities,¹⁰³ so it is likely that such activities will be advanced as race-neu-

100. 514 U.S. 765 (1995).

101. 10 U.S.C. § 825(d)(2) (1994); see also *United States v. Tulloch*, 47 M.J. 283 (C.A.A.F. 1997) (requiring reasonable race-neutral explanation for the peremptory challenge of a minority juror, finding standard set out in *Purkett* inapplicable to military tribunal).

102. See *Choy*, *supra* note 90, at 590 (listing factors used by courts in New York to determine whether *Batson* explanations are pretextual).

103. One well-known example of an effort to disqualify a minority judge due to her prior political activity is the ruling in *Bin Wahad v. Coughlin*, 853 F. Supp. 680 (S.D.N.Y. 1994). There, state prison officials filed a motion requesting the refusal of Judge Constance Baker Motley in a case based on allegations of bias due to the judge's prior civil rights activism and relationship as a cousin to a member of the Black Panther Party allegedly killed by the FBI. See *id.* at 684. Another interesting case is *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981). That case involved the ratification of the ERA, and the judge denied a motion under 28 U.S.C. § 455, in

tral reasons for peremptory challenges. Litigation concerning the propriety of excluding potential *jurors* through peremptory challenges because of their political or speech activity is only in its infancy.¹⁰⁴ As Professor Andrew Leipold has recently suggested, classifying potential jurors in this way cannot be necessary to address the compelling concern that the state has in assuring the impartiality of jurors, because "by the time the parties exercise peremptories, the trial judge has necessarily decided that the existing jury panel can be impartial" ¹⁰⁵ Nor would it appear that political activity could serve as a legitimate basis for removing a judge. The peremptory challenge of judges is invariably a *supplement* to existing provisions that permit a judge to be challenged with proof of bias (and often with merely proof from which a reasonable person would question impartiality).¹⁰⁶ There is no compelling interest that would permit a state to allow attorneys to pick and choose among judges according to whether or not they have engaged in activities protected under the First Amendment. Indeed, this issue has already been raised in California. Assigned to hear a case involving county regulation of gay bathhouses, Judge Jack Newman was challenged by the county defendants after a Republican county supervisor criticized Newman for his ties to the Democratic party.¹⁰⁷ The bathhouse owners and the ACLU argued that a peremptory challenge of judge or juror based on party affiliation and political activity is unconstitutional, but their argument was rejected.¹⁰⁸

In addition to setting the standards for proving intentional discrimination, courts will have to resolve who has standing to object to an allegedly race-based peremptory challenge. Must a judge litigate her own removal, or may litigants protest that removal on her behalf? Locating the holder of the right that is violated when a judge is challenged because of her race is simple enough: the constitutional right

which one party had questioned his impartiality based on his affiliation with a church that opposed the ERA. *See id.* at 733.

104. *See* Cheryl G. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Association Rights*, 24 *HOFSTRA L. REV.* 567 (1996).

105. Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 *GEO. L. J.* (forthcoming Feb. 1998).

106. In federal court, and in jurisdictions that have adopted similar standards for "cause" challenges of judges, the judge is subject to removal not only when the judge is biased, but also when his "impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1994); *see also* *United States v. Couch*, 896 F.2d 78, 80 (5th Cir. 1990) (applying statute).

107. *See* Kim Murphy, *Politics Cued as Judge is Taken off Case*, *L.A. TIMES*, Aug. 21, 1986, pt. 2, p. 6.

108. *See id.*

to be free from government classifications based on race belongs to the judge, just as jurors possess the equal protection rights championed by the Court in its peremptory challenge cases.¹⁰⁹ What is harder is identifying who may obtain relief when that right is denied, other than the judge herself.

The Court has been willing to extend standing in equal protection cases farther than in other types of cases and has been particularly free in affording standing in jury discrimination and voting cases.¹¹⁰ A similar approach makes sense here. A litigant may be able to raise an objection to a judicial challenge using a third-party standing argument like that endorsed by the Court in *Powers v. Ohio*¹¹¹ and *Campbell v. Louisiana*.¹¹² In *Powers* and *Campbell*, the Court applied its three-part test for third party standing¹¹³ to hold that a white defendant may challenge his conviction based on the alleged exclusion of African-Americans from juries because of their race.¹¹⁴ The requirement that the potential jurors' ability to protect their own rights be hindered was most easily met, as jurors were unlikely to pursue on their own behalf available remedies against race-based jury selection.¹¹⁵ The requisite

109. The *Batson* right, however, began as a right of the criminal defendant alone and was only later shifted to the juror, as primarily a right to be free from race-based exclusion. See *Georgia v. McCollum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); see also *Echlin v. LeCureux*, 995 F.2d 1344, 1351 (6th Cir. 1993) (holding that *Powers* established a "new rule" barred from habeas review by *Teague v. Lane*, 476 U.S. 79 (1986)); *Holland v. McGinnis*, 963 F.2d 1044, 1053 (7th Cir. 1992) (stating that the holding of *Powers* allowing cross-racial challenges to peremptory strikes is a "new rule"); *King*, *supra* note 95, at 67 (discussing *Batson*). See generally *Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

110. See David Flickinger, *Standing in Racial Gerrymandering Cases*, 49 STAN. L. REV. 381 (1997); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 290-95 (1996) (discussing standing for equal protection claims in voting cases); Brian R. Markley, Comment, *Constitutional Provisions in Conflict: Article III Standing and Equal Protection after Shaw v. Reno*, 43 KAN. L. REV. 449 (1995).

111. 499 U.S. 400, 410-11 (1991) (allowing white criminal defendant to challenge his conviction based on the race-based exclusion of African-American venirepersons during voir dire).

112. 118 S. Ct. 1419 (1998) (concluding that white defendant had standing to challenge race-based selection of grand jurors).

113. See *Singleton v. Wulff*, 428 U.S. 106, 112, 114-16 (1976) (setting forth elements for asserting third-party standing: injury in fact to litigant, close relation between party asserting right and right holder, and inability of right holder to assert own right).

114. See *Powers*, 499 U.S. at 410-11; *Campbell*, 118 S. Ct. at 1423.

115. See *Powers*, 499 U.S. at 414 (noting that it is a rare occasion when excluded juror brings suit on own behalf); see also *Campbell*, 118 S. Ct. at 1424 ("[G]rand jurors have the same economic disincentives to assert their own rights as do excluded petit jurors."); *Vasquez v. Hillery*, 474 U.S. 254, 262 n.5 (1986) (noting that excluded jurors rarely bring discrimination cases "undoubtedly" because they lack knowledge about discriminatory practices and because of lack of incentive to initiate legal battle); *Rose v. Mitchell*, 443 U.S. 545, 558 (1979) (finding that actions by jurors challenging exclusion based on race are infrequent because they are lengthy and expensive).

“close relationship” between the defendant and the wronged juror was established by the joint interest in eliminating racial discrimination from the courtroom and the prospect of the reversal of conviction should discrimination be proven, making the defendant “a motivated, effective advocate for the excluded” potential juror.¹¹⁶ Finally, the Court found that the defendant suffered an “injury in fact” because racial discrimination in the selection of jurors “casts doubt over the obligations of the parties, the jury, and indeed the court to adhere to the law”¹¹⁷

There are significant differences between judicial challenges and jury challenges, differences that some might argue would provide a basis for denying standing to litigants seeking to block the abuse of one but not the other. First of all, regardless of how likely it is that jurors may object to being bumped from a case, even for improper reasons, judges are apt to be less complacent. Judges lack the incentives to avoid service that may fuel juror passivity, and they possess the knowledge and power needed to protest such a challenge.¹¹⁸

Moreover, any actual injury suffered by the litigant when a judge is challenged is arguably less serious than either the injury to the litigant who witnesses the race-based peremptory challenges during his trial, as in *Powers*, or the injury to the litigant whose trial judge has discriminated against grand jurors on the basis of race, as in *Campbell*.

116. *Powers*, 499 U.S. at 413-14 (stating that a common interest exists because both the defendant and the excluded juror want to eliminate race discrimination); see also *Campbell*, 118 S. Ct. at 1424 (“We find no reason why a white defendant would be any less effective as an advocate for excluded grand jurors than for excluded petit jurors.”).

117. *Powers*, 499 U.S. at 412. The Court explained:

The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. “Jury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant’s culpability.” . . .

.
The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

Id. at 411-13 (citations omitted) (quoting *Gomez v. United States*, 490 U.S. 858, 873 (1989)); see also *Campbell*, 118 S. Ct. at 1423 (noting that if the process of grand jury selection “is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions”).

118. Consider the case of Judge Dorn, the African-American judge who protested the prosecutor’s peremptory challenge in the case of Damian Williams. See *supra* notes 19-32 and accompanying text; cf. *Harris v. Evans*, 20 F.3d 1118, 1121-22 (11th Cir. 1994) (distinguishing *Powers* and holding that prison guards face no impediment to asserting their own First Amendment rights).

Unlike jury challenges that take place in open court, judicial challenges occur on paper.¹¹⁹ A judge is assigned. A motion is filed. An order is entered. The judge need not physically rise and step down from the bench to make way for another, as in the jury context. Arguably, less “doubt” is cast upon “the fairness of [the] criminal proceeding”¹²⁰ when the discrimination is neither taking place in open court for all to hear and witness first hand nor instigated by the judge himself.¹²¹

Yet the effect of the discrimination on the expectations or trust of trial participants cannot determine who may protest and who may not. Such a measure would entail the tedious task of gauging the extent and timing of disclosure of wrongdoing to the objecting litigant, features affected only partially by the context in which the discrimination took place, features that would vary from case to case. It would also lead to the absurd result that those most skilled at concealing discrimination would be rewarded with greater immunity for their wrongs.

This problem was illustrated recently in a Sixth Circuit decision in which a Hispanic defendant challenged his conviction based on the denial of equal protection to “White and Other” non-African Americans excluded from the qualified wheel of potential jurors.¹²² Pretrial jury discrimination, the court reasoned, also “‘damages both the fact and the perception of’ the defendants guarantee of a fair trial.”¹²³

In another case examining the same jury selection plan,¹²⁴ District Judge Gerald E. Rosen had made it clear that the presence of an actual injury for standing purposes would not turn on the number and proximity of witnesses to the discrimination. He declared expansively that “active discrimination at any stage of the jury selection process against any identifiable group—whether the identifiable group is a racial minority or a racial majority—by the very institution entrusted with insuring jury service rights under the United States Constitution causes injury to any litigant.”¹²⁵ The judge also included a thoughtful footnote, interesting especially for our purposes:

119. Hence the term “papering a judge” used to describe the process of challenging a judge in California.

120. *Powers*, 499 U.S. at 411.

121. See *Campbell*, 118 S. Ct. at 1424 (noting that discrimination in the selection of the grand jury calls into question “the impartiality and discretion of the judge himself”).

122. *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998).

123. *Id.* at 1102 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

124. See *United States v. Greene*, 971 F. Supp 1117, 1120 (E.D. Mich. 1997) (opinion and order denying defendant’s motion for new trial).

125. *Id.* at 1134-35.

[I]magine if there were a system which, at the outset, assigned judges to cases based upon the race of the judge. For purposes of determining whether a defendant had a close enough relationship to the selection system by which he was assigned his judge, and to the entire Bench, one need only ask if there would be any question that the defendant would be deemed to have a close enough relationship with the entire court such that he could challenge the racially discriminatory assignment system—even if the judge to whom he was assigned was not of the same race as he and even if he had never been before or even met the non-assigned judges. Clearly, it would not seriously be contended that the Defendant did not have a sufficiently close relationship to the court as a whole to challenge the assignment system.

The paradigm here is precisely the same. The Defendant's relationship here is really that between the Defendant as an accused and the excluded person as his prospective judge. This Court believes that the fact that the exclusion takes place more surreptitiously at an earlier point in the process is largely irrelevant for standing purposes.¹²⁶

Pending further word from the Supreme Court, this unsettled law suggests that parties should expect to litigate the complex issue of standing when raising an objection to discriminatory judicial peremptory challenges.

III. CONCLUSION

The choice of whether to adopt or preserve judicial peremptories should not turn on the resolution of one issue. The risk that such challenges will be used to discriminate between judges on the basis of race must be considered along with the other disadvantages of the challenge and weighed against its potential benefits. Nevertheless, if there is one lesson to be learned from the last few decades of scrutiny of the criminal justice system, it is that discretion can and will be used to discriminate. This difficulty weighs heavily against injecting into our justice system *additional* discretionary opportunities for litigants to play the race card, absent a truly compelling reason to do so.

126. *Id.* at 1136 n.21.