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The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused

TABLE OF CONTENTS

I. Introduction ............................................. 805
II. The Communitarian Function of the Criminal Jury Trial .............................................................. 806
III. Waiver of the Jury By the Accused ...................... 810
   A. The Conflict Between an Accused's Legitimate Interest in Waiver and the Jury's Communitarian Function ... 810
   B. The Federal Rule Prohibiting Waiver Without the Prosecutor's Consent ................................ 811
   C. The Court's Inadequate Attempts to Articulate a Public Interest Justification for the Requirement of Prosecutorial Consent ............................................................ 813
   D. The Communitarian Function and the Requirement of Prosecutorial Consent ................................ 817
IV. Jury Selection ........................................... 820
   A. The Fair-Cross-Section Requirement .................. 821
   B. The Exercise of Peremptory Challenges .............. 822
      1. Swain and the Traditional Function of Peremptory Challenges in Securing an Impartial Jury ........ 822
      2. Batson and the Limitations of the Government's Use of Peremptory Strikes .................................. 824
      4. Conclusions ...................................... 833
V. The Public Trial Guarantee .................................. 834
VI. Conclusion ............................................. 839

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I. INTRODUCTION

Public trial by jury is established by the Sixth Amendment as a right of the criminally accused. Although not articulated in the Constitution or accorded constitutional status by decisional law, the courts have also recognized, sometimes explicitly, sometimes implicitly, a public interest in trial by jury in criminal cases that is distinct from the public's interest in a fair trial for the accused or the reliable determination of guilt and innocence. This separate public interest derives from what can be called the criminal jury's "communitarian" function. The communitarian function of public trial by jury in criminal cases can be divided into three related aspects: 1) a democratic vehicle for community participation in government in general and the criminal justice system in particular; 2) a means by which the community is educated regarding our system of justice; and 3) a ritual by which the faith of the community in the administration of justice is maintained.

In most circumstances, the communitarian function of the jury is consistent with the interests of the accused. The right to public jury trial itself and the procedures associated with it are primarily protections for the accused that at the same time serve to foster community participation, education, and faith in the administration of justice. In some circumstances, however, the communitarian function of the criminal jury may be at odds or appear to be at odds with the rights of the accused. In those instances, one interest must prevail or the conflicting interests must be balanced and accommodated.

This Article examines Supreme Court jurisprudence regarding three circumstances in which the communitarian function of trial by jury is apparently inconsistent with the rights of the accused: 1) where the accused wishes to waive her right to trial by jury and be tried by the court; 2) where the accused wishes to exercise peremptory challenges to eliminate a cognizable group of jurors that she believes will tend to be unsympathetic to her defense; and 3) where the accused opposes television coverage of her trial contrary to the rules or ruling of the court. In each of these circumstances the accused may be confronted with the prospect of majoritarian bias that, while extremely difficult if not impossible to demonstrate, poses a genuine threat to her fair trial rights. The Supreme Court, when confronted with these circumstances, has implicitly balanced the communitarian function of the jury trial against the rights of the accused, without explicitly acknowledging the conflict. The Court has instead engaged in fictions to obscure the fact that the interests of the accused and those of the community diverge.

This Article argues, first of all, that the communitarian function of public trial by jury in criminal cases is an important aspect of the administration of justice in our democratic society. As such, it should be
explicitly acknowledged as a matter of constitutional doctrine, as well as public policy. Secondly, this Article argues that, despite the jury trial's important communitarian function, there should be a presumption in favor of the interests of the accused whenever there is a conflict in an area of Sixth Amendment protection. That presumption should be overcome only where the government can demonstrate that there is no genuine threat of bias against the accused. This conclusion has three foundations: 1) the Sixth Amendment's specific establishment of public trial by jury as a protection for the accused; 2) the problem of majoritarian bias and the role of the judiciary in protecting the accused against such bias; and 3) the compromising of the communitarian function itself that results whenever it is asserted to burden the rights of the accused.

II. THE COMMUNITARIAN FUNCTION OF THE CRIMINAL JURY TRIAL

The Constitution provides, in two separate places, for trial by jury in criminal prosecutions. Article III, Section 2 provides that: "The trial of all crimes except in cases of impeachment shall be by jury...." The Sixth Amendment also provides for trial by jury in criminal prosecutions, but does so specifically as a right of the accused: "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed." Despite the separate provision of Article III, Section 2, which on its face suggests a broader public interest in trial by jury in criminal cases, the Constitution has been generally interpreted by the Supreme Court to provide for trial by jury solely as a protection for the accused, and not for any separate purpose.

In \textit{Patton v. United States},\footnote{281 U.S. 276 (1930).} the Court directly faced the issue of whether the Constitution intended to establish the jury as a necessary part of the criminal justice process, or only to guarantee the accused the right to trial by jury. The Court concluded that Article III, Section 2 must be read together with the Sixth Amendment, not as jurisdictional, but as "confer[ring] a right upon the accused which he may forego at his election."\footnote{Id. at 298. In reaching this conclusion, the Court in \textit{Patton} relied heavily on a 1908 First Circuit opinion that it quoted at great length, Dickinson v. United States, 159 F. 801 (1st Cir. 1908).}

In \textit{Duncan v. Louisiana},\footnote{391 U.S. 145 (1968).} which held that trial by jury in criminal cases is fundamental to the scheme of American justice and therefore mandated in state courts by the Fourteenth Amendment, the Court traced the right to trial by jury in criminal cases from the Magna Carta and through the eighteenth century, in which Blackstone re-
ferred to it as a "wisely placed . . . barrier . . . between the liberties of the people and the prerogative of the crown." The right to trial by jury is, according to Duncan, "granted to criminal defendants in order to prevent oppression by the Government."  

In reconstructing the constitutional foundation of trial by jury in criminal cases, Duncan made no reference to a public interest separate from the protection of the accused. Although Duncan referred to the virtue of "community participation" in the administration of justice, it did so only as the means by which the accused is protected from the unchecked power of government. The Court explicitly stated:

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.  

Thus, the Court in Duncan viewed any communitarian function of trial by jury to be merely a vehicle for the accused's protection.

Nonetheless, the Court has at times articulated (and at other times implicitly asserted) a public interest in criminal trial by jury distinct from protection of the accused and from fair and reliable determination of guilt. This interest focuses not on the accused or the rights of individuals, but on the welfare and efficacy of the community at large. It derives from the perceived contribution of criminal trial by jury to social cohesiveness in a democratic society—from what can be called the criminal jury's "communitarian function."

This communitarian function, as occasionally articulated by the courts, has various interrelated aspects. These can be grouped in three primary categories: 1) a vehicle for direct community participation in the criminal justice system; 2) a means by which the community is educated regarding the criminal justice system; and 3) a ritual
by which the faith of the community in the administration of justice is maintained.

Probably the fullest exposition of the communitarian function of the criminal jury trial is found in *Powers v. Ohio*, in which the Court held that a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. Justice Kennedy’s opinion for the Court began by citing *Duncan* for the proposition that “[t]he opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.” The Court in *Powers* relied for that proposition on *Duncan* in part, despite the fact that, as noted above, *Duncan*'s only reference to community participation is as a protection for the accused.

*Powers* next quoted the following language from *Balzac v. Porto Rico*:

> The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse.

This language evokes both the participatory and the ritual aspects of the communitarian function.

The Court in *Powers* also quoted at length from Alexis de Tocqueville’s *Democracy in America*, which evoked the educational as well as the participatory and ritual aspects of the communitarian function in language that clearly separates the public interest in the jury system from the interest of the accused:

> “The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society.

> * * * * *

> “. . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.

> * * * * *

I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look

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9. Id. at 406.
10. 258 U.S. 298 (1922).
11. Id. at 310. *Balzac* itself, far from a landmark decision in the protection of the right to trial by jury, held that the right of the accused to trial by jury did not extend to Puerto Rico in its territorial status.
Justice Kennedy concluded that jury service, which "preserves the democratic element of the law," is, "with the exception of voting, for most citizens, . . . their most significant opportunity to participate in the democratic process." 14

While never accorded explicit constitutional status by the courts, the communitarian function of the criminal jury trial is fundamental to our system of justice. The values of participation, education and ritual affirmation that it promotes are each crucial in a democratic society for public acceptance of the administration of criminal justice in particular and the exercise of governmental authority in general.

One explanation of the mechanism by which society benefits from the participatory and ritual aspects of the communitarian function was articulated in *United States v. Lewis:* 15 "Jury trials have historically served to vent community pressures and passions. As the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts." 16 Viewed in this way, the communitarian value of trial by jury results from its ability to induce a societal catharsis.

This cathartic value can only be realized, however, where the community perceives that it has truly participated in the administration of justice. What can happen when a segment of the community perceives itself as excluded from participation in the criminal justice process and loses faith in that process was vividly demonstrated by the civil unrest following the acquittal of white Los Angeles policemen accused of illegally beating black motorist Rodney King. As a result of a change of venue, the defendant policemen in that case were tried by an all-white jury in a different community than that in which the alleged crime occurred. 17 The King case, and other similar cases, 18

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14. Id.
16. Id. at 580. In *Lewis,* the court upheld on First Amendment free exercise grounds the right of a defendant religiously opposed to trial by jury to waive his right to a jury without the government's consent.

The practice of excluding blacks from juries was listed in the Governor's Report on the 1980 Miami Riot as a reason why blacks in Dade County distrust the Criminal Jury System. The practice was specifically identified as a cause of the 1980 so-called 'McDuffie Riots' which followed acquittal of white officers who beat to death a local black insurance executive.
NEBRASKA LAW REVIEW
demonstrate just how tenuous is the social contract by which the community accepts and supports the criminal justice system, and they underscore the significance of community participation in, education about, and ritual affirmation of that system.

Recognition of its communitarian function gives substance to the concept of a public interest in trial by jury. That interest is consistent with the fact that the Constitution provides, in Article III, Section 2, without qualification and without reference to the protection of the accused, for trial by jury in all criminal cases. Inherent in the communitarian function, however, is a potential for conflict with the interests of the accused protected by the Sixth Amendment and the ideal of impartial justice. This is particularly true where the defendant is the victim of majoritarian bias. This Article explores that potential for conflict and how the Supreme Court has dealt with it in three specific contexts.

III. WAIVER OF THE JURY BY THE ACCUSED

A. The Conflict Between an Accused's Legitimate Interest in Waiver and the Jury's Communitarian Function

The right to trial by jury in a criminal prosecution means that the accused cannot be convicted so long as one of twelve ordinary citizens has a reasonable doubt as to her guilt. Not surprisingly, consistent with the ideal of the Sixth Amendment, criminal defendants in most circumstances consider the right to trial by jury an important protection that they are loathe to waive. There are, however, circumstances in which a defendant may conclude that she is better off without a jury. In particular, a defendant who holds unpopular religious or political beliefs or against whom public opinion has been aroused by unfavorable publicity, may prefer to have her fate decided by a judge (particularly a federal judge with life tenure and immunity from the majoritarian political process) than by a jury drawn from a community that she perceives as biased against her.¹⁹ A defendant may also seek to waive in a case where the factual or the legal defense or both are complex or technical.

Dissenting in Duncan v. Louisiana,²⁰ Justice Harlan noted that the historical function of criminal trial by jury was as a protection

¹⁴ People were killed in the McDuffie riots, which resulted in $200 million in economic damage. See also Barbara D. Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway? 92 COLUM. L. REV. 725, 748-49 (1992).

¹⁹. Notable criminal defendants who have sought unsuccessfully to waive their jury rights include former Secretary of Defense Caspar Weinberger and the Reverend Sun Myung Moon. See United States v. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983).

against the tyranny of the government. Justice Harlan argued that this function has significantly less efficacy in modern democratic society:

It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations it imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.21

As Justice Harlan well illustrated, the jury no longer must act as a safeguard against a judiciary whose loyalty lies with a royal monarch rather than the people.

The corollary to Justice Harlan's argument is that, in the modern context, the jury may be, as much or more so than the court, the source of danger to the rights of the accused. The source of tyranny in a democracy is not the tyranny of a monarch, but the tyranny of the majority. The same public pressure that may lead to a questionable, politically-motivated or biased prosecution, may affect jurors who must return to their communities and explain their verdict in favor of an unpopular defendant. A judge, especially a federal judge with life tenure, may be better-situated than a jury to withstand the pressure of public opinion.

In any event, one can assume that a self-interested defendant will forego the normal advantages of trial by jury only when she genuinely perceives danger of jury bias. Ironically, however, the very cases that present the most potential for jury bias against an unpopular defendant will be often those in which the communitarian functions of participation, education, and ritual (and resulting catharsis) are most significant. This is true because in these cases the underlying events, as well as the legal process, have aroused the greatest public interest and concern. The public interest in the communitarian function may, therefore, directly conflict with the legitimate interest of the accused in waiver.

B. The Federal Rule Prohibiting Waiver Without the Prosecutor's Consent

If trial by jury were solely a protection for the accused and served no independent communitarian function, it would follow that the defendant could waive that right at her election. While true in some jurisdictions,22 that is not the case in federal court. Federal Rule of

21. Id. at 188 (Harlan, J., dissenting).
22. See Commonwealth v. Wharton, 435 A.2d 158, 163 n.3 (Pa. 1981) ("states are almost evenly divided as to whether prosecutorial consent should be required for waiver of a jury trial").
Criminal Procedure 23(a), which had its origin in Patton v. United States, provides in plain language that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government."

In Singer v. United States, in an opinion by Chief Justice Warren, the Court upheld the constitutionality of that rule against the defendant's claim that he had a constitutional right to waive inherent in his constitutional right to an impartial jury. Singer held that, under the Sixth Amendment as well as under Article III, Section 2, the defendant's "only constitutional right concerning the method of trial is to an impartial trial by jury." Therefore, the government can constitutionally condition waiver on the prosecutor's consent. In addition, the government need not articulate its reasons for demanding a jury trial.

Singer left open the question of "whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." The defendant in Singer sought to waive his jury only for the purpose of shortening the trial. Thus, confined to its facts, the Singer decision is not an absolute grant of governmental power to insist on trial by jury.

The Singer exception applied on its terms, however, is so narrow as hardly to exist. That a defendant cannot get a fair jury trial can be demonstrated presumably only where the procedures designed to remedy partiality—including voir dire, change of venue, continuance, jury sequestration, severance and closure—are shown to be ineffective.

24. FED. R. CRIM. P. 23(a).
26. Id. at 35.
27. The courts of Pennsylvania have reached a contrary result. In Commonwealth v. Wharton, 435 A.2d 158 (Pa. 1981), an equally divided supreme court affirmed a lower court ruling that invalidated a statute granting the Commonwealth an absolute right to a jury trial despite waiver by the defendant. According to one justice:
   It is particularly offensive to the fair and proper administration of criminal justice that the prosecution should compel a jury trial, which was conceived and preserved by the federal and state Constitutions as a protection for the accused against arbitrary and oppressive law enforcement, for purely arbitrary or tactical reasons. . . . Such compulsion turns the protective shield of a jury trial into a sword of the very oppression which it was intended to prevent.

Id. at 167.
29. Id.
30. Id. at 26.
The demonstration of partiality necessary for change of venue is, in itself, nearly insurmountable in practice. Even a juror who comes into the courthouse with a preconceived opinion as to the guilt of the accused is deemed sufficiently impartial if she assures the court that she can set that opinion aside and decide the case on the evidence.31

A bench trial over the prosecutor's objection under the Singer exception is, in any case, a logical impossibility. If the defendant is unable to get a trial by an impartial jury, a right guaranteed by the Sixth Amendment, the charges should be dismissed.32 That is, to meet the requirements of the Singer exception is also to provide grounds for dismissal.

In effect, therefore, under Rule 23(a) as upheld by Singer, the prosecutor has an effectively absolute veto over a defendant's jury waiver. Accordingly, since Singer was decided in 1965, only four reported district court cases have allowed waiver over the government's objection.33 Only one of those cases, United States v. Lewis,34 rested its decision solely on the Singer exception. In Lewis, the Court held that a defendant who had a sincerely held religious belief that precluded submitting himself to a jury trial had a First Amendment free exercise right to waive.35 In the numerous other cases considering Rule 23(a), denial of the defendant's attempt to waive the jury over the government's objection has been affirmed with a strict application of the Federal Rule.36 Clearly, a legitimate but general fear of bias on the part of an unpopular or minority defendant will not meet the requirements of the Singer exception.

C. The Court's Inadequate Attempts to Articulate a Public Interest Justification for the Requirement of Prosecutorial Consent

Rule 23(a) had its origin in Patton v. United States.37 As noted above, in Patton, the Court held for the first time that the constitutional provision for jury trial in criminal cases is not jurisdictional and may be waived.38 In the final paragraph of a long opinion, however,

33. See id. at 235-36.
35. Id.
36. See Fieldman, supra note 32, at 228.
37. 281 U.S. 276 (1930).
38. Prior to the Court's 1930 decision in Patton, dicta in earlier cases, widely followed by lower courts, precluded waiver of trial by jury even with the government's consent. In Patton, the prosecutor and the defendants stipulated to trial by 11 jurors when one of the 12 empanelled jurors became ill during the course of the
the Court, invoking "experience" and "tradition," stated in dicta that jury waiver by the defendant must be conditioned on the consent of government counsel as well as the court:

Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.\(^3\)

That dicta was later codified by the Supreme Court as Rule 23(a) and endowed with the force of a statute when Congress adopted the Federal Rules of Criminal Procedure.

In Gannett Co. v. DePasquale,\(^4\) which held that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials, the Court explained in dicta the holdings of Patton and Singer as based on a "public interest" in trial by jury in criminal cases distinct from the rights of the accused:

[The public has an interest in having a criminal case heard by a jury, an interest distinct from the defendant's interest in being tried by a jury of his peers. . . . Thus because of the great public interest in jury trials as the preferred mode of fact-finding in criminal cases, a defendant cannot waive a jury trial without the consent of the prosecutor and judge.\(^4\)]

Gannett gave no explanation, however, of the substance of this public interest.

The only public interest articulated by Patton is a paternalistic interest in the protection of the accused—that "the liberties and the lives of the citizens" not "be taken away 'without due process of law.'"\(^4\)\(^2\) Put another way, so long as waiver is intelligent and well-

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39. Id. at 312.
41. Id. at 383 (citations to Patton and Singer omitted).

Patton itself persuasively disposes of the paternalistic argument for not allowing jury waiver as inconsistent with allowing a plea of guilty:
counseled, the public interest articulated in *Patton* collapses into the interest of the accused and provides no justification for a restriction on the rights of the accused. *Gannett* refers similarly only to a "public interest in the enforcement of the Sixth Amendment," which again by its terms is intended solely for the protection of the accused. In upholding Rule 23(a)'s requirement of government consent to waiver, *Singer* provides no further illumination as to the substance of a public interest in trial by jury that could justify the requirement of government consent to jury waiver. *Singer* merely cites *Patton* in this regard and refers to the "Constitution's emphasis on jury trial." *Singer* does, however, introduce a new justification for the rule—the government's rights as a litigant:

The Constitution recognizes an adversary system as the proper method of determining guilt, and the government as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

Certain constitutionally mandated aspects of the criminal justice process do not, of course, conform to this model. This would include the requirement of proof beyond a reasonable doubt.

Coexisting with this equal adversary view of the criminal justice process, is the view that the Constitution has properly weighted the system in favor of the accused to protect her against the resources and power of the state. As articulated in Justice Douglas' concurring opinion in *Wardius v. Oregon*, "[t]he Bill of Rights does not envision an adversary proceeding between two equal parties," but rather "is designed to redress the advantage" that results from "the awesome power of the state." It is difficult to see why the fact, frequently suggested, that the accused may plead guilty and thus dispense with a trial altogether, does not effectively disclose the fallacy of the public policy contention; for if the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, *a fortiori* it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt.

*Id.* at 305.

45. *Id.* at 36. This view of the criminal justice process—a fairly weighted adversary process—is often traced to *Hayes v. Missouri*, 120 U.S. 68 (1887), which upheld a Missouri statute giving peremptory juror challenges to the prosecution in capital cases. The Court in *Hayes* observed that "impartiality requires, not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Id.* at 70. The prosecution and the accused are looked at in this model as similar to civil litigants. As noted in the text, there are many constitutionally mandated aspects of the criminal justice system that do not conform to this model.

46. *412 U.S. 470* (1973). *Wardius* held that an Oregon statute precluding introduction of alibi evidence without pre-trial notice was unconstitutional because it did not require reciprocal discovery from the government.
power of indictment and the virtually limitless resources of government investigators." The Sixth Amendment guarantee of public trial by jury is, of course, specifically phrased as a right of the accused and says nothing about the equal litigation rights of the prosecution.

_Singer_ itself justifies an equal adversary rule only through reference to the fiction of the neutral prosecutor. The Court in _Singer_ explains:

In upholding the validity of Rule 23(a), we reiterate the sentiment expressed in _Berger v. United States_, 295 U.S. 78, 88, that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a "servant of the law" with a "twofold aim . . . that guilt shall not escape or innocence suffer." It was in light of this concept of the role of prosecutor that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose.

_Singer_ thus creates an unbearable tension between two prosecutorial roles: that of litigant in an adversary system and that of neutral agent of justice. While the prosecutor may fulfill both roles at various times in the course of a prosecution, she cannot realistically remain a neutral agent of justice above the adversary fray at the time that she is asked to consent to jury waiver.

An ethical and conscientious prosecutor will present a case to a grand jury only against a defendant whom she believes guilty beyond a reasonable doubt. Once that decision is made, however, she necessarily and inevitably makes the transition to a litigant in an adversary system. Any decision in the litigation process will be made with a mind to gaining maximum advantage, within the rules, for a successful prosecution. Analysis of any issue by the prosecutor will be shaped, consciously or unconsciously, by the prosecutor's genuine belief that the defendant is guilty.

47. _Id._ at 480. _See also_ Williams v. Florida, 399 U.S. 78, 111-12 (1970)(Black, J., concurring in part and dissenting in part)(procedures for criminal trials spelled out in the Constitution "are designed to shield the defendant against state power" and "[l]one are designed to make conviction easier").
48. _Singer v. United States_, 380 U.S. 24, 37 (1965)(some citations omitted). _See_ _Berger v. United States_, 295 U.S. 78, 88 (1935)(government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done").
49. This does not assume any unethical motive or conduct on the part of the prosecutor. Although an ethical prosecutor would not, for example, attempt to sway the jury by an appeal to prejudice or allow a juror to be seated who has an improper bias, she will certainly use her peremptory strikes in an effort to obtain a jury panel that in her judgment, among the range of all persons that could sit on the panel, is likely to be disposed to find the defendant guilty. Since the prosecutor genuinely believes in the defendant's guilt, she will perceive those jurors as unbiased.
It is, therefore, unrealistic to expect that a prosecutor will respond to a request for consent to jury waiver based on a balanced, neutral interest in a fair trial. Except perhaps in a minor case where saving of time and resources is a controlling issue, the prosecutor will agree to waiver only if she believes that the court is at least as likely to convict—just as the conscientious defense attorney will advise her client to waive only if she believes the court is at least as likely to acquit. This natural litigant’s response will be exacerbated in a high-profile prosecution in which the prosecutor’s office is publicly committed to obtaining a conviction. This kind of case, where press and public opinion have been actively engaged, is, of course, precisely the kind of case in which a defendant may have a legitimate fear of jury bias and seek to waive for that reason.

Singer’s premise—the neutral prosecutor—is, therefore, false in the relevant context. A prosecutor is a litigant in an adversary system who, far from being counted on to act in a neutral manner only to protect the fair trial rights of the accused, will predictably refuse consent whenever doing so will gain a litigation advantage. The prosecutor’s equal rights as a litigant cannot, therefore, serve as a proxy for a legitimate public interest in criminal trial by jury separate from the Sixth Amendment rights of the accused. More importantly, justification of the requirement of prosecutorial consent by reference to the prosecutor’s rights as a litigant and the myth of prosecutorial neutrality does nothing to explain the substance of the public interest in trial by jury that the prosecutor is empowered to protect.

### D. The Communitarian Function and the Requirement of Prosecutorial Consent

Thus, none of the public interest rationales for the requirement of prosecutorial consent articulated by the Supreme Court can withstand scrutiny. However, even though never articulated by Patton or Singer in establishing and enforcing the requirement of prosecutorial consent to jury waiver, there is a legitimate public interest in criminal trial by jury: the communitarian function of participation, education and ritual. That function gives substance to the “tradition” invoked by Patton and Singer and is consistent with the provision for trial by jury in criminal cases in Article III, Section 2. As already noted, however, the public interest derived from the communitarian function is greatest in those cases that have attracted the greatest public attention and controversy. Those are the same cases in which, typically, there is also the greatest potential for public bias and majority oppression of an unpopular defendant.
The tax prosecution of cult leader Sun Myung Moon is illustrative. Moon was indicted on various counts of tax evasion and false statements. At a subsequent rally of his followers, Moon made the following statement that was partially reprinted as an advertisement in the New York Times:

I would not be standing here today if my skin were white or my religion were Presbyterian. I am here today only because my skin is yellow and my religion is Unification Church. The ugliest things in this beautiful country of America are religious bigotry and racism.

Consistent with those sentiments, Moon sought to waive his jury. The prosecutor refused to consent.

Although under Singer, the prosecutor is not obligated to articulate reasons for refusal to consent, the prosecutor did so in a letter to the judge. That letter invoked the ritual aspect of the communitarian function of trial by jury:

In response to defense efforts to waive a trial by jury, the prosecutor wrote a letter to Judge Goettel dated March 11, 1982 stating her opposition and, referring to [Moon's statement reprinted in the New York Times], adding that defendants had raised—and circulated world-wide—questions about "the integrity and motives of the prosecution." It was the prosecutor's conclusion that a single fact-finder would be placed in an "untenable" position and that there was an overriding public interest in the appearance as well as the fact of a fair trial, which could be achieved only by a jury. The government insisted that employing this normal and preferable mode of disposing of fact issues in a criminal trial would defuse the public criticism that had been leveled by Moon.

The prosecutor's letter did not explain why the decision of a jury would be less susceptible than that of a judge to continued claims by Moon of religious bigotry and racism.

Moon argued, in support of waiver, "that there was a reasonable likelihood in advance that public animosity toward Moon and his religion would prevent a fair trial," that this likelihood was exacerbated by his public statements, and "that the subject matter of this tax fraud prosecution, together with the sheer volume of complicated exhibits, turned this trial into one of mesmerizing complexity" inappropriate for a jury. Moon also argued, based on the prosecutor's citation of his public statement as a basis for refusal to consent, that the refusal "punish[ed] Moon for exercising his First Amendment rights."

Following Singer and relying on review of the record of voir dire, the Second Circuit affirmed Moon's conviction. It did so without ex-

51. Id. at 1217.
52. Id.
53. Id. at 1218 & n.1.
54. Id. at 1218.
55. Based on the record, the Second Circuit was "convinced . . . of the accuracy of the trial court's finding after selection was completed that "we have gotten a jury
plicitly acknowledging the tension between the prosecutor's communitarian justification for insistence on trial by jury and Moon's legitimate concerns about juror bias. Therefore, on the insistence of the prosecutor, and through application of Singer and Patton, Moon was forced to trial by jury despite his willingness to entrust his fate to a single judge; and despite the fact that, according to those same cases and their progeny, the constitutional provision of trial by jury was intended solely as a protection for the accused against the arbitrary power of government.

The only possible justification for this result, and for the federal rule requiring prosecutorial consent, is that which was partially articulated by the prosecutor. The prosecutor in Moon was implicitly appealing to the communitarian values of participation, education and ritual affirmation of faith in the administration of justice (including catharsis), each of which is heightened in high-profile cases that have stirred public emotions and controversy. Those values must, however, be weighed against the danger of majoritarian bias to the accused, whose willingness to forego her Sixth Amendment right to a jury, combined with the great difficulty of demonstrating actual bias, should give presumptive legitimacy to a claim of bias in the jury pool.

Patton and Singer and their progeny, by invoking tradition and the fiction of the neutral prosecutor, never acknowledge the balance that they ultimately strike in favor of the communitarian function and against the accused who seeks waiver. While there may be circumstances in which the communitarian function justifies denial of the accused's attempt to waive her jury right, the prosecutor, a litigant in an adversary system, is certainly not the appropriate party in whom to invest that discretion. Yet, that is the result of the holdings in Patton and Singer.

Even assuming that discretion were more properly invested in the court alone, the question remains as to how that discretion should be exercised. In other words, how should the court balance the genuine public interest in trial by jury (that derived from the communitarian function) against the defendant's desire to waive the jury and her presumptively valid fear of jury bias? As developed more thoroughly in Part VI within, three principles argue for a presumption in favor of the accused: 1) the Sixth Amendment's specific reference to trial by jury as a right of the accused and the absence of similar constitutional

which is, if not totally free from bias, by and large capable of putting aside the bias they have and deciding the case on the merits of the charges."

56. See supra note 52 and accompanying text.

57. A particularly compelling case might exist, for example, when the defendant is a high official of the government who, by seeking waiver, seeks to be tried solely by a judge, another high official of the same government. That circumstance would present a particular threat to public faith in the administration of justice and might justify denial of waiver in the absence of genuine potential for jury bias.
articulation of a separate, public interest; 2) the danger in a democratic society of majoritarian bias, which may find expression in the jury, and the traditional role of the independent judiciary to protect against that bias, particularly through enforcement of the Bill of Rights; and 3) the compromise of the communitarian goal of faith in the administration of justice that will result if a defendant with a legitimate fear of jury bias is not allowed to waive.

The burden, therefore, should be on the government to overcome this presumption by a clear showing that there is no particularized danger of jury bias in the circumstances of the case. That showing might be made on the record of voir dire, but the standard would necessarily be more rigorous than that required to defeat a motion for change of venue.58 Again, the purpose of presumption in favor of the accused would be to protect a defendant who seeks waiver from the difficult to demonstrate, but nonetheless real, danger of facing trial by a jury selected from a community in which bias is widespread. As such, the government should have the burden of demonstrating, not only that a jury can be obtained comprised of individuals who purport to be able to put aside any preconception or bias, but further, that there is no general bias against the defendant in the pool from which the jury will be selected.

IV. JURY SELECTION

The Sixth Amendment guarantees to the accused "an impartial jury" but is silent with regard to the composition of the jury and the means of its selection. Case law interpreting the demands of the Equal Protection Clause of the Fourteenth Amendment as well as the Sixth Amendment as they apply to jury selection has emphasized the communitarian function of the jury, as well as the rights of defendants and the rights of individual jurors. As in the case of the right to trial by jury itself, the interest of the accused in jury selection is generally consistent with the communitarian function of the jury, but it is sometimes at odds with it. Recent holdings of the Supreme Court limiting the use of preemptory strikes by criminal defendants have implicitly weighed the value of the communitarian function, especially its ritual value for fostering community faith in the administration of justice, against the interest of the accused in selection of impartial jurors.

58. A change of venue also burdens to some degree the communitarian function since it precludes the community in which the alleged crime was committed from participating in the trial.
A. The Fair-Cross-Section Requirement

In Taylor v. Louisiana, the Court held that "the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn, is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." The Court accordingly reversed the conviction of a male defendant because of systematic exclusion of women from the venire.

In establishing a fair-cross-section requirement under the Sixth Amendment, the Court justified that requirement, first of all, as essential to the function of the jury as a protection of the accused against the arbitrary power of government. The Court said:

The purpose of the jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

This would seem to be a necessary and sufficient justification for a holding under the Sixth Amendment.

The Court went on immediately, however, to state:

Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. . . . "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

60. Id. at 526.
61. The Louisiana jury selection system at issue did not exclude all women from the venire but included them only if they had previously executed a written declaration of desire to be subject to jury service. There were no women on the venire from which the defendant's petit jury was selected.
62. Id. at 530 (citation omitted). See also Holland v. Illinois, 493 U.S. 474, 480 (1990)("The fair-cross-section venire requirement is obviously not explicit in [the text of the Sixth Amendment], but is derived from the traditional understanding of how an 'impartial jury' is assembled.").
63. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946)(Frankfurter, J., dissenting)). See also Lockhart v. McCree, 476 U.S. 162, 174-75 (1986)(analyzing Taylor and identifying three purposes for the fair-cross-section requirement: "(1) 'guard[ing] against the exercise of arbitrary power' and ensuring that the 'common sense judgment of the community' will act as 'a hedge against the overzealous or mistaken prosecutor,' (2) preserving 'public confidence in the fairness of the criminal justice system,' and (3) implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'").
Thus, the Court invoked the participatory and ritual aspects of the communitarian function to give further justification for the fair-cross-section requirement. In doing so, despite founding its decision on the Sixth Amendment, the Court shifted its emphasis from the criminal jury's function as a protection of the accused to its function as a democratic vehicle for community participation.

The fair-cross-section requirement has been held to apply only to the venire and not to the petit jury. Nor is a criminal defendant entitled to a proportionate number of her race or gender on either the venire or the petit jury. The function of the fair-cross-section requirement in eliminating bias from the petit jury is, therefore, important but limited. By prohibiting discrimination in the composition of the venire from which the petit jury will be selected, it furthers the communitarian values of participation and ritual affirmation at the same time that it assures the accused that persons of her race or nationality or gender will be included in the pool of potential jurors. It does nothing, however, to eliminate the selection of biased jurors from that venire.

B. The Exercise of Peremptory Challenges

1. Swain and the Traditional Function of Peremptory Challenges in Securing an Impartial Jury

Other than the fair-cross-section venire requirement and the right to strike jurors with demonstrable bias for cause, the criminal defendant's only vehicle to exercise control over the composition of the petit jury, and thereby to eliminate potentially biased jurors, is through the exercise of peremptory challenges. Peremptory challenges are a specified number of challenges without cause traditionally allowed to both the defendant and the government. The exercise of peremptory challenges has been recognized by the Court as an important part of the selection of an impartial jury but has not been accorded constitutional protection as a fundamental part of the Sixth Amendment guarantee.

The history and significance of the peremptory challenge was set forth at length in Justice White's opinion for the Court in Swain v. Alabama, which summarized its quasi-constitutional status as follows:

The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. Although "[t]here is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges," nonetheless the challenge is "one of the most important of the rights secured to the accused, [sic]". The denial or impairment of the right is reversible error without a showing of prejudice.68

Ironically, Swain invoked the centrality of the peremptory strike to the selection of an impartial jury as justification for denying the black defendant/petitioner's claim that the government's striking of all non-exempt black jurors from the venire was a violation of Equal Protection. No black had been left on a petit jury in a criminal case in the Alabama county at issue for more than ten years.

In upholding the government's exercise of peremptory challenges, the Court emphasized the arbitrary nature of the peremptory challenge as essential to its function in the selection of an impartial jury. The Court stated:

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control... While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.69

The Court in Swain thus believed that the arbitrary nature of the peremptory challenge served to protect the accused against partiality that would be difficult to demonstrate but might nonetheless be real.

Swain specifically validated the practice of using race or other suspect qualifications as surrogates for partiality in a particular case:

[The peremptory strike] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.[ ] For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be....

... In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge.70

The Court held that in order to establish a violation of the Fourteenth Amendment, a defendant would have to show not only that the government had excluded jurors on the basis of race in her trial, but that the government had done so systematically in the jurisdiction without regard to the specific case.71

68. Id. at 219.
69. Id. at 220 (citations omitted).
70. Id. at 220-22.
71. Id. at 224.
2. Batson and the Limitations of the Government’s Use of Peremptory Strikes

Just over 20 years later, Swain was overruled in Batson v. Kentucky. The Court held in Batson that a criminal defendant could establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial. It specifically disallowed the government’s use of race as a predictor of bias, stating:

[T]he prosecutor may not rebut the defendant’s prima facie case of discrimination by stating merely that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they would be partiuclar partial to the defendant because of their shared race. . . . [T]he Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.

Like Swain, Batson involved a black defendant’s challenge to the government’s use of peremptory strikes to exclude black jurors.

Not surprisingly, the Court looked first to impairment of the defendant’s right to a fair trial.

Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure. . . . The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Those on the venire must be “indifferently chosen,” to secure the defendant’s right under the Fourteenth Amendment to “protection of life and liberty against race or color prejudice.”

Indeed, on certain assumptions, the prosecutor’s ability to strike minority jurors in the trial of a minority defendant will frustrate rather than further the purpose of obtaining an impartial jury. If one assumes that members of the majority race are more apt to be biased against the minority defendant, and that jurors are represented in the venire in proportion to the general population, a prosecutor who systematically strikes minority jurors may be able to secure a jury that is predominantly or entirely composed of majority jurors with a greater tendency towards bias.

This reasoning would also support a finding of a violation of the Sixth Amendment, which guarantees the defendant “an impartial jury.” Significantly, however, the Court decided Batson solely based on the Fourteenth Amendment. The Court did so despite the fact that the defendant/petitioner “disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment.”

73. Id. at 97 (citations omitted).
74. Id. at 86-87 (citations omitted).
75. Id. at 112 (Burger, C.J., dissenting).
That the Court was unwilling to limit the government’s use of peremptory challenges based on the accused’s right to an impartial jury under the Sixth Amendment was confirmed four years later in *Holland v. Illinois.* In Holland, the Supreme Court denied a white defendant’s claim that exclusion of black jurors violated the Sixth Amendment. While, as is implicit above, a majority race defendant may not be able to demonstrate the same impairment of fair trial rights as an otherwise similarly situated minority defendant, the Court in *Holland,* in an opinion by Justice Scalia, made no such fine distinctions:

> We reject petitioner’s fundamental thesis that a prosecutor’s use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the “fair possibility” of a representative jury. ... A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury.

Thus, the Sixth Amendment was held to be simply not applicable to the peremptory challenge debate.

Since the defendant’s Fourteenth Amendment rights to an impartial jury and a fair trial cannot be meaningfully separated from his Sixth Amendment rights, which are insufficient under the Court’s jurisprudence to justify limitation on the government’s use of peremptories, further explanation must be found for the rule announced in *Batson.* In articulating a justification that might better explain its holding, the Court in *Batson* relied on the individual rights of excluded jurors and the participatory and ritual aspects of the criminal jury’s communitarian function:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. ... As long ago as *Strauder,* ... the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. ... The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

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77. Id.
78. As stated by Justice Rehnquist in dissent: “The Court does not suggest that exclusion of blacks from the jury through the State’s use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. *Batson v. Kentucky,* 476 U.S. 79, 138 (1986)(Rehnquist, J., dissenting).
79. Id. at 87. See also *Underwood,* supra note 18, at 748-50 (arguing that race-based jury selection damages public confidence in jury verdicts).
Thus, the prevention of discriminatory jury selection was held to serve the communitarian function of maintaining public confidence in the judicial system.

"Public confidence" and its sources are, however, somewhat nebulous commodities. They are subject to interpretation, as well as to genuine change, as the center of gravity of public opinion shifts over time. In 1965, in Swain, the Court also emphasized public confidence in the administration of justice. It assumed, however, contrary to Batson's limitation on peremptory use, that maintenance of the peremptory system was integral to selection of an impartial jury and, therefore, to public confidence. The Court explained:

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way justice must satisfy the appearance of justice."80

Twenty-one years later, in Batson, the Court minority still adhered to the same model of public confidence: "[T]oday's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than 'disconcert' litigants; it will diminish confidence in the jury system."81 But, as already discussed, in the view of the Court majority, by 1986, exclusion by the government of jurors on the basis of race could no longer co-exist with the criminal jury's ritual function of maintaining the faith of the community in the administration of justice.

In a first extension of Batson, in Powers v. Ohio82 the Court reversed the result in Holland by application of the Fourteenth rather than the Sixth Amendment, holding that a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. The Court reached that result without finding any impairment of the defendant's own rights. Instead, it relied solely on the defendant's standing to raise the third-party equal protection claims of the jurors excluded by the prosecution because of their race. As set forth above in Part II, Justice Kennedy's opinion for the Court in Powers places significant emphasis not only on the rights of excluded jurors but on all three aspects of the communitarian function.

In Powers, which reversed the conviction of a white defendant based on exclusion of black jurors, however, the interests of the defendant remained allied with the jury's perceived communitarian function. "The purpose of the jury system," according to Powers, "is to

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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." 83 The expression of the jury's ritual function remained wedded to the perception, if not the reality, of a fair trial for the accused: "Racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." 84 The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors, and the intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. 85 Still, after Batson and Powers, the accused, in contrast to the government, remained free to exercise peremptory challenges without justification and without court scrutiny.

3. McCollum and the Limitation of the Defendant's Use of Peremptories: The Communitarian Function in Conflict with the Rights of the Accused

In the circumstances of the Batson and Power cases, the fulfillment of the jury's communitarian function as perceived by the Court was consistent with the minority defendant's interest in avoiding the assumed partiality of a jury purged of minority jurors. However, subsequent extensions of Batson have put the communitarian function in opposition to the accused's right to an impartial jury. While those cases have emphasized the rights of individual jurors as well as the interests of the community, the results in those cases can ultimately be explained only as a balancing by the Court of the communitarian function against the rights of the accused.

Two months after the announcement of the decision in Powers, the Court held, in Edmonson v. Leesville Concrete Co. 86 that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race. While not directly affecting the rights of the criminally accused, the decision in Edmonson laid the groundwork, in two important ways, for subsequent extensions of Batson that would do so. First, the court held that private litigants are state actors when they exercise peremptory challenges. Secondly, in Edmonson, for the first time, the Court expressed a model of the ritual aspect of the jury's communitarian function completely independent of the protection of the accused from the arbitrary power of government and the fairness of the process to the litigants:

Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality . . . .  

83. Id. at 413.
84. Id. at 411 (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)).
85. Id. at 86.
It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution.\textsuperscript{87}

In other words, notwithstanding its possible prejudicial effects for the defendant, the communitarian interest in the "integrity of the judicial system" conclusively demands that racial discrimination not be a part of peremptory challenges.

The implications of this balance in favor of the communitarian interest for the criminal defendant, and the minority criminal defendant in particular, were recognized by Justice Scalia in dissent:

The effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the defendant from [exercising race-based strikes]—so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible.\textsuperscript{88}

Fulfilling Justice Scalia's prediction, one term later, in \textit{Georgia v. McCollum},\textsuperscript{89} the Court extended the \textit{Edmonson} rule to criminal cases. The Supreme Court held for the first time that the Constitution prohibits a criminal defendant from exercising peremptory challenges on the basis of race.

In order to reach that result, the Court in \textit{McCollum} broke new ground to hold that a criminal defendant is herself a state actor when exercising peremptory challenges. As Justice O'Connor put it in dissent: "The Court reaches the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection."\textsuperscript{90} While presaged by the questionable holding in \textit{Edmonson} that civil litigants are state actors when exercising peremptory challenges,\textsuperscript{91} the actual holding that a criminal defendant—whose Sixth Amendment right to a jury trial was "granted...to prevent oppres-

\textsuperscript{87. Id. at 628-30.}
\textsuperscript{88. Id. at 644 (Scalia, J., dissenting).}
\textsuperscript{89. 505 U.S. 42, 59 (1992).}
\textsuperscript{90. Id. at 62 (O'Connor, J., dissenting).}
\textsuperscript{91. Justice O'Connor in dissent in \textit{McCollum} distinguished between state action analysis when applied to civil litigants and when applied to criminal defendants. While the nonpartisan administrative interests of the State and partisan interests of private litigants may not be at odds during civil jury selection, the same cannot be said of the partisan interests of the State during jury selection in a criminal trial. A private civil litigant opposes a private counterpart, but a criminal defendant is by design in an adversarial relationship with the government. Simply put, the defendant seeks to strike jurors predisposed to convict, while the State seeks to strike jurors predisposed to acquit. Id. at 2363 (O'Connor, J., dissenting).}
sion by the Government,"92—is a state actor at a critical stage in the proceedings against her, was nonetheless breathtaking.93

The Court also held implicitly that a criminal defendant who exercises peremptory challenges on the basis of race is engaged in purposeful discrimination.94 The Court explained:

This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. . . . We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.95

In sum, race as a surrogate for partiality was no longer unacceptable.

While unassailable in a sense, once it is held that the defendant is a state actor, the holding that a criminal defendant cannot assume that a juror is less likely to be sympathetic to her case based on race (or gender or perhaps other suspect categories) highlights the tension between the communitarian function of a trial by jury and the interest of the accused in obtaining impartial jurors. The goal of a society free from racial bias and stereotype and the importance of affirming that goal in the conduct of court proceedings are at odds with the attempts of a criminal defendant to deal with the reality of continued bias in the community from which the jury pool is drawn. While the use of racial stereotypes is nonetheless odious, it can be presumed that a defendant, particularly one faced with serious charges, will exercise challenges based on race only if she genuinely believes that jurors of one race are more likely to be biased against her. Her “purpose” in that sense, though perhaps misguided by stereotypes, is not discrimination but freedom from juror bias.

Ironically, the idea that race and other suspect categories are legitimate predictors of bias was enunciated by the Supreme Court itself only 25 years earlier in Swain: “defense counsel must decide . . . not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.”96 Moreover, as pointed out by Justice Thomas in his concurring opinion in McCollum, the assumption that the racial composition of a jury may affect the outcome in a criminal case is implicit in the holding in Strauder v.

93. See Katherine Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv. L. Rev. 808 (1989)(arguing prior to McCollum that criminal defendant cannot be state actor). See also Urbanski, supra note 66, at 1935-41 (arguing that McCollum erred in holding that criminal defendant is state actor).
94. Since Washington v. Davis, 426 U.S. 229 (1976), a governmental action to be racially discriminatory in violation of the Fourteenth Amendment “must ultimately be traced to a racially discriminatory purpose.” Id. at 240.
West Virginia, which reversed a conviction and invalidated a state law that prohibited blacks from serving on juries. As Justice Thomas explained Strauder: "We reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly."

Though the burden of the holding in McCollum will fall most heavily on the minority defendant, who will be prohibited from using peremptory challenges in an attempt to obtain a jury that includes members of her race, the facts of McCollum presented the opposite situation. In McCollum, it was a white defendant who sought to use peremptory challenges to eliminate minority jurors. Confronted with those facts, the Court majority in McCollum was clearly motivated in large part by its perception of the criminal jury trial's communitarian function of promoting public confidence in the administration of justice. The issue of public confidence was presented in McCollum, not abstractly, but in the context of recent race riots in response to jury verdicts acquitting white defendants. The Court explicitly stated, "Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes." The Court referred to a law review article "describing two trials in Miami, Fl[orid][a], in which all African-American jurors were peremptorily struck by white defendants accused of racial beating, and the public outrage and riots that followed the defendants' acquittal."

Furthermore, race was alleged to be a factor in the charged assault and battery. A leaflet had been "widely distributed in the local African-American community reporting the assault and urging community residents not to patronize respondents' business." The prosecutor moved prior to the commencement of trial for a prohibition on race-based strikes by the defendants. The Court thus decided McCollum against the specter of the community's expected reaction to acquittal of the white defendant by a jury from which black jurors had been removed by the defendant's exercise of peremptory challenges.

The rule enunciated in McCollum will necessarily, however, be applied to minority defendants as well. Minority defendants will, therefore, be prevented from exercising race-based peremptory strikes in an attempt to secure minority representation on the jury. As stated

97. 100 U.S. 303 (1879).
100. Id. at 44.
101. Id.
102. As stated by the NAACP Legal Defense and Educational Fund's amicus brief in McCollum and quoted by Justice O'Connor's dissenting opinion:
succinctly by Justice Thomas in his concurring opinion: "I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes."\textsuperscript{103}

The majority in \textit{McCollum} purported to address directly the burden of its decision on the criminal defendant: "The final question is whether the interests served by \textit{Batson} must give way to the rights of a criminal defendant."\textsuperscript{104} Its analysis, however, begs the question by assuming its conclusion, \textit{i.e.}, that a defendant's racially based peremptory strikes are unlawful. The Court had already concluded that "neither the Sixth Amendment right nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct."\textsuperscript{105}

Once again, it was left for Justice Thomas, who concurred in the result, to speak plainly:

\begin{quote}
In \textit{Strauder}, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during \textit{voir dire}, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. . . . In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death.\textsuperscript{106}
\end{quote}

What Justice Thomas failed to acknowledge was the additional factor that shifted the balance in favor of the juror and against the accused: the Court's perception that the ritual aspect of the jury's communitarian function will not allow for the use, even by a criminal defendant, of race as a surrogate for bias. It is not only the rights of jurors, but the myth or goal of freedom from group bias that is exalted over the rights of the accused.

The ability to use peremptory challenges to exclude majority race jurors may be crucial to empanelling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.

\textit{Id.} at 69 (O'Connor, J., dissenting).

103. \textit{Id.} at 60.
104. \textit{Id.} at 57.
105. \textit{Id.} at 58.
106. \textit{Id.} at 61-62. \textit{See also The Supreme Court—Leading Cases,} 106 \textit{Harv. L. Rev.} 163, 241 (1992)("In striking its latest blow against race-based jury selection, the Court has saved prospective jurors from the dignitary harm caused by race-based peremptories only by subjecting criminal defendants to the greater risk that they will be deprived of life or liberty because of their race. Moreover, the Court substituted one discriminatory evil for another without critically assessing the relative harms of each.").
Most recently, in *J.E.B. v. Alabama ex. rel. T.B.*, the Court extended *Batson* to prohibit peremptory strikes based on gender. While *J.E.B.* reversed a conviction based on the government's exercise of peremptory challenges, given the precedent of *McCollum*, its prohibition will necessarily be extended to criminal defendants as well. Prohibition of gender-based strikes must surmount a logical barrier not faced in the case of race-based strikes. Since women are not a numerical minority, peremptory challenges against them by one party will not result in their exclusion from petit juries, especially where, as will commonly be the case, the other party uses peremptory challenges to exclude men.

The Court dispensed with this fact in a footnote:

> It is irrelevant that women, unlike African-Americans, are not a numerical minority and therefore are likely to remain on the jury if each side uses its peremptory challenges in an equally discriminatory fashion. . . . The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.

Since, in the case of gender, there is no danger of regular exclusion of jurors of either sex, the burden of the Court's holding must rest almost entirely on the Court's perception of "public confidence in the fairness of the system," that is, the ritual aspect of the communitarian function. The Court emphasized that:

> The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders. When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women.

Thus, putting aside the communitarian interest in justice for the litigants, the Court in *J.E.B.* held that the mere presence of stereotypes and discrimination in a public trial results in an unacceptable harm to the community.

Given that, in general, one cannot expect prosecutors or defendants to exercise challenges more often against one sex than the other, and that gender-based challenges will not result, therefore, in systematic exclusion of either men or women, it is not at all clear how the striking of men or women in a particular case will adversely affect the trial's communitarian function. In particular, it is unclear how gender-based peremptory strikes would reflect on the relative abilities of either gender or how it would shake public confidence in the adminis-

108. Id. at 1428 n.13.
109. Id.
110. Id. at 1427.
Finally, it should not be forgotten that although the Court in *J.E.B.* relied heavily for its decision on the historical discrimination against women, its holding was to reverse the conviction of a male defendant in a paternity action because the government used its peremptory strikes to excuse potential male jurors.

While the holding of *J.E.B.* was to reverse the conviction of a criminal defendant, its ultimate effect is inevitably to limit further the use of peremptory challenges by both the government and defendants. Thus, the effect of *J.E.B.* is to impair whatever value the peremptory system has for securing an impartial jury as guaranteed by the Sixth Amendment. Since one cannot expect that either sex will be disproportionately subject to peremptory exclusion, the virtually sole justification for that holding is the ritual aspect of the communitarian function and the Court's perception that gender-based strikes will undermine the faith of the community in the administration of justice.

4. Conclusions

By disallowing race-based peremptory strikes by criminal defendants in *McCollum* and gender-based strikes, as is the inevitable result of *J.E.B.*, the Court has implicitly concluded that the communitarian function of the criminal jury, and particularly its ritual purpose of maintaining public confidence in the administration of justice, justifies a significant burden on the ability of the defendant to eliminate potentially biased jurors. Thus, the trial's communitarian ritual purpose may place a significant burden on a criminal defendant's right to obtain a fair trial. While the Court's decisions emphasize the rights of individual jurors, which are closely allied in any case with the participatory aspect of the communitarian function, they also invoke the communitarian function and can be fully explained, especially in the case of gender-based strikes, only by reference to that function. The Court has held, in effect, that the goal of freedom from group bias, and the perceived importance to that goal of not allowing expressions of group bias in court proceedings, justify limitations on the ability of the accused to eliminate potentially biased jurors.

Ironically, it is the reality of continued group bias that makes that holding a burden on the accused, particularly the minority defendant. Implicit in the NAACP's amicus argument in *McCollum*—that "[t]he ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury"112—is the belief that majority race jurors are more likely to be biased against a minority defendant.

111. Justice O'Connor argued in dissent, with reference to cases of rape, sexual harassment, child custody and spousal or child abuse, that "one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case." *Id.* at 1432.
112. *See supra* note 102.
Without the use of race-based peremptory challenges, the minority defendant may have no ability to secure minority representation on her jury.

Unlike the defendant's right to jury waiver, which presents a simple balance between the Sixth Amendment rights of the accused and the public's interest in the communitarian function of trial by jury, the defendant's right to exercise group-based challenges also implicates the Fourteenth Amendment rights of jurors and the paramount public goal of eliminating race and gender discrimination. Nonetheless, as in the case of jury waiver, the ritual purpose of promoting public confidence and faith in the administration of justice is significantly compromised if the result is to burden the defendant's ability to obtain an impartial jury. Nor should the defendant's Sixth Amendment right to an impartial jury be summarily swept aside, as it was by the majority in *McCollum*, with the conclusory assertion that the Sixth Amendment does not justify discrimination. The defendant may herself be a victim of majoritarian bias with no means other than peremptory challenges to attempt to obtain a jury that is the least prone to bias against her.

Therefore, even assuming the correctness of the *McCollum* Court's holding that the defendant is a state actor when she exercises peremptory challenges, a minority defendant's use of group-based challenges to secure minority representation on the petit jury should be presumptively valid and not subject to the justification requirements of *Batson/McCollum*. This conclusion is justified by the historical purpose of the Fourteenth Amendment as well as the Sixth Amendment rights of the accused. It should be presumed that such challenges are for the legitimate purpose of avoiding the effects of historical discrimination.

V. THE PUBLIC TRIAL GUARANTEE

"Public trial" is mandated by the Sixth Amendment and is a right of the accused. As set forth in *Estes v. Texas*, "The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. History has proven that secret tribunals were effective instruments of oppression." Members of the public have no right under the Sixth and Fourteenth

113. This issue is beyond the scope of this Article.
114. *Estes v. Texas*, 381 U.S. 532, 538-39 (1965). *See also* *Estes v. Texas*, 381 U.S. 532, 588 (1965)(Harlan, J., concurring)("[T]he right of 'public trial' is not one belonging to the public, but one belonging to the accused."); *In re Oliver*, 333 U.S. 257, 270 (1948)(public trial is a "safeguard against any attempt to employ our courts as instruments of persecution").
Amendments to attend criminal trials. The public nature of criminal trials is, of course, also essential to their communitarian function. If not public, the participatory, educational and ritual aspects of the criminal trial’s communitarian function would all be severely curtailed.

The televising of criminal trials, an issue that presented itself for the first time in the 1960s, would seem to provide a significant opportunity for expansion of the communitarian function. Televised coverage of criminal trials has the potential to increase by orders of magnitude the community of citizens able to observe trials directly. This is particularly true of those criminal proceedings that have aroused public interest and controversy and would therefore presumably be prime objects for television coverage.

A criminal defendant may, on the other hand, believe that televising coverage will impair her right to an impartial jury and a fair trial. Televised coverage of preliminary proceedings or other aspects of the criminal process to which the jury is not privy, may, for example, subvert the rules of evidence by exposing jurors or potential jurors to inadmissible evidence or argument. An unpopular defendant may also believe with justification that televised coverage will increase the pressure on the jury for conviction and will inhibit the willingness of defense witnesses to come forward and testify candidly. Even judges, it is argued, may be affected in the performance of their duties by the presence of television cameras. In general, television coverage can be expected to amplify the majoritarian pressures that may bias the fair trial rights of an unpopular defendant.


116. The trial of O.J. Simpson attracted unprecedented numbers of television viewers. See, e.g., Hal Bodeker, Simpson’s Verdict Drew Best Ratings in TV History; About 75% of U.S. Adults Watched, And That Doesn’t Count the People Watching Outside of Their Homes, The Orlando Sentinel, Oct. 5, 1995, at A4; Fred Brunning, The Simpson Trial; A Must TV Watch, Maclean’s, Apr. 17, 1995, at 13; 50 Million Watch TV Court Drama; A Murder of Jealousy; O.J. Simpson The Trial!, Scottish Daily Record & Sunday Mail, Jan. 25, 1995, at 12; The Simpson Case; 57% Watched the Verdict, N.Y. Times, Oct. 5, 1995, at 18B (“About 107.7 million people, or 57 percent of the nation’s adult populations watched the live telecast of the verdict in O.J. Simpson’s murder trial . . . according to a survey commissioned by the Cable News Network.”).

117. This will not always be the case. In United States v. Hastings, 695 F.2d 1278 (11th Cir. 1983), the defendant, a federal judge, moved to permit televising of his criminal trial and argued that he was entitled to televised coverage under the public trial provision of the Sixth Amendment. Judge Hastings “favor[ed] televising of his trial so that his reputation [could] be restored.” Id. at 1279 n.6. Denial of his motion was affi rmed by the Eleventh Circuit.
The Supreme Court first addressed the issue of televised coverage of a criminal trial in *Estes v. Texas*.\(^\text{118}\) In *Estes*, the Court reviewed the much publicized trial and conviction of Billie Sol Estes for swindling. The Supreme Court held that the televising and broadcasting of the trial over the defendant's objection created the probability of prejudice to the accused and, therefore, violated his fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.

The result in *Estes* would seem, at first blush, to assert the fair trial rights of the accused over the communitarian function of his trial, in which the public had taken great interest. The Court, indeed, reviewed a seemingly overwhelming array of ways in which televising of the trial might create unfairness for the defendant. As summarized by the syllabus to the opinion:

> There are numerous respects in which televising court proceedings may alone, and in combination almost certainly will, cause unfairness, such as: (1) improperly influencing jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, distracting their attention, facilitating (in States which do not sequester jurors) their viewing of selected parts of the proceedings, and improperly influencing potential jurors and thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, and generally influencing the testimony of witnesses, thus frustrating invocation of the "rule" against witnesses; (3) distracting judges generally and exercising an adverse psychological effect particularly upon those who are elected; and (4) imposing pressure upon the defendant and intruding into the confidential attorney-client relationship.\(^\text{119}\)

The Court decried the power of the television camera to "destroy an accused and his case in the eyes of the public."\(^\text{120}\)

Chief Justice Warren, in his concurring opinion, argued specifically "that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt."\(^\text{121}\) He eschewed any other function of the criminal trial, especially its ritual function:

> The decision below affirming petitioner's conviction runs counter to the evolution of Anglo-American criminal procedure over a period of centuries. During that time the criminal trial has developed from a ritual practically devoid of rational justification to a fact-finding process, the acknowledged purpose of which is to provide a fair and reliable determination of guilt.\(^\text{122}\)

Thus, one might conclude that the Court in this context gave no consideration to the criminal jury trial's communitarian function.

Closer examination of *Estes v. Texas*, and Chief Justice Warren's concurring opinion in particular, suggests, however, that the Court

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\(^{118}\) 381 U.S. 532 (1965).
\(^{119}\) Id. at 533.
\(^{120}\) Id. at 549.
\(^{121}\) Id. at 565.
\(^{122}\) Id. at 557.
did not so much reject the communitarian function of criminal jury trials, as it reached the conclusion that televising of trials is contrary to their proper communitarian function. Televising of trials was rejected by *Estes* not solely because it was believed to impair the defendant's right to a fair trial, but also because it was believed to communicate to the public the wrong message about the nature of court proceedings.

Chief Justice Warren concluded his opinion stating “that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large” not only because of its potential for prejudice to the defendant, but because “it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials.” He argued that “[t]he sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization” and posed the question: “Can we be sure that the public would not inherently distrust our system of justice because of its intimate association with a commercial enterprise?”

Chief Justice Warren also argued explicitly against the educational aspect of the communitarian function, but for the same reason—that a conscious attempt to use the trial for educational purposes would subvert its ritual function of fostering public confidence in the administration of justice:

> It is argued that television not only entertains but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process.

It was not that trial by jury had no communitarian purpose, but rather, Warren believed, that it failed to serve its communitarian purpose when used as an educational tool. Thus, it was held that televising coverage served to subvert rather than support the function of the public jury trial in establishing community confidence in the fair administration of justice.

*Estes*, decided like *Swain* in 1965, was effectively overruled 15 years later in *Chandler v. Florida*. *Chandler* interpreted *Estes* as “not announc[ing] a constitutional rule that all photographic or broad-
cast coverage of criminal trials is inherently a denial of due process” and declined to promulgate such a rule. The Court held that the Constitution does not prohibit states from experimenting with televised coverage of criminal trials.

In reaching that result, the Court noted, first of all, that there had been no showing of actual prejudice from the televising of trials. Secondly, the Court noted that advances in technology since Estes made television equipment less obtrusive. As pointed out by Justice Stewart in his concurrence, however, there was no demonstration of actual prejudice in Estes, and the television equipment was found there to be unobtrusive.

The Court’s switch on its view of television coverage may be explained in part by a differing view as to the prejudicial impact on the defendant. The Court noted in Chandler that no one had demonstrated empirically what the Court had assumed in Estes—that television necessarily has an adverse effect on due process to the defendant. However, the potentially detrimental effects on jurors, witnesses and judges noted by Estes remain essentially undiminished.

What must be weighed against the burden on the accused, who seeks to exclude television coverage of her trial, is the value of television coverage for augmenting the communitarian function of the criminal trial. As noted in Chandler, the Florida practice it reviewed was justified by reference to the educational and ritual aspects of the communitarian function:

127. Because there were four dissenters in Estes, the Court in Chandler looked to Justice Harlan’s concurring opinion to define the scope of the Court’s holding. The Court reached the conclusion that Estes did not announce a per se rule against television coverage based on some equivocal language in Justice Harlan’s opinion—“At the present juncture I can only conclude that televised trials, at least in cases like this one . . .!” Id. at 573 (quoting Estes v. Texas, 381 U.S. 532, 596 (1965)). Justice Stewart, concurring in Chandler, expressed the view that the Court was overruling Estes:

The Court in Estes found the admittedly unobtrusive presence of television cameras in a criminal trial to be inherently prejudicial, and thus violative of due process of law. Today the Court reaches precisely the opposite conclusion. I have no trouble in agreeing with the Court today, but I would acknowledge our square departure from precedent.

Id. at 586.


The Florida court was of the view that because of the significant effect of the courts on the day-to-day lives of the citizenry, it was essential that the people have confidence in the process. It felt that broadcast coverage of trials would contribute to wider public acceptance and understanding of decisions.130

Indeed, if one gives any credence to the extensive sources of potential prejudice to the defendant cataloged by the Court in Estes, substantial weight must be given to the communitarian function to justify television cameras in the courtroom.131

The Court's switch from Estes to Chandler can only be explained by a shift from the view expressed by Chief Justice Warren that the criminal trial's sole purpose is reliable determination of guilt and/or a changed view of the communitarian value of television coverage. What is clear is that, in the absence of demonstrable prejudice from the television coverage, which will be exceedingly hard to demonstrate, the states are free to allow television coverage. This remains the case despite a defendant's objection, and despite the resulting burdens on the fair trial rights of the accused set forth in Estes. As in the case of the requirement of prosecutorial consent to jury waiver and the limitation of defendants' use of peremptory challenges, that result can only be rationalized by giving constitutional weight to the communitarian function of the criminal jury trial.

For the same reasons that pertain in the case of jury waiver, a presumption should be exercised in favor of a defendant's motion to preclude television coverage. As in the case of the right to public trial itself, the right to public trial is set forth in the Sixth Amendment as a right of the accused and as a safeguard against the exercise of arbitrary power by the government. Similar to jury waiver, there is no reason to doubt that the defendant who seeks to preclude television coverage is genuinely motivated by fear of resulting bias.132 And finally, if television coverage results in bias to the defendant of the kind described in Estes, the communitarian justification for television coverage is compromised. A defendant's motion to preclude television coverage should, therefore, be granted in the absence of a clear showing that it will not result in prejudice.

VI. CONCLUSION

In each of the three circumstances examined—where a defendant seeks to waive her right to a jury, to exercise peremptory strikes to

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130. Id. at 565-66.
131. The Court has consistently held that the public and the media have no rights to insist upon a public trial. Gannett Co. v. DePasquale, 443 U.S. 368, 379-81 (1979).
132. The operation of this principle is, however, significantly weaker than in the case of jury waiver, since television coverage, unlike trial by jury, does not normally provide any particular advantage to the defendant.
eliminate a cognizable group of jurors, or to prevent televising of her trial—the defendant seeks to avoid bias which, though palpable, will be exceedingly difficult, if not impossible, to demonstrate. Defendants who are victims of majoritarian bias (because of their minority race or because they have espoused unpopular beliefs or for some other reason) may be particularly in need of the protection sought in each instance. Defendants who seek these protections can be presumed to do so out of a genuine perception of bias. To assume otherwise would be to assume that the defendant is acting against her penal interest. This is particularly true in the case of a defendant who seeks to waive her jury trial rights altogether and submit her fate to a single judge.

In each circumstance, however, granting the request of the defendant will limit if not quash the communitarian function of the criminal jury in promoting community participation, education and ritual affirmation. In the case of waiver, the jury is eliminated altogether. Where television coverage is precluded despite public interest that would support it, an opportunity for larger community involvement is cut off. And if the defendant is allowed to exercise peremptories to strike a cognizable group of jurors, the social myth or goal of freedom from group bias is impaired.

There is, therefore, conflict between the rights of the accused and the communitarian function inherent in each of these circumstances. As demonstrated above, the Court has largely ignored that conflict, primarily by engaging in legal fictions. In the case of prosecutorial veto over the defendant's jury waiver, the Court has relied on the fiction of the neutral prosecutor. In the case of the defendant's exercise of peremptory strikes, the Court has treated the criminal defendant as a state actor when exercising peremptories, and it has accordingly relied on the illegality of discrimination by the state to obviate the need to balance the communitarian function and the participation rights of jurors against the rights of the accused. In the case of the televising of trials, the Court has ignored its own findings in Estes, partly through reference to technological advance and despite the fact that Estes found that the technology at issue was unobtrusive.

In each case, an implicit balance has been struck in favor of the communitarian function and against the rights of the accused. This is true despite the fact that the Sixth Amendment establishes public jury trial in criminal cases as a right of the accused and despite the fact that the interest of the community in public criminal jury trials is never articulated in the Constitution.

Article III, Section 2 of the Constitution does provide, however, without reference to the rights of the accused, that "[t]he trial of all crimes except in cases of impeachment shall be by jury. . . ." Though the Court, in Patton, concluded that this provision must be read together with the Sixth Amendment as conferring a right upon the ac-
cused, it nonetheless provides a constitutional basis for trial by jury independent of the rights of the accused or the reliable determination of guilt or innocence. Though never relied on in this vein, Article III, Section 2 gives some justification, therefore, for the constitutional value implicitly accorded in decisions of the Court to the communitarian function of the criminal jury trial.

Nonetheless, where this inchoate community interest clashes with the legitimate attempts of the accused to avoid majoritarian bias, a presumption should be exercised in favor of the rights of the accused. First of all, despite the genuine community interest in public criminal trial by jury and the general provisions of Article III, Section 2 that give a constitutional foundation to that interest, the specific provisions of the Sixth Amendment, firmly tied to protection of the fair trial rights of the accused, should prevail where individual and community interests appear to clash. As a corollary, while the bias that the accused seeks to avoid may be difficult to demonstrate, the "public confidence" that the communitarian function seeks to instill is particularly amorphous and prone to changing perceptions.\footnote{133. As noted above, "public confidence" has been argued on both sides of the peremptory challenge issue.}

Secondly, analysis of the right to public jury trial in the modern democratic context reinforces that conclusion. While the right of the criminally accused to public trial by jury was historically constructed as a barrier against the arbitrary power of the government (and the monarch in particular), the danger to the accused in modern democratic society may as likely come from majoritarian bias in the jury pool as from the court. Indeed, one of the primary functions of the independent judiciary in our democratic government is to protect the individual against the majoritarian bias of the community.

Finally, the legitimate attempts of a defendant to protect against majoritarian bias should prevail against the interests of the community where there is a perceived conflict because the communitarian function is itself compromised when it is asserted to burden the fair trial rights of the accused. An important aspect of the communitarian function is its utility in maintaining community faith in the administration of justice. If the insistence on trial by jury or television coverage or limitations on the use of peremptory challenges, to take the examples focused on here, while promoting community participation also result in biased proceedings, the communitarian function will be severely compromised. The public faith and confidence that it would instill will ultimately suffer rather than flourish.

Therefore, the request of a defendant for protection from majoritarian bias—by waiving her jury and being tried by the court, by exercising peremptory challenges to secure minority representation
on her jury, or by avoiding the majority pressures created by television coverage—should normally be honored absent the government's ability to demonstrate that there is no genuine danger of bias or the defendant is making her request for some ulterior purpose. Only when the accused's rights to an impartial trial are jealously guarded can the values of the criminal jury's communitarian function be truly realized.