

Winter 2014

Negotiating Peremptory Challenges

Caren Myers Morrison

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#)

Recommended Citation

Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1 (2014).
<https://scholarlycommons.law.northwestern.edu/jclc/vol104/iss1/1>

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

CRIMINAL LAW

NEGOTIATING PEREMPTORY CHALLENGES

CAREN MYERS MORRISON*

Peremptory challenges enable litigants to remove otherwise qualified prospective jurors from the jury panel without any showing of cause, and accordingly, are often exercised on the basis of race. In Batson v. Kentucky, the Supreme Court tried to remedy the most obvious abuses by requiring that strike proponents give a “race neutral” reason for their strikes and directing trial courts to assess the credibility of the explanation. But the Batson regime has proved spectacularly unsuccessful. It has not ended racial discrimination in jury selection, nor does it adequately safeguard the rights of the excluded jurors.

One of the reasons for this failure is that the Batson framework rests on psychologically naïve theories of human behavior. These are that (1) considerations of race can be purged from the jury selection process, (2) lawyers will be aware of their motivations for striking particular jurors and will report these reasons honestly, and (3) judges will be able to distinguish between honest and dishonest explanations. But these theories are inconsistent with recent advances in cognitive psychology, which suggest instead that most of us retain implicit biases against racial minorities, even when we believe that we are unbiased.

If implicit bias is indeed a pervasive fact, then we need to find effective ways to prevent it from dictating outcomes. I therefore propose that we jettison the inherently unstable framework of Batson and allow peremptory challenges only on consent of both parties with the challenges waived if no agreement is reached. The benefits of this proposal would be

* Assistant Professor of Law, Georgia State University College of Law. I am grateful to Al Alschuler, Jeff Bellin, Russ Covey, Jancy Hoeffel, Nancy Marder, Dan Richman, Nirej Sekhon, and Jonathan Todres for their thoughtful comments on earlier drafts of this piece. Special thanks to my research assistants, Mary Ellen Lighthiser, Morgan Medders, and Leslie Smith, and to Pam Brannon, librarian extraordinaire.

similar to abolition of the peremptory challenge: less litigation, a more robust safeguard against racial discrimination, and potentially broader participation by prospective jurors. But because this proposal retains the use of peremptory challenges on consent, it would better preserve party autonomy and the acceptability of verdicts. Ultimately, negotiating peremptory challenges could protect the rights of the excluded jurors, preserve the original benefits of the peremptory challenge, and maintain the dignity of all participants.

TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION..... | 3 |
| I. THE CONTESTED FUNCTION OF THE PEREMPTORY CHALLENGE..... | 9 |
| A. The Origins of the Challenge | 10 |
| B. Justifications for the Challenge | 11 |
| C. The Peremptory Challenge in America | 17 |
| D. Responses | 21 |
| II. THE TROUBLE WITH <i>BATSON</i> | 26 |
| A. Unwieldiness | 26 |
| B. The Problem of Implicit Bias | 30 |
| C. Misunderstanding the Attorney's Role..... | 34 |
| D. <i>Batson's</i> Failure to Remedy the Exclusion of Minorities from Juries | 37 |
| III. NEGOTIATING PEREMPTORY CHALLENGES | 42 |
| A. The Mechanics of the Proposal | 42 |
| B. The Benefits of a Negotiation Model | 45 |
| C. Critiques and Rebuttal | 49 |
| CONCLUSION..... | 57 |

INTRODUCTION

“[I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without sh[ow]ing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.”

—William Blackstone¹

Of all the contests of wit and will involved in trial practice, none are as fraught as jury selection. If the trial—the impassioned closing argument or the devastating cross-examination—has pride of place in public mythology, jury selection holds that honor among lawyers. Sometimes said to determine the outcome of a trial even before the first witness is sworn,² it is a procedure regarded with a peculiar blend of reverence and suspicion. It can consume weeks of court time and hundreds of thousands of dollars of consultant fees. But the primary source of ambivalence about jury selection coalesces around the peremptory challenge and the complicated, counterintuitive scaffolding we have erected around it to prevent its misuse.

Peremptory challenges, also known as peremptory strikes, enable litigants to remove otherwise qualified prospective jurors from their jury panel without any showing of cause. Empirical study—consonant with common intuition—has long revealed that both prosecutors and defense counsel use peremptory challenges to rid the jury of the types of jurors they find most threatening, and that these types correlate with age, gender, and particularly, race.³ This means that not only do nonwhite defendants frequently have to face trial without any of their peers on their jury but also that substantial numbers of citizens, who have survived challenges for cause only to be summarily dismissed, are denied the opportunity to participate in an important aspect of civic life.

¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *353. “*In favorem vitae*” means “in favor of life”; presumably the peremptory challenge at its inception was a means of mitigating the death penalty, the standard punishment for most felonies in eighteenth century England. See JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 6, 334 (2003) (noting how the English “Bloody Code” overprescribed capital punishment, including for property offenses).

² Jeffrey Abramson notes the famous quip about the difference between trials in England, which abolished peremptory challenges twenty-five years ago, and trials in the United States: “[I]n England, the trial starts when jury selection is over; in the United States, the trial is already over.” JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 143 (1994); see also Herald P. Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 LAW & CONTEMP. PROBS. 116, 116 (1980) (“In most cases, the defendant’s fate is fixed after jury selection.”).

³ See David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 51–69 (2001).

The framework established by the Supreme Court's 1986 decision in *Batson v. Kentucky* and its progeny tried to remedy the most obvious abuses of the peremptory challenge based on race, and later, gender.⁴ The Court thus required that strike proponents give a "race neutral" reason for the strike and directed the trial courts to assess the credibility of the explanation. But the *Batson* regime has proved largely unsuccessful. Lawyers are often inhibited from raising *Batson* claims for fear of antagonizing their opponent or the judge, and judges are inhibited from granting *Batson* motions because of the implied judgment that the strike's proponent is either a racist, a liar, or both. The requirement of a race-neutral explanation for peremptory strikes has not ended racial discrimination in jury selection, nor does it adequately safeguard the rights of the excluded jurors. And it is embarrassing to everyone because it is a pretense—everyone is forced to assert, under pains of violating the Constitution, that race was not a factor in their decisions.

While the *Batson* framework relies on apparently commonsense assumptions about human behavior, these assumptions are contrary to what we know about human mental processes and the influence of race on decisionmaking.⁵ The behavioral theories that seem to undergird *Batson* are that (1) considerations of race can be purged from the jury selection process, (2) lawyers will be aware of their motivations for striking particular jurors and will report these reasons honestly, and (3) judges will be able to distinguish between honest and dishonest explanations.⁶ But these theories are inconsistent with recent advances in cognitive social psychology. While long suspected, there is now substantial empirical evidence that most of us labor under some amount of implicit bias against racial minorities, even when we believe ourselves to be unbiased.⁷ The

⁴ See *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986) (holding that the Equal Protection Clause forbids racial discrimination in the prosecutor's use of peremptory challenges). The cases that followed extended *Batson*'s protection to gender. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (extending constitutional protection to strikes based on gender). In view of history and the focus of social psychological research, I will focus primarily in this Article on the effects of peremptory challenges on African-Americans.

⁵ See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1006 (2006) ("When subjected to empirical scrutiny, 'common sense' theories of how people perceive and judge themselves and others in their social environment often turn out to be wrong.").

⁶ See Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1104–05 (1994) ("[T]hose who want to discriminate will know enough to conceal their intent, and the Court has failed to explain how that intent is to be divined, leaving trial judges by and large to hew to the tradition of arbitrary strikes and allow peremptory challenges in doubtful cases.").

⁷ See Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL PSYCHOL. 316, 316–17 (2000) (noting

Batson framework operates as if implicit bias barely exists when it almost certainly is a significant factor in jury selection and one that is not amenable to self-report. It is time to subject *Batson* to behavioral realism—the demand “that the law account for the most accurate model of human thought, decisionmaking, and action provided by the sciences.”⁸

There has been no shortage of proposals aimed at remedying racial discrimination in jury selection, ranging from “affirmative strikes” to establishing racial quotas on trial juries.⁹ Ultimately, the most effective alternative to *Batson* would also be the simplest: the abolition of peremptory challenges. Proponents argue that eliminating the challenge would put an end to invidious discrimination, cut down on wasteful litigation, and free lawyers from the contortions of trying to deny all influence of race on their decisionmaking.¹⁰ But abolition presents two problems. First, however compelling the arguments, they cannot override one simple truth: American lawyers *like* peremptory challenges. Many litigators view peremptory challenges as essential tools for sculpting a jury that will give them and their clients the most favorable audience. As one former litigator has observed, trial lawyers “would sooner dispense with a few amendments to the Constitution than give up peremptory challenges.”¹¹ Accordingly, no U.S. jurisdiction has ever eliminated peremptory challenges.¹² Second, there is an intrinsic value to the peremptory challenge that would be lost if it were eliminated. Peremptory challenges allow litigants to participate in the creation of the factfinder, free from interference by courts. This value of autonomy should not be lightly discarded.

research suggesting that despite a decline in overt racism, “subtle and implicit forms of prejudice and discrimination remain pervasive”); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 966 (2006) (concluding that “a substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans”); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 5–6 (1995) (noting that unconscious or automatic operation of stereotypes often escapes introspective notice); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465 (1998) (identifying implicit attitudes and associations “which might be expected for White subjects raised in a culture imbued with pervasive residues of a history of anti-Black discrimination”).

⁸ Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 468 (2010).

⁹ See *infra* Part I.D.1.

¹⁰ See *infra* Part II.B.

¹¹ Morris B. Hoffman, *Peremptory Challenges: Lawyers Are from Mars, Judges Are from Venus*, 3 GREEN BAG 2D 135, 136 (2000).

¹² To the contrary, every U.S. jurisdiction provides for peremptory challenges. See *infra* note 23 and accompanying text.

So we find ourselves at an impasse. We can keep tinkering with the formula. We can keep issuing impassioned, but doomed, calls for abolition. Or we can recognize that jury selection, at the discretionary, peremptory challenge stage, simply should not be constitutionalized. It may be time to admit that the *Batson* experiment has failed because stereotyping in some form is the essence of jury selection.¹³ But that does not mean we need to revert to the bad, old days of institutionalized racism, where many prosecutors' offices had policies of systematically purging jury panels of African-American jurors.¹⁴ Instead, we should consider a different approach for using peremptory challenges: that they be allowed only on consent.

If implicit bias is indeed a pervasive fact, the question then becomes how to prevent it from dictating outcomes in a discriminatory way. Having parties swear that no considerations of race entered their minds in deciding which jurors to strike does not provide the moral message we think it does. Instead of sending a clear signal that racial discrimination will not be tolerated, the *Batson* hearing is usually a far more degrading exercise and one that does not prevent minorities from being summarily excluded from jury service. When explanations such as "he looks like a drug dealer to me"¹⁵ are accepted as "race neutral," the message is effective tolerance of racial bias.

Drawing on empirical studies, psychological research, and the emerging school of behavioral realism, I suggest that courts should abandon the failed constitutional experiment of trying to divine attorney intent. Social science research strongly suggests that such an undertaking is futile and only encourages specious explanations. Instead, we should focus on what really matters: increasing the opportunities for all Americans to participate in jury service, allowing defendants a greater chance to have

¹³ See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 447 (1996) ("[E]valuating people on the basis of stereotypes is an inherent aspect of the peremptory challenge system.").

¹⁴ Throughout this Article, I will use the terms "African-American" and "black" interchangeably. When referring to all racial and ethnic groups other than the dominant majority, I will use the term "nonwhite" or "minority."

¹⁵ *State v. Crawford*, 873 So. 2d 768, 780, 783–84 (La. Ct. App. 2004) (affirming trial court's finding of race-neutrality in a strike where prosecutor stated, "I don't like the way he's dressed. He looks like a drug dealer to me"); see also *Jackson v. State*, 5 So. 3d 1144, 1149–50 (Miss. Ct. App. 2008) (affirming trial court's finding of race-neutrality in a strike where a prosecutor explained that a juror was "inattentive" and "had dyed-red hair"); *State v. Tyler*, No. M2005–00500–CCA–R3–CD, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006) (affirming ruling of race-neutrality where prosecutor explained a strike used on a black juror on the ground that she "had a hat on, kind of a large white hat, with sunglasses on" and "would have brought some attention to herself").

peers on their jury,¹⁶ and protecting the dignity of all participants, litigants and prospective jurors alike. We should therefore jettison the procedurally unwieldy, inherently unstable world of *Batson* and replace it with a system in which the parties could determine which prospective jurors should be challenged through negotiation.

Under this proposal, voir dire would proceed as usual.¹⁷ Lawyers would raise any challenges for cause, on which the court would rule. Then, each side would be presented with a panel of twelve qualified, impartial jurors. But instead of each side only conferring with her client or co-counsel to decide which jurors to strike peremptorily, the adversaries would confer with each other. Neither party would have exclusive power to decide, and any strikes would be the product of mutual consent. If the parties agreed to a shortlist of jurors to strike, they would then present their choices to the court. The struck jurors would not know which side had struck them or if the strike was the product of a joint decision. The lawyers would not have to make excuses for their actions. If the parties failed to reach an agreement, they would end up with the first twelve jurors on the panel. Abolition, therefore, would be the default position, the price to pay if the parties failed to come to terms in any given case.

While negotiation may seem to be a counterintuitive solution to the problems raised by peremptory challenges, it is closer to a challenge-based system than might initially be apparent. Notwithstanding the juror-centered conception of rights promoted by the *Batson* line of cases, enforcement of these rights is largely a matter of adversarial preference. While judges have the authority to raise *Batson* objections *sua sponte*, they appear to exercise this power extremely rarely.¹⁸ So whether a peremptory strike is subject to

¹⁶ Jury diversity may in fact be significant to trial outcomes in a substantial number of cases. A recent empirical study found statistically significant disparities in outcome between juries selected from all-white jury pools and juries selected from racially mixed pools. See Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019–20 (2012).

¹⁷ None of this is intended to argue for a reduced or limited voir dire. The most persuasive arguments made in this sphere are for more detailed, individualized voir dire, precisely so that the lawyers have something other than stereotypes upon which to base their decisions. See, e.g., Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1198–1201 (2003) (arguing for expanded, individualized voir dire).

¹⁸ See *People v. Rivera*, 852 N.E.2d 771, 785 (Ill. 2006) (holding that “a trial court has the authority to raise a *Batson* issue *sua sponte* in appropriate circumstances”), *aff’d* *Rivera v. Illinois*, 129 S. Ct. 1446, 1456 (2009); *State v. Mootz*, 808 N.W.2d 207, 217 (Iowa 2012) (“While we recognize a trial court may raise the issue of purposeful racial discrimination *sua sponte*, like other jurisdictions to consider this issue, we will also insist upon a clear indication of a *prima facie* case of purposeful discrimination *before* trial courts are authorized to act.” (internal quotation marks and citation omitted)). However, the Illinois

the *Batson* analysis in the first place is typically dependent on attorney choice.¹⁹ Negotiation just provides another means of expressing party preferences.

Some of the benefits of this proposal would be similar to those gained by eliminating the peremptory challenge: less litigation, a more robust safeguard against racial discrimination, and potentially broader participation by prospective jurors. But unlike simply eliminating peremptory challenges, negotiation would better preserve party autonomy and the acceptability of verdicts by maintaining some ability of the parties to sculpt a jury of their own choosing.

Part I of this Article briefly sketches the history of the peremptory challenge and the theoretical and practical justifications for its use. It argues that, of all the reasons given in support of the peremptory challenge, the only justification that is specific to the peremptory challenge, as opposed to the challenge for cause, is party autonomy and independence from the court. This Part details how the *Batson* regime changed, in some important ways, the nature of the peremptory challenge and infringed on the most justifiable reason for its existence.

Part II reviews the reasons why an alternative to the *Batson* structure is desirable, even necessary. This Part considers the claims in the literature and by practitioners and judges that the *Batson* framework is not effective at eradicating racial discrimination and examines some of the reasons why this is so. It argues that the *Batson* line of cases fundamentally misunderstood attorneys' motivations and rested its entire framework on unsupported assumptions about human behavior. As the most recent cognitive science points in just the opposite direction, this Part contends that the *Batson* doctrine needs to come to terms with empirical reality.

Part III outlines the proposal of negotiating peremptory challenges in more detail and explores the ways in which negotiation would provide a more robust shield against discrimination, protect the original purposes of the peremptory challenge, and preserve the dignity of the court and the

Supreme Court in *Rivera* added that the “*prima facie* case of discrimination must be abundantly clear before a trial court acts *sua sponte*.” 852 N.E.2d at 785. In addition, at least some courts frown upon judges raising *Batson* claims *sua sponte*. See, e.g., *Aki-Khuam v. Davis*, 339 F.3d 521, 527 (7th Cir. 2003) (“[T]he voir dire process is still an adversarial one and the case law, including *Batson* and the cases that followed it, make it clear that *Batson* issues must be raised. *Batson* is not self-executing.” (internal quotation marks and citation omitted)); *Doe v. Burnham*, 6 F.3d 476, 481 (7th Cir. 1993) (“Under *Batson*, a court should at least wait for an objection before intervening in the process of jury selection to set aside a peremptory challenge. . . . Judges should invade a party’s discretion to strike potential jurors only in narrow circumstances.” (citation omitted)).

¹⁹ Many lawyers are reluctant to raise *Batson* claims, lest they draw their own *Batson* objections in response. See *infra* notes 133–35 and accompanying text.

participants. This Part considers the potential doctrinal and practical critiques of the proposal, particularly the concerns that the proposal would not protect the rights of the absent jurors, that it would enable lawyers to engage in collusion, and that it would unfairly benefit the defense. The Article concludes that, despite certain inevitable shortcomings, negotiating peremptory challenges would be a significant improvement over our current regime.

I. THE CONTESTED FUNCTION OF THE PEREMPTORY CHALLENGE

The process of jury selection involves two related but distinct inquiries: a search for qualified jurors and a shaping of the jury through peremptory challenges.²⁰ To begin, prospective jurors are questioned in a process known as *voir dire*.²¹ If a prospective juror appears to have prejudged the case or seems biased for any reason, she can be challenged for cause, and that motion will be ruled on by the court.²² In addition, the parties may exercise a set number of peremptory challenges and remove any jurors without cause.²³ The twelve²⁴ who remain, not counting any alternate jurors, are then sworn and become the trial jury. This Part considers the historical origins of the peremptory challenge, the justifications for this practice in the modern justice system, and how its complexion has been transformed by *Batson* and its progeny.

²⁰ Jury selection procedures are not necessarily sequential, as different jurisdictions employ different methods.

²¹ *Voir dire* is conducted either by the lawyers, the judge, or some combination of both, depending on the jurisdiction. Some *voir dire* procedures are quick and judge-led, questioning the jurors in groups, while others rely on questionnaires and individualized follow-up.

²² There is no limit to the number of challenges for cause. See Stuart L. Young, *Challenge for Cause in a Criminal Trial*, 78 MICH. B.J. 976, 976 (1999).

²³ The number of peremptory challenges is set by statute and the allotment varies widely, from four challenges per side in all felony cases in Nevada, Ohio, Utah, and Virginia, to twenty challenges per side for serious felonies in California, New York, and South Dakota. See DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 228–32 tbl.41 (2006), available at <http://goo.gl/wSNRHJ>. More challenges are typically granted in capital cases but still with wide variation, from four per side in Virginia up to twenty-five strikes per side in Connecticut. See *id.*

²⁴ Not all jurisdictions require twelve jurors for criminal trials. See *Trial Juries: Size and Verdict Rules*, NAT'L CTR. FOR STATE COURTS, at tbl.51a, <http://goo.gl/GLWZVM> (last updated Aug. 2, 2013). While federal courts and the majority of states do use twelve-person juries, Arizona, Connecticut, Florida, Indiana, Louisiana, Massachusetts, and Utah allow felony trials (though not capital cases) with six- or eight-juror panels. See *id.*

A. THE ORIGINS OF THE CHALLENGE

The peremptory challenge, the Supreme Court has observed, is “an arbitrary and capricious right, [which] must be exercised with full freedom, or it fails of its full purpose.”²⁵ Unlike a challenge for cause, which only “permit[s] rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality,”²⁶ a peremptory challenge may be “exercised without a reason stated, without inquiry, and without being subject to the court’s control.”²⁷

In the early fourteenth century, the English Parliament abolished the Crown’s right to challenge jurors simply by claiming the challenge was being exercised in the King’s name.²⁸ Thereafter, “for more than five hundred years, use of the peremptory challenge was the exclusive right of the defense lawyer as a means of protecting the fair trial rights of an accused.”²⁹ While defendants were entitled to have up to three dozen peremptory challenges,³⁰ these rights appear to have been rarely exercised.³¹

²⁵ Swain v. Alabama, 380 U.S. 202, 219 (1965) (citation omitted).

²⁶ *Id.* at 220.

²⁷ *Id.*

²⁸ See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 9 (1990) (describing the operation of an act of Parliament passed in 1305).

²⁹ *Id.* The Crown nonetheless retained the unlimited ability to have jurors “stand aside.” See Hayes v. Missouri, 120 U.S. 68, 71 (1887) (describing the “stand-aside” process). This meant that, while it was restricted to challenges for cause, the Crown “was not obliged to show cause until the whole panel was called.” *Id.* Instead, the prosecution simply directed the jurors it did not want to “stand aside” and only had to show cause if a full jury could not be obtained from the rest of the panel. See *id.* Albert Alschuler suggests that the Medieval defendants’ challenges may have been a hybrid of cause and peremptory challenges; they ended up peremptory because it was quicker. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165 n.51 (1989) [hereinafter Alschuler, *The Supreme Court and the Jury*].

³⁰ THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 134 (1985); see also J.B. Post, *Jury Lists and Juries in the Late Fourteenth Century*, in TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800, at 65, 71 (J.S. Cockburn & Thomas A. Green eds., 1988) (“The received opinion of the lawyers allowed a defendant to challenge jurors, peremptorily or for cause, and a maximum of thirty-five is the number usually cited.”).

³¹ Thomas Andrew Green notes that criminal defendants were granted a high number of peremptory challenges—thirty-six challenges at common law, later reduced to twenty in the 1540s—but that they were almost never exercised. See GREEN, *supra* note 30, at 134. This may have been because “[d]uring most of the history of the common law, peremptory challenges could at most have determined which members of a reasonably elite group of propertied men served on juries.” Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 165.

Over the next centuries, the number of challenges was gradually reduced until England abandoned the peremptory challenge entirely in 1988.³²

Conversely, the peremptory challenge flourished in the United States.³³ Towards the end of the nineteenth century, jury selection procedures expanded, lengthening the process “to a tedious and exasperating extent,” as one contemporary commentator griped.³⁴ More importantly, the challenge took on a new significance in the face of an increasingly heterogeneous jury pool. Before the Civil Rights Act of 1875, the racially motivated use of peremptory challenges did not arise because, in most states, African-Americans were rarely called to jury service.³⁵ But as Albert Alschuler observed, as eligibility for jury service broadened, “manifest[ing] democratic faith in the popular administration of justice, the peremptory challenge manifested countervailing doubt, mistrust, and ambivalence.”³⁶

B. JUSTIFICATIONS FOR THE CHALLENGE

The justifications for the peremptory challenge have changed very little since Blackstone described what, in his view, were the two primary reasons for its use. The first reason is that such a challenge could be an arbitrary prerogative: a litigant may simply have been seized with a sudden dislike for a juror, and “the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.”³⁷ Second, the peremptory challenge could protect a defendant from the resentment engendered in a prospective juror by a failed challenge for cause.³⁸ The most convincing justifications

³² See Criminal Justice Act, 1988, c. 33, § 118(1) (Eng.) (abolishing the right to challenge jurors without cause in criminal trials).

³³ Colonial courts in the United States had quickly adopted a defendant’s use of the peremptory challenge, and the prosecutor’s right to challenge peremptorily followed thereafter. See Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 374–75 (1992). Prosecutors were deemed entitled to peremptory challenges on the basis that “the system should guarantee ‘not only freedom from any bias against the accused, but also from any prejudice against his prosecution.’” *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (quoting *Hayes*, 120 U.S. at 70).

³⁴ JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT § 166, at 220 (1877).

³⁵ See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI L. REV. 867, 877 (1994). The authors note that in 1791, “[e]very state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists.” *Id.* There do not appear to be any reported instances of African-Americans serving on juries until 1860. See *id.* at 884.

³⁶ Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 167.

³⁷ 4 BLACKSTONE, *supra* note 1, at *353.

³⁸ See *id.*

for the challenge rest on notions of party autonomy and participation—the theory that, by giving the litigants the chance to select their own juries, they are more likely to see the result reached by that jury as fair.

1. *Impartiality*

Impartiality—or at least its appearance—is the value most often invoked in support of the challenge. “The function of the challenge,” wrote the Supreme Court in *Swain v. Alabama*, is primarily “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.”³⁹ The peremptory challenge has therefore been celebrated as “a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial.”⁴⁰

But this account is unconvincing.⁴¹ “In the exercise of peremptory challenges,” writes one commentator, “the lawyers, of course, seek not an impartial jury, but rather jurors most favorable to their client’s interests.”⁴² Given the fact that removing biased jurors is the role of the challenge for cause, the most plausible argument is that peremptory challenges enable the parties to “eliminate extremes of partiality on both sides,”⁴³ effectively canceling each other out.⁴⁴ The prosecution can strike all of the most pro-defense jurors, the defense can strike all of the most pro-prosecution jurors, and the remaining jurors are expected to cluster at the crest of the bell curve

³⁹ *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

⁴⁰ *Id.* at 212 (paraphrasing Alabama’s argument). This justification is echoed by numerous scholars. See, e.g., Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 552 (1975) (“The ideal that the peremptory serves is that the jury not only should be fair and impartial, but should seem to be so to those whose fortunes are at issue.”).

⁴¹ Some scholars argue that, to the contrary, “[p]eremptory challenges ensure the selection of jurors on the basis of insulting stereotypes without substantially advancing the goal of making juries more impartial.” Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 170. Some commentators claim that the appearance of impartiality, rather than impartiality itself, is the goal served. See, e.g., Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. REV. 1533, 1577 (1991) (“[T]he peremptory challenge [exists] not to facilitate the selection of juries that are actually impartial, but rather to foster the perception of impartiality and thus promote confidence in the criminal justice system.”).

⁴² Melilli, *supra* note 13, at 453.

⁴³ *Swain*, 380 U.S. at 219.

⁴⁴ Some commentators describe this idea as the “canceling out” hypothesis, which “suggests that the use of peremptories is not an important problem because both sides discriminate and any harm caused by one side is immediately canceled or offset by the reciprocal strikes of the other side.” Baldus et al., *supra* note 3, at 125.

of neutrality. This idea is long-standing—as Barbara Babcock described the process in 1975:

[N]either litigant is trying to choose “impartial” jurors, but rather to eliminate those who are sympathetic to the other side, hopefully leaving only those biased *for* him. But the interplay of the efforts of both sides to accomplish the same end should leave surviving jurors who are, as Lord Coke described them, “indifferent as they stand unsworn.”⁴⁵

In practice, this means that “[t]he police officer’s brother and the flower child will be among the first casualties in the striking process.”⁴⁶

Of course, whether the two sides’ strikes really cancel each other out depends on the number of favorable jurors in the pool to begin with; sheer mathematics will benefit the side whose favorable jurors are more numerous. In a study of capital juries in Philadelphia, researchers found that the prime targets for prosecution strikes—typically, young, African-American male jurors—appeared in jury pools in far fewer numbers than the prime targets for the defense—typically, older, white male jurors. “As a result of this disparity in the sizes of their respective target groups, the [State] was more effective than defense counsel in depleting target group members from the pools of death eligible cases that each side considered.”⁴⁷ The mechanics of peremptory challenges therefore favor the side with the most to gain from majority participation, tilting the balance against the litigant whose most favorable jurors are few.⁴⁸

Finally, embedded in the idea that the challenge can eliminate “extremes of partiality,” leaving only the most “indifferent” jurors, is the assumption that an impartial jury is equivalent to the sum of its parts—that the twelve blandest jurors (often those who simply gave the fewest answers during voir dire) will form the most impartial jury. Another arguably more persuasive view is that a truly impartial jury is one, not from which strong opinions have been purged, but whose impartiality is the fruit of the deliberative process. Impartiality might more properly be seen as a perspective forged by the confrontation of diverse points of view rather than an immutable quality possessed by twelve separate people.⁴⁹ On this view, the peremptory challenge does more to hinder impartiality than to champion it.

⁴⁵ Babcock, *supra* note 40, at 551.

⁴⁶ Fahringer, *supra* note 2, at 134.

⁴⁷ Baldus et al., *supra* note 3, at 125.

⁴⁸ This imbalance is exacerbated by the underrepresentation of minority jurors that begins at the jury assembly stage. See *infra* note 209 and accompanying text.

⁴⁹ See ABRAMSON, *supra* note 2, at xxv (describing the diverse jury as impartial “precisely because every juror brings the perspectives of his or her kind into the jury room”).

2. *Compensating for the Challenge for Cause*

Peremptory challenges are also valued for their ability to repair any injury caused by unsuccessful challenges for cause, particularly when the juror is aware that she has been challenged—and by whom—and then takes a rather jaundiced view of that party.⁵⁰ Peremptory challenges defuse this fear and encourage a full and free voir dire (subject, of course, to the goodwill and patience of the judge, which typically flourish in inverse proportion to the length of the examination).⁵¹

Peremptory challenges thus provide “a margin of protection for challenges for cause.”⁵² Not only are they quick and easy to use,⁵³ but they also support the goal of impartiality by lessening the risk of error incurred by a challenge for cause improperly denied.⁵⁴ But this idea of the peremptory challenge as “an essential fallback”⁵⁵ is less a function of any innate quality of the peremptory challenge than a comment on the failings of the challenge for cause. Worse, the very availability of the peremptory challenge seems to remove any incentive to improve the functioning of the challenge for cause. As one state court judge noted, “Peremptory challenges have made all of us lazy—judges included—when it comes to challenges for cause.”⁵⁶ Indeed, the existence of the peremptory challenge allows judges to sidestep the unpleasant task of ruling on whether a juror is

⁵⁰ As Blackstone described it, “Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment: to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.” 4 BLACKSTONE, *supra* note 1, at *353. Some courts have applied this reasoning in the context of denied peremptory strikes as well. *See, e.g.,* Gaines v. State, 575 S.E.2d 704, 706 (Ga. Ct. App. 2002) (reversing conviction where trial court denied defendant’s peremptory strikes under *Batson* and reseated jurors “despite the fact that they had been present when they were struck and were aware they were struck by the defendants”).

⁵¹ The availability of peremptory challenges “allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror’s hostility through examination and challenge for cause.” Swain v. Alabama, 380 U.S. 202, 219–20 (1965).

⁵² Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 771 (1992).

⁵³ Barbara Underwood calls the peremptory a “device [that] has the advantage of saving the time of attorneys, jurors, and the court that would otherwise be spent in probing the true extent, if any, of the bias of potential jurors.” *Id.*

⁵⁴ *See id.* (arguing that the peremptory “implements a sound judgment about the relative costs of errors: an error that seats a biased juror is fatal to the ideal of fair decisionmaking, while an error that excludes an unbiased juror ordinarily costs only the time of the people involved”).

⁵⁵ *Id.*

⁵⁶ Hoffman, *supra* note 11, at 139.

credible when she assures the court that she can be fair.⁵⁷ It is easier simply to leave the juror on the panel and let the lawyers dismiss her peremptorily.

It is true that when challenges for cause fall short, peremptory challenges can be profitably employed to fill any gaps. But if challenges for cause are used too parsimoniously or inhibit the lawyers' abilities to question the jurors, surely this could be ameliorated. Perhaps courts could implement a new norm of expanded challenges for cause or procedures that excuse jurors neutrally (by the clerk of court, say). Bar associations could improve lawyer training so that they can conduct effective voir dire without offending prospective jurors.⁵⁸ Whatever steps are taken, it hardly seems unreasonable to consider ways in which to improve the challenge for cause, rather than leaving it in an unsatisfactory state and relying on the peremptory challenge to mop up after it.

3. *Autonomy and Participation*

In the end, the most persuasive argument in favor of the peremptory challenge is that it protects the parties' autonomy by allowing them an active role in choosing their fact finder, beyond the court's control. It is this quality of free choice that enables a litigant to "have a good opinion of his jury, the want of which might totally disconcert him."⁵⁹ The capriciousness of the original challenge gave a defendant the unreviewable power to sculpt the jury as he saw fit, without having to explain or even "being able to assign a reason for such his dislike."⁶⁰ Even today, in a criminal justice system that can reduce defendants to near-powerlessness, the challenge's arbitrariness can give participants a sense of control—they can get rid of jurors simply because they develop a spontaneous dislike for them based on no more than "sudden impressions and unaccountable prejudices."⁶¹ For one brief moment during jury selection, even the

⁵⁷ Arguably, the judge sometimes may be trading one uncomfortable decision point—does the prospective juror's possible bias rise to the level of cause?—for another. By leaving the juror on the panel for a litigant to strike peremptorily, the judge may instead need to determine whether the lawyer's explanation for the strike is permissible under *Batson*.

⁵⁸ This Article is not the place to offer detailed proposals for improvements to the challenge-for-cause regime.

⁵⁹ 4 BLACKSTONE, *supra* note 1, at *353. Indeed, as one judge noted, there has been little effort to improve on Blackstone's formulation. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 812–13 (1997) ("Although there is no shortage of academic and judicial generalizations about the importance of the peremptory challenge, there have been remarkably few efforts to articulate precisely why the peremptory challenge is so important.").

⁶⁰ 4 BLACKSTONE, *supra* note 1, at *353.

⁶¹ *Id.* These prejudices might be rooted in healthy self-preservation instincts. As one commentator noted, we might "bear in mind the advice given by an experienced trial lawyer,

humblest litigant can wield the autocratic power of the Queen of Hearts, dismissing anyone who displeases her.⁶²

In addition, some scholars contend that participating in the creation of the tribunal is valuable in itself. One of the principal functions of the peremptory challenge, writes Barbara Underwood, is “to provide the parties with an opportunity to participate in the construction of the decision-making body, thereby enlisting their confidence in its decision.”⁶³ This function is pedagogical: the challenge “teaches the litigant, and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense the jury belongs to the litigant: he chooses it.”⁶⁴

The autonomy and opportunity for participation provided by the challenge may also enhance the acceptability of verdicts to the parties and the public. Certainly, being judged by a jury that one had some role in creating, as opposed to one that has simply been imposed on the litigant, may provide the litigant some solace.⁶⁵ Regardless of conviction, the respect for one’s autonomy and freedom to choose may help legitimize the jury’s verdict in the eyes of the litigants.

Most importantly, the challenge allows the parties a measure of independence from the judge. “[T]he best—indeed, after *Batson*, the only—justification for peremptory challenges,” writes Charles Ogletree, “is that the trial judge should not necessarily have the sole power to determine who can sit on a jury”⁶⁶ In a system without peremptory challenges, the only way to construct the jury would be through challenges for cause, which are decided by the court. Therefore the judge alone could be responsible for determining who served on the jury.⁶⁷ This is not a trivial

who said, ‘If you don’t like a juror’s face, chances are he doesn’t like yours either—and you’d better get rid of him.’” Fahringer, *supra* note 2, at 135 (quoting a possibly apocryphal “experienced trial lawyer”).

⁶² See LEWIS CARROLL, *ALICE IN WONDERLAND* 67 (North-South Books 1999) (1866). In Carroll’s classic, an ill-fated croquet game played with flamingos for mallets and hedgehogs for balls tries the Queen of Hearts’ patience, and “in a very short time the Queen was in a furious passion, and went stamping about, and shouting ‘Off with his head!’ or ‘Off with her head!’ about once a minute.” *Id.*

⁶³ Underwood, *supra* note 52, at 771.

⁶⁴ Babcock, *supra* note 40, at 552.

⁶⁵ Although the litigant’s solace may be substantially offset by his sense that his opponent has acted arbitrarily and unfairly in exercising his strikes.

⁶⁶ Ogletree, *supra* note 6, at 1140.

⁶⁷ See *id.* Ogletree argues that abolishing the peremptory challenge would lead parties to rely exclusively on the challenge for cause, concentrating more power in the hands of the trial judge. “The judge alone—in a series of highly discretionary, practically unreviewable decisions—would then be permitted to shape the jury in every case.” *Id.* (quoting Barbara

concern. For nearly fifty years, it has been an article of faith that the constitutional guarantees of trial by jury “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.”⁶⁸ The peremptory challenge therefore provides a systemic advantage, preserving a sphere of action in jury selection over which the court has limited control.

C. THE PEREMPTORY CHALLENGE IN AMERICA

The story of the peremptory challenge in America is inextricably linked with racial discrimination and the Supreme Court’s efforts to counteract it. As discrimination evolved from explicit statutory bans on African-American participation in jury service⁶⁹ to strategic but no less blatant uses of peremptory challenges,⁷⁰ the Court was forced to come up with a way to reconcile the peremptory challenge’s arbitrary and capricious nature with the requirements of equal protection.

1. *Before Batson*

While the Supreme Court has frequently described the peremptory challenge as “necessary” for a fair trial, it has always stopped short of characterizing the peremptory challenge as a constitutional requirement.⁷¹ “Challenge for cause is doubtless a constitutional right,” a Massachusetts federal circuit court noted in 1857, “as without its exercise the prisoner might be deprived of an impartial jury, but the peremptory challenge is a

Allen Babcock, *A Place in the Palladium, Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1175 (1993).

⁶⁸ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); see also Ogletree, *supra* note 6, at 1140 (arguing that “the trial judge should not necessarily have the sole power to determine who can sit on a jury that itself exists because, in our legal system, some decisions should not be made by judges”).

⁶⁹ For example, in 1873 West Virginia enacted a statute that allowed only white men to serve on juries. *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879). In *Strauder*, the Supreme Court struck down the West Virginia statute as violating the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 310. In addition, around 1791, “[t]hree states—South Carolina, Georgia, and Virginia—denied the vote to African-Americans,” which almost certainly operated as a ban on African-Americans serving on juries. Alschuler & Deiss, *supra* note 35, at 877 n.52 (citation omitted).

⁷⁰ This shift happened very slowly. See Alschuler & Deiss, *supra* note 35, at 894–97 (describing the halting progress of African-American participation on juries, particularly in the South).

⁷¹ See *Swain v. Alabama*, 380 U.S. 202, 219 (1965); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 163 (1994) (Scalia, J., dissenting) (referring to the peremptory challenge as “a practice that has been considered an essential part of fair jury trial since the dawn of the common law”).

privilege conferred by law, which may be enlarged, abridged, or annulled by the legislative authority.”⁷²

The first real challenge to the peremptory’s free exercise came in *Swain v. Alabama*, over a century later. Robert Swain, an African-American sentenced to death for the rape of a white woman, had been convicted by a jury from which every African-American had been peremptorily struck.⁷³ In a fairly uncomfortable opinion, the *Swain* Court struggled to reconcile the dictates of the Equal Protection Clause with the “arbitrary and capricious” nature of the challenge. The Court had no trouble with the broad strokes, reaffirming the fact that “a State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause”⁷⁴ and condemning such practices as antithetical to “our basic concepts of a democratic society and a representative government.”⁷⁵

Yet the Court could not bring itself to abandon the Blackstonian vision of the peremptory challenge. Justice Byron White, writing for the Court, waxed eloquent on the challenge’s long and venerable history, its persistence in the face of criticism, and its extensive use.⁷⁶ The Court declined to examine the reasons that might have motivated the prosecutor to strike all six African-American jurors from the panel,⁷⁷ averring that the challenge “must be exercised with full freedom, or it fails of its full purpose.”⁷⁸

Faced with the tension between the Constitution and the peremptory challenge,⁷⁹ the Court chose the challenge, concluding that “[t]o subject the

⁷² *United States v. Plumer*, 27 F. Cas. 561, 575–76 (C.C.D. Mass. 1859) (No. 16,056); see also *Rivera v. Illinois*, 129 S. Ct. 1446, 1450 (2009) (“This Court has long recognized that peremptory challenges are not of federal constitutional dimension.” (internal quotation marks and citation omitted)).

⁷³ See *Swain*, 380 U.S. at 203, 205. There had been eight black jurors on the petit jury venire; two were found to be exempt, and six were struck by the prosecution. See *id.* at 205. In fact, the Court found that no African-American had served on a jury in Talladega County, Alabama, since about 1950. See *id.*

⁷⁴ *Id.* at 203–04 (citations omitted). This principle had been established almost one hundred years earlier in *Strauder v. West Virginia*, 100 U.S. 303, 308–09 (1879), which held that a state law prohibiting African-Americans from sitting on juries violated the Equal Protection Clause.

⁷⁵ *Swain*, 380 U.S. at 204 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

⁷⁶ See *id.* at 219 (claiming that these factors “demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury”).

⁷⁷ Instead, the Court adopted a presumption “that the prosecutor is using the State’s challenges to obtain a fair and impartial jury to try the case before the court.” *Id.* at 222.

⁷⁸ *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)).

⁷⁹ In dissent, Justice Arthur Goldberg explicitly acknowledged the starkness of the choice. See *id.* at 244 (Goldberg, J., dissenting) (“Were it necessary to make an absolute

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."⁸⁰ And that the Court refused to countenance.⁸¹

2. *Batson v. Kentucky and Thereafter*

Unrestricted by the commands of equal protection, the peremptory challenge after *Swain* endured as "the last bastion of undisguised racial discrimination in the criminal justice system."⁸² *Batson v. Kentucky* was therefore an important step in deterring the blatant and unapologetic use of race in jury selection. James Kirkland Batson, an African-American, was charged with second-degree burglary and receipt of stolen goods.⁸³ At trial, the prosecutor used his peremptory challenges to remove all four black prospective jurors, and Batson was consequently convicted by an all-white jury.⁸⁴ For the first time, the Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."⁸⁵

To guide the lower courts, *Batson* established a three-step framework for determining whether a peremptory strike had been exercised in violation of equal protection. First, the defendant had to establish a prima facie case of purposeful discrimination.⁸⁶ Once the defendant made this showing, the burden shifted to the prosecution to "come forward with a neutral

choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.")

⁸⁰ *Id.* at 221–22 (majority opinion).

⁸¹ While the Court did not entirely close the door on Equal Protection Clause claims made in the peremptory challenge context, it did set forth a test that could not be met. If a defendant could show that a prosecutor's office in a particular county employed its peremptory challenges to exclude black jurors "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," with the result that no blacks ever served on juries in the county, then the Fourteenth Amendment claim would take on "added significance." *Id.* at 223. Consequently, for the next twenty years, practically no defendants were able to make a successful claim that prosecutors were using their peremptory strikes in a racially discriminatory fashion. See *United States v. Childress*, 715 F.2d 1313, 1316 (8th Cir. 1983) (en banc) (noting that defendants had been able to establish "systematic exclusion in only two cases since *Swain* was decided in 1965").

⁸² Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 167.

⁸³ See *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

⁸⁴ See *id.* at 83.

⁸⁵ *Id.* at 89.

⁸⁶ See *id.* at 96.

explanation for challenging black jurors.”⁸⁷ The Court emphasized that this explanation “need not rise to the level justifying exercise of a challenge for cause,” but warned that the prosecutor could not rebut a prima facie case by stating that he had acted on the assumption that the struck jurors “would be partial to the defendant because of their shared race.”⁸⁸ At the third step, the Court directed trial courts to determine whether the defendant had established purposeful discrimination.⁸⁹

Despite *Batson*’s own insistence on racial commonality between the defendant and the prospective jurors,⁹⁰ the Court soon changed its focus from the exclusion of nonwhite jurors from nonwhite defendants’ cases to protecting the rights of the excluded jurors, regardless of the race of the defendant. In *Powers v. Ohio*, a case in which a white defendant objected to the exclusion of black jurors, the Court held that “the Equal Protection Clause prohibits a prosecutor from using the State’s peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life.”⁹¹

Accordingly, the right to make a *Batson* claim was extended to defendants who did not share the race of the excluded jurors,⁹² to civil litigants,⁹³ and to the prosecution.⁹⁴ Protected categories expanded to include gender and ethnicity.⁹⁵ The end result was a jurisprudence that changed the nature of the peremptory challenge, prompting Justice Sandra Day O’Connor to muse that “as we add, layer by layer, additional

⁸⁷ *Id.* at 97. The Court further directed the prosecutor to provide “a neutral explanation related to the particular case to be tried.” *Id.* at 98. The Court later explained that the neutral explanation need not be “persuasive, or even plausible.” *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

⁸⁸ *Batson*, 476 U.S. at 97 (citations omitted). The Court explicitly forbade the state from making the assumption either that “blacks as a group are unqualified to serve as jurors . . . [or] that they will be biased in a particular case simply because the defendant is black.” *Id.*

⁸⁹ *See id.* at 98. The Court nonetheless declined to “formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” *Id.* at 99.

⁹⁰ The original *Batson* test required the defendant to show that he was a member of a cognizable racial group, and that the prosecutor had used peremptory challenges to strike members of that group. *See id.* at 96.

⁹¹ *Powers v. Ohio*, 499 U.S. 400, 402–03, 409 (1991).

⁹² *See id.* at 415–16 (explaining that defendant may raise a *Batson* claim even where defendant and jurors are of different races).

⁹³ *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627–31 (1991) (extending *Batson* to civil cases).

⁹⁴ *See Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (forbidding race-based strikes by defense counsel).

⁹⁵ *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (extending constitutional protection to strikes based on gender); *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (affirming constitutional protection against strikes based on ethnicity).

constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable. In so doing, we make the peremptory challenge less discretionary and more like a challenge for cause.⁹⁶

Demanding litigants to give a reason for their exercise of an “arbitrary and capricious right” makes little sense, as Chief Justice Warren Burger, dissenting in *Batson*, pointed out. “It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause*,”⁹⁷ wrote the Chief Justice, exasperation seeping through every line. “Analytically, there is no middle ground: A challenge either has to be explained or it does not.”⁹⁸

What we are left with today is a “quasi-peremptory challenge” that sort of has to be explained.⁹⁹ The requirement of an explanation undermines the values of autonomy and free choice that the challenge represented. Yet the explanation does not have to be “persuasive, or even plausible,”¹⁰⁰ so long as the trial court finds it credible.¹⁰¹ Meanwhile, the Court has given the trial courts very little guidance as to how, exactly, they are to determine an attorney’s credibility. And “without clearer standards, *Batson* asks trial judges to read attorneys’ minds,”¹⁰² something they are singularly ill-equipped to do.

D. RESPONSES

What we have now is the worst of both worlds: persistent concerns about racial discrimination paired with a peremptory challenge that does not function properly. The chorus of criticism has not been lacking—*Batson*’s standards have been dubbed “a shameful sham,”¹⁰³ “a disingenuous charade,”¹⁰⁴ and a possible “invitation to hypocrisy.”¹⁰⁵ Finding ways either

⁹⁶ *J.E.B.*, 511 U.S. at 148 (O’Connor, J., concurring).

⁹⁷ *Batson v. Kentucky*, 476 U.S. 79, 127 (1986) (Burger, C.J., dissenting) (quoting HENRY H. JOY, ON PEREMPTORY CHALLENGE OF JURORS 1 (1844) (emphasis added by Justice Burger)) (internal quotation marks omitted).

⁹⁸ *Id.*

⁹⁹ See Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 200.

¹⁰⁰ *Purkett v. Elem*, 514 U.S. 765, 768–70 (1995) (upholding as “race neutral” prosecutor’s explanation that he struck two black jurors because of their hair and beards).

¹⁰¹ See *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (noting that “the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible”).

¹⁰² Ogletree, *supra* note 6, at 1109.

¹⁰³ Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 165 (2010).

¹⁰⁴ Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 67 (1993) [hereinafter Johnson, *Language and Culture*].

to improve the *Batson* framework or to eliminate peremptory challenges has spawned its own cottage industry of academic and judicial proposals to “fix” jury selection. All these proposals share a common goal: to lessen the race-based use of peremptory challenges. But short of mandating affirmative selection or a quota system, the only truly effective way of ending the race-based use of peremptory challenges would be to eliminate the peremptory challenge entirely—a solution unlikely to happen and that raises problems of its own.

1. *Tweaks, Quotas, and Affirmative Selection*

Proposals to improve the current regime fall into two camps: either a complete overhaul of jury selection procedures or a strengthening of the *Batson* framework. The most ambitious proposals have advocated for affirmative selection, which would allow litigants to designate certain jurors to remain on the panel,¹⁰⁶ or racial quotas to ensure some demographic diversity on jury panels, particularly at trials of nonwhite defendants.¹⁰⁷

¹⁰⁵ Raymond Brown, *Peremptory Challenges as a Shield for the Pariah*, 31 AM. CRIM. L. REV. 1203, 1204 (1994).

¹⁰⁶ This proposal was most clearly set forth in a student note. See Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 806–11 (1986) (describing affirmative selection model). Altman proposed that both sides submit a list of twelve jurors ranked in order of preference with the judge then empaneling “any overlapping choices, regardless of their differing ranks. Then, alternating between the lists, the judge would take each party’s selection in descending order, until the appropriate number of jurors were empanelled.” *Id.* at 806; see also Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 171 (suggesting litigants be provided with a fixed number of affirmative peremptory choices, giving them “a limited opportunity to create a jury of his or her peers”); Clem Turner, Note, *What’s the Story? An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289, 319 (1996) (suggesting a structure similar to Ramirez’s except that the judge would choose two jurors from the prosecution’s list for every one juror from the defense’s list to account for the burden of proof). All of these proposals start from the assumption, with which I agree, that “the racial, religious, and ethnic diversity of the jury has a positive and important influence on the jury process.” Ramirez, *supra*, at 162.

¹⁰⁷ See, e.g., DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* § 5.22, at 412–13 (3d ed. 1992) (presenting a scenario with hypothetical legislation mandating that a jury for a nonwhite defendant be composed of at least 50% nonwhite jurors); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698–99 (1985) (proposing that every defendant of color should have at least three “racially similar” jurors on his petit jury); Harold A. McDougall, Note, *The Case for Black Juries*, 79 YALE L.J. 531, 546–50 (1970) (proposing proportional representation schemes for criminal juries); see also Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 718 (1995) [hereinafter Alschuler, *Racial Quotas*] (noting that “affirmative action in jury selection has special virtues and . . . is likely to prove less costly to individuals and society than affirmative action in other contexts”).

There have been proposals to give litigants cumulative voting rights borrowed from the corporate sphere¹⁰⁸ and to develop a “peremptory block” system, where each side would submit to the judge a confidential list of venire members they designated as “blocked”; if the other side then attempted to strike that juror, the juror would be automatically seated on the jury.¹⁰⁹ Others have called for voir dire to be conducted entirely by jury questionnaire, so that selection would be “blind” rather than influenced by group status,¹¹⁰ or for proposed ethical rules that would prevent attorneys from exercising their challenges on the basis of race.¹¹¹

Commentators have also suggested modifications to *Batson*’s framework¹¹² in an attempt to strengthen the notoriously weak second prong of the test.¹¹³ Some propose that trial courts should avoid making any determination of the striking attorney’s subjective intent,¹¹⁴ or advocate for

¹⁰⁸ See Edward S. Adams & Christian J. Lane, *Constructing a Jury that Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 745–46 (1998) (proposing a set number of votes for each side to be exercised either positively, to seat a juror, or negatively, to strike a juror); Geoffrey Cockrell, Note, *Batson Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 351, 381 (1997) (proposing a modified lottery system incorporating cumulative voting).

¹⁰⁹ See Brian W. Stoltz, Note, *Rethinking the Peremptory Challenge: Letting Lawyers Enforce the Principles of Batson*, 85 TEX. L. REV. 1031, 1047 (2007). As the author explains, this provision “would cause a prosecutor to hesitate in exercising peremptory strikes against an obvious class of potential jurors who might be stereotypically ‘favorable’ to the defendant . . .” *Id.* at 1050.

¹¹⁰ See Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1015–16 (1996).

¹¹¹ See Andrew G. Gordon, Note, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685, 713 (1993) (advocating a rule of professional conduct to forbid discrimination “on the basis of race, sex, religion, or national origin”). Ogletree took this idea one step further and suggested sanctions for prosecutors who violated *Batson* that included dismissal of the case with prejudice. See Ogletree, *supra* note 6, at 1116–17.

¹¹² See, e.g., Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 64–65 (1988) (proposing three-part test at the second step of the *Batson* inquiry, requiring that the prosecutor’s explanation be specific, rationally related to juror bias, and bona fide); Joshua E. Swift, Note, *Batson’s Invidious Legacy: Discriminatory Juror Exclusion and the “Intuitive” Peremptory Challenge*, 78 CORNELL L. REV. 336, 361–62 (1993) (advancing idea that courts should not accept prosecutorial explanations for strikes based on “soft data,” such as demeanor and intuition, but only those based on the juror’s written or oral statements).

¹¹³ As some commentators have quipped, jurors are more likely to be struck by lightning than by a lawyer violating the Equal Protection Clause. See Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1102 (2011).

¹¹⁴ See *id.* at 1123.

an expansion of attorney-conducted voir dire,¹¹⁵ or urge courts to reject explanations that betray a mixed motive.¹¹⁶ But these proposals do not address the fact that some lawyers are reluctant to raise *Batson* challenges in the first place, often for fear of being “*Batsoned*” in return. And many other litigants never get to step two of the *Batson* test.¹¹⁷

However ingenious some of these suggestions, there is no indication that any have ever been adopted. Some may have been too complicated to implement.¹¹⁸ Some merely shifted the standard slightly. And most did not give sufficient assurance that they would effectively remediate racial discrimination in jury selection or help resolve the tensions between the *Batson* framework and the value of the peremptory challenge.

2. Abolition of Peremptory Strikes

The only truly effective curb on racially motivated peremptory challenges is to eliminate them entirely. Since they are not constitutionally mandated, there is no obligation to keep them. Indeed, England, the birthplace of the peremptory challenge, abolished the challenge some twenty-five years ago.¹¹⁹ In the United States, ever since Justice Thurgood Marshall warned in his *Batson* concurrence that “[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process,” and suggested that only elimination of the challenges could do so,¹²⁰ there has been a steady chorus of calls for abolition from scholars, judges, and Supreme Court Justices.¹²¹ Yet no U.S. jurisdiction has to date eliminated the peremptory challenge.¹²²

¹¹⁵ See, e.g., Ogletree, *supra* note 6, at 1127–28 (listing reasons why expansive voir dire conducted by attorneys is an important tool for making *Batson* effective).

¹¹⁶ See Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 316 (2007).

¹¹⁷ See *infra* notes 133–34 and accompanying text.

¹¹⁸ The cumulative voting suggestions, though clever, required the apportionment of twenty-four lottery tickets to each litigant, one ticket for each prospective juror, and a random selection by the judge. See Cockrell, *supra* note 108, at 381.

¹¹⁹ See Criminal Justice Act, 1988, c. 33, § 118(1) (Eng.) (abolishing peremptory challenges in criminal trials). The boldness of this move is somewhat blunted by the fact that jury unanimity is not required. See Juries Act, 1974, c. 23, § 17(1)(a) & (b) (Eng.) (providing for majority verdicts in felony trials).

¹²⁰ *Batson v. Kentucky*, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

¹²¹ See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) (“I believe it necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.”); Bennett, *supra* note 103, at 167 (“I join Justice [Thurgood] Marshall and Justice [Stephen] Breyer’s call for banning peremptory challenges entirely as the only means to eliminate lawyers’ tendency to strike jurors due to stereotype and bias.”); Broderick, *supra* note 33, at 418, 420 (arguing that the peremptory challenge “functions as a repository of the unexamined fears, suspicions, and hatreds held by attorneys and their clients” and thus

The foremost reason that peremptory challenges have survived seems to be a lack of political will: Trial lawyers value peremptory challenges and are unlikely ever to agree to their abolition.¹²³ Some litigators see them as an essential protection for their clients' rights. "To take away that tool, especially from that most benighted soul—the unpopular criminal defendant who is black, who is Latino, who is a pariah," wrote one criminal defense attorney, "is, in and of itself, a criminal and amoral act."¹²⁴ Other lawyers simply "love peremptory challenges because they are fun."¹²⁵ Either way, lawyers are not likely to part with their challenges anytime soon.¹²⁶

Even so, abolition is not an optimal solution. Without the peremptory challenge, the judge alone would have final say over who serves on the jury.¹²⁷ "If we were to abolish peremptory challenges altogether, parties would be totally dependent on the goodwill and sensibilities of the particular trial judge," cautioned one commentator. "Systemically, that would put an enormous amount of largely unchecked power in the hands of one individual."¹²⁸ Beyond serving an error-correcting function for the challenge for cause, the peremptory challenge can provide genuine

should be abolished); Hoffman, *supra* note 59, at 853 (arguing that "peremptory challenges conflict with the most basic notions of individual liberty and individual responsibility inherent in the idea of trial by an impartial jury"); Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1607 (2012) ("The elimination of the peremptory would improve the jury process in . . . significant ways."); Antony Page, *Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 246 (2005) (noting the "powerful reason[s] to eliminate the peremptory challenge"); John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907, 907–08 (2003) ("A citizen should not be denied the opportunity to serve as a juror unless an impartial judge can state an acceptable reason for the denial. A challenge for cause provides such a reason; a peremptory challenge does not.").

¹²² See ROTTMAN & STRICKLAND, *supra* note 23, at 228–32 tbl.41.

¹²³ Every lawyer, it seems, believes he can make the challenge work for him, despite substantial evidence "that lawyers, and even their highly paid jury consultants, are no better at detecting hidden juror bias than a monkey throwing a dart." Hoffman, *supra* note 11, at 139.

¹²⁴ Brown, *supra* note 105, at 1212; see also *Georgia v. McCollum*, 505 U.S. 42, 60 (1992) (Thomas, J., concurring) ("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.").

¹²⁵ Hoffman, *supra* note 11, at 140. Peremptory challenges allow lawyers to engage in the kind of pop-psychology insights that usually characterize couch discussions of a favorite television show. As Hoffman puts it, "It's drivel, but it's fun drivel." *Id.*

¹²⁶ See *supra* note 11 and accompanying text.

¹²⁷ See Ogletree, *supra* note 6, at 1140; see also Babcock, *supra* note 67, at 1175. And "if the judge is racially biased too," litigants would have little recourse. See Johnson, *Language and Culture*, *supra* note 104, at 67.

¹²⁸ Ramirez, *supra* note 106, at 172 n.37.

protection against the “compliant, biased, or eccentric judge”¹²⁹ making a final ruling on the challenge for cause.

Judges are no more immune to implicit biases than anyone else.¹³⁰ Even under an expanded regime of challenges for cause, the judge may still sympathize more readily with one side’s argument than the other.¹³¹ The peremptory challenge, which allows the litigants rather than the judge to shape the jury, may be necessary to the jury’s democratic function. This Article’s proposal, therefore, seeks to preserve the best of the challenge—its ability to give the parties autonomy to make their own decisions and independence from the judge—while erecting an effective block against its most invidious uses.

II. THE TROUBLE WITH *BATSON*

Despite its logical incoherence and the enforcement difficulties it presents, *Batson*’s framework would be worth the price if it significantly helped remedy illegal discrimination in jury selection. But *Batson* has not fulfilled its promise of remedying the exclusion of minority jurors from jury service. Instead, it has created cumbersome procedures and appeals of Dickensian length, all because the *Batson* Court failed to recognize two fundamental truths. First, cognitive biases will doom any framework based on self-reporting. Second, the *Batson* framework is in tension with lawyers’ obligations of zealous advocacy. The end result is that *Batson* has failed in its mission of protecting the right of democratic participation by all.

A. UNWIELDINESS

Without making an appreciable difference to lawyers’ strategies (although no doubt successfully driving them underground), *Batson* has proved to be an “enforcement nightmare” at all levels of the court system.¹³²

¹²⁹ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

¹³⁰ And these biases appear to be more pronounced when the judges are white. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). Rachlinski and his coauthors administered a psychological test measuring implicit racial bias to eighty-five white judges and forty-three black judges. They found that 87% of the white judges demonstrated a white preference on the test while only 44% of the black judges did. See *id.*

¹³¹ Since many state court judges are elected, they are particularly vulnerable to political pressure. A little over half of the states elect their felony court judges, seventeen states appoint their judges, and seven states use both methods. See *Trial Juries: Size and Verdict Rules*, *supra* note 24, at tbl.36a.

¹³² See William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 134; see also Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 653 (2012) (citing Pizzi, *supra*, at 134).

The problems with *Batson* are built into its unwieldy structure. First, the protection relies on the aggrieved party to raise it, and lawyers often fail to raise *Batson* objections.¹³³ This seems to be less a result of attorney incompetence than simple strategy: on the evidence, “the two sides tolerate one another’s discriminatory use of peremptories to reduce the risk that a successful retaliatory claim will be brought by the other side.”¹³⁴ Given the number of collateral attacks for which defendants claim they received ineffective assistance of counsel because their attorneys failed to raise *Batson* issues, at least some legitimate claims are not raised in the first place.¹³⁵ Finally, now that prosecutors can make “reverse *Batson*” claims

¹³³ This was a conclusion of David Baldus’s study of capital juries in Philadelphia. He writes that “while evidence of systemic discrimination across cases is strong at the individual case level, i.e., statistically significant race and gender disparities in about one-half of the cases, defense counsel and prosecutors infrequently raise *Batson* and *McCullum* claims.” Baldus et al., *supra* note 3, at 83; accord Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 214–15 & n.21 (2003).

¹³⁴ Baldus et al., *supra* note 3, at 83–84.

¹³⁵ See, e.g., *Brazil v. United States*, No. 07–20531, 2013 WL 5476249, at *2–5 (E.D. Mich. Oct. 1, 2013) (considering ineffective assistance of counsel claim based on failure to raise *Batson* challenge after prosecutor struck the only two African-Americans on the jury panel); *Price v. Sec’y*, No. 6:09–cv–1061–Orl–35GJK, 2011 WL 2561246, at *5–9 (M.D. Fla. June 28, 2011) (considering ineffective assistance of counsel claim based on failure to object to prosecution’s strike of only African-American on the venire); *Grate v. Stinson*, 224 F. Supp. 2d 496, 511–20 (E.D.N.Y. 2002) (finding defendant’s appellate counsel ineffective for failing to raise *Batson* claim against government’s impermissible exercise of peremptory challenges based on race during jury selection); see also *Scott v. Hubert*, 635 F.3d 655, 663 & n.8 (5th Cir. 2011) (noting that defendant had presented “factually detailed and legally specific arguments in support of his claim that his lawyers rendered constitutionally ineffective assistance of counsel by failing to object to the racial makeup of the jury” in view of the fact that the prosecution had struck all four of the African-American jurors on the panel); *Jackson v. State*, No. CR–07–1208, 2010 WL 5130867, at *3 (Ala. Crim. App. Dec. 17, 2010) (remanding capital murder conviction to determine whether State had race-neutral reasons for its challenges to African-American venire members where defendant did not raise *Batson* objection at trial); *Lackey v. State*, 104 So. 3d 234, 238–39 (Ala. Crim. App. 2010) (remanding capital murder conviction to determine whether State had race-neutral reasons for striking African-American venire members where defendant did not raise *Batson* objection at trial).

To know exactly what is going on at the trial level is difficult, if not impossible. Most states and counties do not keep aggregated demographic records of who is called to jury duty, nor do they keep lists of the individuals struck or selected. The best anyone has been able to do with the data available is to examine appellate cases that review trial-level *Batson* decisions. These cases, obviously, only capture those instances in which a defendant is convicted and raises the issue on appeal. In the absence of an appeal, there is no hard data on the *Batson* challenges that might have been made but were not (except as part of a collateral attack where they can be revived through the medium of an ineffective assistance of counsel claim), cases where the defendant was acquitted at trial, or cases where the

against defendants under *Georgia v. McCollum*,¹³⁶ *Batson* has proved to be a far more effective sword against defendants than a shield to protect them, as “reverse *Batson*” claims appear to enjoy a far higher success rate at trial than defendants’ *Batson* claims against prosecutors.¹³⁷

Another great disadvantage is that *Batson*’s standards are inconsistently applied and interpreted, generating a large quantity of ultimately unedifying litigation.¹³⁸ If the actual *Batson* process during jury selection is often fairly quick and informal—one lawyer objects, the judge directs the other lawyer to respond—the appellate process can drag on for years.¹³⁹ *Batson* claims at trial are frequently denied, as “[t]he current framework makes it exceedingly difficult for judges to reject even the most spurious of peremptory strikes.”¹⁴⁰ But there are many technical reversals, as trial courts misinterpret how *Batson* should be applied or fail to maintain

defendant successfully raised a *Batson* claim at trial and was either acquitted or was convicted and had no need to raise the *Batson* issue on appeal.

¹³⁶ See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

¹³⁷ See Melilli, *supra* note 13, at 463 (noting a success rate for *Batson* claims of 16.95% when the challenged juror was black and 13.33% when the challenged juror was Hispanic). In contrast, when the *Batson* challenge was made following the exclusion of a white juror, the success rate of the *Batson* claim was 53.33%. *Id.* It is not entirely clear from Melilli’s article whether he meant success rate in the trial court or on appeal, although it appears to be a combination.

¹³⁸ See *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 183 (S.D.N.Y. 1996) (pointing out that “judicial interpretations of *Batson* are all over the map”); Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 *FORDHAM L. REV.* 1683, 1707–08 (2006) (describing inconsistencies in *Batson* application). While the *Batson* Court was unpersuaded “that our holding will create serious administrative difficulties,” *Batson v. Kentucky*, 476 U.S. 79, 99 (1986), this pronouncement, as one commentator noted wryly, “seemed to reveal a limited understanding of the litigation process.” Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 199.

¹³⁹ *Miller-El v. Dretke* alone generated “17 years of largely unsuccessful and protracted litigation—including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary.” 545 U.S. 231, 267 (2005) (Breyer, J., concurring).

¹⁴⁰ *Bellin & Semitsu*, *supra* note 113, at 1077. For a selection of upheld explanations for strikes, see, for example, *McElemore v. State*, 798 So. 2d 693, 697 (Ala. Crim. App. 2000) (finding no clear error where prosecutor explained a strike on the ground that a juror had “the type of personality that it seems that . . . she would probably be greatly offended by the fact that the prosecutor did overlook her and did leave her out of asking [any additional] questions” (alteration in original) (citation omitted)); *State v. Crawford*, 873 So. 2d 768, 780, 783–84 (La. Ct. App. 2004) (affirming trial court’s finding of race-neutrality in a strike where prosecutor stated, “He looks like a drug dealer to me”); *Shelley v. State*, 30 So. 3d 379, 382–84 (Miss. Ct. App. 2010) (upholding prosecutorial strike of black juror because, as prosecutor stated, he wore “his hair in long braids”); *Watson v. State*, 991 So. 2d 662, 664, 666 (Miss. Ct. App. 2008) (upholding strikes of five black jurors where prosecutor stated, for example, “my information is that she is on drugs” and “my information is that he runs with the dopers”).

an adequate record.¹⁴¹ As a result, cases are remanded and re-appealed, with defendants in limbo and victims denied closure. All of the post-trial challenges, counterchallenges, and reopening of old records take up an enormous amount of time and resources. A *Batson* violation at trial can lead to automatic reversal on appeal, but the success rate is quite low.¹⁴² Instead, a far more likely outcome is a strange beast variously called a *Batson* hearing or a “reconstruction hearing,”¹⁴³ which requires parties to testify years later to what they were thinking in the split seconds during which they made strikes, based on little more than dim memories and scrawled handwritten notes. And then the claim is usually denied.¹⁴⁴

In the face of all this, it would be hard to improve on one commentator’s observation that “[i]f one wanted to understand how the

¹⁴¹ See, e.g., *People v. Ibarra*, No. E031542, 2003 WL 21739035, at *5–9 (Cal. Ct. App. July 28, 2003) (finding that trial court erred in requiring “systematic exclusion” to find a prima facie case); *State v. Davis*, 155 P.3d 1207, 1216 (Kan. Ct. App. 2007) (holding that “the trial court’s failure to properly analyze Davis’ challenge to the prosecutor’s use of peremptory strikes to exclude [two minority jurors] from the jury under the third *Batson* step requires that the case be remanded for a proper *Batson* hearing”).

¹⁴² I reviewed the reported *Batson* appeals in seven states: Alabama, California, Georgia, Illinois, Kansas, Mississippi, and New York, from 2000 to 2011. In Georgia, out of 121 cases appealing the denial of a defendant’s *Batson* claim at trial, only three resulted in a reversal of the defendant’s conviction and a new trial. An additional two cases were remanded for *Batson* hearings, but the outcome of those hearings is not reported. See *Georgia Batson Spreadsheet* (on file with the *Journal of Criminal Law and Criminology*). In the sixteen cases in which the defendant appealed a prosecutor’s successful reverse-*Batson* motion, the judgments were affirmed in twelve cases, and a new trial was granted in four cases. See *id.* In terms of preventing the prosecution from exercising peremptory challenges allegedly based on race, these figures indicate that a defendant’s chances of obtaining a new trial on appeal are under 3%. But defendants had better luck reversing their convictions when their own peremptory challenges were blocked by a *Batson* ruling; they obtained new trials approximately one quarter of the time, though the number of appeals on this issue may be too low to reach statistical significance. See *id.* In Mississippi, out of ninety-one cases decided between 2000 and 2012—seventy-eight appealing the denial of a defendant’s *Batson* claim at trial and thirteen appealing a prosecutor’s successful reverse-*Batson* motion—only three resulted in a reversal of the defendant’s conviction and a new trial. See *Mississippi Batson Spreadsheet* (on file with the *Journal of Criminal Law and Criminology*). An additional four cases were remanded for *Batson* hearings, all of which were unsuccessful. See *id.* In Kansas, out of forty-four appeals raising *Batson* claims, forty-two were affirmed, and two were remanded for *Batson* hearings. See *Kansas Batson Spreadsheet* (on file with the *Journal of Criminal Law and Criminology*).

¹⁴³ See, e.g., *People v. Johnson*, 136 P.3d 804, 807–08 (Cal. 2006) (remanding case to the trial court to require prosecutor to explain his peremptory challenges); *Davis*, 155 P.3d at 1216 (same).

¹⁴⁴ See, e.g., *Grimsley v. State*, 678 So. 2d 1197, 1200–01 (Ala. Crim. App. 1996) (affirming lower court’s decision, following a *Batson* hearing, that defendant had not proved discrimination); *People v. Rodriguez*, 91 Cal. Rptr. 2d 308, 322 (Cal. Ct. App. 1999) (same); *People v. Davis*, 909 N.E.2d 766, 775–76 (Ill. 2009) (same); *State v. Bolton*, 49 P.3d 468, 481 (Kan. 2002) (same); *People v. Wint*, 655 N.Y.S.2d 469, 470–73 (N.Y. App. Div. 1997) (same).

American trial system for criminal cases came to be the most expensive and time-consuming in the world, it would be difficult to find a better starting point than *Batson*.¹⁴⁵

B. THE PROBLEM OF IMPLICIT BIAS

The critical weakness of *Batson* is conceptual. The entire framework rests on the assumption that considerations of race are conscious and can be purged from the jury selection process either by honest self-reporting or by judicial assessments of attorney motivation. Like most unstated assumptions about human behavior embedded in legal doctrine,¹⁴⁶ *Batson*'s foundations are psychologically naïve. Recent advances in social cognition research have shown that most of us operate under a considerable burden of implicit bias.¹⁴⁷ While racism is no longer socially, morally, or legally acceptable, even people who believe themselves committed to egalitarianism may simultaneously hold negative views about racial minorities in general and African-Americans in particular.¹⁴⁸ Cognitive research suggests that people automatically categorize others upon first contact and that they use the most salient characteristics, such as race and gender, to do so.¹⁴⁹ As one research team put it, "The ability to understand

¹⁴⁵ Pizzi, *supra* note 132, at 155.

¹⁴⁶ As Linda Hamilton Krieger and Susan Fiske have observed, "[T]he behavioral theories embedded in legal doctrines often go unstated. Even when stated, they are often unexamined, and they are almost never empirically tested . . ." Krieger & Fiske, *supra* note 5, at 998.

¹⁴⁷ As the song from the satirical musical *Avenue Q* puts it, "Everyone's a little bit racist." See ROBERT LOPEZ & JEFF MARX, *Everyone's a Little Bit Racist*, on AVENUE Q: THE MUSICAL (RCA Victory Broadway 2003) ("Everyone's a little bit racist sometimes / Doesn't mean we go around committing hate crimes / Look around and you will find / No one's really colorblind / Maybe it's a fact we all should face / Everyone makes judgments based on race."). For more sobering data, see Greenwald & Krieger, *supra* note 7, at 956, 958 tbl.2 (finding that "any non-African American subgroup of the United States population will reveal high proportions of persons showing statistically noticeable implicit race bias in favor of [European-Americans] relative to [African-Americans]").

¹⁴⁸ See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61, 62 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (noting that many white Americans will "sympathize with the victims of past injustice . . . [and] regard themselves as nonprejudiced and nondiscriminatory; but, almost unavoidably, possess negative feelings and beliefs about blacks"). Gaertner and Dovidio contend that these beliefs "are typically excluded from awareness." *Id.*

¹⁴⁹ See Page, *supra* note 121, at 211–12. Page argues that "[u]sing race or sex for the initial categorization is likely particularly frequent in a situation like voir dire, where there is generally little beyond race and sex on which an attorney could make an initial categorization." *Id.* at 212; see also Kang & Lane, *supra* note 8, at 469 ("[R]ace and ethnicity are highly salient and chronically accessible categories.").

new and unique individuals in terms of old and general beliefs is certainly among the handiest tools in the social perceiver's kit."¹⁵⁰

In the past decade, research using the Implicit Association Test has shown that implicit biases are both pervasive and widespread,¹⁵¹ with the result that many Americans show automatic preference for white over black.¹⁵² But *Batson* rests on outdated and inaccurate assumptions about human behavior—assumptions that were recognized as problematic even at the time. As early as his *Batson* concurrence, Justice Marshall recognized the flaws in its framework: “A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically,” he warned.¹⁵³ “A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.”¹⁵⁴ His observations only have more support today.

Studies in the emerging field of implicit social cognition, an area that draws on social psychology, cognitive psychology, and cognitive neuroscience, have revealed that “[w]e are not perceptually, cognitively, or

¹⁵⁰ Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509 (1991) (citations omitted).

¹⁵¹ See Kang & Lane, *supra* note 8, at 473. The Implicit Association Test (IAT) is constructed “to assess the strength of associations between target categories (e.g., black persons vs. white persons) and attribute categories (e.g., negative vs. positive), both arranged on bipolar dimensions.” Sarah Teige-Mocigemba et al., *A Practical Guide to Implicit Association Tests and Related Tasks*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 117, 118 (Bertram Gawronski & B. Keith Payne eds., 2010). On the hypothesis that people will “find it easier to associate pleasant words with white faces and names than with African-American faces and names,” researchers define implicit bias against African-Americans “as faster responses when the ‘black’ and ‘unpleasant’ categories are paired than when the ‘black’ and ‘pleasant’ categories are paired.” Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006).

At the Project Implicit website, anyone can take an Implicit Association Test to measure implicit attitudes across a range of topics, including race, gender, age, sexual orientation, and religion. See *Take a Test*, PROJECT IMPLICIT, <http://goo.gl/6MvxDo> (last visited Dec. 6, 2013); see also Kang & Lane, *supra* note 8, at 473. There are currently more than seven million completed tests, making Project Implicit the largest available database of social cognition data. See *id.*

¹⁵² *FAQs*, PROJECT IMPLICIT, <http://goo.gl/9RpwX4> (last visited Dec. 6, 2013). The site suggests that “Automatic White preference may be common among Americans because of the deep learning of negative associations to the group Black in this society.”

¹⁵³ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

¹⁵⁴ *Id.*

behaviorally colorblind.”¹⁵⁵ Instead, the research shows that “most of us have implicit biases against racial minorities notwithstanding sincere self-reports to the contrary.”¹⁵⁶ But what is most striking about these findings is the wide dissociative gap between what we believe our feelings to be and what they actually are. We want others to see us, and we want to think of ourselves, as unbiased and open-minded.¹⁵⁷ This motivation is powerful, sometimes to the extent that people deny that race matters to them or that they even noticed race.¹⁵⁸

Therefore, even if we put aside the incentives created by the adversary system, asking lawyers to identify their own implicit biases is “at best uninformative and at worst misleading.”¹⁵⁹ If a lawyer is unaware of how a juror’s race has affected her decision to strike, she will be unable to explain it. Conversely, if she is aware that race informed her decision to strike, she will have the double incentive of not losing the strike by admitting that race was a factor and the generally shared desire not to appear racially biased. As commentators have noted in the employment discrimination context:

¹⁵⁵ Kang & Lane, *supra* note 8, at 468. Nor does the Constitution require us to be, as Alschuler points out: “Americans are not color-blind. They cannot be. The Constitution does not require them to pretend to be. The Constitution requires only that the government not stigmatize or otherwise disadvantage people on the basis of race” Alschuler, *Racial Quotas*, *supra* note 107, at 743.

¹⁵⁶ Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005). Some social psychologists have referred to this conflict as “aversive racism.” See John F. Dovidio et al., *Contemporary Racial Bias: When Good People Do Bad Things*, in THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 141, 143–44 (Arthur G. Miller ed., 2004) (“A critical aspect of the aversive racism framework is the conflict between the denial of personal prejudice and the underlying unconscious negative feelings and beliefs.”).

¹⁵⁷ See Michael I. Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 819 (2004) (noting widely documented finding that “[i]n addition to this desire to appear unbiased to others, people are also motivated to view themselves as unbiased”).

¹⁵⁸ See *id.* (“White Americans, for example, can be motivated to appear nonprejudiced toward Blacks and even to avoid acknowledging the possibility that they may have negative attitudes towards Blacks.” (internal citations omitted)). In various studies, researchers found that white people “resist admitting that they have even noticed race during social interaction, much less that race has affected their judgment.” Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 532 (2008) [hereinafter Sommers & Norton, *Race and Jury Selection*] (internal citation omitted). This idea was nicely lampooned in the HBO comedy *Girls*, in which the white protagonist, attempting to break up with her boyfriend, who is black, tells him, “I never thought about the fact that you were black once!”—to his evident skepticism. *Girls: I Get Ideas* (HBO television broadcast Jan. 20, 2013). Stephen Colbert has been having fun with this concept for some time as well. “I don’t see race,” he once told his audience. *The Colbert Report* 0:50–0:51 (Comedy Central television broadcast Nov. 2, 2006), available at <http://goo.gl/Zp7ziw>. “People tell me I’m white and I believe them, because I own a lot of Jimmy Buffett albums.” *Id.*

¹⁵⁹ Sommers & Norton, *Race and Jury Selection*, *supra* note 158, at 532.

Even if people *want* to conform their behavior to the norms underlying antidiscrimination law, full compliance with the law's prescriptions is unlikely if the relevant legal doctrines fail to capture accurately how and why discrimination occurs, how targets respond to it, and what can be done to prevent it from occurring.¹⁶⁰

None of this should give us any comfort that *Batson* is a meaningful way of identifying bias or helping judges to determine the “real reasons” for any strike.

Caught between the need to zealously represent their clients and the edicts of the Supreme Court, many lawyers are tempted to lie to the court or to themselves. This is not hard to do, either doctrinally, because the race-neutral reasons do not have to be “persuasive, or even plausible,”¹⁶¹ or psychologically, as “[r]esearch suggests that people are remarkably facile at generating neutral explanations to justify biased judgments.”¹⁶² This results in widespread use of casuistry, defined as “specious reasoning in the service of justifying questionable behavior.”¹⁶³

This behavior was illustrated in a recent study by social psychologists Samuel Sommers and Michael Norton, in which they created a jury selection scenario in a hypothetical case. In the scenario, the defendant was charged with robbery and aggravated assault; the prosecution's case relied heavily on DNA evidence.¹⁶⁴ Sommers and Norton asked participants¹⁶⁵ to assume the role of a prosecutor exercising her final peremptory strike and choose between two prospective jurors whose profiles—which included familiarity with police misconduct for one, skepticism about statistical evidence for the other—were designed to be equally unattractive to the prosecution.¹⁶⁶ To test the effects of race on the decision, in one condition,

¹⁶⁰ Krieger & Fiske, *supra* note 5, at 1001.

¹⁶¹ *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

¹⁶² Sommers & Norton, *Race and Jury Selection*, *supra* note 158, at 532; *see also* Melilli, *supra* note 13, at 448, 461 (reviewing all reported cases from the time *Batson* was decided in 1986 through 1993 and finding that prosecutors were able to give an adequate race-neutral reason nearly 80% of the time). This result was predicted by Justice Marshall in his *Batson* concurrence. *See* *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (“Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.”).

¹⁶³ Norton et al., *supra* note 157, at 817.

¹⁶⁴ Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 *LAW & HUM. BEHAV.* 261, 265 (2007) [hereinafter Sommers & Norton, *Race-Based Judgments*].

¹⁶⁵ The participants included ninety college students, eighty-one law students, and twenty-eight practicing lawyers. *See id.* at 266.

¹⁶⁶ Specifically, the first juror was a journalist who had written articles about police misconduct, while the second juror was an executive who was skeptical of statistics. *See id.* at 265.

the first juror was depicted as white and the second juror was depicted as black, and in the other condition, the races were reversed. The study showed that participants' judgments of who to strike varied sharply by race. When the first juror was black, "participants challenged him 77% of the time; this same individual was challenged just 53% of the time when he was White."¹⁶⁷ Similarly, the second juror "was challenged 47% of the time when he was Black, compared to 23% when he was White."¹⁶⁸

Despite these disparities, the participants "rarely cited race as influential, focusing instead on the race-neutral characteristics associated with the Black prospective juror."¹⁶⁹ Therefore, 96% of the participants "cited as their most important justification" either the first juror's familiarity with police misconduct or the second juror's skepticism about statistics.¹⁷⁰ Norton and Sommers concluded that, "even absent awareness of the restrictions implemented by *Batson*, individuals are loath to admit to the influence of race."¹⁷¹ So the chances of a judge being able to divine an attorney's true intent in exercising a strike are remote. Instead, it may be time to subject the entire peremptory challenge inquiry to the scrutiny of behavioral realism, whose "only real normative commitment," write Jerry Kang and Kristin Lane, is to stand "against hypocrisy and self-deception."¹⁷²

C. MISUNDERSTANDING THE ATTORNEY'S ROLE

Another *Batson* weakness is that it systematically underestimates the professional motivations of attorneys. Trial lawyers, faced with the choice

¹⁶⁷ *Id.* at 267.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 269.

¹⁷⁰ *Id.* at 268. This was consistent with the findings of a similar experiment that set up a hypothetical college admissions task where participants were asked to choose between two candidates for college admission, one with a higher GPA, and the other with more Advanced Placement classes. See Norton et al., *supra* note 157, at 823. The researchers varied the race of the candidates to see whether the participants favored the black candidates, regardless of qualifications. They found that "[w]hen making a choice between two equally attractive college candidates, participants overwhelmingly selected Black candidates and justified this decision by inflating the importance of whichever qualification [GPA or number of Advanced Placement classes] favored the Black candidate." *Id.* at 824. Effectively, the participants were favoring black candidates "while masking the true reason for that preference." *Id.* at 823.

¹⁷¹ Sommers & Norton, *Race-Based Judgments*, *supra* note 164, at 270.

¹⁷² Kang & Lane, *supra* note 8, at 491 (internal quotation marks and citation omitted). As they observe, "The law implicitly adopts some folk-psychology model of human behavior and decisionmaking in order to apportion responsibility and incentivize behaviors. But garbage in (i.e., incorrect models of the mind) will produce garbage out (i.e., unfair and inefficient rules and policies)." *Id.*

between protecting their clients' interests and upholding some vague constitutional mandate, routinely choose the former.¹⁷³ David Baldus, after conducting a meticulous empirical study of 317 capital murder trials in Philadelphia between 1981 and 1997, found that prosecutors in capital cases overwhelmingly struck black jurors and defense counsel overwhelmingly struck white jurors.¹⁷⁴ He concluded that, "in *Batson*, the United States

¹⁷³ The paradigmatic expression of this view was summed up by former Philadelphia homicide prosecutor Jack McMahon in a 1987 jury selection training video. See Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987) (on file with the *Journal of Criminal Law and Criminology*). On the tape, McMahon tells young prosecutors that the case law says that the object of jury selection "is to get a competent, fair, and impartial jury. Well, that's ridiculous. . . . You're there to win . . . and the only way you're going to do your best is to get jurors that are as unfair and more likely to convict than anybody else in that room." *Id.* Conversely,

the blacks from the low-income areas are less likely to convict. It's just, I understand it. It's [an] understandable proposition. There is a resentment for law enforcement, there's a resentment for authority and, as a result, you don't want those people on your jury. And it may appear as if you're being racist or whatnot, but, again, you are just being realistic. You're just trying to win the case.

Id. Because he is so focused on winning cases, McMahon disparages attempts to comply with equal protection:

If you go in there and any one of you think you're going to be some noble civil libertarian and try to get jurors, "well, he says that he can be fair; I'll go with him," that's ridiculous. You'll lose; you'll be out of the office; you'll be doing corporate law. Because that's what will happen. You're there to win.

Bellin & Semitsu, *supra* note 113, at 1079 (quoting Videotape: Jury Selection with Jack McMahon, *supra*).

¹⁷⁴ See Baldus et al., *supra* note 3, at 10, 63 tbl.5. Baldus and colleagues found a strong difference in strike rates among subgroups, finding that prosecutors overwhelmingly disfavored young black men (strike rates of .61) and young black women (.63) as well as mid-age black women (.49) and older black women (.48). Defense counsel primarily targeted older nonblack men (.65), mid-age nonblack men (.58), older nonblack women (.55), and young nonblack men (.54). See *id.* Conversely, the study found that, for both parties, the strike rates of older black men and young nonblack women were near the average rate, "suggesting indifference." *Id.* at 62. Nor can these patterns be described as irrational, because empirical evidence has shown repeatedly that there are "differential attitudes and beliefs of black and non-black jurors that are highly relevant to trial guilt and death-sentencing outcomes." *Id.* at 17. More recently, a study of prosecutorial strike patterns in North Carolina capital trials over a twenty-year period found that "prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black." Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012). Moreover, "[t]hese disparities remained consistent over time and across the state, and did not diminish when we controlled for information about venire members that potentially bore on the decision to strike them, such as views on the death penalty or prior experience with crime." *Id.* at 1533-34. Grosso and O'Brien also noted a study conducted by journalists at the *Dallas Morning News*, which focused on 108 noncapital felony cases in Dallas County, Texas, in 2002. See *id.* at 1539-40 (citing Steve McGonigle et al., *Striking Differences: A Process of Juror Elimination*, DALL.

Supreme Court completely misunderstood the conviction of both prosecutors and defense counsel that race and gender discrimination are rational, ethical, and necessary strategies to protect the interests of their clients.”¹⁷⁵

At trial, a lawyer’s foremost obligation is to her client.¹⁷⁶ For lawyers committed to defending their clients with “devotion and zeal,”¹⁷⁷ *Batson* represents a roadblock to single-minded advocacy. Faced with the immediate obligation of representing a client facing the loss of liberty or even life, they do not have the time or inclination “to fight cultural stereotypes unless they are being used against [their] client.”¹⁷⁸ Indeed, some may believe that their duty to their clients is so strong that, as one lawyer argued, it would be “unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny.”¹⁷⁹

Justice O’Connor acknowledged the difficult position in which the *Batson* doctrine places attorneys. “We know that like race, gender matters,” she wrote, concurring in *J.E.B. v. Alabama*.¹⁸⁰ “[O]ne 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.”¹⁸¹ But the Court’s decision “severely limit[ed] a litigant’s ability to act on this intuition.”¹⁸² Instead, the Court had decreed that “any correlation between a juror’s gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.”¹⁸³ The same is true for race—studies have shown that juror race can have an impact on trial outcomes, particularly for nonwhite defendants.¹⁸⁴ So the Court’s

MORNING NEWS, Aug. 21, 2005, at 1A). “The journalists concluded that being black was the most important personal trait affecting which jurors prosecutors rejected.” *Id.* at 1540 (internal quotation marks omitted).

¹⁷⁵ Baldus et al., *supra* note 3, at 124.

¹⁷⁶ See, e.g., Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 184 (1983) (noting the criminal defense “tradition of unmitigated devotion to the client’s interest”).

¹⁷⁷ Abbe Smith, “Nice Work if You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 529 (1998).

¹⁷⁸ *Id.* at 529–30.

¹⁷⁹ *Id.* at 531. This view appears to be shared by many trial lawyers. See, e.g., William F. Fahey, *Peremptory Challenges: A Crucial Tool for Trial Lawyers*, 12 CRIM. JUST. 24, 26 (1997) (“[W]hen I represent a client to the best of my ability, my job is to win—not to become part of the latest social experiment to improve community relations.”).

¹⁸⁰ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O’Connor, J., concurring).

¹⁸¹ *Id.* at 149.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *supra* note 175.

insistence that race cannot legally be a consideration puts lawyers in an impossible position. And when voir dire is limited, lawyers are even more likely to rely, at least in part, on stereotypes.¹⁸⁵

Therefore, there is a double incentive for lawyers to mask any effect of race in their decisions to challenge particular jurors—both the *Batson* line of cases and psychological pressures. Above all, lawyers want to win, particularly at trial, where the stakes are highest. As one trial lawyer admitted, once the burden shifts to him to justify a peremptory strike, “then you are tempted to engage in that thing which is absolutely horrible: lying in a courtroom. You have an ethical duty to be candid to the court, and yet we all know that pretext is the name of the game here.”¹⁸⁶ The end result is that it is “highly unlikely that many attorneys will cite race in justifying peremptories, even if they are aware of its influence.”¹⁸⁷ Ultimately, as one attorney suggested, the *Batson* analysis does not seem to be honest, given the fact that there may not be “any such thing as a racially neutral ‘anything’ in America.”¹⁸⁸

D. *BATSON*’S FAILURE TO REMEDY THE EXCLUSION OF MINORITIES FROM JURIES

It is therefore unsurprising that *Batson*’s signal failure has been its inability to eliminate racial discrimination in jury selection. There is little dispute that in 1986, when *Batson* was decided, peremptory challenges were widely misused.¹⁸⁹ Unfortunately, these patterns are not all in the past. One study of jury selection procedures in eight Southern states revealed counties where prosecutors “excluded nearly 80% of African-

¹⁸⁵ The psychological literature suggests that, while reliance on stereotypes is diminished when more factors are at play, “[s]tereotypes are particularly likely to affect judgments that are based on limited information, made under cognitive load, and hurried by time pressure, all apt descriptions of typical voir dire.” Sommers & Norton, *Race and Jury Selection*, *supra* note 158, at 530 (internal citations omitted).

¹⁸⁶ Brown, *supra* note 105, at 1209; *see also* Fahringer, *supra* note 2, at 117 (noting that jury selection generally “involves some guile on the part of lawyers. Lawyers announce to the panel that they want only jurors who will decide the case impartially, while, in fact, they want partisan jurors.”).

¹⁸⁷ Sommers & Norton, *Race and Jury Selection*, *supra* note 158, at 532.

¹⁸⁸ Brown, *supra* note 105, at 1204.

¹⁸⁹ Justice Marshall, in his concurrence in *Batson*, collected a list of cases showing strike rates against black jurors of around 70% to 80%. *See* *Batson v. Kentucky*, 476 U.S. 79, 103–04 (1986) (Marshall, J., concurring). Similar phenomena were noted by the Eleventh Circuit in *Horton v. Zant*, 941 F.2d 1449, 1457 (11th Cir. 1991) (discussing prosecutor who, between 1974 and 1981, “exercised 1,580 peremptory strikes, 1,095 of them (70%) against black venire members”). In cases where the defendant was black, the prosecutor struck nearly 90% of black venire members in capital cases and 85% of black venire members in noncapital cases. *See id.* at 1458.

Americans qualified for jury service.”¹⁹⁰ Specifically, the researchers found that between 2005 and 2009, prosecutors in Houston County, Alabama, used their peremptory strikes to remove 80% of African-American jurors from jury venires,¹⁹¹ and in Dallas County, Alabama, prosecutors had used 157 out of 199 strikes—that is, about 80% of them—against African-American venire members in the twelve reported cases since *Batson*.¹⁹²

Another study, which focused on 390 felony jury trials in a single Louisiana parish between 1994 and 2002, showed that prosecutors struck African-American jurors at more than three times the rate they struck white jurors.¹⁹³ In other words, at least in some parts of the country, *Batson* has done little to curb the use of racially based peremptory challenges.

While the problem is clearly more acute in some jurisdictions than in others,¹⁹⁴ nonwhite defendants are still convicted today—of serious or even capital crimes—by all-white juries due to the use of peremptory challenges.¹⁹⁵ And if this phenomenon is far less prevalent than it was fifty

¹⁹⁰ EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), available at <http://goo.gl/h9PSve>. The states studied were Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee. See *id.*

¹⁹¹ See *id.* at 14 (citation omitted). The population of Houston County is about 26% African-American. See U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS FOR HOUSTON COUNTY, ALABAMA (last revised June 27, 2013), available at <http://goo.gl/rwoiQl>.

¹⁹² See EQUAL JUSTICE INITIATIVE, *supra* note 190, at 14. The population of Dallas County is over 69% African-American. See U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS FOR DALLAS COUNTY, ALABAMA (last revised June 27, 2013), available at <http://goo.gl/IDGGFT>.

¹⁹³ See RICHARD BOURKE ET AL., LA. CRISIS ASSISTANCE CTR., BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY’S OFFICE 5, 7 (2003), available at <http://goo.gl/NXiJVH>. In the eighteen murder trials since *Batson* in Jefferson Parish that resulted in death sentences and where there was a record of juror race, “10 had no black members. Seven had one. One had two. None had three.” Adam Liptak, *Oddity in Picking Jurors Opens Door to Racial Bias*, N.Y. TIMES, June 4, 2007, at A12. This comes out to 4% participation by African-American jurors in a parish where the population in 2000 was 23% African-American. See *id.*

¹⁹⁴ Louisiana appears to have had more than its share of black defendants convicted by all-white juries. See, e.g., *State v. Austin*, No. 2011 KA 2150, slip op. at 2, 20 (La. Ct. App. June 8, 2012) (involving a black defendant convicted of a 2009 second-degree murder before an all-white jury after prosecutor struck two black jurors from the panel); *State v. Qualls*, 921 So. 2d 226, 240–42 (La. Ct. App. 2006) (describing how prosecutor used nine of eleven strikes against black jurors, resulting in all-white jury); *State v. Price*, 917 So. 2d 1201, 1210 (La. Ct. App. 2005) (noting that prosecutor struck all six black jurors from panel in 2003 rape case involving black defendant). This seems in line with the success rate for *Batson* claims in Louisiana, measured in 1993, of just 2.94%. See Melilli, *supra* note 13, at 468 tbl.F-4.

¹⁹⁵ See, e.g., *State v. Weary*, 931 So. 2d 297, 336–37 (La. 2006) (Johnson, J., dissenting) (describing the 2002 capital murder trial of a black defendant tried by all-white jury after prosecutor struck only black juror left on the venire); *Howell v. State*, 860 So. 2d 704, 724, 767 (Miss. 2003) (affirming death sentence of black defendant for 2000 murder tried by an all-white jury after prosecutor struck only two black jurors on panel); *State v. McFadden*,

years ago,¹⁹⁶ it is arguably due more to changing cultural norms than to any improvement brought about by *Batson*. If *Batson* were genuinely curbing the race-based use of peremptory challenges, we would probably have fewer cases like these:

- Darryl Batts was convicted of robbery in Kentucky in 2003. Batts, who is African-American, was convicted by an all-white jury. While there had been ten prospective African-American jurors on his jury panel, five were eliminated by random selection, and the prosecutor struck the remaining five. Nonetheless, the trial court found no *Batson* violation, and Batts was sentenced to fifty years in prison.¹⁹⁷
- Ricky Burnette was convicted of sexual assault in Wisconsin in 2003. Burnette, who is African-American, was tried before an all-white jury after the prosecutor struck all three African-American jurors (and one Asian-American juror) from the panel. The trial court found no *Batson* violation.¹⁹⁸
- Lawrence Branch was tried for murder in Mississippi in 2002. Branch, who is African-American, was tried before an all-white jury after the prosecutor struck the only three African-American prospective jurors on the venire. The trial court found no *Batson* violation and Branch was convicted and sentenced to death.¹⁹⁹

216 S.W.3d 673, 674, 678 (Mo. 2007) (reversing conviction and death sentence for black defendant tried by all-white jury for 2003 murder after prosecutor struck four black jurors and one Asian juror from panel); *State v. Carter*, 711 S.E.2d 515, 519, 522, 524 (N.C. Ct. App. 2011) (affirming 2010 second-degree murder conviction of black defendant where prosecutor struck only two black jurors on a panel and the jury seated was all-white); *State v. Saintcalle*, No. 86257-5, slip op. at 1, 24–27 (Wash. Aug. 1, 2013) (affirming 2009 conviction of black defendant for felony murder by all-white jury after prosecutor peremptorily struck only black juror on venire).

¹⁹⁶ In researching trials that had taken place since January 1, 2000, I found seventy-five cases in which defendants, who had been convicted by all-white juries, raised *Batson* claims on appeal. Of those defendants, fifty-two were African-American, three were Hispanic, four were white, one was Asian-American, one was Native-American, and fifteen could not be determined. See *All-White Jury Spreadsheet* (on file with the *Journal of Criminal Law and Criminology*). An additional twelve defendants claimed that they had been tried before all-white juries, but their contentions could not be verified. See *id.*

¹⁹⁷ See *Batts v. Commonwealth*, No. 2004-SC-000364-MR, 2005 WL 3500779, at *2, *4, *6 (Ky. Jan. 26, 2006).

¹⁹⁸ *State v. Burnette*, No. 2004AP2754-CR, 2005 WL 3466532, at *1 (Wis. Ct. App. Dec. 20, 2005).

¹⁹⁹ *Branch v. Epps*, 844 F. Supp. 2d 762, 766–67, 778–79 (N.D. Miss. 2011). Although his *Batson* claim was unsuccessful, Branch's death sentence was vacated on grounds of mental retardation. See *id.* at 773.

These cases echo the long history of racial discrimination in American justice and belie the notion that we live in a post-racial world.²⁰⁰ But all-white juries are not problematic just because they are symbolically disturbing.²⁰¹ Empirical evidence suggests that they do a worse job than racially diverse juries. In a study comparing racially mixed mock juries and all-white mock juries, researchers found that racially mixed juries tended to deliberate longer and discuss more information, made fewer factual errors, and were less resistant to discussions of race than all-white juries.²⁰² As a result, defendants tried by all-white juries are more likely to be found guilty than those tried before more diverse juries.²⁰³ For black defendants in capital cases, all-white juries correspond with more likely imposition of the death penalty.²⁰⁴ A study of 340 capital trials in fourteen states found that the presence of one or more black men on the jury was markedly associated

²⁰⁰ Kang & Lane, *supra* note 8, at 519. “In a post-civil rights era, in what some people exuberantly embrace as a post-racial era, many assume that we already live in a colorblind society,” they write. *Id.* But “[t]he data force us to see through the facile assumptions of colorblindness.” *Id.* at 520.

²⁰¹ See Alschuler, *Racial Quotas*, *supra* note 107, at 704 (observing that all-white juries “evoke disturbing images of American criminal justice”). Alschuler notes that, in the many communities where all-white juries are mistrusted, “the mistrust has deep historical roots.” *Id.* at 707.

²⁰² See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608 (2006). Sommers concluded that “arguments in favor of diversity need not focus exclusively on righting historical wrongs or providing equal access for members of underrepresented social categories,” but could instead be supported by data suggesting that “racial heterogeneity can have observable decision-making benefits for groups as a whole and can also lead majority individuals to demonstrate improved performance.” *Id.*

²⁰³ Longitudinal studies of trials show a relationship between probability of conviction and the number of black jurors with increased black representation on juries corresponding with a decline in felony convictions. See JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 375–76, 378–79 (1977) (showing a decline of approximately 10% in felony convictions in Baltimore following a change in jury selection procedure that increased black representation). In 1969 in Baltimore, jury commissioners changed from “selecting jurors from the lists of property owners—which meant older, richer, whiter juries—to taking them randomly from the voter registration list.” *Id.* at 33. This sharply increased black representation on juries, from approximately 30% before 1969 to 46.7% in 1973. See *id.* “The rate of conviction,” reports Van Dyke, “which between 1965 and 1969 had averaged about 83.6 percent in Baltimore’s jury trials, dropped to about 65.3 percent during the first few months after the switch and remained below 70 percent during the next several years.” *Id.* In the Central District of Los Angeles, criminal convictions declined from 67% to 47% from 1969 to 1971 after the District’s method of jury selection substantially increased black representation on juries. See *id.* at 377, 380.

²⁰⁴ See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 189, 192 tbl.1, panels B & C (2001).

with lower death sentencing rates for black defendants. In cases in which the victim was black, jurors imposed the death penalty 66.7% of the time when the jury included no black men versus 42.9% of the time when the jury included one or more black men.²⁰⁵ In cases in which the victim was white, jurors imposed the death penalty 71.9% of the time when the jury had no black men, but only 42.9% of the time if the jury included one black man and 36.4% of the time when the jury included two black men.²⁰⁶ The most recent study, of 785 felony jury trials in Florida between 2000 and 2010,²⁰⁷ showed that juries drawn from all-white pools were more likely to convict black defendants than white defendants; when one or more black prospective jurors were included in the pool, the conviction rates for black and white defendants were nearly identical.²⁰⁸

Not every instance of an all-white jury is due to the discriminatory use of peremptory challenges—there remains an abiding issue with assembling jury pools that can lead to serious underrepresentation.²⁰⁹ Indeed, the more pervasive problem may be that many African-Americans never make it to the courthouse in the first place, that instead they are, as one judge observed, “consistently and pervasively underrepresented in [her jurisdiction’s] juries, from one year, and one jury wheel, to the next.”²¹⁰ But to the extent that the exclusion of African-American and minority jurors is also due to the use of peremptory challenges, it is fair to ask whether *Batson* has been effective at remedying the matter. And the data suggest that *Batson* has had surprisingly little effect. In the Baldus study of 317 capital murder trials in Philadelphia between 1981 and 1997,²¹¹ a

²⁰⁵ *Id.* at 192 tbl.1, panel C.

²⁰⁶ *Id.* at 192 tbl.1, panel B.

²⁰⁷ See Anwar et al., *supra* note 16, at 1017, 1027.

²⁰⁸ “When there are no potential black jurors in the pool, black defendants are significantly more likely than whites to be convicted of at least one crime (81% for blacks versus 66% for whites).” *Id.* at 1032. Conversely, the researchers found, if there was at least one black juror in the pool, conviction rates became “almost identical (71% for blacks and 73% for whites).” *Id.*

²⁰⁹ See Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It With Equal Protection*, 64 HASTINGS L.J. 141, 145–46 & n.18 (2012) (arguing that, despite the consistently low level of successful fair-cross-section claims, “research demonstrates—just as consistently—that African-Americans and Hispanics are underrepresented in jury systems across the count[r]y”). As one First Circuit judge wrote, “[T]he true distortion of ‘reality’ is the failure of a criminal law system, before which is tried a large number of persons from an ethnic group, to include within its mechanisms the peers of those charged, at least in some reasonable measured proportion to their membership in the population.” *United States v. Pion*, 25 F.3d 18, 27 (1st Cir. 1994) (Torruella, J., concurring).

²¹⁰ *United States v. Bates*, No. 05-81027, 2009 WL 5033928, at *17 (E.D. Mich. Dec. 15, 2009).

²¹¹ See Baldus et al., *supra* note 3, at 10.

period of time that included the five years before *Batson*, researchers found that the “Supreme Court decisions banning these practices [of racially motivated strikes] appear to have had only a marginal impact.”²¹²

III. NEGOTIATING PEREMPTORY CHALLENGES

This Article proposes a way out of the current impasse. Negotiating peremptory challenges preserves the original values of the peremptory challenge while offering litigants an effective bulwark against its misuse. And it can achieve those ends using simple negotiation skills that are part of every lawyer’s arsenal. If effective, this method would do away with cumbersome and ineffective *Batson* procedures, maintain party control of the process, preserve dignity for all participants, and be more effective at blocking attempts to purge juries of minorities.

A. THE MECHANICS OF THE PROPOSAL

The procedure for negotiating challenges contemplates that voir dire would proceed as usual, and then the parties would exercise all of their challenges for cause, leaving a panel of qualified jurors.²¹³ This panel would be seated sequentially, resulting in an identifiable “first twelve” jurors.²¹⁴ If any one of the first twelve were struck peremptorily, they would be replaced by the next juror in the venire.²¹⁵ Once presented with a slate of qualified jurors, the parties would be allowed a set amount of time to negotiate peremptory strikes.²¹⁶ If the parties failed to agree, the first twelve jurors would be empaneled.²¹⁷

²¹² *Id.*

²¹³ The size of this panel would probably be close to the qualified panels used currently, which correspond to the number of jurors needed plus the number of strikes allotted to each side—usually somewhere on the order of thirty jurors.

²¹⁴ This assumes that the jurisdiction would use twelve jurors. In certain jurisdictions, the panel might be smaller. *See supra* note 24.

²¹⁵ This practice would correspond to that in a sequential strike system, where the prospective jurors are seated in order so that the parties know who would be next on the panel if someone is struck. Some jurisdictions follow a struck juror system where if a juror is struck, he could be replaced by any other juror remaining in the venire. This system would add an extra layer of uncertainty to the negotiations, making a sequential system preferable.

²¹⁶ I envisage this “negotiation window” as being approximately thirty minutes, slightly longer than the time a judge would ordinarily allow for the parties to decide how to exercise their peremptory strikes. While some judges, particularly in the state system, only give litigants a couple of minutes to decide on their strikes and might be reluctant to commit half an hour or more to negotiation, they might be swayed by the prospect of never having to adjudicate a *Batson* issue again.

²¹⁷ This proposal, in its simplest form, contemplates a single-defendant trial. In a multiple defendant trial, negotiation would need to be conducted in two stages—one for defense counsel to agree on a strategy and the other for counsel to negotiate with the prosecution. Multi-

Negotiation, then, would likely proceed along four possible lines. The first scenario, which seems likely to be the most common, can best be described as horse-trading. Under this scenario, the parties would “trade” the perceived most pro-prosecution juror for the perceived most pro-defense juror, then the next most pro-prosecution juror for the next most pro-defense juror, and so on. In negotiation terms, this scenario would be a compromise, where each side would “give in somewhat to find a common ground.”²¹⁸ In many ways, this would not be dissimilar to the peremptory strike system used now—both the “flower child” and the police officer’s brother likely would be mutually struck, leaving fewer strongly partisan jurors on the panel in favor of more seemingly neutral ones. But there is an important difference in that parties can stop negotiating before all members of any groups they wish to preserve are eliminated from the jury panel. Any numerical disparities in the number of favorable jurors for either side would therefore be less outcome determinative.²¹⁹

The second scenario, in which parties might actually agree to challenge particular jurors, is more aspirational. If an oddball juror was on the initial panel—one “whose statements provide no basis for exclusion but whose manner seems erratic”²²⁰ and who seemed unattractive both to the prosecution and to the defense—the parties might cooperate. If both parties agreed on removal, they could exclude the potentially disruptive juror on consent without “expending” a challenge they might prefer to reserve for a juror who seemed unfavorable to them specifically. In negotiation terms, this would be a collaborative strategy, where the outcome of the negotiation would maximize the outcomes for both parties.²²¹ The rest of the strikes would likely be the product of the compromise scenario described above.

The third scenario might occur if the parties decided that it would be in their best interests to exercise their peremptory challenges as usual and then simply present their joint list to the judge, thereby evading the negotiation rules (and *Batson* to boot). In this evasion scenario, the parties could simply take the entire panel of qualified jurors and make alternate strikes

defendant negotiations could raise a number of additional issues, including disagreement among defense counsel, whether the refusal of one to negotiate would bind the others, and so forth. The resolution of these issues is beyond the scope of this Article.

²¹⁸ Roy J. Lewicki et al., *Selecting a Strategy*, in NEGOTIATION: READINGS, EXERCISES, AND CASES 14, 17 (Roy J. Lewicki et al. eds., 5th ed. 2007) (describing the compromising, or “split-the-difference,” strategy).

²¹⁹ This would give the parties more effective power to “cancel out” each other’s strikes and achieve something closer to parity. *Cf. supra* notes 44–47 and accompanying text.

²²⁰ Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 206. These jurors are sometimes referred to as “three dollar bills.” *Id.*

²²¹ *See* Lewicki et al., *supra* note 218, at 22–23 (describing collaborative, or “win-win,” strategy).

until they were left with twelve jurors. The negotiation between the parties would be limited to an agreement to disregard the rules and simply exercise their strikes. Such a result would effectively mimic a peremptory strike regime, albeit with less judicial oversight and with both parties effectively forgoing any *Batson* claims. While it might be the least desirable scenario from the point of view of the excluded jurors, the scenario is not much different from situations in which the parties exercise their strikes and simply do not raise *Batson* claims. In addition, a lawyer with a stake in retaining one or more jurors on the initial panel might be less likely to make such an agreement. A strength of this proposed negotiation system is that it makes no peremptory strikes the default option instead of relying on attorneys to overcome the inertia and diffidence that might prevent them from raising a *Batson* objection.²²² Attorneys therefore would have to consider whether they actually want to agree to a blanket authorization of all of their opponents' strikes to trigger this scenario.

A fourth scenario could be termed "refusal to play." If one participant decided that he was happy with the panel as it was, he could simply refuse to negotiate, forcing his counterpart to accept the first twelve jurors. This would unilaterally end the process and would result in no peremptory challenges being exercised by either side. This result would be tantamount to abolishing peremptory challenges on a case-by-case basis at the instance of the parties.

No matter which scenario or combination of scenarios the parties followed in their negotiation, a useful feature of the system would be to have the parties jointly present their agreed-upon strikes to the court. Having the parties agree to a list of jurors to be peremptorily struck would be similar to handing the judge a stipulation. Not only would a list resolve the issue of who would ultimately constitute the jury panel, but it would also function as a certification that the parties had waived their *Batson* rights.²²³ In a sense, this is an open way of doing what is ordinarily accomplished by silence when attorneys fail to raise *Batson* objections. The proposal contemplates that, similar to a stipulation, the judge would accept the list as agreed to by the parties unless she had good cause to reject

²²² A recognized cognitive bias is the "status quo" bias, which "refers to the tendency to value the status quo over other options, even when those options increase individual welfare." Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1134–36 (2010) (citing William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 19 (1988)).

²²³ While a defendant would be foreclosed from relitigating that waiver, he might be able to claim ineffective assistance of counsel during the negotiation process.

it.²²⁴ Once the list is accepted by the judge and the challenged jurors are excused, there would be no further inquiry into the process. The defendant would lose the opportunity to raise jury selection issues on appeal except as part of an ineffective assistance of counsel claim.

B. THE BENEFITS OF A NEGOTIATION MODEL

Negotiating peremptory challenges offers a number of benefits. One is clarity: If no resolution is reached, the parties are left with the first twelve jurors on the panel. A second benefit is ease of implementation. Lawyers negotiate all the time—over discovery, during plea bargaining, for exclusion of time. Even if a case goes to trial, there are numerous procedural aspects to be worked out. Third, negotiation is likely to protect many of the interests at stake in the jury selection process: autonomy, parity, and the possibility of enhanced community participation. While it might seem counterintuitive to propose a system of negotiated consent at the beginning of a trial, perhaps the paradigmatic adversarial experience, the proposal is not as radical as it might appear. Vindication of jurors' equal protection rights depends overwhelmingly on a party's decision to raise those rights, thus negotiation is not that great a departure from the current system.

1. *Curbing the Use of Race-Based Peremptories*

Unlike *Batson*, which requires the affirmative step of raising a challenge to an opponent's strike, the negotiation model, by its very structure, would put the parties in a position of having no challenges at all if there is no agreement. By simply having to consent, lawyers and their clients would be forced to consider whether a proposed strike helps or hurts their prospects. If the strike seemed unfavorable, they would have to assess whether there is a complementary strike that would even the scales. The cognitive biases that might prevent a party from raising a *Batson* challenge or prevent a judge from finding a violation would therefore be tempered by the necessity of making a conscious choice.

In addition, litigants would have the power to block race-based strikes if they so desired. In any situation where there were at least some nonwhite jurors on the initial panel, there would be considerably less risk that they

²²⁴ This is a similar standard to that used by courts when contemplating stipulations of fact between the parties. As a rule the courts “will enforce stipulations if such stipulations are reasonable, are not against good morals or sound public policy, are within the general scope of the case made by the pleadings, and are in such form as may be required by rule of court or statute.” ROBERT S. HUNTER, *FEDERAL TRIAL HANDBOOK: CIVIL* § 21.4 (4th ed. 2005). Moreover, “It is generally considered that stipulations which tend to expedite the trial should be enforced unless good cause is shown to the contrary.” *Id.*

would all be struck. As an example, consider a situation similar to that of Ricky Burnette, mentioned above, who faced an all-white jury after three African-American jurors and one Asian-American juror were struck from the venire.²²⁵ Under the *Batson* regime, Burnette had relatively little agency—even if he raised an objection, he could not ensure that the judge would find a violation and disallow the strikes. But in negotiation, Burnette and his attorney would have a veto power. They could judge for themselves whether they wanted to keep the panel as constituted or agree to a certain number of strikes in exchange for strikes of their own. If it was important to Burnette and his counsel to retain an African-American presence on the jury, and there were African-American jurors in the first twelve, they could simply refuse to let them go.²²⁶ They might agree to the strikes of one or even two of the African-American jurors in exchange for strikes of white jurors who seemed particularly prosecution-friendly. But as a matter of self-interest—assuming that both sides believed that juror race might be significant to the outcome of the case—it is implausible that Burnette and his attorney would agree to an all-white jury.

Even if the first twelve jurors on the panel were white, the prosecutor might still want to trade some challenges when certain prospective jurors among the first twelve seemed unfavorable to the prosecution. If the prosecutor refused to negotiate, the defendant would indeed have to go ahead with an all-white jury. But this risk is no greater than the risk that would accompany abolishing peremptory challenges, long championed as a means of enhancing jury diversity in the aggregate.²²⁷ At minimum, the homogeneity of the initial panel would be due to random selection rather than to the purposeful exclusion of nonwhite jurors.

2. Fidelity to Original Purposes of the Peremptory Challenge

As discussed above, the original peremptory challenge was an arbitrary and capricious right, designed to give the litigants some control over the jury selection process and thereby enhance the acceptability of that jury's verdict for the litigants and the public. Its greatest virtue was not its much-vaunted—though little supported—claim to enhancing impartiality²²⁸

²²⁵ See *supra* note 198 and accompanying text.

²²⁶ See, e.g., Smith, *supra* note 177, at 523–26 (describing her representation of a black medical student charged with assaulting a white police officer). For Smith, the calculus was simple: “We wanted as many black or Hispanic jurors as we could get. We exercised all of our peremptory challenges to excuse whites.” *Id.* at 526.

²²⁷ See *supra* Part I.D.2.

²²⁸ Impartiality is still frequently invoked as the driving reason for the challenge. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 70 (1992) (Scalia, J., dissenting) (“In the interest of promoting the supposedly greater good of race relations in the society as a whole . . . we use

but the opportunity for litigants to participate and attain freedom from judicial control. These values are kept intact by a system of negotiating peremptory challenges. Whether the litigant wants to exercise a challenge for whimsical or strategic reasons, she has the latitude to do so, without needing to make up any justifying reasons. This latitude is only circumscribed by the exercise of her opponent's own autonomy.²²⁹ Each party will have to decide, in the circumstances of each case, whether she wants to reach a compromise or whether she would rather forego her own challenges than allow any opposing challenges.

3. *Ease of Implementation*

Finally, negotiating peremptory challenges employs a process that is familiar and easy to understand. While negotiation permeates all areas of lawyering (and, arguably, modern life),²³⁰ it has a particularly salient role in criminal practice. In our system, with the overwhelming majority of cases resolved by plea bargaining, trials are quite literally exceptional.²³¹ Even lawyers who see themselves primarily as litigators spend an enormous amount of time negotiating—discussing plea offers, working out deadlines, drafting stipulations. Experienced trial attorneys know that the most effective use of their time is to focus on the issues that are really in contention and work out everything else.²³² According to one trial attorney, the lawyers who shrink from such agreements are typically “also the ones

the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair.”). Nonetheless, that rationale is ultimately unconvincing, as impartiality should properly be the province of the challenge for cause. *See supra* Part I.B.1.

²²⁹ Negotiation also helps ensure parity among the litigants, a value that Justice Marshall recognized was important to prevent abuse. *See Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (“Our criminal justice system ‘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.’” (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887))).

²³⁰ *See* ROGER FISHER ET AL., *GETTING TO YES*, at xvii (2d ed. 1991) (“Negotiation is a fact of life.”).

²³¹ *See* Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1623 (2011) (noting that, “[f]or the overwhelming majority of criminal defendants, we have an adversarial system in name alone”). This is one of the reasons that “[c]riminal practice is one of the most cooperative practices in all of law.” Richard Birke, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*, 91 MARQ. L. REV. 39, 41 (2007).

²³² *See, e.g.*, Elliott Wilcox, *Sifting the Issues with Stipulations*, 44 TRIAL 39, 39 (2008). Wilcox describes how, when defending a client charged with attempted murder, he and the prosecutor ended up stipulating to almost every material fact in the case. *See id.* The reason was simple: “Because we knew the strengths and weaknesses of our cases, we were able to identify the true issues that we needed to focus on. In short, we knew what mattered and, more important, what *didn't* matter.” *Id.*

who either don't understand their cases very well or don't know how to try cases."²³³ Unlike, say, cumulative voting, which requires some familiarity with the structure of corporate voting, negotiation is a central lawyering skill.

Peremptory challenge negotiation would also take place on a more level playing field. Each side would have autonomy and roughly equal bargaining power—a distinct departure from the world of plea bargaining, where the prosecution holds almost all the bargaining chips. Of course, the strength of a party's position will be determined to a large extent by random selection. If the first twelve jurors seem more favorable to one side than the other, that side will have an upper hand in negotiation, because its alternative to a negotiated agreement is fairly satisfactory.²³⁴ But even the party in the weaker position can easily calculate whether he would be better off accepting the existing panel or agreeing to other terms.

Nor does the proposal require wholesale adoption throughout the land. If necessary, an individual judge could establish negotiation as the rule in her courtroom. Constance Baker Motley, the former federal judge and prominent civil rights advocate, decided on her own initiative to bar peremptory challenges in her courtroom.²³⁵ “[J]udicial experience with peremptory challenges proves that they are a cloak for discrimination,” she wrote.²³⁶ The peremptory challenge, “therefore, should be banned.”²³⁷ Equally, a state's Supreme Court could experiment with the proposal in a limited way, for instance in districts where the racial make-up of the juries has consistently proved problematic.

²³³ *Id.* Parties can even occasionally agree on ways to streamline jury selection. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896, 2900 (2010) (“The parties agreed to exclude, in particular, every prospective juror who said that a preexisting opinion about Enron or the defendants would prevent her from being impartial.”); *Carter v. State*, 600 S.E.2d 637, 639 (Ga. Ct. App. 2004). In *Carter*, the parties cross-challenged each other's strikes on the basis of *Batson*. In the end, both sides “explicitly waived any *Batson* objection upon reaching an agreement that two jurors originally excluded—a female struck by the defense and an African-American struck by the prosecution—would be seated on the jury. The trial court agreed to this remedy, and the two individuals joined the jury.” *Id.*

²³⁴ The idea of BATNA (best alternative to a negotiated agreement) was popularized by Roger Fisher in the best-selling book *Getting to Yes*. See FISHER ET AL., *supra* note 230, at 100. As Fisher explains, “[T]he relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement,” therefore “[t]he better your BATNA, the greater your power.” *Id.* at 102.

²³⁵ See Mark Hansen, *Peremptory-Free Zone: A Federal Judge Won't Allow Such Challenges in Her Courtroom*, 82 A.B.A. J. 26, 26 (1996).

²³⁶ *Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 185 (S.D.N.Y. 1996). For a discussion of judicial self-help measures in combating racial discrimination in jury selection, see Marder, *supra* note 138, at 1709–12.

²³⁷ *Id.*

C. CRITIQUES AND REBUTTAL

Any proposal that suggests doing away with a well-entrenched (even if much-criticized) system is going to be subject to critiques from a variety of perspectives. It is important to remember that even if the proposal were adopted, it is not a universal panacea. Even with this system, the jury might not always be representative in any event.²³⁸ But negotiating peremptory challenges could quiet the noise surrounding *Batson* and enable us to focus on less visible, but wider-reaching, systemic reforms. And negotiation would strike a fairer and more honest balance than the system criminal attorneys currently labor under.

1. *Doctrinal Objections*

Several objections could fairly be made to the proposal. First, negotiation can be said to ignore the rights of the absent jurors, who may be excluded by agreement with no chance to rectify the injustice of their exclusion. Second, a negotiated process might appear to lack legitimacy, as private ordering would replace decisions made in open court. Finally, there is a concern that the expressive value of the *Batson* exercise will be lost. This Part answers all of these objections in turn.

a. The Third-Party Doctrine Critique

One objection to this proposal is that it fails to honor the rights of prospective jurors. The concern that peremptory challenges may be used to exclude protected classes of jurors from democratic participation has become the animating principle of the *Batson* regime, displacing the interests of the defendant in retaining particular jurors.²³⁹ “Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process,” observed the Court in *Powers v. Ohio*.²⁴⁰ Accordingly, the Court held that

²³⁸ See *supra* notes 209–10 and accompanying text.

²³⁹ Although the *Batson* Court had originally required that a defendant show that he is a member of a cognizable racial group and that the prosecutor had used peremptory challenges to strike members of that group, *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), it had also acknowledged the rights of the excluded jurors. As the Court observed, not only did racial discrimination in jury selection harm the accused, but it also harmed the excluded juror by “denying [him] participation in jury service on account of his race.” *Id.* at 87.

²⁴⁰ *Powers v. Ohio*, 499 U.S. 400, 407, 409 (1991) (holding that white defendant’s race did not affect his standing to raise the equal protection rights of excluded black jurors). *Batson*, wrote Justice Anthony Kennedy, was designed to serve multiple ends, “only one of which was to protect individual defendants from discrimination in the selection of jurors.” *Id.* at 406.

litigants had third-party standing to raise the rights of excluded jurors, as the jurors were not in a position to object themselves.²⁴¹

Of course, the issue is less that jurors are unable to assert their rights than that they lack the desire to do so. But while there may be no stampede to the courthouse by people demanding to be selected for jury service, much less prepared to sue about it,²⁴² the right of every citizen to have the opportunity to sit on a jury is an important part of the democratic project. As Alschuler observed, if the rights of prospective jurors are violated by the discriminatory use of peremptory challenges, what is at stake is “not only the opportunity to serve on juries (an opportunity that many of them would gladly decline) but also and more importantly their freedom from classification on invidious grounds.”²⁴³ And this is a right that is difficult to vindicate directly. Even under our current, open-court *Batson* regime, jurors have no opportunity to voice their own objections. “Although an unusually assertive juror might demand a hearing on the propriety of his or her exclusion, the predictable judicial response would be one of rejection—probably one of astonished rejection.”²⁴⁴

The concern raised by a system of negotiated strikes is that juror participation would depend on private parties’ acquiescence with little input from the court. Without the *Batson* framework, the absent jurors might simply be forgotten, their rights only vindicated, if at all, as a byproduct of the parties’ self-interest as expressed through bargaining. At first blush, this seems a compelling argument. But the same can be said for the *Batson* regime itself. While the doctrine holds that litigants are the proper party to

²⁴¹ While “[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party,” *Barrows v. Jackson*, 346 U.S. 249, 255 (1953), a litigant may bring a claim on behalf of third parties so long as three conditions are met. First, the third party must have suffered an “injury in fact,” giving her “a ‘sufficiently concrete interest’ in the outcome of the issue in dispute.” *Powers*, 499 U.S. at 411 (quoting *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)). Second, the litigant must have a “close relation to the third party,” and third, “there must exist some hindrance to the third party’s ability to protect his or her own interests.” *Id.* (citing *Singleton*, 428 U.S. at 113–14, 115–16). Despite the preference for allowing each party to raise its own claims, “[i]f there is some genuine obstacle to such assertion . . . the third party’s absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right’s best available proponent.” *Singleton*, 428 U.S. at 116.

²⁴² As the Court pointed out in *Powers*, it took nearly a century after the Civil Rights Act of 1875 for anyone to press a claim that he was being excluded from jury service in violation of equal protection. *See Powers*, 499 U.S. at 414 (citing *Carter v. Jury Comm’n of Greene Cnty.*, 396 U.S. 320, 320 (1970)).

²⁴³ Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 193.

²⁴⁴ *Id.* at 194. As Alschuler points out, a court is not going to allow a juror to “interrupt an ongoing criminal proceeding to demand a hearing simply because the juror’s own rights may have been violated.” *Id.*

assert excluded jurors' rights, a party will only bother to vindicate those rights if she believes it will be advantageous to her. While bluntly put, the view of one defense lawyer that she felt "no obligation as an attorney to fight cultural stereotypes unless they are being used against my client, or to serve the interests of the broader community, unless this somehow also serves my client"²⁴⁵ is likely widely shared in the legal community. If a litigant can be an effective defender of jurors' rights, it is not because she particularly cares about those rights, but because it suits her purposes to defend them. As Underwood astutely observed, third-party standing works in jury selection because it "harnesses private motivations to public purposes . . . [and] enlists the self-interest of litigants to protect the rights of the jurors and the public interest associated with those rights."²⁴⁶ Negotiation functions in exactly the same way.

A litigant engaged in a private negotiation with her opponent will not be any less driven by self-interest than the same litigant simply conferring with her client or communing with her notes before deciding on her strikes. Negotiation is likely to do as good a job as the *Batson* framework on this score. It may even do a better one, as the structure of negotiation makes refusal of the challenge the default with affirmative consent required for a strike's exercise.²⁴⁷

Of course, this does not directly answer the concerns of those who argue that leaving the selection of the jury in the hands of the litigants is antidemocratic—particularly if all the litigants are white. Derrick Bell rejected proposals for affirmative selection on the basis that they disregarded the fact "that society has an interest in including members of minority groups independent of the desires of the parties in a particular case."²⁴⁸ He advocated a statutory guarantee of racial representation (waivable by defendants) because he believed that "[t]he need for legitimate and participatory decision-making in criminal cases will not necessarily be served when the choice of jurors is left to the whim of litigants."²⁴⁹ But that is the system we have. My proposal simply provides a way to make litigants' self-interest both more transparent and more effective.

²⁴⁵ Smith, *supra* note 177, at 529–30.

²⁴⁶ Underwood, *supra* note 52, at 759.

²⁴⁷ See Zimmerman, *supra* note 222, at 1134 (describing how default rules affect decisionmaking because of status quo bias). Zimmerman also notes how the status quo bias can be magnified by omission bias, which is an exaggerated preference for inaction. See *id.* at 1135. "Omission bias bolsters the status quo effect because a failure to act increases the persistence of the status quo." *Id.*

²⁴⁸ BELL, *supra* note 107, §5.21 at 411–12.

²⁴⁹ *Id.* at 412.

b. The Perception of Illegitimacy

Another critique that can be leveled at the proposal is that private ordering by litigants of third parties' constitutional rights lacks the expressive value of vindication in open court. The negotiation process is off the record, secret, and may appear illegitimate, presenting the court with the results of the negotiation as a *fait accompli*.

It is important to be clear about which part of the process would transfer to a private setting. *Voir dire* of prospective jurors, arguments and rulings on challenges for cause, and excusing peremptorily challenged jurors would remain public. Two moments would not be public: the decision of which jurors to strike and the challenges to either side's strike preferences, which would be dealt with in negotiation rather than aired in open court. The first moment is not controversial—the act of choosing who to strike has always been private.²⁵⁰ The second, however, diverges from current practice by replacing *Batson* challenges made in open court and ruled on by a judge with private negotiation. Private negotiation would effectively obscure any disagreement or tension surrounding the decision over which jurors, if any, to strike. Only a limited public moment would remain when the court decided whether to accept the parties' joint decision.

To the extent that the parties did not reach an agreement, there would be no peremptory challenges, only a jury constituted by random selection. The difficulty would arise when the parties did agree to certain strikes because private negotiation would replace the public "*Batson* moment." But given the absolute veto power that negotiation affords each party, in practice, the *Batson* moment would not be replaced with silence but with visible outcomes. To illustrate with a simple binary, a peremptory challenge by a party can be seen by her adversary as either objectionable or unobjectionable. If unobjectionable (either on its own merits or in tandem with a countervailing strike), the adversary would have no reason to raise a *Batson* claim, because she would acquiesce in the strike. If objectionable, the adversary, under the current system, would raise a *Batson* claim. But under a negotiation system, the adversary would simply refuse to allow that strike. There would be no *Batson* argument, but the outcome would be the same as a successful *Batson* challenge and its rejection of a particular peremptory strike. To that extent, the results of the negotiation would be quite clear.

²⁵⁰ That is the time when all lawyers review their notes, defense attorneys consult with their clients, and prosecutors consult with co-counsel or with law enforcement, and decide which jurors to strike and in which order. The process is entirely private. The judge does not attend these discussions; often a judge will declare a short recess or will simply give the parties a few minutes to decide on their challenges. There is no record made of the discussions. After the break is over, the parties return to the judge and usually take turns striking jurors.

c. Loss of Expressive Value

If the aims of *Batson* are to protect jurors' constitutional rights not to be discriminated against on invidious grounds, then its symbolic meaning is fully as important as its deterrent value.²⁵¹ Moving the equal protection inquiry from public litigation in open court to an opaque system of private ordering provokes the critique that the proposal will result in a considerable loss of expressive value. As a general matter, that may be true. But it is worth stopping to ask whether the *Batson* moment really expresses anything worth saying. Occasionally, to be sure, the public lesson of *Batson* will be clear. A party will raise a claim, the proponent of the strike will be unable to defend it or will give a transparently false reason, and the judge will disallow the strike. This effectively sends the message that racism will not be tolerated in the courts. But far more often, the message devolves into something more hypocritical and demeaning.

Most of the time, the *Batson* moment does little more than “bring[] to the surface and . . . ratify crude and unbecoming ways of classifying human beings.”²⁵² Worse, it coopts the judge into the process. Obligated to assess whether a party has made a prima facie case under *Batson*, judges puzzle over the numbers of nonwhite jurors and their proportion to white jurors. To justify their strikes, lawyers criticize jurors in terms of their family ties, their neighborhoods, their hairstyles, their demeanors, and other reasons so flimsy they seem like nothing more than a proxy for race.²⁵³ And since a *Batson* challenge cannot be made at all if the excluded juror is not a member of a cognizable group, lawyers wishing to raise a *Batson* claim may be forced into unseemly inquiries into the exact lineage of a prospective juror.²⁵⁴ As a result, our courts end up engaging in debates like this:

²⁵¹ See Covey, *supra* note 116, at 316 (arguing that *Batson* “symbolizes official intolerance of discrimination in jury selection”).

²⁵² Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 201.

²⁵³ See *supra* note 15 and accompanying text.

²⁵⁴ See, e.g., *United States v. Guerrero*, 595 F.3d 1059, 1061 (9th Cir. 2010) (referencing a defense lawyer making a *Batson* challenge to the exclusion of a juror on the basis that she “looked like she may have some native American or Hispanic background”). The district court judge in *Guerrero* denied the motion on the basis that he had not observed “anything unusual of her, and I don’t think she’s the type of person that would be subject to *Batson* challenge.” *Id.* When the judge later saw that the juror had identified herself as “Native Hawaiian/Pacific Islander” on her jury questionnaire, he told counsel, “I didn’t pick up on the fact that she was a minority and subject to a *Batson*, but I have heard—somebody did say that she may have looked like she was. And then I looked at the questionnaire, and I see that there was a connection to Hawaii.” *Id.* Other cases have provoked similar discussions. See *Johnson v. Campbell*, 92 F.3d 951, 952 (9th Cir. 1996) (referencing debate between counsel and the court as to whether an excluded juror was in fact gay, with counsel arguing, “I listened to his answers. I watched his mannerisms. I believe him to be gay.”); *People v. Barber*, 245 Cal.

DEFENSE COUNSEL [after the prosecutor challenged a particular juror]: I'd like to question that choice, too, assuming she is black.

PROSECUTOR: I don't believe she is.

THE COURT: It says Hispanic.

PROSECUTOR: I think she is actually Indian.²⁵⁵

None of this is particularly ennobling. To the contrary, it appears to turn constitutional rights on “invidious, irrelevant inquiries.”²⁵⁶ But the issue goes beyond unseemliness. Regardless of the individual abilities of any particular judge, the Judiciary as an institution is supposed to uphold the egalitarian ideal. When a judge discharges her duty to that ideal by entertaining debates such as these or accepting reasons for strikes that are patently implausible and insulting, then the overriding message trivializes concerns about equality. Instead, the *Batson* moment recirculates and ratifies the most reductionist possible view of race. When the court and the litigants add up the total number of black jurors, when they calculate the proportion of strikes of black jurors as compared to strikes of white jurors, they are not considering those prospective jurors as individuals but almost as interchangeable units of blackness. Not only is this not a constructive didactic moment, it may actually be a harmful one.

In fact, our collective obsession with *Batson* may have obscured more systemic problems with underrepresentation in jury pools across the

Rptr. 895, 895, 901 (Cal. Ct. App. 1988) (referencing debate over whether juror had a Hispanic surname with the judge concluding, “[T]hat lady could have been anything,” and denying the *Batson* challenge); *Smith v. State*, 59 So. 3d 1107, 1109 (Fla. 2011) (referencing discussion regarding whether juror was a member of a distinct minority group based on the fact that his surname sounded “*like a German name*”). It is doubtful that any courts want to indulge in these kinds of debates. See *State v. Superior Court*, 760 P.2d 541, 545 (Ariz. 1988) (noting the desirability of avoiding having trial judges and lawyers “be forced to inquire into the racial and ethnic makeup of particular jurors” because such a procedure would be “unseemly and intrusive”). Yet the *Batson* framework encourages them.

²⁵⁵ *Windom v. State*, 656 So. 2d 432, 436 (Fla. 1995). In view of the uncertainty regarding the juror's race, the court then decided to question the juror directly:

THE COURT: Hi. What is your nationality?

JUROR: East Indian.

THE COURT: Okay. That's all we need to know. Thank you. [To counsel:] She is definitely not a recognized minority. She's East Indian.

DEFENSE COUNSEL: Everybody in Trinidad is black.

PROSECUTOR: Not everybody because she is, obviously, not.

DEFENSE COUNSEL: She may be Indian.

THE COURT: All right. She's Indian but I'm going to let him strike her if that's what he wants to do.

Id. at 437.

²⁵⁶ Alschuler, *The Supreme Court and the Jury*, *supra* note 29, at 192 n.150.

nation.²⁵⁷ Because it is a drama played out in open court, *Batson* has the panache of courtroom derring-do—far more exciting than the mundane administrative tasks of compiling jury lists and mailing out jury summonses. But it is in those mundane tasks where the roots of the problem lie.²⁵⁸ Just as mindfulness can help combat the effect of implicit biases, maybe if we can quiet the noise around *Batson* and relegate peremptory strikes to the realm of private ordering, we can finally address the deeper systemic problems that desperately need our attention.

2. Practical Objections

The proposal may also be subject to a number of practical objections. The first such objection is that the benefit would be one-sided, that if the *Batson* inquiry seems too easily twisted to the State's advantage, this model is too easily swayed to the defense's. After all, in most jurisdictions, a unanimous jury is needed to convict, therefore all a defense lawyer needs for at least a partial victory for her client is one hold-out juror.²⁵⁹ If defense counsel can identify one such juror, she might refuse to negotiate, forcing the prosecution to go to trial with at least one juror who seems like a real risk. Nonetheless, this concern may be overblown. Empirical evidence based both on real juries and on mock jury studies indicates that, *Twelve*

²⁵⁷ As a very broad comparison, a September 2013 Westlaw search of law reviews citing the lead case on the composition of the jury venire, *Taylor v. Louisiana*, 419 U.S. 522 (1975), decided eleven years before *Batson*, turned up 1,113 articles. By contrast, a Westlaw search of law review articles citing *Batson* revealed 2,735 articles.

²⁵⁸ In *Taylor v. Louisiana*, the Supreme Court held that because the Sixth Amendment imposes a fair cross-section requirement on the jury venire, "petit juries must be drawn from a source fairly representative of the community." 419 U.S. 522, 538 (1975). But in assembling the lists from which jury venires will be selected, each state uses a variety of sources that can limit the pool of prospective jurors. See *Trial Juries: Size and Verdict Rules*, *supra* note 24, at tbls.48b & c. Sources that potential jurors are pulled from include driver's license databases, motor vehicle registration, utility rolls, voter registration, non-driver ID cards, and tax rolls—sources that hardly represent the full scope of the community. See *id.* at tbl.48b (providing data showing that as of September 26, 2013, out of the fifty states, twenty-nine require a driver's license, twenty-nine require voter registration, and twenty-four require both). Furthermore, the initial pool of jurors is further diminished by various eligibility requirements, such as a minimum residency period and a minimum age, or the disqualification of convicted felons and non-English speaking people. See *id.* at tbl.48c. Six states, however, do not bar convicted felons from jury duty (Colorado, Illinois, Maine, Mississippi, New Mexico, and Wisconsin) and eight states do not require the juror to speak English (Georgia, Maine, Montana, New Mexico, Ohio, Oklahoma, Tennessee, and Texas). *Id.* Finally, many jurors simply do not respond to summonses, narrowing the pool even further.

²⁵⁹ All jurisdictions except for Oregon and Puerto Rico require a unanimous jury verdict. See ROTTMAN & STRICKLAND, *supra* note 23, at 233–37 tbl.42. Louisiana only requires unanimity for capital cases and those where the mandatory penalty is confinement at hard labor. *Id.* at 234, 236 n.20.

Angry Men notwithstanding, a single juror will not often hang the jury.²⁶⁰ Many scenarios can be imagined where the proposal could result in a net disadvantage to one side or the other, depending on which twelve jurors end up on the initial panel. But this risk is no greater than what both parties would face if peremptory challenges were abolished.

The flip side of this argument is that this proposal would benefit the prosecution and disadvantage the defense by taking away the built-in advantage in some jurisdictions, which allow the defense more peremptory challenges than the prosecutor.²⁶¹ The negotiation system, by giving the parties equal bargaining power, removes this slight advantage in those jurisdictions. Nonetheless, the power to prevent the prosecutor from eliminating any defense-friendly prospective jurors by simple veto may more than offset this cost.

Second, the negotiated consent model is vulnerable to collusion, should the parties agree to exclude a particular class of jurors because it furthers their own ends. Historically, collusion to exclude African-Americans was a serious problem, particularly in the South.²⁶² However, this issue appears to have subsided. And while this proposal does not do much to combat this problem, neither does *Batson*. Currently, parties who collude to exclude a certain segment of the population from their jury need only refrain from making *Batson* objections to each other's strikes, and the courts only rarely exercise their authority to raise *Batson* issues *sua sponte*.²⁶³ Under a negotiation system, the court should retain the ability to

²⁶⁰ See REID HASTIE ET AL., *INSIDE THE JURY* 106–07 tbl.6.3 (1983) (showing that, in mock jury study, a single holdout juror would change her vote and side with the majority over 75% of the time); see also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 462 (1966) (observing that “juries which begin with an overwhelming majority in either direction are not likely to hang” and that “[i]t requires a massive minority of 4 or 5 jurors at the first vote to develop the likelihood of a hung jury”). But see Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI.-KENT L. REV. 579, 584–85 (2007) (noting that dissenters occasionally prevail).

²⁶¹ In federal court, and in a number of states, the defense is allotted more peremptory strikes than the prosecution. See, e.g., FED. R. CRIM. P. 24(b)(2) (in noncapital felony cases, the “government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges”); MD. R. CRIM. P. 4-313(a)(2) (in cases involving a penalty of death or life imprisonment, the defendant is generally allowed twenty peremptory challenges and the state ten); W. VA. R. CRIM. P. 24(b)(1)(A) (in felony cases, defendants are allowed six peremptory challenges and the state two).

²⁶² In *Swain v. Alabama*, the Court described several occurrences where prosecution and defense counsel agreed to exclude black jurors. See 380 U.S. 202, 224–25 (1965) (“Apparently in some cases, the prosecution agreed with the defense to remove Negroes.”). In another instance, “the prosecution offered the defendant an all-Negro jury but the defendant in that case did not want a jury with any Negro members. There was other testimony that in many cases the Negro defendant preferred an all-white to a mixed jury.” *Id.* at 225.

²⁶³ See *supra* note 18 and accompanying text.

question any joint strikes as violating equal protection and disallow them if unsatisfied upon further inquiry. This would not be an improvement on current practice, but in those rare situations where the court mistrusts the parties and is concerned that there might be collusion to the detriment of the defendant or the excluded jurors, the court should at least have the same flexibility it had under *Batson*.

Third, the proposal would sharply limit an occasionally viable appellate avenue for defendants. While *Batson* issues are not often winners on appeal,²⁶⁴ a successful appellate claim of a *Batson* violation will result in automatic reversal—not an inconsequential benefit to a convicted defendant. Nonetheless, it surely would be better not to have the defendant convicted by an illegally selected jury in the first place.

Finally, it may be difficult to convince litigants and courts to adopt this proposal, as lawyers take a notoriously dim view of change. But for courts seeking an alternative to *Batson*, negotiation presents some inherent advantages. There would be no complicated rules to learn, no unfamiliar strategies, no arcane skills needed. For attorneys, it would just be a question of sitting down with their opponents and seeing if they could agree on any strikes. If not, they would turn their attention to their opening statements. Negotiation would not overwhelmingly advantage either side. It would not undermine the dignity of the participants or the court. Most of all, negotiation would offer a better chance of achieving more representative juries.

It is simply not true to say that our system is working. Negotiating peremptory challenges may not be a perfect solution, but no one procedure will achieve optimal results in every situation. There may be cases of collusion. There may be cases in which a lawyer does a very poor job safeguarding his client's interests. But it is not at all clear that those clients would have fared any better under the *Batson* scenario. In the end, we are flawed people living in an imperfect world. But “even if implicit biases themselves cannot change, the causal link between biases and behavior can be disrupted through procedural and structural reforms.”²⁶⁵ That is what this proposal hopes to achieve.

CONCLUSION

The system of peremptory challenges we currently employ does not work. The *Batson* framework may curb some racial discrimination, but not

²⁶⁴ See, e.g., *State v. Saintcalle*, No. 86257-5, slip op. at 13 (Wash. Aug. 1, 2013) (“In over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court’s erroneous denial of a *Batson* challenge.” (citation omitted)).

²⁶⁵ Kang & Lane, *supra* note 8, at 511.

all, and probably not even most. The requirement that questioned challenges must be explained leads to dishonesty and does little to encourage attorneys to understand their motives. Allowing the parties to negotiate their peremptory challenges with each other offers a way out that is equitable, simple, and considerably more effective at curbing improper uses of the challenge. While adopting a system of negotiating peremptory challenges would require a reevaluation of the methods we are accustomed to, that reevaluation is long overdue.

