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Jeffrey Bellin
William & Mary Law School, jbellin@wm.edu

Junichi P. Semitsu

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WIDENING *BATSON'S* NET TO ENSNARE MORE THAN THE UNAPOLOGETICALLY BIGOTED OR PAINFULLY UNIMAGINATIVE ATTORNEY

Jeffrey Bellin† *& Junichi P. Semitsu*††

In Snyder v. Louisiana, *the Supreme Court reaffirmed its commitment to rooting out racially discriminatory jury selection and its belief that the three-step framework established in* Batson v. Kentucky *is capable of unearthing racially discriminatory peremptory strikes. Yet the Court left in place the talismanic protection available to those who might misuse the peremptory challenge—the unbounded collection of justifications that courts, including the Supreme Court, accept as "race neutral."*

To evaluate the Court's continuing faith in Batson, *we conducted a survey of all federal published and unpublished judicial decisions issued in this first decade of the new millennium (2000–2009) that reviewed state or federal trial court rejections of a* Batson *challenge. In light of this study and studies that have come before, we conclude that* Batson *is easily avoided through the articulation of a purportedly race-neutral explanation for juror strikes. As a result, there is no reason to believe that* Batson *is, as the Court suggests, achieving its goal of eliminating race-based jury exclusion and little hope that it will ever do so. In light of our conclusion, this Article proposes an alteration to the* Batson *framework that we believe would enable trial courts to reduce the role of race in the jury selection process.*

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† Southern Methodist University, Dedman School of Law.
†† University of San Diego School of Law.

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Introduction

The jury plays a vital role in the narrative of American criminal justice, serving as an "inestimable safeguard against the corrupt or overzealous prosecutor"[1] and as the "criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'"[2] Indeed, the very first law that the Supreme Court branded racially discriminatory and in violation of the Equal Protection Clause was a West Virginia statute restricting jury service to white men.[3] Since then, juries have been at the forefront of the Court's efforts to stamp out race discrimination in criminal justice. The recent case of *Snyder v. Louisiana*[4] continues this trend, reversing a death sentence after concluding that a prosecutor's proffered explanations for the peremptory strike of a potential juror were a pretext for racial discrimination.

But despite its emphasis on the importance of a color-blind jury selection process and a self-proclaimed record of "over a century of jurisprudence dedicated to the elimination of race prejudice within

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

2 McCleskey v. Kemp, 481 U.S. 279, 310 (1987) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1880)).

3 *Strauder,* 100 U.S. at 312; Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. Ill. L. Rev. 405, 421 (recognizing *Strauder* as "the first case invalidating a state statute on equal protection grounds").

4 552 U.S. 472, 485–86 (2008).

the jury selection process,"[5] the Court has allowed discrimination to flourish by failing to place significant limits on race-based jury selection's primary enabler—the peremptory challenge.[6] While the Court has consistently reaffirmed its 1986 holding in *Batson v. Kentucky* that race-based peremptory strikes are unconstitutional,[7] virtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials.[8]

Our own analysis of *Batson* in practice reveals that it is not trial judges who are primarily at fault. Rather, the blame lies squarely with the *Batson* framework itself. The current framework makes it exceedingly difficult for judges to reject even the most spurious of peremptory strikes—a reality that is not lost on trial attorneys. Specifically, the Supreme Court has decreed that before a trial court can find a *Batson* violation it must determine that an attorney has (1) exercised a racially motivated peremptory challenge and (2) lied to the court in an effort to justify the strike.[9] The trial court must find all of this based almost solely on the attorney's demeanor. Accordingly, trial courts rightly hesitate to make the damning findings *Batson* requires

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5 Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618 (1991).

6 *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) ("[T]here can be no dispute[ ] that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953))). A case decided during the final editing stages of this Article fits comfortably into our thesis. *See* Felkner v. Jackson, 131 S. Ct. 1305 (2011) (per curiam) (reversing a Ninth Circuit ruling that granted relief to a defendant claiming a *Batson* violation where the prosecutor struck two black jurors and offered as "race-neutral" justifications that one of the jurors said he was "frequently stopped by California police officers because . . . of his race and age," and the other "had a master's degree in social work, and had interned at the county jail").

7 The Court also recently applied *Batson* in *Thaler v. Haynes*, 130 S. Ct. 1171, 1172, 1174–75 (2010) (per curiam) where it concluded that the trial judge who rules on a *Batson* challenge need not be the same judge that personally observed the prospective juror's demeanor.

8 *See, e.g.*, Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (criticizing "*Batson's* fundamental failings"); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501, 528 (decrying "*Batson*'s toothless bite" and opining that *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) "marked the final demise of the *Batson* doctrine into the rule of useless symbolism"); Camille A. Nelson, Batson*, O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) (arguing that "*Batson*'s promise of protection against racially discriminatory jury selection has not been realized"); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 178, 179 (2005) (stating that "*Batson* has engendered an enormous amount of often virulent criticism" and contending that "[m]ost of the criticism of *Batson* is justifiable"); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229, 236 (1993) (arguing that "in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race").

9 *See infra* Part II.

on such paltry evidence. Add to this the fact that attorneys may not even be aware of the racial motivation for their own strikes, as well as the administrative difficulty of remedying *Batson* violations, and it should come as no surprise that *Batson*, in application, is all form and little substance.

This Article proposes a two-part fix to what ails *Batson*: (1) decouple *Batson* violations from any finding regarding the striking attorney's subjective intent and (2) foster a procedural mechanism that permits the immediate reseating of an improperly stricken juror without the juror ever knowing that she was the subject of a strike. In essence, we propose to minimize both the finding required to invalidate a peremptory challenge and the consequence of that finding, all for a common goal: to empower courts to disallow dubious peremptory challenges even without concrete evidence that any particular strike was racially motivated. As we shall explain, this reform adheres to the basic principles underlying *Batson*, while also freeing judges to make the findings that could breathe substantive life into the noble constitutional command that race must not factor into jury selection.

The argument proceeds in four parts. In Part I we introduce the troubling case of *Commonwealth v. Cook* to highlight the overarching problem addressed by this Article—that given the inherent difficulty of eliminating race-based jury selection, the *Batson* framework as currently applied is not equal to the task. Part II presents an overview of the *Batson* framework, revealing the foundation for our reform proposal to follow. Part III summarizes the results of a survey we performed of all federal court decisions from 2000 to 2009 that reviewed allegedly race-based peremptory strikes. In this Part, we confirm that *Cook* is no aberration but is instead representative of a widespread problem. Part IV reviews reforms that commentators have proposed to address the widely recognized underenforcement of *Batson*. We argue that these suggested reforms are either not politically viable or would actually exacerbate the problem. Finally, Part V details the reform proposal that we believe will significantly curtail race-based peremptory strikes and widen *Batson*'s net.

I
"You're There to Win": Lessons from *Commonwealth v. Cook*

It would be difficult to hypothesize a fictional case that could better demonstrate the failings of *Batson* than the 2008 Pennsylvania case of *Commonwealth v. Cook*.[10] The facts underlying the case began two decades earlier, in 1987, when Assistant District Attorney Jack McMa-

[10] 952 A.2d 594 (Pa. 2008).

hon prepared a training video for new prosecutors on how to select as "unfair" a jury as possible.[11] In the video, McMahon unabashedly advocated striking blacks and women from jury venires:

> Let's face it, . . . there's the blacks from the low-income areas . . . you don't want those people on your jury. . . . You know, in selecting blacks, again, you don't want the real educated ones, . . . [and] this goes across the board, all races, you don't want smart people. [I]n my experience, black women, young black women, are very bad. There's an antagonism. I guess maybe because they're downtrodden on two respects, they got two minorities, they're women and they're blacks, so they're downtrodden on two areas. And they somehow want to take it out on somebody, and you don't want it to be you. And so younger black women are difficult, I've found.

Acknowledging that such race-based strikes ran afoul of *Batson*, which the Supreme Court decided a year earlier, McMahon noted ways to conceal race-based strikes:

> When you do have a black juror, you question them at length. And on this little sheet that you have, mark something down that you can articulate later if something happens . . . and question them and say, "Well the woman had a kid about the same age as the defendant and I thought she'd be sympathetic to him," or "She's unemployed and I just don't like unemployed people." . . . So, sometimes under that line you may want to ask more questions of those people so it gives you more ammunition to make an articulable reason as to why you are striking them, not for race.

McMahon warned rookie prosecutors of the consequences of failing to heed this advice:

> 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.[12]

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[11] Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987), *available at* http://video.google.com/videoplay?docid=-5102834972975877286. The Office of the District Attorney of Philadelphia released this video in April of 1997; the video was harshly criticized by the Pennsylvania Supreme Court in *Commonwealth v. Basemore*, 744 A.2d 717, 729–31 (Pa. 2000).

[12] Jury Selection with Jack McMahon, *supra* note 11. Some of the excerpts of these comments are included in *Basemore*, 744 A.2d at 730–31, though the language differs slightly in places. Neither McMahon nor his then-supervisor, District Attorney Ronald D. Castille, has disputed the authenticity of the video. *See* Bond v. Beard, 539 F.3d 256, 273 (3d Cir. 2008) ("The Commonwealth does not attempt to defend the contents of the McMahon video."). Then–District Attorney Lynne Abraham released the video during an election campaign. *Cook*, 952 A.2d at 611–12, 612 n.14. In press coverage following the release, the incumbent Abraham explained that she felt "'ethically, morally and legally' compelled to release the information 'on a former prosecutor who advocated selecting

After receiving a copy of the video from the District Attorney's Office almost a decade after his trial, Robert Cook filed a postconviction petition for relief, arguing that when a jury convicted him of first-degree murder in 1988, McMahon had practiced what he preached.[13] During voir dire, McMahon had used fourteen of his nineteen peremptory challenges to strike black potential jurors from Cook's jury.[14] The resulting jury sentenced Cook to death.[15]

In 2002, a Philadelphia court held a hearing to review Cook's claim.[16] After reviewing the fifteen-year-old voir dire transcript, McMahon provided specific explanations for striking eleven of the fourteen black prospective jurors but struggled to recall the specific reasons for the remaining three. For example, in explaining one strike, he testified:

> Again I can't—there's nothing that jumps out at me as to a reason I would have struck this individual other than again what I've talked about a few other of the jurors. This is not a very long voir dire either, very short voir dire and there's nothing that I can—that refreshes my recollection as to [a] reason why I struck this individual. It obviously was something outside the cold record, how she answered, how she dressed, how she appeared, how she answered these questions is the only thing I can tell you.[17]

In addition, some of McMahon's explanations were arguably contradicted by the existence of similarly situated jurors he did not strike. For example, McMahon struck two black potential jurors because they were unemployed and he was concerned about their "stability"; however, he did not strike a similarly unemployed white venireperson.[18] Perhaps most notably, McMahon did not disavow his comments in the video nor testify that he did not utilize the approach he summarized therein.[19] Nevertheless, the court rejected Cook's *Batson* claim.[20] Cook appealed to the Pennsylvania Supreme Court. That court affirmed, concluding that McMahon's explanations rebutted Cook's

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jurors on the basis of race, seeking unfair panels and lying about the process.'" *Id.* at 611 (citations omitted).

13 *See Cook*, 952 A.2d at 601.

14 *Id.* at 605. The court also noted that "McMahon struck 58% (14) of the 24 black venirepersons whom he had an opportunity to strike and 18% (5) of the white venirepersons he had an opportunity to strike." *Id.*

15 *Id.* at 600.

16 *Id.* at 601.

17 *Id.* at 606.

18 *Id.* at 609. One of the unemployed—and allegedly unstable—black jurors was a twenty-four-year-old student living with her mother. The dissent in *Cook* commented that "[i]t is not evident, however, why a 24-year-old student may be considered in any respect unusual or unstable." *Id.* at 638 (Saylor, J., dissenting).

19 *Id.* at 637.

20 *Id.* at 613 (majority opinion).

suggestion that any of the fourteen challenged strikes were racially motivated.[21]

Admittedly, *Cook* is an unusual case because it involved direct evidence of a prosecutor's race-conscious juror-selection strategy. Moreover, practices like those advocated in McMahon's training video are likely no longer officially sanctioned in prosecution offices.[22] Nevertheless, *Cook* unequivocally highlights *Batson*'s impotence. Even in a case in which the defendant produced a veritable cornucopia of evidence of racial motivation, *Batson* permitted the strikes to stand. Justice Marshall's critique that *Batson*, as currently interpreted, permits courts to deny defendants relief even in the face of "smoking guns"[23] rings true in *Cook*.

While *Cook* illustrates the need for *Batson* reform, it also demonstrates the enormity of the task of eradicating race-based jury selection. The difficulty stems, in part, from the fact that an attorney's animus toward members of any race or an institutional racism that pervades the legal community will not explain most race-based strikes. Rather, the difficulty is a function of the continued relevance of race in our larger society and the fact that, in an adversary system, the attorneys "are there to win."

Racism is often defined as the irrational hatred of another race or the belief that one's own race is superior.[24] But conscious or subconscious race-based peremptory strikes might constitute a *rational* form of discrimination. Consider an Asian-American defense attorney representing a black defendant in a capital murder case with a white victim. Racism is unlikely to explain why she might disproportionately

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[21] *Id.* at 604–11.

[22] For example, the video is not at all representative of the training one of the authors of this Article received while serving as an Assistant United States Attorney in the District of Columbia. *Compare* Jennifer Emily, *Black Juror Seated: Judge Orders Change After All-White Panel Picked in Murder Case*, DALL. MORNING NEWS, July 31, 2009, LexisNexis Academic (reporting that Dallas County District Attorney's Office employee handbook now includes "a section about race and jury selection" and that prosecutors in the office have been told that "if a [*Batson*] challenge based on jury selection was upheld, there would be an internal investigation"), *with* Miller-El v. Cockrell, 537 U.S. 322, 334–35 (2003) (highlighting that in the 1960s and 1970s, evidence suggested that the Dallas County District Attorney's Office had a "formal policy to exclude minorities from jury service" that included a "1963 circular by the District Attorney's Office" instructing "prosecutors to exercise peremptory strikes against minorities: [ ]'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'").

[23] Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

[24] *See, e.g.*, Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1106–07 (2009) (noting that the most "rank form of racism" involves "either a desire to disparage a group or the belief that the group is inherently inferior in some fundamental way," while recognizing that in other circumstances, race-based decision making can be motivated not by animus but by potentially erroneous empirical assessments).

exclude white jurors and fill the jury box with as many black jurors as possible; the chances are slim that the attorney would be acting out of a hatred of white jurors or a belief that black jurors represent a superior race.[25] Rather, she may be aware of: (1) the documented tendency of jurors to be more sympathetic to the defendant when they share similar characteristics,[26] (2) studies confirming that white jurors are more likely to convict and to more harshly sentence black defendants accused of killing white victims,[27] or (3) studies demonstrating

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25 We recognize that, unfortunately, most of the racial examples in this Article continue the black–white dichotomy that has dominated the discussion of race in the United States. *See* Nelson, *supra* note 8, at 1709 n.140 (noting the weaknesses of the "black–white binary" as an analytical paradigm); Raphael & Ungvarsky, *supra* note 8, at 235 n.38 (using the original *Batson* paradigm to facilitate discussion). Most of the *Batson* cases in the last decade, however, fall within this paradigm. Moreover, most psychological studies addressing race and juries—whether focused on the defendant's race, the victim's race, or the juror's race—have employed a black–white dichotomy. *See* Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 175 (2007) (recognizing that "the vast majority of studies have compared [w]hite jurors' judgments of [w]hite and [b]lack defendants" and that "[t]his focus on the [w]hite/[b]lack dichotomy mirrors the myopia found in the more general psychological literature on prejudice"). Indeed, we found few psychological studies of jurors that went beyond this dichotomy. *See* David A. Abwender & Kenyatta Hough, *Interactive Effects of Characteristics of Defendant and Mock Juror on U.S. Participants' Judgment and Sentencing Recommendations*, 141 J. SOC. PSYCHOL. 603, 603 (2001) (noting, among other things, that Latino mock jurors rendered harsher decisions when the defendant was black rather than white); Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISP. J. BEHAV. SCI. 275, 282 (1983) (observing that white mock jurors were more likely than Latino mock jurors to react negatively to a Latino defendant); Dolores A. Perez et al., *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249, 1249 (1993) (concluding that majority-white mock juries were more likely than majority-Latino mock juries to convict a defendant, especially if the defendant was Latino).

26 *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1639–40 (1985) ("It would appear that white subjects tend to assume less favorable characteristics about black defendants than white defendants and that such assumptions contribute to these subjects' greater tendency to find black defendants guilty."); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75–100 (1993) (reviewing jury discrimination studies and finding that race of jurors generally effects outcomes).

27 *See* William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 189, 259 (2001) (concluding that in 340 capital trials, the higher the proportion of white jurors, the more likely those jurors would sentence a black defendant to death, especially when the victim was white); Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. PSYCHOL. 47, 48–49 (1982) (observing that white jurors were more likely to vote to convict a defendant accused of sexual battery when the defendant was black than when he was white but finding no statistical significance with black mock jurors); *see also* Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination*, 28 LAW & HUM. BEHAV. 529, 542 (2004) (finding that "[b]lacks and [w]hites actually seem to give mitigation the same level of attention in the bulk of capital cases" but that "when [b]lack jurors are faced with a situation where an in-group member, [b]lack defendant, is faced with killing an out-group member, [w]hite victim, that they become significantly more receptive to mitigation than their [w]hite colleagues on the jury"); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 43 (2001) ("The empirical evidence tends to show that white jurors are

that white jurors in racially-diverse juries are more lenient toward a black defendant than white jurors in all-white juries.[28] In other words, if this defense attorney seeks to maximize the chances of her client's acquittal, she cannot ignore the fact that race matters.

Indeed, the Supreme Court's jury discrimination jurisprudence has assumed that race matters ever since its 1880 decision in *Strauder v. West Virginia*.[29] The Court held that a statute barring black citizens from the jury box was "a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing . . . equal justice."[30] The Court concluded, however, that the discriminatory statute violated not the black venireperson's Equal Protection rights but the black *defendant's* rights. In granting this Equal Protection right to the defendant, the Court presumed that jurors of different races in criminal prosecutions would react differently depending on the race of the accused.[31]

Even as our society has become increasingly racially diverse and our tolerance of discriminatory attitudes has subsided, we cannot realistically expect the salience of race-based jury selection to recede until the societal relevance of race diminishes. Over half a century after *Brown v. Board of Education*[32] desegregated public schools and four decades after the passage of sweeping civil rights laws, racial disparities remain in virtually every quality-of-life measure including health,[33] in-

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more likely than black jurors to convict black defendants."). For a comprehensive review of social-science research on race and juries, see generally Sommers, *supra* note 25, at 183, arguing that "[r]esearch on race and legal decision making has provided compelling evidence that race can exert a causal effect on trial outcomes in some cases."

28 *See, e.g.*, 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, 606 (2006) (finding that in an experiment where the defendant was African–American "the presence of [b]lack group members translated into fewer guilty votes before deliberations").

29 100 U.S. 303 (1880).

30 *Id.* at 308.

31 *See id.* at 309 ("[P]rejudices often exist against particular classes in the community, which sway the judgment of jurors.").

32 347 U.S. 483 (1954).

33 *See* Andrew J. Epstein et al., *Racial and Ethnic Differences in the Use of High-Volume Hospitals and Surgeons*, 145 ARCHIVES SURGERY 179, 184 (2010) (finding a "persistent pattern" of racial disparities that "play out differently for different minority groups" due to more than differences in socioeconomic status).

come,[34] education,[35] and housing.[36] Not surprisingly, then, lawyers often incorporate—though not always consciously[37]—racial stereotypes in the freewheeling practice of jury selection.[38] Even the Court has recognized this reality: just a few years ago, in fact, Justice Breyer summarized some of these perhaps unconscious racial stereotypes, such as the general belief that black jurors are more sympathetic toward civil plaintiffs.[39] Additionally, because empirical studies have demonstrated that there may be truth to some of these racial assumptions,[40] an attorney might rationally (albeit unconstitutionally) con-

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34 *See* U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS TABLE 681: MONEY INCOME OF FAMILIES (2008), *available at* http://www.census.gov/compendia/statab/2010/tables/10s0681.pdf (reporting that in 2007, the median family income by race was $77,133 (Asian, Pacific Islander households), $64,427 (white households), $40,566 (Hispanic households), and $40,143 (black households)); *see also* CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 13 (2009), *available at* http://www.census.gov/prod/2009pubs/p60-236.pdf (noting that 24.7% of blacks and 23.2% of Hispanics were under the poverty threshold, compared to 8.6% of white non-Hispanics and 11.8% of Asians); AJAMU DILLAHUNT ET AL., UNITED FOR A FAIR ECONOMY, STATE OF THE DREAM 2010: DRAINED—JOBLESS AND FORECLOSED IN COMMUNITIES OF COLOR iii (2010), *available at* http://www.faireconomy.org/news/state_of_the_dream_2010_drained (noting that in December 2009 the unemployment rate among African-Americans was 16.2%, for Latinos was 12.9%, and for whites was 9% and that these rates were higher for African–Americans and Latinos than any other annual rate in nearly three decades).

35 *See* AM. CIVIL LIBERTIES UNION, RACE AND ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 144 (2007), *available at* http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf (noting that "over one third of African-American and Latino students attend schools where 90% or more of the student body is non-white"); GARY ORFIELD, THE CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 3 (2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf.

36 *See, e.g.*, NAT'L URBAN LEAGUE, THE STATE OF BLACK AMERICA 2009: A MESSAGE TO THE PRESIDENT 22 (2009) (noting that blacks are less likely than whites to own homes and remain twice as likely as whites to be unemployed, three times more likely to live in poverty, and more than six times as likely to be imprisoned).

37 *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1213–14 (1995) ("[A] persuasive body of empirical and theoretical research suggests that, in large measure, people lack access to the mental processes involved in evaluation and judgment, and are quite poor at accurately attributing the causes of their actions and decisions."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.").

38 *See* Page, *supra* note 8, at 210–14.

39 Miller-El v. Dretke, 545 U.S. 231, 271 (2005) (Breyer, J., concurring).

40 *See* Bowers et al., *supra* note 27, at 179, 259 (suggesting that a distrust of blacks is carried into the jury box on the part of whites and is likely the consequence of the "racialization" of certain violent crimes as "black crimes" in popular media and finding that the greater the proportion of whites to blacks on a jury, the more likely a black defendant was to be sentenced to death, especially when the victim was white); Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1954 (2009) ("[T]he overwhelming consensus among researchers is that [b]lack defendants are more likely to be found guilty than [w]hite defendants, especially when the

sider race when assembling a sympathetic jury. The accuracy of the stereotypes, however, is hardly the issue;[41] the important point is that, absent some substantial countervailing force, race-based generalizations will inevitably seep into the jury selection process.

II
THE PEREMPTORY CHALLENGE AND *BATSON V. KENTUCKY*

Before critiquing *Batson* any further, it is necessary to sketch its parameters. As the sketch reveals, the *Batson* framework, although well intended, is simply not equal to its enormous task.

Any examination of *Batson* must begin, of course, with the peremptory challenge itself. Peremptory challenges permit a party in a criminal or civil trial to remove potential jurors during jury selection peremptorily, that is, "without a reason stated, without inquiry and without being subject to the court's control."[42] Although not mandated by the Constitution, "[t]he peremptory challenge has very old credentials"[43] dating back to English common law and beyond. It continues to be available in all American jurisdictions, with the precise number of peremptory challenges allotted to any party varying in accordance with the severity of the charge, the type of proceeding (criminal or civil), and the applicable jurisdiction.[44] The Supreme

jurors are [w]hite."); Lipton, *supra* note 25, at 282–85; Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 621–37 (2005) (concluding that black jurors are more lenient toward black defendants than are white jurors); Perez et al., *supra* note 25, at 1249. One study explored negative attitudes toward law enforcement held by blacks. *See* Rod K. Brunson, *"Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 71, 72, 94–96 (2007), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2007.00423.x/pdf (demonstrating the negative impact on the trust in law enforcement by forty black males in an urban setting following adverse experiences between them and police and their community as a whole and police). Other studies on mock jurors have attempted to identify racial biases in actual jurors. *See, e.g.*, Steven Fein et al., *Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors' Verdicts,* 53 J. SOC. ISSUES 487, 498 (1997) (noting that participants playing the role of jurors in mock trials were more likely to convict when they were white than when they were nonwhite); Sommers, *supra* note 25, at 172–73 ("[A] larger body of studies converges on the conclusion that [w]hite mock jurors are often harsher in their judgments of out-group vs. in-group defendants."). *But see* Sommers, *supra* note 25, at 176 (noting skepticism among mock-juror researchers that "little, if any, reliable relationship exists between a juror's race and her decision-making tendencies").

41 *See, e.g.*, Peters v. Kiff, 407 U.S. 493, 503–04 (1972) (plurality opinion) ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.").

42 Swain v. Alabama, 380 U.S. 202, 220 (1965).

43 *Id.* at 212.

44 As early as 1790, Congress established that the defendant in a prosecution for treason would have thirty-five peremptory challenges available, and the defendant in any other prosecution for a felony punishable by death would have twenty such challenges available. *Id.* at 214. Over time, Congress altered the number of challenges available to both sides in

Court has explained that "[t]he persistence of peremptories and their extensive use" in American jurisdictions "demonstrate[s] the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[45]

While peremptory challenges continue to be widely used in American jurisdictions, a line of cases beginning with the landmark 1986 case of *Batson v. Kentucky*[46] has tempered their "arbitrary and capricious"[47] nature. In *Batson,* the Supreme Court overruled *Swain v. Alabama*[48] to hold 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."[49] In reaching this conclusion, the Court emphasized that race-based peremptory challenges cause injury not only to the defendant and the excluded juror, but also to "the entire community" by "undermin[ing] public confidence in the fairness of our system of justice."[50]

Having identified a constitutional prohibition against the race-based exercise of peremptory challenges, the Supreme Court embarked on the daunting task of fashioning a mechanism to enforce that prohibition. This task was particularly difficult because of the Court's rejection of Justice Marshall's early call for a relatively clean

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a criminal prosecution until, at present, the Federal Rules of Criminal Procedure dictate that in a capital case, each side is entitled to twenty peremptory challenges; in other felony cases, the defense is entitled to ten, and the prosecution to six, peremptory challenges; and in misdemeanor cases, each side is entitled to three peremptory challenges. *Id.* The Rules permit additional challenges with respect to alternate jurors. FED R. CRIM. P. 24(c)(4). In federal civil trials, each side is generally permitted three peremptory challenges. 28 U.S.C. § 1870 (2006). Peremptory challenges are also available in state trials. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991); *Swain,* 380 U.S. at 217. In state, noncapital felony trials, the number of peremptory challenges allotted to each side ranges from a high of twenty to a low of four. *See* Mary Catherine Campbell, *Black, White, and Grey: The American Jury Project and Representative Juries,* 18 GEO. J. LEGAL ETHICS 625, 634 n.69 (2005) (citing DAVID B. ROTTMAN et al., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, 269–72 tbl.40 (June 2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/sco98.pdf).

45 *Swain,* 380 U.S. at 219.

46 476 U.S. 79 (1986).

47 *Swain,* 380 U.S. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)).

48 The *Batson* opinion, which was joined by the author of *Swain,* framed its holding as a modification rather than as a repudiation of that precedent. This exercise in tact, however, cannot obscure the fact that *Batson* reached precisely the opposite conclusion as *Swain. See Batson,* 476 U.S. at 100 (White, J., concurring) (recognizing that "[t]he Court overturns the principal holding in *Swain*"); *id.* at 100 n.25 (majority opinion) ("To the extent anything in [*Swain*] is contrary to the principles we articulate today, that decision is overruled."); *see also* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies,* 77 WASH. U. L.Q. 713, 783 (1999) (arguing that despite the Court's disclaimers, *Batson* "was obviously a decision to overturn *Swain*").

49 *Batson,* 476 U.S. at 89.

50 *Id.* at 87.

solution: the abolition of the peremptory challenge altogether.[51] Rather than abandon the venerable peremptory challenge, the Court, beginning with its decision in *Batson*, deployed a three-step procedure designed to stamp out "purposeful" race-based discrimination while at the same time "permit[ting] prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process."[52]

The *Batson* three-step procedure, which has changed little in the twenty-five years since *Batson*, is triggered whenever a party moves to disallow an opponent's use of a peremptory challenge based on an allegation of racial discrimination. At the first step, *Batson* requires the trial court to consider whether "the totality of the relevant facts" establishes that the moving party has made out "a prima facie case of purposeful discrimination."[53] Indicia of a prima facie case might include the "'pattern' of strikes," counsel's "questions and statements during voir dire,"[54] as well as "racial identity between the defendant and the excused prospective juror."[55]

Once a prima facie case of discrimination is established, "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation."[56] An explanation will not be considered race neutral if it is based on an "intuitive judgment" or "assumption" that members of a particular race generally hold certain

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51 *See id.* at 99 n.22 (rejecting Justice Marshall's suggestion to abolish "this historic trial practice, which long has served the selection of an impartial jury"); *id.* at 102–03, (Marshall, J., concurring) (calling for abolition of peremptory challenge). Justice Breyer would later echo Justice Marshall's advocacy of the abolition of the peremptory challenge, *see* Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J. concurring), as would a continually expanding chorus of commentators, *see, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 864 (1997); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502–03 (1996); Nelson, *supra* note 8, at 1723. England abolished the use of peremptory challenges in 1988. *Id.* at 1723–24. It permits, however, nonunanimous verdicts. *See* Stephen C. Thaman, *A Comparative Approach to Teaching Criminal Procedure and Its Application to the Post-Investigative Stage*, 56 J. LEGAL EDUC. 459, 474–75 (2006) (contrasting Europe's majoritarian verdicts with America's unanimous ones and noting that abolishing "peremptory challenges, and go[ing] to a super-majoritarian verdict (like the 10–2 verdicts allowed in England and Wales . . .)" would likely lead to more "African-Americans or anti-death penalty jurors on jury panels").

52 Hernandez v. New York, 500 U.S. 352, 358–59 (1991) (plurality opinion); *see also* Snyder v. Louisiana, 552 U.S. 472, 484–85 (2008) ("[T]he question presented at the third stage of the *Batson* inquiry is [ ]'whether the defendant has shown purposeful discrimination.[ ]'" (quoting *Miller-El v. Dretke*, 545 U.S. at 277) (Thomas, J., dissenting)); Johnson v. California, 545 U.S. 162, 168 (2005).

53 *Batson*, 476 U.S. at 93–94; *see Johnson*, 545 U.S. at 170 ("[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.").

54 *Batson*, 476 U.S. at 97 (emphasis omitted).

55 Powers v. Ohio, 499 U.S. 400, 416 (1991); *see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991).

56 Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam).

views or are likely to be biased in favor of a particular party.[57] Apart from this requirement, however, "[t]he second step of th[e] process does not demand an explanation that is persuasive, or even plausible."[58] Rather, the only issue "is the facial validity of the prosecutor's explanation," and "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[59]

If the proponent of the strike is able to articulate a race-neutral explanation, the *Batson* analysis shifts to step three. At this step, the trial court must evaluate "the persuasiveness of the prosecutor's justification for his peremptory strike"[60] by assessing its "plausibility . . . in light of all evidence with a bearing on it."[61] Given the nature of the voir dire proceedings, "[t]here will seldom be much evidence bearing on th[is] issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."[62] The ultimate question invariably "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible," which "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."[63]

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57 *Batson*, 476 U.S. at 97–98 ("[A]ssumptions[ ] which arise solely from the jurors' race" will not survive step two); *see* Georgia v. McCollum, 505 U.S. 42, 59 (1992) ("This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. . . . [T]he exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.").

58 *Elem*, 514 U.S. at 767–68, 769 (stating that a "legitimate reason" for a strike "is not a reason that makes sense, but a reason that does not deny equal protection."); Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) ("A neutral explanation . . . means an explanation based on something other than the race of the juror."). Dissenting from the four-page per curiam opinion in *Elem*, Justice Stevens contended that the case represented "a law-changing decision" that "overrules a portion of our opinion in *Batson*"—specifically that a second step explanation must be "trial related." 514 U.S. at 770, 775 (Stevens, J., dissenting); *see also Batson*, 476 U.S. at 98 (stating that at step two, the prosecutor "must articulate a neutral explanation related to the particular case to be tried").

59 *Elem*, 514 U.S. at 768 (quoting *Hernandez*, 500 U.S. at 360); *Hernandez*, 500 U.S. at 359 (plurality opinion) ("In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.").

60 Miller-El v. Cockrell, 537 U.S. 322, 338–39 (2003).

61 Miller-El v. Dretke, 545 U.S. 231, 251–52 (2005); *Batson*, 476 U.S. at 98 ("The trial court then will have the duty to determine if the defendant has established purposeful discrimination.").

62 *Miller-El v. Cockrell*, 537 U.S. at 339 (quoting *Hernandez*, 500 U.S. at 365 (plurality opinion)).

63 *Id.*; *Hernandez*, 500 U.S. at 365 (plurality opinion) ("[T]he decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."); *Batson*, 476 U.S. at 98 n.21 ("[T]he trial judge's findings in the context under consideration here largely will turn on evaluation of credibility."). Other relevant factors include the likelihood that a proffered reason for a strike will "result[ ] in the dispropor-

Although the Court intended the procedure set forth in *Batson* to enforce the constitutional prohibition of race-based jury selection in a specific scenario—the prosecutor's removal of black jurors in a criminal proceeding against a black defendant—its applicability gradually expanded to encompass essentially every conceivable instance of jury selection and to include gender-based as well as race-based discrimination. This expansion fit with the Court's increased focus on the equal protection rights of stricken *jurors*, rather than those of criminal *defendants*. As the Court has explained, "whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[64] Thus, *Batson* challenges can be made and won on the grounds of race as well as gender discrimination,[65] by litigants in civil cases,[66] by the prosecution and the defense in criminal cases,[67] and by defendants (or other litigants) who do not share the racial or gender characteristics of the improperly stricken juror.[68]

In a series of cases decided after *Batson*, the Supreme Court gradually relegated the first and second steps in the *Batson* process to a nonsubstantive, procedural role akin to the complaint and answer in civil pleadings. As now interpreted, the first two steps merely "govern the production of evidence that allows the trial court to determine," at step three, "the persuasiveness of the defendant's constitutional claim."[69] It is, then, this third step—the adjudication of the validity of the justification proffered for a disputed peremptory challenge—that is preeminent in the three-step *Batson* process.

In tandem with its narrowing of the substantive focus of the *Batson* inquiry to the third step of the process, the Supreme Court also established that the trial court's step three determinations must be "accorded great deference,"[70] rendering those determinations essentially unreviewable on appeal. The Court justifies this deference on practical grounds: the *Batson* process is necessarily fact intensive, and many of the critical facts, such as the demeanor of an attorney or prospective juror, will not be apparent from the appellate record, which

tionate exclusion of members of a certain race," *Hernandez*, 500 U.S. at 363 (plurality opinion), and any "[r]acial identity between the defendant and the excused person," which "may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred," Powers v. Ohio, 499 U.S. 400, 416 (1991).

64 J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128 (1994).

65 *Id.* at 128–29.

66 Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).

67 Georgia v. McCollum, 505 U.S. 42, 59 (1992).

68 *See Powers*, 499 U.S. at 415–16.

69 Johnson v. California, 545 U.S. 162, 171 (2005).

70 Hernandez v. New York, 500 U.S. 352, 364 (1991) (plurality opinion).

generally consists of "only the transcripts from voir dire."[71] Understandably, a step-three determination "based on demeanor and credibility" implicates an area of inquiry that "lies 'peculiarly within a trial judge's province'" and is poorly suited to second guessing on appeal.[72]

III
The Continued Impotence of *Batson* in Application: A Review of Challenges in Federal Court from 2000 to 2009

> [W]e now consider the charade that has become the *Batson* process. The State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. . . . Surely, new prosecutors are given a manual, probably entitled, "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations." It might include: too old, too young, divorced, "long, unkempt hair," free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, "lived in an area consisting predominantly of apartment complexes," single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat . . . .
>
> —Justice Greiman[73]

While Illinois Appeals Court Justice Greiman's analysis may be dripping with equal parts sarcasm, humor, and contempt, his list accurately characterizes the catalogue of explanations that various courts have upheld in the near-quarter century of *Batson* jurisprudence.[74] In fact, one need only read a handful of cases to find examples from Justice Grieman's list. For example, in the 2009 case of *People v. Hamilton*, the California Supreme Court rejected a defendant's challenge

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71 Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (emphasis omitted).

72 *Id.* (quoting *Hernandez*, 500 U.S. at 365 (plurality opinion)); *Hernandez*, 500 U.S. at 364 (plurality opinion) ("[T]he ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal."). The great deference afforded to the trial court in this circumstance is quite natural and accords with the deference applied in virtually all appellate tribunals to a trial court's credibility determination. *See* Wainwright v. Witt, 469 U.S. 412, 428 (1985) (recognizing that a trial court's determination of whether a juror is biased will generally be "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province" and are "entitled to deference" on appeal).

73 People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (footnotes omitted).

74 Marvin L. Longabaugh, *The Z-Test for Percentages: A Statistical Tool to Detect Pretextually Neutral Juror Challenges*, 13 Rich. J.L. & Tech. 1, 20 (Dec. 2006) (quoting Justice Greiman's analysis and suggesting that "each of the above reasons would actually survive a *Batson* challenge under *Purkett*").

to the prosecutor's exercise of peremptory strikes to remove all six of the black venirepersons.[75] In so doing, the court recognized a laundry list of excuses that can successfully rebut allegations of race-based juror exclusion:

> Lacked "family values"
>
> "[H]ad considerable sympathy for [b]lack people on trial"
>
> "[U]nkempt and slovenly appearance"
>
> "[N]ot smart enough to serve on the jury"
>
> "[C]ame from a family that did not have 'an abiding respect for the rule of law' "
>
> "[F]elt the death penalty law treated [b]lack people unfairly"
>
> "[H]arbored a 'wholly naïve view of the criminal mind' "
>
> "[H]ad family members in prison"
>
> "[U]nwed 33-year-old mother of a 14-year-old boy"
>
> Too young
>
> Considered the justice system unfair to blacks
>
> "[D]ressed like a 15-year-old, with baggy clothes"
>
> Not mature enough
>
> Lacked "hope in the legal system"
>
> Single
>
> Failed to rise "above the rank of Petty Officer First Class after serving 20 years in the Navy"[76]

While the trial court in *Hamilton* admitted that the prosecutor's "credibility [was] beginning to wear a little thin,"[77] it permitted the strikes, and the California Supreme Court deemed the prosecution's reasons sufficient under *Batson* to rebut the defense's allegation of a racial motive.[78]

Of course, cases like *People v. Hamilton* and *Commonwealth v. Cook* could be unrepresentative of most *Batson* claims. In addition, older studies suggesting that these cases are indeed representative[79] may

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75 200 P.3d 898, 929–37 (Cal. 2009).

76 *Id.*

77 *Id.* at 936.

78 *Id.* at 929–37.

79 *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, 10, 45, 127–30 (2001) (concluding after an "analysis of 317 capital murder cases tried by jury in Philadelphia between 1981 and 1997" that "discrimination in the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread" and that "United States Supreme Court decisions banning these practices appear to have had only a marginal impact"); Melilli, *supra* note 51, at 448, 503 (surveying "reported decision[s] of every federal and state court applying *Batson*" between 1986 and 1993 and concluding, in light of, *inter*

simply be reflective of a different era. Thus, to determine whether *Hamilton* and *Cook* are representative of modern practice, we undertook our own exhaustive examination of all opinions and orders between January 1, 2000 and December 31, 2009 in which a federal court evaluated a race-based *Batson* challenge in either a civil or criminal case.[80] Ultimately, we unearthed 269 federal decisions.

Our first finding, that federal courts provided little relief to *Batson* claimants, is no surprise given that in each decision reviewed, the *Batson* movant had failed initially in the trial court, and the trial court is afforded great deference under *Batson*.[81] Our analysis reveals that of 269 federal decisions between 2000 and 2009, the reviewing court granted a new trial in only eighteen cases—6.69% of the total. In an additional ten cases—3.7%—the reviewing court remanded to the trial court to determine whether the second or third step of the *Batson* inquiry was satisfied in light of the trial court's error in handling either the first or second step of the *Batson* inquiry. In an additional twelve cases—4.5%—the reviewing court affirmed the decision below, in part, by upholding the lower court's finding that the appellant or petitioner violated *Batson*.[82] In the remaining 85.1% cases, the court rejected the *Batson* claim altogether.[83]

Our interest, however, was as much in the proceedings in the trial court as in those on review. Indeed, given the inherent limits of our survey, we could not hope to determine anything conclusive about the likelihood of success of initial *Batson* challenges. For one thing, to the extent the defense is initially successful in a *Batson* challenge, a judicial opinion will almost never reflect it; prosecutors will have no desire

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alia, the nature of race-neutral reasons permitted to explain a challenged strike, "*Batson* is almost surely a failure," and "[i]t is time for the peremptory challenge to go"); Raphael & Ungvarsky, *supra* note 8, at 234, 237 (reviewing *Batson* challenges in opinions issued by federal and state courts between 1986 and 1992 and concluding that "given the current case law, a prosecutor who wishes to offer a pretext for a race-based strike is unlikely to encounter difficulty in crafting a neutral explanation").

80 We reviewed all published and unpublished decisions available on Westlaw from the Supreme Court, circuit courts, and federal district courts that no other court has explicitly affirmed, reversed, overruled, or vacated on the *Batson* issue prior to January 1, 2010. To avoid duplication, we eliminated opinions of different courts reviewing the same case. Additionally, we did not design our survey to discover opinions that either are not included in the Westlaw database or are conclusory opinions (e.g., one sentence orders stating "the petition is denied") that denied *Batson* claims without identifying them.

81 *See* discussion *supra* Part II.

82 The *Batson* claimants in these cases were either the losing party in a civil case or the defendant in a criminal case.

83 In this 85.1%, we include the handful of cases in which an appeals court affirmed a lower court's decision to grant the prosecution's *Batson* claim(s) and reseat a juror struck by the defense. *See, e.g.*, United States v. Thompson, 528 F.3d 110, 116–17 (holding that the defendants' facially neutral reasons for striking a white venireperson were a pretext for racial discrimination).

to appeal a successful defense challenge when a defendant is convicted, and no ability to do so when the defendant is acquitted.

Our inquiry was less ambitious but, nevertheless, still significant. What we sought to explore, and what our survey in fact reveals, is that cases like *People v. Hamilton* and *Commonwealth v. Cook* are not aberrations but symptoms of a continuing and systemic problem. As discussed below, the last decade of federal court opinions reflect that prosecutors regularly respond to a defendant's prima facie case of racially motivated jury selection with tepid, almost laughable "race-neutral" reasons, as well as purportedly "race-neutral" reasons that strongly correlate with race. More significantly, we found that courts accept those reasons as sufficient to establish the absence of a racial motivation under *Batson*, and almost without exception, those reasons survive subsequent scrutiny in the federal courts. *Batson* is a response to the "fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[84] Our study suggests that the *Batson* response is as ineffective as a lone chopstick.

A. Acceptable Reasons for Peremptory Strikes

In the cases we surveyed, the race-neutral explanations proffered for a peremptory strike run the gamut. Many of the reasons submitted were, if true, reasons that would be either grounds for striking for cause (e.g., venireperson's sister was married to one of the prosecution's witnesses[85]) or explanations that few attorneys would deny are valid grounds to strike a prospective juror:

"[A]ppeared intoxicated"[86]

Appear[ed] to fall asleep during voir dire[87]

Failed to disclose her own criminal history[88]

Unsure of ability to follow court's instructions[89]

Read *National Enquirer* during voir dire[90]

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84 Batson v. Kentucky, 476 U.S. 79, 96 (1986) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

85 Woods v. Cain, No. 04-361, 2007 WL 2480351, at *5 (M.D. La. Aug. 28, 2007).

86 Lettley v. Walsh, No. 01-5812, 2007 WL 4590019, at *12 (E.D.N.Y Dec. 20, 2007).

87 *See* United States v. White, 552 F.3d 240, 251–52 (2d Cir. 2009) (holding that the government's use of a peremptory challenge did not violate *Batson* where an African-American juror "'had her eyes closed for extended periods of time' as if she had been sleeping"); Hayes v. Quarterman, No. 05-1974, 2007 WL 4440951, at *2 (N.D. Tex. Dec. 18, 2007).

88 Johnson v. Quarterman, No. 03-2606, 2007 WL 2735638, at *13–14 (N.D. Tex. Sept. 18, 2007).

89 Hargrove v. Pliler, No. 03-1141, 2007 WL 2245737, at *6 (E.D. Cal. July 31, 2007).

90 Llaca v. Duncan, No. 01-9367, 2004 WL 964113, at *3 (S.D.N.Y. May 4, 2004).

Requested to "see the cash" when prosecution mentioned stolen property[91]

Also in capital cases, venirepersons were struck because of their hesitancy to impose a death sentence.[92]

Another major category of accepted explanations related to the demeanor of the prospective juror. A demeanor-based explanation arose in almost half of the cases. While some cases indicated specific hostile behavior toward one party, most of the explanations were vague hunches or feelings about jurors with tenuous connections to the nature of the case:

Failed to make eye contact[93]

Appeared bewildered[94]

Seemed nervous[95]

Had "an angry look that she wasn't happy to be here"[96]

Gave "smart-ass answer[s]"[97]

Had a "strong personality"[98]

"[W]ore a beret one day and a sequined cap the next"[99]

In about twelve cases, the prosecution's race-neutral explanations for at least one venireperson did not extend beyond the juror's demeanor—i.e., the explanation did not involve the prospective juror's education, occupation, age, experience with the police or justice system, hardship explanations, life experience, or connection to any of the witnesses.[100] For example, in *Elder v. Berghuis*, the trial court accepted a prosecutor's explanation that he struck one particular juror

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91 Price v. Cain, No. 03-3066, 2007 WL 433484, at *5 (E.D. La. Feb. 5, 2007).

92 A potential juror can be struck for cause in a capital case if she expresses an inability to impose a death sentence. *See* Morgan v. Illinois, 504 U.S. 719, 728 (1992) ("[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."). So-called death qualification may itself have racial implications. *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1463 (1997) ("Death-qualified juries are less likely to share the racial and status characteristics or the common life experiences with capital defendants that would otherwise enable them to bridge the vast differences in behavior the trial is designed to highlight.").

93 Simon v. Epps, No. 04-26, 2007 WL 4292498, at *31 (N.D. Miss. Nov. 30, 2007).

94 Derrickson v. Myers, No. 07-1917, 2007 WL 4289979, at *5 (E.D. Pa. Nov. 29, 2007).

95 Woods v. Cain, No. 04-361, 2007 WL 2480351, at *5 (M.D. La. Aug. 28, 2007).

96 United States v. White, 552 F.3d 240, 251 (2d Cir. 2009).

97 Ali v. Hickman, No. 05-5243, 2007 WL 2417377, at *6 (N.D. Cal. Aug. 24 2007).

98 United States v. Fields, 378 F. Supp. 2d 1329, 1331 (E.D. Okla. 2005).

99 Smulls v. Roper, 535 F.3d 853, 856 (8th Cir. 2008) (en banc).

100 *See, e.g.*, United States v. Prather, 279 F. App'x 761, 766 (11th Cir. 2008) (upholding the prosecutor's peremptory strike of two African-American jurors based on the fact that "she had stricken [those potential jurors] after sensing they might be biased against the Government based on their demeanor when describing their personal histories").

solely "based on a 'gut feeling' that 'something didn't feel right with her.'"[101]

We also discovered numerous explanations that rested on assumptions about venirepersons with various traits largely unrelated to race or gender:

Watched science fiction programs on television[102]

Too "grandmotherly"[103]

Too young[104]

Had a dental abscess[105]

Divorced[106]

Unmarried[107]

Held Bible in hand[108]

Graduated with a Theatre Arts degree[109]

"[M]entioned the word 'government' twice in his answers"[110]

Wore t-shirts[111]

Wore earrings in each ear[112]

Wore a nose ring[113]

Lacked outside hobbies and interests[114]

Worked in customer service[115]

Unemployed[116]

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101 644 F. Supp. 2d 888, 895–96 (W.D. Mich. 2009).

102 United States v. Smith, 272 F. App'x 811, 813 (11th Cir. 2008) (per curiam).

103 Hayes v. Quarterman, No. 05-1974, 2007 WL 4440951, at *2 (N.D. Tex. Dec. 18, 2007). While "grandmotherly" is clearly a gender-specific term, the prosecutor seemed to be using the term to suggest an age-based stereotype, as opposed to a gender-based stereotype.

104 Brown v. Klem, No. 07-1250, 2007 WL 2907953, at *6 (E.D. Pa. Sept. 28, 2007).

105 United States v. Walley, 567 F.3d 354, 357 (8th Cir. 2009).

106 Cole v. Roper, No. 05-131, 2007 WL 1460460, at *4 (E.D. Mo. May 16, 2007).

107 Lewis v. Bennett, 435 F. Supp. 2d 184, 191–92 (W.D.N.Y. 2006).

108 Lockridge v. Franklin, No. 02-729, 2006 WL 2021493, at *3 (N.D. Okla. July 17, 2006).

109 United States v. Rodriguez, No. 04-55, 2007 WL 466752, at *32 (D.N.D. Feb. 12, 2007).

110 United States v. Ervin, 266 F. App'x 428, 433 (6th Cir. 2008).

111 Cook v. La Marque, No. 02-2240, 2007 WL 3243864, at *8 (E.D. Cal. Nov. 1, 2007).

112 United States v. Claytor, No. 05-0007, 2005 WL 1745642, at *3 (W.D. Va. July 26, 2005).

113 Bush v. Portuondo, No. 02-2883, 2003 WL 23185751, at *11 (E.D.N.Y. Oct. 29, 2003).

114 Lewis v. Bennett, 435 F. Supp. 2d 184, 191 (W.D.N.Y. 2006).

115 Reynoso v. Hall, No. 04-5025, 2007 WL 3096886, at *3 (E.D. Cal. Oct. 22, 2007).

116 United States v. Carter, No. 04-0404, 2006 WL 1128740, at *2 (W.D. Mo. Apr. 24, 2006).

Worked as a teacher[117]

Worked as a nightclub manager[118]

Worked at the post office[119]

Seemed to "'over-intellectualize' the case"[120]

Served on a jury that previously acquitted a criminal defendant[121]

Many of the above explanations had a tenuous connection, at best, to the trial; in one case, the prosecutor even admitted that the explanation was "rather a stretch."[122] However, the courts approving these explanations often cited the Supreme Court's rule that a trial judge must accept even "silly or superstitious" explanations at step two so long as the explanations are facially race and gender neutral; moreover, the Court further dictates that lower courts can reject those reasons at step three only if they find that the attorney is lying.[123]

Perhaps our most revealing discovery was the substantial list of acceptable reasons that could conceivably implicate a juror's likelihood of being impartial but were likely to disproportionately impact specific racial or ethnic groups. For example, several black venirepersons were struck because they had relatives who had been convicted and imprisoned.[124] Similarly, in one case, a black venireperson was struck because she had previously testified in another criminal trial in support of a criminal defendant's self-defense claim.[125] In another case, the Second Circuit accepted a prosecutor's "general practice" of avoiding "jurors who had family members who had either been arrested or undergone negative experiences with the police" or "harbored negative feelings about the police."[126]

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117 McGahee v. Campbell, No. 05-0042, 2007 WL 3037451, at *49 (S.D. Ala. Oct. 15, 2007), *rev'd sub nom*, McGahee v. Ala. Dep't of Corr., 560 F.3d 1252 (11th Cir. 2009).

118 Crawford v. Zon, No. 04-34, 2005 WL 857056, at *6 (W.D.N.Y. Apr. 14, 2005).

119 Carter v. Duncan, No. 02-0586, 2005 WL 2373572, at *10 (N.D. Cal. Sept. 27, 2005).

120 Ali v. Hickman, No. 05-5243, 2007 WL 2417377, at *6 (N.D. Cal. Aug. 24 2007).

121 United States v. Douglas, 525 F.3d 225, 241 (2d Cir. 2008).

122 *See* United States v. Smith, 272 F. App'x 811, 813 (11th Cir. 2008) (per curiam) (finding no *Batson* violation where the government struck jurors based on their television viewing habits).

123 *See* Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) (explaining that only at step three of a *Batson* challenge can "implausible or fantastic justifications . . . be found to be pretexts for purposeful discrimination"); *see also Smith*, 272 F. App'x at 813 (per curiam) ("About the second step, almost any plausible reason can satisfy the striking party's burden, including reasons deemed superstitious, silly, or trivial, as long as the reason is race or gender neutral.").

124 *See, e.g.*, United States v. McKay, 431 F.3d 1085, 1092 (8th Cir. 2005) (holding that the strike of a black venireperson was appropriate and nondiscriminatory because, among other things, she had a cousin and brother who had both been convicted for drug offenses).

125 *See* United States v. White, 552 F.3d 240, 252 (2d Cir. 2009).

126 Green v. Travis, 414 F.3d 288, 300 (2d Cir. 2005).

While most courts would consider explanations such as a venireperson's acquaintance or family relationship with a person in prison as "race neutral," such a conclusion is called into question by the stark racial disparities in the criminal justice system. For example, the Bureau of Justice Statistics reported in 2008 that "black males were incarcerated at 6.6 times the rate of white males"; whereas only 1 in 138 white males were in prison or jail, 1 in 21 black males were incarcerated.[127] Moreover, the Bureau estimated that 32% of black men born in 2001 will be imprisoned at least once during their lifetime, compared to 17.2% of Latinos and 5.9% of white men.[128] Therefore, striking all persons with a relative who is or has been in prison will disproportionately exclude minority venirepersons.

Moreover, many of the race-neutral criteria upheld in our survey played into racial stereotypes and might reflect subconscious bias. A prosecutor's vague reference to the "intelligence" of a venireperson, for example, often withstood a *Batson* challenge even when the estimation of intelligence was not based on educational level, language barriers, IQ, vocabulary, *Jeopardy* winnings, or any other specified way of gauging the venireperson's ability to follow the trial.[129] For example, in *Williams v. Norris*, the Eighth Circuit reviewed the prosecution's strike of an African-American woman.[130] At trial, the State explained that the venireperson "had only a high school education" and that they "wanted to 'get the best educated jurors that we can' because it planned to introduce complex DNA evidence."[131] However, the defense demonstrated that at least eight white venirepersons had only a high school education or less and were not struck.[132] When the trial judge asked the state why it struck the black juror but kept another similarly-situated white juror, the prosecutor explained:

> [The African-American venireperson] did not appear to me to be bright when I was talking to her. She also was a shipping clerk for Maybelline. All of these things worried me in conjunction with DNA. [The white juror who also only had a high school education] appeared to be articulate. She's also a manager of a store. I felt like

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127 Press Release, Bureau of Justice Statistics, U.S. Dep't of Justice, Growth in Prison and Jail Populations Slowing: 16 States Report Declines in the Number of Prisoners (Mar. 31, 2009), *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/BJS090331.htm.

128 THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf).

129 *But see* McGahee v. Ala. Dep't of Corr., 560 F.3d 1252, 1265 (11th Cir. 2009) (concluding that the record did not support and the court should have considered the prosecution's removal of multiple African-American jurors because of their "low intelligence").

130 576 F.3d 850, 863–65 (8th Cir. 2009).

131 *Id.* at 863.

132 *See id.* at 864.

> that . . . boded well for the DNA—understanding the DNA evidence.[133]

Despite the fact that the prosecution conducted no further questioning of the struck African-American juror to indicate why she would be any less able to understand DNA evidence than the eight other white jurors whose education level was identical, the trial court, the Supreme Court of Arkansas, the district court, and the Eighth Circuit all concluded that no *Batson* error had been committed.[134] In effect, the prosecution was permitted to strike a black venireperson with a high school education merely because she "did not *appear* . . . to be bright" while seating a white venireperson with only a high school education who "*appeared* to be articulate."[135] While we acknowledge that the voir dire transcript may not capture specific physical interactions that might further validate the prosecutor's hunch, we have no difficulty concluding that the race-neutral explanation given plays into one of the worst stereotypes of African-Americans.[136]

In all of these situations, the courts upheld the proffered reasons as race neutral and "not otherwise vague or facially questionable."[137] Under the current *Batson* framework, the courts had no obligation to rule otherwise, even if presented with clear evidence of how such "race-neutral" criteria were likely to disparately impact specific groups.

In sum, in the cases reviewed, the reasons advanced to successfully justify questionable peremptory strikes were commonly the same type of reasons given by the prosecutors in *Hamilton* and *Cook*. Further, another broad subset of reasons encountered, while not race-based per se, seem to correlate with race, suggesting that an attorney seeking to eliminate all the members of a certain race from the jury

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133 *Id.* at 864 (omission in original) ("In denying the challenge to [the] strike, the trial judge explained: 'I think the high school [education] was probably [an] inappropriate way to say it, but I think [the State] felt that from her responses and her background that perhaps she wasn't the person they wanted because of her ability to understand the evidence in this case.'" (second, third, and fourth alterations in original)).

134 *Id.* at 865.

135 *Id.* at 864 (emphasis added).

136 *See* RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 108–09 (1993) (noting that stereotypes of "black mental inferiority" have been historically "used to support the notion of white supremacy and to justify racial segregation"); Sheri Lynn Johnson, *Race and Capital Punishment*, *in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 121, 137 (Stephen P. Garvey ed., 2003) ("[T]he majority group sees African Americans as less intelligent, less hard-working, less patriotic—less *good* . . . —than white Americans."); *see also* McGahee v. Ala. Dep't of Corr., 560 F.3d 1252, 1265 (11th Cir. 2009) ("[T]he State's claim that several African-Americans were of 'low intelligence' is a particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries."); *cf.* Raphael & Ungvarsky, *supra* note 8, at 255 (reporting "routine[ ]" prosecution strikes of potential jurors based on claims that the jurors "lack formal education or . . . appear inarticulate").

137 Green v. Travis, 414 F.3d 288, 301 (2d Cir. 2005).

could achieve much of that goal by focusing on purportedly "race-neutral" factors that happen to correlate with race.

B. Unacceptable Reasons for Peremptory Strikes

The federal courts in our study never reversed based on a reason's facial implausibility.[138] Of the eighteen successful[139] posttrial *Batson* challenges we encountered, ten involved undeniable evidence of implausibility based on side-by-side comparisons of similarly situated jurors of different races.[140] These rulings follow the Supreme Court's recognition that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."[141]

One of the Supreme Court's more recent *Batson*-related opinions, *Snyder v. Louisiana*,[142] exemplifies how such a side-by-side comparison—effectively *proving* that any race-neutral explanations are pretexts for racial discrimination—is the circumstance most likely to convince a court to grant a *Batson* challenge on appeal. In *Snyder*, the Court held that the prosecution's first proffered reason for striking an African-American juror—nervousness—was insufficient by itself because the record did not indicate that the trial judge credited the prosecutor's assertion.[143] This left the second reason—the juror's student-teaching obligations—with too much weight to bear. The Court considered the justification implausible in light of the brevity of the trial

138 In a few cases, federal courts have concluded that a specific reason for striking a juror was facially invalid but nonetheless concluded that the strike did not violate *Batson* because other proffered reasons were valid. *See, e.g.*, United States v. Walley, 567 F.3d 354, 357 (8th Cir. 2009) (noting that the trial court concluded that an African-American juror's back problem was not a valid ground upon which to strike her but that her health problems and "connection to a person with substance-abuse issues were sufficient reasons to justify the strike").

139 This number does not include cases remanded for further *Batson* hearings.

140 *See* Snyder v. Louisiana, 552 U.S. 472, 483–85 (2008); Ali v. Hickman, 584 F.3d 1174, 1193–96 (9th Cir. 2009); Reed v. Quarterman, 555 F.3d 364, 375–81 (5th Cir. 2009); Green v. Lamarque, 532 F.3d 1028, 1030–33 (9th Cir. 2008); United States v. Williamson, 533 F.3d 269, 275–77 (5th Cir. 2008); Riley v. Taylor, 277 F.3d 261, 276–77 (3d Cir. 2001); Williams v. Runnels, 640 F. Supp. 2d 1203, 1221 (C.D. Cal. 2009); Love v. Yates, 586 F. Supp. 2d 1155, 1169–71, 1173 (N.D. Cal. 2008); Hardcastle v. Horn, 521 F. Supp. 2d 388, 405–23 (E.D. Pa. 2007); Hargrove v. Pliler, No. 03-1141, 2007 WL 2245737, at *10–20 (E.D. Cal. July 31, 2007).

141 Miller-El v. Dretke, 545 U.S. 231, 241 (2005).

142 552 U.S. 472 (2008).

143 *Id.* at 479. The Court did not suggest, however, that "nervousness" was an otherwise improper ground for striking a juror. Moreover, the Court noted that "the record does not show that the prosecution would have pre-emptively challenged [the stricken juror] based on his nervousness alone." *Id.* at 485.

and because the prosecutor struck white jurors who disclosed conflicting obligations at least as serious as those of the stricken juror.[144]

Similarly, the Fifth Circuit in *Reed v. Quarterman* concluded that the prosecution's proffered reasons for striking at least two prospective African-American jurors were pretexts for discrimination.[145] In explaining why they struck one juror, the state prosecuting attorneys explained that the stricken juror (1) "would impose the death penalty only 'if the facts [were] presented to [him] beyond a shadow of doubt,'" (2) "would need to see 'a little premeditation' to convict for capital murder," and (3) "was concerned about losing his job if he was gone from work for a long time."[146] The Fifth Circuit concluded that the proffered explanations were pretexts for racial discrimination in light of evidence that other white jurors expressed nearly identical opinions and concerns but were not similarly struck or questioned further.[147] The court also rested its opinion on historical evidence of racial bias, evidenced by use of the same Sparling Manual used by the Dallas County District Attorney's Office that the Supreme Court relied on to find a *Batson* violation in *Miller-El v. Dretke*.[148]

In *Hardcastle v. Horn*, a Pennsylvania district court concluded that the state's proffered race-neutral reasons for striking multiple nonwhite potential jurors were pretextual in light of the defendant's exhaustive side-by-side comparisons of eight of the black venire members stricken by the state with their white counterparts in the venire.[149] The trial prosecutor, for example, argued that she struck Lisa Stewart, a black woman, in keeping with her usual practice of striking young, single, unemployed, unmarried mothers.[150] The record, however, clearly demonstrated that four other women in the venire fit a similar description, three of whom were Caucasian, but that the prosecutor still struck only Stewart.[151] The district court found that the prosecutor treated Stewart differently than other similarly situated members of the venire.[152]

Many of the decisions that resulted in a remand for a new *Batson* hearing also stemmed from a failure to properly apply the compara-

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144 *Id.* at 483.

145 555 F.3d 364, 376 (5th Cir. 2009).

146 *Id.* at 378.

147 *Id.* at 379–80.

148 *Id.* at 381–82 (citing Miller-El v. Dretke, 545 U.S. 231, 263–64 (2005)); *Miller-El v. Dretke*, 545 U.S. at 264 (2005) (explaining that the Sparling manual "contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service").

149 521 F. Supp. 2d 388, 405–23 (E.D. Pa. 2007).

150 *Id.* at 405–06.

151 *Id.* at 408.

152 *Id.*

tive-analysis test. In *United States v. Torres-Ramos*, for example, the Sixth Circuit remanded to the district court to determine whether the third step of *Batson* was satisfied.[153] In that case, the prosecution struck an African-American juror on the grounds that (1) his education consisted of a high school diploma and a few community college classes and (2) he had been laid off from his job as a factory worker.[154] The court's remand stemmed from the fact that the district court, in ruling on a *Batson* claim, conducted a side-by-side comparison of the excluded African-American juror with white venirepersons who were similarly *excluded*, as opposed to a comparison with similarly situated white venirepersons who had *not* been excluded.[155]

The other common scenario in the cases that led to reversal was a prosecutor justifying a strike by referencing a statement the juror never made or something that the record did not support.[156] For example, in *Durant v. Strack*, the prosecutor explained the strike of a black juror on the grounds that the juror was making faces and appeared hostile.[157] The state trial court allowed the strike, although it stated that the juror did not appear to be hostile and that it did not see the juror make any faces.[158] The federal district court, however, granted the defendant's habeas petition on the grounds the state trial court's ruling was contrary to *Batson* and its progeny.[159] Similarly, in *McGahee v. Alabama Department of Corrections*, the Eleventh Circuit held that the prosecution's explanation for striking jurors because of their "low intelligence" had no support in the record.[160]

In all but one of the remaining cases, the reviewing court granted a new trial simply because the trial court failed to properly apply the *Batson* framework: In *Love v. Yates*, the district court ruled that the state trial court failed to conduct a comparative analysis.[161] In *Paulino v. Harrison*, the Ninth Circuit affirmed the district court's habeas grant because the trial court did not require the prosecution to explain the strikes and the prosecutor was then unable to remember any reasons

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153 536 F.3d 542, 560–61 (6th Cir. 2008).

154 *Id.* at 558.

155 *Id.* at 560.

156 A court may deem a mistake, however, a valid race-neutral reason for a peremptory challenge. *See* People v. Williams, 940 P.2d 710, 735 (Cal. 1997) (rejecting a *Batson* challenge where prosecutor's "race-neutral" justification for the strike was that he mistakenly struck the juror, while acknowledging "the possibility . . . that counsel called upon to explain a questionable peremptory challenge will take refuge in a disingenuous claim the challenge was mistakenly made").

157 151 F. Supp. 2d 226, 231 (E.D.N.Y. 2001).

158 *See id.* at 231–32.

159 *Id.* at 235.

160 560 F.3d 1252, 1265 (11th Cir. 2009).

161 586 F. Supp. 2d 1155, 1169 (N.D. Cal. 2008).

for the strike.[162] In *Sims v. Berghuis*, the court noted that the prosecutor offered no explanation at trial for excusing one juror.[163]

The final category of reasons that triggered reversal consists of situations where the court granted a defendant's *Batson* claim based on unambiguous evidence that the prosecutor's proffered justification was false. In *Weddell v. Weber*, for example, the prosecution put a question mark by the name of a Native American juror before even seeing or questioning her.[164]

In sum, reviewing courts based all eighteen reversals on virtually conclusive *proof* that the prosecutor was not telling the truth. Which is to say, a reviewing court's skepticism about proffered justifications that were far-fetched, tenuously connected to the case, strongly correlated with race, or irreducibly vague and ambiguous did not form the basis for granting the reversals.

C. Implications of These Results: Jurors Are More Likely to Be Struck by Lightning than to Be Struck by a Violator of the Equal Protection Clause

Our survey reveals that in a broad array of cases, as exemplified by *Hamilton* and *Cook*, attorneys articulate and judges accept "race-neutral" explanations for peremptory strikes that either highly correlate with race or are silly, trivial, or irrelevant to the case. Reviewing courts then affirm these determinations. This is significant because if attorneys can avoid *Batson* in this manner, there are only two narrow circumstances in which a *Batson* challenge is likely to succeed: (1) where an attorney admits to a racial motivation and (2) where an attorney's explanation applies to a virtually identical juror of a different race who was not stricken.[165] As discussed below, these two scenarios in which *Batson* will likely smoke out a racially discriminatory strike are exceedingly unlikely.

One circumstance where *Batson* is well poised to invalidate a strike is where an attorney concedes a racial motivation at step two. Even if we would somehow expect counsel to acknowledge unconstitutional racial discrimination in open court, however, attorneys will often fail to perceive their own racial motivation.[166] Psychological studies suggest that people readily provide a nonracial explanation for

162 542 F.3d 692, 699–700, 703 (9th Cir. 2008).

163 494 F. Supp. 2d 575, 582 (E.D. Mich. 2007).

164 290 F. Supp. 2d 1011, 1026–29 (D.S.D. 2003).

165 As noted above, a trial court may disbelieve a prosecutor's proffered justification and disallow the strike in the first instance, at which point the strike largely disappears from the judicial record. But as discussed *infra* Part V, significant obstacles hamper such rulings, and we found no evidence of their prevalence in the cases we studied.

166 *See* Page, *supra* note 8, at 210–15.

their behavior even when race is actually influencing their decision.[167] Most notably, Professors Samuel Sommers and Michael Norton recently conducted a study in which they asked three populations—college students, advanced law students, and practicing attorneys—to play the role of prosecuting a twenty-four-year-old black male defendant in a robbery and aggravated assault trial.[168] Each "prosecutor" was given one remaining peremptory strike with instructions to strike one of two prospective jurors because either "(a) you don't think they would be able to be fair jurors or (b) you do not think they would be sympathetic to your case."[169] Both jurors were given a trait that was likely to be unattractive to a prosecutor. Juror #1 was a forty-three-year-old married male journalist who had, several years earlier, written articles about police misconduct. Juror #2 was a forty-year-old divorced male advertising executive who stated during voir dire that he was skeptical of statistics because they are easily manipulated.[170] Photos of the hypothetical veniremen accompanied the descriptions of the jurors; however, half of each population saw that Juror #1 was black and Juror #2 was white, while the other half saw that Juror #1 was white and Juror #2 was black.[171]

Sommers and Norton discovered that all three populations were more likely to challenge a prospective juror when he was black as opposed to white.[172] However, when justifying their strikes from the myriad factors provided, the participants rarely cited race as an influential factor. Rather, they focused instead

> on the race-neutral characteristics associated with the [b]lack prospective juror. That is, when Juror #1 was [b]lack, participants tended to justify their judgments by citing his familiarity with police misconduct as their reason for excluding him. When Juror #2 was [b]lack, on the other hand, participants reported his skepticism about statistics to be more important than the police misconduct issue.[173]

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167 *See, e.g.*, Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 39–40 (2006) (arguing that social category information can subconsciously affect decision making and that people are skilled at masking such behavior that may be viewed negatively by others).

168 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).

169 *Id.* at 266.

170 *Id.* at 265.

171 *Id.* at 266.

172 Specifically, participants struck Juror #1 77% of the time when he was black but only 53% of the time when he was white. Similarly, participants challenged Juror #2 47% of the time when he was black but only 23% when he was white. *Id.* at 267.

173 *Id.* at 269.

Perhaps the most significant result of the Sommers and Norton study is that the evidence of racial bias only became clear when viewing the data in the aggregate.[174] Thus, if a court were to look at only one individual's responses—e.g., "I struck Juror #1 because he probably distrusts the police"—it would be impossible to conclude that his explanation was pretextual. Yet the aggregate data demonstrates that race played a role in the strikes.[175]

The results of the Sommers and Norton study demonstrate why judges will inevitably struggle to discredit proffered race-neutral explanations. Any investigation will be unproductive because attorneys not only are hesitant to admit bias but also may not even be aware of their bias. Thus, except in unusual cases where there is unambiguous evidence that the proffered justification was false or where there is clear evidence of implausibility based on side-by-side comparisons of similarly situated jurors of different races, aggregated data (which will be unavailable to the trial court) is required to conclusively establish racial bias.

Unfortunately, any attorney smart enough to pass a bar exam can easily circumvent the comparative-analysis pitfall by "packaging" additional characteristics in a way that makes it statistically impossible that another individual will have an identical response. Consider, for example, that if a venire of sixty persons were to answer a dozen multiple choice questions with only four possible answers and each person answered randomly, the likelihood that two of those sixty people

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174 *See id.* ("We observed bias against [b]lack venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory [strike] was influenced by race or whether the justification provided was valid.").

175 Anecdotally, we attempted to replicate this experiment in Professor Semitsu's Spring 2011 Constitutional Law II course at the University of San Diego Law School. Ninety-two students were shown images of two smiling, male, middle-aged venirepersons in suits; one was black, and the other was white. Asked to assume the role of a prosecutor in a robbery trial with a black defendant and a white victim, the students received the same descriptions of the two jurors and were instructed to only strike one. Unbeknownst to them, half the class received a paper stating that the black male was the "43-year-old married journalist who wrote articles about police misconduct and never served on a jury before" while the other half was given that same description for the white venireperson. After conducting an anonymous survey, we learned that 92.5% of the class struck that journalist when it was the black man, but only 76.3% struck that journalist when it was the white man. Conversely, when offered a chance to strike a "40-year-old divorced advertising executive who has served on a jury once before in a civil trial and is skeptical of statistics because they are easily manipulated," 23.7% of the class struck him when he was black, but only 7.5% of the class struck him when he was white. Given the fact that these law students chose to take a class on the Equal Protection Clause, we do not suggest that these results reflect the larger USD Law School student body, much less all law students or society in general. Nonetheless, despite a participant pool of ninety-two students who had already spent several weeks discussing invidious race discrimination, we found that the conscious or subconscious use of race played a statistically significant role in the students' decision to strike jurors.

would have identical responses would be 0.0105501%.[176] In other words, if a prosecutor needed to explain why she was striking one prospective juror (of sixty) and used that venireperson's answers to twelve questions as an explanation, the odds of any of the remaining fifty-nine people having identical answers would be approximately 1 in 9479.[177]

These odds are worse than the probability of being struck by lightning in one's lifetime, which is 1 in 6250.[178] Of course, while answers to questions in voir dire are not random, the questions are rarely so simple. Typically, questions are open ended and rarely are limited to four choices.

Moreover, to trigger a *Batson* claim, the two prospective jurors with identical answers would need to be racially distinct, further reducing the odds (unless the one stricken black venireperson was part of an otherwise all-white jury pool, for example). Therefore, an attorney need only ask a handful of questions to essentially guarantee that she never fail the "implausibility" test of side-by-side comparisons of similarly situated jurors of different races.

The low likelihood of being "caught" with an unpersuasive race-neutral explanation is demonstrated by again examining *Cook*.[179] Although the strikes in that case were allowed, McMahon ran the greatest risk of being discredited when he struck two black unemployed venirepersons without striking the similarly unemployed white juror.[180] However, had he included even three other responses in his packaged explanation of why one juror was struck—e.g., "I struck him because he is an unemployed gun owner who hasn't been to church in the last ten years"—the odds of finding a similarly situated prospective juror plummet to zero. If asked to defend this "packaged" concern, an attorney need only suggest that the combination of these factors is what makes the person especially problematic—e.g., "His in-

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176 Rather than calculating the probability that any two people in this sample have identical answers (denoted by $P(identical)$), it is easier to calculate the complementary probability that no two people have the same answers (denoted by $P(different)$). $P(identical) + P(different) = 1$ since those are the only two options in the probability space. Therefore, $P(identical) = 1 - P(different)$. With sixty people in the jury pool, twelve questions, and four possible choices per question,

$$P(identical) = 1 - \frac{(4^{12})!}{(4^{12} - 60)!(4^{12})^{60}} \approx 0.000105501 \approx 0.0105501\%$$

177 $\frac{1}{.000105501} = 9478.58314.$

178 *See Lightning Safety: Medical Aspects of Lightning*, NAT'L WEATHER SERVICE, http://www.lightningsafety.noaa.gov/medical.htm (last visited Mar. 20, 2011) (estimating one's lifetime as eighty years).

179 952 A.2d 594 (Pa. 2008); *see also supra* Part I.

180 *See Cook*, at 609–10 (allowing the strikes because "both of the [striken] venirepersons . . . revealed additional indications of instability other than just unemployment").

come security, his sawed-off shotgun, and his lack of spiritual centering, collectively, make him too likely to sympathize with the defendant." Indeed, McMahon's habit of providing a long, rambling list of potential reasons did just that; he bundled enough characteristics into one description such that a similarly situated venireperson of a different race would never exist.[181]

In sum, our survey supports the conclusions of previous commentators who have studied the issue.[182] *Batson*, as currently applied, is unable to prevent the use of race in jury selection because its dictates are so easily avoided. The three-step framework fashioned by the Supreme Court is simply not up to the task it has been assigned.

IV
Summary of Existing Reform Proposals

Over the years numerous commentators, from Supreme Court Justices to prominent academics, have questioned the efficacy of *Batson*.[183] Most of the criticism roughly parallels our critique that *Batson* has no teeth and allows attorneys to mask racial stereotypes in race- or gender-neutral rationales and thus succeed in striking jurors based on race or gender. As explained in Part III, these criticisms continue to be borne out.

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[181] For example, McMahon explained that one venireperson he struck was not only unemployed but also a twenty-four-year-old female student who still lived at home with an unemployed mother and accordingly raised issues of instability. *Id.* at 609. *See* Raphael & Ungvarsky, *supra* note 8, at 237 (explaining that in combating a *Batson* challenge, "the best strategy for the prosecutor is to offer a combination of . . . rationales").

[182] *See* Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 4, 6 (Aug. 2010), *available at* http://www.eji.org/eji/raceandpoverty/juryselection (follow "PDF: Read the Report" hyperlink) (examining jury selection procedures in eight southern states and summarizing findings as "shocking evidence of [continuing] racial discrimination in jury selection in every state" where "[h]undreds of people of color called for jury service have been illegally excluded from juries after prosecutors asserted pretextual reasons to justify their removal" that are false, humiliating, demeaning, and injurious); Shaila Dewan, *Blacks Still Being Blocked from Juries in the South, Study Finds*, N.Y. Times, June 2, 2010, at A14 ("[T]he practice of excluding blacks and other minorities from Southern juries remains widespread . . . ."); *see also* Melilli, *supra* note 51, at 502 ("With regard to the two legitimate goals of providing litigants with fair and impartial juries and providing potential jurors with fair and nondiscriminatory selection procedures, [*Batson*] is entirely counterproductive."); Raphael & Ungvarsky, *supra* note 8, at 234, 236 (arguing that "*Batson*'s neutral explanation test" can be satisfied too easily); discussion *infra* Part IV.

[183] *See e.g.*, Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (criticizing "*Batson*'s fundamental failings"); Cavise, *supra* note 8, at 501, 528 (decrying "*Batson*'s toothless bite" and opining that *Purkett v. Elem*, 515 U.S. 765 (1995), "marked the final demise of the *Batson* doctrine into the rule of useless symbolism"); Page, *supra* note 8, at 178, 179 (stating that "*Batson* has engendered an enormous amount of often virulent criticism" and contending that "[m]ost of the criticism of *Batson* is justifiable").

Commentators propose a number of reforms, the most straightforward of which is the abolition of peremptory strikes altogether.[184] However, almost a quarter-century since Justice Marshall called for the abolition of the peremptory challenge in his concurring opinion in *Batson*,[185] there is little likelihood of this reform being adopted. Even if the judiciary could find the will to eliminate this venerable facet of jury selection,[186] such drastic action is arguably beyond the power of the courts. It is one thing to argue that a legislatively authorized and facially neutral practice (peremptory strikes) is susceptible to abuse and to invalidate its use in cases where abuse occurs; it is quite another to judicially abolish the practice in all cases regardless of whether abuse is present.[187] The legislators who possess the requisite authority to act in such a sweeping fashion have shown no inclination to implement such a change.[188]

Commentators have also suggested ways to supplement or supplant the *Batson* framework.[189] Among the most notable are (1) guaranteeing a minimum number of jurors who are "racially similar" to the defendant;[190] (2) permitting a new facet of jury selection—the "peremptory inclusion"—which would allow a party to designate particular jurors who would be immune from peremptory strikes;[191] and

[184] *See* Melilli, *supra* note 51, at 502–03 ("It is time for the peremptory challenge to go.").

[185] 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

[186] *See* Swain v. Alabama, 380 U.S. 202, 212 (1965).

[187] The peremptory challenge is primarily a creature of statute (or rule). Consequently, courts could not easily eradicate it simply because it is, on occasion, used in an unconstitutional fashion. *See* Henning, *supra* note 48, at 796 (recognizing that "it would be much harder to justify a complete ban on a well-established trial practice because it has, in some instances, been used in a discriminatory manner").

[188] *See* Page, *supra* note 8, at 246 (recognizing that "the legislatures and courts show little or no likelihood of eliminating the peremptory challenge").

[189] For a summary of reform proposals, see *id.* at 245–62. Professor Page's summary concludes that "the best solution is to completely eliminate the peremptory challenge." *Id.* at 261; *see also* Cavise, *supra* note 8, at 547 (stating that most existing reform proposals "are highly unlikely either because of the disposition of the Supreme Court or because they are simply too dissonant with the realities of criminal practice").

[190] *See* Johnson, *supra* note 26, at 1698–99 (arguing that to combat racial discrimination among jurors, minority defendants should be provided "three racially similar jurors" in every case and that courts should "leave open the door for experimentation with alternative remedies").

[191] *See* Page, supra note 8, at 249 & n.479; Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV. 781, 806–08 (1986) (describing the procedure for a process of affirmative selection); Donna J. Meyer, Note, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE W. RES. L. REV. 251, 280 (1994) (proposing that defendants be granted "the option of exercising a peremptory inclusion in place of a statutorily authorized peremptory challenge," which would seat the selected juror "without contest or removal by the prosecution").

(3) ratcheting up the severity of the sanctions available for *Batson* violations, particularly those committed by prosecutors.[192]

A more modest set of solutions "aimed at improving the detection of pretext" at the third step of the *Batson* process have also been proposed.[193] As a general matter, retooling the *Batson* framework is an attractive approach to improving *Batson*'s functioning. More sweeping proposals such as eliminating peremptory challenges, mandating racial jury quotas, and imposing draconian sanctions (such as dismissal of a criminal prosecution) for *Batson* violations are unlikely to resonate beyond the academy and particularly unlikely to resonate with legislatures who must implement any such reform proposal. Retooling the *Batson* framework, however, is a solution that courts can easily implement without legislative assistance and may be willing to entertain.[194] The focus on "improving the detection of pretext,"[195] however, is likely a wrong turn. Rather, for the reasons expressed below, a more promising revision of the *Batson* framework is to abandon the need for a pretext finding altogether.

V
REFORMING *BATSON* BY EXPANDING ITS SCOPE AND NARROWING THE REMEDY FOR ITS VIOLATION

We next focus our analysis on what we perceive to be the two primary obstacles to a more robust judicial effort to eradicate the use of race and gender in jury selection: (1) the stark implication of attorney misconduct that now lies at the core of any trial court finding of a *Batson* violation and (2) confusion regarding the proper remedy for a *Batson* violation in the trial court. Unless these obstacles are addressed, *Batson* cannot be expected to have anything but the most superficial success in rooting out unconstitutional race- or gender-based peremptory challenges.

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192 Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1117, 1122 (1994) (recommending increased sanctions for prosecutors found to have violated *Batson*, including dismissing the case with prejudice and seeking disciplinary action against the individual prosecutor responsible).

193 *See* Page, *supra* note 8, at 259–60; *see also* Cavise, *supra* note 8, at 549 (recommending "a reactivation of the judge's role in rooting out pretext and racist/ sexist/ ethnic bias").

194 Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) ("I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole.").

195 Page, *supra* note 8, at 260.

A. The Need for an Efficient Remedy for *Batson* Violations

The more easily eliminated obstacle to robust implementation of *Batson*'s antidiscrimination directive is the confusion regarding the proper remedy for a *Batson* violation.[196] While an appellate finding of *Batson* error leads to automatic reversal,[197] there is little discussion in the case law of the proper remedy in *the trial court* for a *Batson* violation. The Supreme Court has never endorsed a trial court remedy for *Batson* violations, although *Batson* itself takes note of the two most obvious potential remedies: (1) "discharg[ing] the venire" and (2) "disallow[ing] the discriminatory challenges and resum[ing] selection with the improperly challenged jurors reinstated on the venire."[198] Commentators, however, criticize both of these remedies, and these criticisms must be answered, or an alternative remedy suggested, in any serious reform proposal.

1. *Objections to the Two Most Obvious Remedies for* Batson *Violations*

The remedy of dismissing the entire jury panel in response to a *Batson* violation is particularly unattractive both administratively and as a deterrent to *Batson* violations. The dismissal of the venire impacts an entire panel of jurors, almost all of whom had no involvement with the constitutional violation. The dismissal also creates administrative hardship for the court, jurors, and parties by erasing any progress that had been made in jury selection prior to the *Batson* violation.

Dismissing the entire jury panel also arguably has little deterrent effect because it renders the offending side no worse off than if the discriminatory strike had never been attempted.[199] Indeed, if the offending party is dissatisfied with the venire, the opportunity to select jurors from a new panel will provide a tactical advantage. In essence,

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[196] *See* Cavise, *supra* note 8, at 543–44 (noting confusion about the proper trial court remedy for a *Batson* violation and criticizing possible remedies). *Compare* Dripps, *supra* note 27, at 43 ("Currently, the remedy for a *Batson* violation at trial is to strike the venire and start jury selection over . . . ."), *and* Ogletree, *supra* note 192, at 1116 ("Under current practice, the only remedy that courts are prepared to impose when a prosecutor abuses peremptory challenges in a racially discriminatory way is to call for a new jury."), *with* Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1139 (2000) (stating that the remedy for a *Batson* violation is to "deprive[ ]the offending party of the result that it obtained by exploiting a defendant's or a juror's race: the trial court reseats the juror").

[197] *See* Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir. 1998) ("[A] *Batson/Powers* claim is a structural error that is not subject to harmless error review."); Turner v. Marshall, 121 F.3d 1248, 1254 n.3 (9th Cir. 1997) ("There is no harmless error analysis with respect to *Batson* claims.").

[198] 476 U.S. 79, 100 n.24 (1986).

[199] Although, as discussed later, any finding of a *Batson* violation will have the effect of stigmatizing the striking attorney.

the dismissal of the venire punishes judges and jurors more than it does the misbehaving attorney.[200]

The second remedy referenced in *Batson*—reinstating an improperly stricken juror—is also easily criticized as administratively impractical and likely to inject untoward bias into jury deliberations.[201] The administrative-inconvenience criticism is based on the fact that in many cases the jurors who are the subject of a *Batson* inquiry—particularly those who were subject to strikes that preceded the strike that ultimately elicited a *Batson* objection—will have been dismissed from the courtroom and replaced on the jury. Reseating these now-absent jurors will consequently be administratively burdensome, if not practically impossible.

The more substantive criticism of the reseating of an improperly stricken juror is that, even when a stricken juror is available for reseating, he or she may now harbor prejudice against the striking party. Indeed, the striking attorney could conceivably resurrect a failed peremptory challenge as a successful challenge for cause, arguing that the juror is now unlikely to be impartial after being subject to the attorney's race- or gender-based strike.

While the two criticisms noted above are certainly valid in particular cases, they do not establish that the remedy of reseating an improperly stricken juror (unlike that of dismissing the entire venire) is inherently flawed. Rather, these criticisms establish only that procedural safeguards must accompany any reform that relies on reseating improperly stricken jurors. As discussed below, once such procedural safeguards are in place, the remedy of reseating improperly stricken jurors can serve as an elegant and efficient response to a *Batson* violation and a foundation upon which to base the much-needed reform of the *Batson* framework.

2. *The Benefits of Reseating Improperly Stricken Jurors*

The remedy of reseating improperly stricken jurors has numerous advantages. These advantages are both doctrinal (i.e., a consistency with existing *Batson* doctrine) and practical. First, the reseating remedy fits neatly within the themes of existing *Batson* doctrine. By disallowing a challenged strike, the trial court provides a narrowly tai-

200 *See* Cavise, *supra* note 8, at 544 ("The dismissal of the entire jury panel as tainted by discrimination not only costs the court valuable time and resources but also gives the offending attorney a fresh start—hardly a worthy punishment."); Ogletree, *supra* note 192, at 1116 (recognizing that dismissing the venire "makes life more difficult for judges who reject fishy pretexts, rather than for [attorneys] who offer them").

201 *See* Cavise, *supra* note 8, at 543–44 ("The reseating of an improperly-excused juror is not always practical, since most challenged jurors are excused from the venire and permitted to leave the courtroom." There is added doctrinal difficulty in compelling the criminal defendant to accept jurors he or she had previously stricken . . . .").

lored response to a *Batson* violation. In essence, the judge blocks or voids the unconstitutional act and returns all parties (including the subject juror) to the status quo ante.[202] This remedy also reflects the Supreme Court's emphasis in recent *Batson* cases on the equal protection rights *of the stricken juror*.[203] If, as the Court has repeatedly emphasized, a race- or gender-based strike implicates the rights of the stricken juror to serve on the jury, a remedy that returns that juror to the jury is ideal and certainly preferable to one that results in the juror's discharge along with the rest of the venire.

Second, the remedy of reseating the juror is practically appealing. This remedy will be attractive from a judicial perspective because, unlike many remedial suggestions forwarded by academic commentators, it is specifically mentioned in *Batson*[204] and has been regularly referenced in state and federal appellate decisions.[205] Reseating an improperly stricken juror is also desirable from the standpoint of administrative efficiency: the remedy, when accompanied by appropriate

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[202] *See* Holland, *supra* note 196, at 1139.

[203] *See* Powers v. Ohio, 499 U.S. 400, 409–10, 415 (1991) (explaining that a race-based peremptory challenge violates the right of "[a]n individual juror . . . not to be excluded . . . on account of race" and concluding that "a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race"); Henning, *supra* note 48, at 784 ("*Powers* broadened the scope of the equal protection right by shifting the focus from harm to the defendant to harm to potential jurors removed from the jury for an impermissible reason.").

[204] 476 U.S. 79, 100 n.24 (1986).

[205] *See* McCrory v. Henderson, 82 F.3d 1243, 1247 (2d Cir. 1996) (suggesting that *Batson* violations are "remediable in any one of a number of ways[:] [c]hallenges found to be abusive might be disallowed; if this is not feasible because the challenged jurors have already been released, additional jurors might be called to the venire and additional challenges granted to the defendant; or in cases where those remedies are insufficient, the jury selection might begin anew with a fresh panel"); Jones v. State, 683 A.2d 520, 529–30 (Md. 1996) (surveying jurisdictions and concluding, along with "the majority of the courts that have considered the issue, . . . that the trial court has the discretion to fashion a remedy for a *Batson* violation that addresses and resolves the specific harm caused by that violation," including "reseat[ing] the improperly stricken jurors"); State v. Scott, 706 A.2d 1109, 1116 (N.J. Super. Ct. App. Div. 1998) (finding that "the majority of jurisdictions having addressed the issue leave the decision of determining the appropriate remedy within the discretion of the trial judge to reseat the wrongfully challenged venireperson" while "[o]nly a handful of jurisdictions have taken the position that the entire venire must be discharged"). Two commentators discount the existence of this remedy under current case law, but it is unclear from their arguments on what this conclusion is based. *See* Geoffrey Cockrell, Batson *Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 351, 370 & n.119 (1997) (citing Ogletree, *supra* note 192, for the proposition that "[c]urrently, the only remedy for a *Batson* violation is to call for a new jury"); Ogletree, *supra* note 192, at 1116 (stating that "[u]nder current practice, the only remedy that courts are prepared to impose when a prosecutor abuses peremptory challenges in a racially discriminatory way is to call for a new jury" but including no citations).

procedural safeguards (discussed below), is easily implemented and minimally disruptive to the jury selection process.[206]

3. *A Procedure for Reseating Improperly Stricken Jurors*

Given the comparative attractiveness of the simple remedy of reseating an improperly stricken juror, it is incumbent on the courts to adopt procedures that address the common criticisms of that remedy. The trial courts undoubtedly have authority to craft such procedures given the vast discretion they possess in this context.[207] Although there are, no doubt, numerous ways to accomplish this goal, we propose two simple procedural safeguards by way of example that would permit reseating of an improperly challenged juror as a remedy for a *Batson* violation.

First, and most obviously, trial courts must refrain from excusing jurors who have been the subject of a peremptory challenge. Instead of dismissing jurors immediately after they are stricken, the trial court should require stricken jurors to remain in the courtroom until the final jury is empanelled. Admittedly, one negative consequence of this proposal is that it would slightly inconvenience properly stricken jurors who will be required to remain in the courtroom somewhat longer than under previous practice prior to being discharged.

Second, the trial court must ensure that jurors do not become aware that they have been the subject of a peremptory strike. Ensuring jurors' unawareness of the parties' strikes can be accomplished in a variety of ways, including by requiring counsel to note peremptory strikes on a piece of paper that is passed to the judge rather than announcing challenges orally in open court. Upon receipt of the written strikes, the trial court would take no immediate action but simply note the jurors who had been *provisionally* stricken. (Counsel would have to keep track of the potential jurors who had been subject to strikes in order to identify the twelve jurors, plus alternates, who will, absent further strikes or a *Batson* challenge, make up the jury.) Later, when counsel challenges a strike and that strike is disallowed, the juror will be available for reseating without engendering any administrative inefficiency or bias-related juror objections.

The above-described procedure would allow a party to raise—and the trial court to rule on—a *Batson* motion without the subject jurors

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206 *Cf.* Hernandez v. New York, 500 U.S. 352, 358 (1991) (plurality opinion) ("*Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.").

207 *See* Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) (plurality opinion) ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." (emphasis omitted)).

ever realizing that they have been stricken. Further, because the jurors would not be dismissed until a final jury is selected, each provisionally stricken juror remains available for reinstatement if the court invalidates a peremptory challenge under *Batson*. Consequently, this voir dire procedure (or an analogous procedure) would eliminate any administrative or objectivity-based objection to the remedy of reseating an improperly stricken juror, allowing for a narrowly tailored remedy for a *Batson* violation that could be easily (and thus more willingly) implemented by trial courts.

B. Successful *Batson* Challenges Require Drastic Findings of Attorney Misconduct

Providing a simple, practical remedy for *Batson* violations is a necessary, but not sufficient, step toward the realization of *Batson*'s stated goal of eliminating race and gender bias in jury selection. The primary obstacle to successful *Batson* challenges is not the absence of a remedy but rather the drastic finding required before any court may deem the exercise of a peremptory strike unconstitutional. As discussed below, so long as a personally and professionally damning finding of attorney misconduct remains a prerequisite to awarding relief under *Batson*, trial courts will be understandably reluctant to find *Batson* violations.

Under current *Batson* doctrine, the trial court cannot reject a peremptory challenge unless it makes a finding of attorney misconduct that has at least two facets, either of which would give any reasonable trial judge pause. First, the judge must make a factual finding that the race- or gender-neutral explanation proffered by the striking attorney at *Batson*'s second step is not, in fact, the reason for the strike but is instead "pretextual."[208] In other words, the court must find that the attorney has made a misrepresentation to the court of a material fact—a serious breach of the attorney's ethical duty of candor.[209] Sec-

[208] Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (per curiam).

[209] Misrepresenting a material fact to a court is a violation of the ethical standards governing attorneys in every American jurisdiction. *See* Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 12–14 & n.14 (1997) (cataloguing operative ethics rules and noting that "there are universally applicable rules banning the making of false statements or misrepresentations to a court"); Tania Tetlow, *How* Batson *Spawned* Shaw—*Requiring the Government to Treat Citizens as Individuals When It Cannot*, 49 LOY. L. REV. 133, 165 (2003) ("In order to grant a *Batson* challenge against an attorney, the judge must call him a liar, a judicial determination that raises legal ethics considerations.").

There is, theoretically speaking, a subset of pretext findings that would not amount to an accusation of intentional misconduct. *See infra* Part V.C. In arguing against the imposition of disciplinary sanctions for *Batson* violations, for example, Professor Charlow notes that a judge could conclude that the attorney's proffered justification is a pretext, but an "unintentional falsehood" based on the attorneys having "lied to themselves" about the true motivation for the strike. *See* Charlow, *supra*, at 23, 39 (referencing possibility that the striker "acted with an unconscious discriminatory intent"). In such cases, the attorney's

ond and relatedly, the judge must find that the attorney exercised a peremptory challenge based on race or gender and accordingly violated the juror's constitutional right to equal protection under the law.[210] Indeed, considered together, a trial court ruling in favor of a *Batson* movant constitutes a judicial determination that an attorney, in open court, engaged in a misrepresentation of a material fact to obscure a violation of the law—an action that, in other contexts, could warrant criminal prosecution.[211]

Given the implications of the findings required to establish a *Batson* violation, it is understandable that in all but the most extreme cases, trial courts will err on the side of crediting the reason proffered for a strike.[212] Often judges are themselves former prosecutors or de-

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level of culpability is certainly lowered. Nevertheless, the finding of a *Batson* violation is still quite damning, and one could legitimately question whether an attorney beset by such severe unconscious bias should be permitted to engage in jury selection. In any event, a judge's ability to discern an attorney's true motivation when that motivation is unknown even to the attorney is highly questionable, particularly because the judge's finding will be based almost solely on the attorney's demeanor. Consequently, instances of such findings, while theoretically conceivable, are undoubtedly rare.

210 *See* Charlow, *supra* note 209, at 17, 20 (noting that "[i]n the vast majority of cases, . . . a finding of pretext will demonstrate [the requisite discriminatory] intent" because "the[ ] two determinations are often integrally intertwined"); Page, *supra* note 8, at 177–78 (recognizing that "to refuse to accept a peremptory challenge is the equivalent of calling the attorney a liar, and maybe racist or sexist as well" such that "[a] judge is likely to be reluctant to stigmatize a lawyer in this way"); *see also* Snyder v. Louisiana, 552 U.S. 472, 485 (2008) ("The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent."). Admittedly, there are possible, but unlikely, scenarios where a finding of pretext does not lead to a conclusion that the attorney engaged in purposeful discrimination. For example, the attorney may offer a pretext to cover up a potentially embarrassing, but not unconstitutional, explanation for a strike (e.g., a potential juror reminds the attorney of an ex-spouse).

211 Because the ethical implications of a *Batson* violation are so severe, commentators have suggested that courts could enhance the sanctions for *Batson* violations to include "[a] contempt citation," "removal from the courtroom," "suspension," and "referral to the appropriate disciplinary bodies in every jurisdiction where the [attorney] is admitted to practice." Ogletree, *supra* note 192, at 1122.

212 *See* José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 374, 377 (1998) (recognizing that *Batson* "requires the judge to ask an officer of the court whether he has violated his obligation to be candid with the court," which is "tantamount to an accusation of dishonesty," and that trial courts "have little incentive to use it against lawyers who regularly practice before them"); Cavise, *supra* note 8, at 531 (noting that it is "asking a lot" of the trial court to "doubt the integrity of an attorney who has, in most cases, been in that trial courtroom before and who is perhaps well-known to the trial judge"); Henning, *supra* note 48, at 787 (noting that a finding that a prosecutor has intentionally violated a juror's constitutional rights is "one that no judge wants to reach lightly" and that "trial courts have a hard time finding the prosecutor's proffered explanation a subterfuge for purposeful discrimination"); William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 HAMLINE L. REV. 235, 268 (2002) ("The trial judge's task is complicated by the reality that any finding of intentional discrimination may have serious ethical implications for the prosecutor. It might be appropriate for judges to give prosecutors the benefit of the doubt before making any finding that a prosecutor's stated reason is a pretext and the prosecutor has in fact engaged in impermissible racial discrimination.");

fense attorneys who, consequently, are likely to be part of the same professional and social networks as the attorneys whose strikes they evaluate.[213] A judge who might have few qualms about ruling against the prosecution or defense may be hesitant to make the findings of personal misconduct against prosecutors or defense attorneys (who are also more often than not repeat players in the judge's courtroom) called for under *Batson*.[214] As a consequence, a trial judge is likely to acquiesce in *Batson* violations that it might prevent if a less drastic mechanism were available.

It is interesting to note that the above criticism (or a response to it) does not appear in the Supreme Court's extensive *Batson* jurisprudence. One potential explanation for this omission is that, as a general matter, the Justices have little or no experience as trial judges.[215] Indeed, the sole exception on the Court prior to Justice Sotomayor's appointment was Justice Souter, who suggested that the *Batson* framework should be revisited.[216] Viewed from the Supreme Court's perspective, there likely does not appear to be anything personal about finding a *Batson* violation; the Court's decisions are far removed from the face-to-face findings required of a trial court. For example, in *Miller-El v. Dretke*, the Supreme Court held that a Dallas County prosecutor's reasons for a peremptory strike exercised *twenty years earlier* were pretextual.[217] Similarly, in *Snyder v. Louisiana*, the Court found that a state prosecutor in Louisiana offered a pretextual justification in exercising a strike twelve years before.[218] It is, of course, one thing for a Supreme Court Justice to determine that an unknown local prosecutor at a distant time in the past offered a pretextual reason for a strike; it is quite another to make the same finding face-to-face with a

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Page, *supra* note 8, at 177–78 (recognizing that a finding of pretext is "likely to color the rest of the trial" as well as "other trials in jurisdictions where lawyers appear frequently before the same judges"); Tetlow, *supra* note 209, at 165 (explaining that judges are unlikely to reject proffered justifications when they are required "to decide (under a pretext analysis) that the lawyer has lied to them" because "[r]egardless of whether sanctions attach, judges must find it unpleasant to do so, particularly to repeat players").

213 *See* Charlow, *supra* note 209, at 60 (warning against imposing harsher sanctions for *Batson* violations because "*Batson* findings are made by trial judges, who often know the attorneys practicing before them" and are "especially apt to know prosecutors, who appear regularly before local courts").

214 *See id.*

215 *See* SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789–2009, at 32 (2010) ("Only one [Justice at the time of writing] served on a trial court at the state or federal level.").

216 *See* Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (bemoaning "*Batson*'s fundamental failings"); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1741 (2007) (noting that on the Court at that time, only Justice Souter had experience as a trial court judge).

217 *See* 545 U.S. 231, 235–36, 240, 266 (2005).

218 *See* 552 U.S. 472, 475–76 (2008).

legal peer or social acquaintance immediately following the voicing of the pretext.

C. Trial Courts Have Little Information from Which to Determine Attorney Intent

A trial court's natural reluctance to make findings that, if taken seriously, will forever mar the professional reputation of the subject attorney dovetails with the difficulty inherent in resolving whether such findings are truly warranted. Even if a trial court is inclined to make the severe findings required under *Batson*, the court will have little information upon which to ground those findings. In particular, the trial court has almost no evidence from which to discern a striking attorney's intent, which is the dispositive question under *Batson*.[219]

In part, the trial court's lack of information is a byproduct of the fact that the minihearing contemplated by the *Batson* three-step process is remarkably unadorned with procedure.[220] In fact, the hearing may take only a matter of seconds, with (1) a *Batson* motion, (2) a reason proffered by the striking attorney, and (3) the trial court's ruling all occurring in rapid succession. In most cases there will be little argument and no evidence presented during this brief colloquy.[221]

Contrast this with the evidence that will be brought to bear on the analogous question of whether an employer has offered a pretextual reason for an unlawful, adverse employment decision. For example, in *McDonnell Douglas Corp. v. Green*,[222] the Supreme Court considered an employer's liability for racial discrimination when it refused to rehire a black applicant ostensibly because of his participation in an unlawful job action.[223] The Court noted that the dispositive question was whether this justification was a pretext and that that question could be answered by: (1) "evidence that white employees involved in acts against [the employer] of comparable seriousness to the 'stall-in' were nevertheless retained or rehired"; (2) "the [employer's] treatment of [the applicant] during his prior term of employment;" (3) the employer's "reaction, if any, to [the applicant's] legitimate civil rights activities"; and (4) the employer's "general pol-

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[219] Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("*Batson* challenges occur in a virtual evidentiary vacuum—there is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of whether an explanation is credible.").

[220] *See* Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (noting that "[t]here will seldom be much evidence bearing on" the question of whether an attorney exercised a discriminatory strike and that "the best evidence often will be the demeanor of the attorney who exercises the challenge" (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion))).

[221] *See id.*

[222] 411 U.S. 792 (1973).

[223] *See id.* at 794–95, 807.

icy and practice with respect to minority employment," including "statistics as to [the employer's] employment policy and practice."[224] The Court stated that the applicant "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision."[225]

In contrast, in resolving the issue as to whether a reason proffered under *Batson* is pretextual, the Court has blandly acknowledged that "[t]here will seldom be much evidence bearing on [the] issue."[226] The trial court will have before it some rough numbers as to the racial makeup of the venire, its observations of the strikes to the point of the challenge, and the race- or gender-neutral reasons offered for the disputed challenges. It is unlikely that this information will provide any definitive answer to the *Batson* inquiry,[227] and, accordingly, the ultimate decision will turn, and is intended to turn, on the trial court's assessment of the credibility of the striking attorney, something that it must divine largely from the attorney's demeanor.[228]

Under current *Batson* doctrine, then, the trial court is expected to function as something of a human lie detector in evaluating whether

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224 *Id.* at 804–05.

225 *Id.* at 805.

226 Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion); *cf.* Wilkerson v. Texas, 493 U.S. 924, 927 (1989) (Marshall, J. dissenting from denial of certiorari) (emphasizing that the *Batson* inquiry "differs decisively from the employment context, where the court can examine an employer's treatment of similarly situated applicants to test an employer's assertion that an Afro–American candidate would not have been hired absent a discriminatory motive").

227 The Court's Equal Protection Clause jurisprudence already establishes a high hurdle for a plaintiff seeking to prove discriminatory purpose behind a facially neutral government decision with a disproportionate racial impact: she must prove that the decision maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (elaborating on the requirement of discriminatory purpose announced in *Washington v. Davis,* 426 U.S. 229, 248–50 (1976), which upheld a test administered to job applicants despite its discriminatory effect and lack of correlation to job performance). The plaintiff can jump this hurdle, however, by proving purpose through various means, including aggregate data of statistical disparities by the state actor, a historical background revealing evidence of racial invidiousness, and departures from normal procedures or prior policymaking standards. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (announcing that an analysis of discriminatory purpose is "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"). But the *Batson* test raises the hurdle even higher by requiring an attorney to demonstrate this discriminatory purpose in a matter of minutes—without the weeks of research, depositions, interrogatories, and other discovery that might allow a challenger to better support her Equal Protection Clause claim. In other words, what the Court expects a *Batson* claimant to prove is similar to what it expected the ejected applicants in *Washington* to prove, except that the entire pretrial and trial process could take less than a minute without any opportunity to research the law, interrogate the state actor, or accumulate useful evidence.

228 *See, e.g.*, Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (noting that determinations of credibility and demeanor typically lie within the province of the trial judge).

an Equal Protection violation has occurred.[229] There is little empirical evidence, however, that trial courts are particularly adept at this task, and the evidence that exists calls any such assumption into question.[230] In light of the accusation of misconduct implied by a *Batson* challenge, demeanor may, in fact, be a less reliable indicator than has been shown in experimental studies. Even when acting in good faith, an attorney will likely become unusually nervous and agitated when accused of violating *Batson*, indicia that will likely interfere with the trial court's intuitive ability to perceive mendacity.[231]

Given the bare-bones procedure and resulting absence of concrete evidence of intent, the trial court will often be left with a great deal of uncertainty about the propriety of a finding of pretext and purposeful discrimination. In essence, the entire *Batson* inquiry comes down to the trial judge's gut feeling as to the credibility of the striking attorney. As one commentator has stated, "Courts are guessing at the content of the striking attorney's thoughts, something which they simply cannot know and about which there will be precious little evidence."[232] It is unrealistic in this context to expect trial courts to "guess" in favor of a *Batson* movant. Indeed, it would generally be legally improper to do so, as the Supreme Court has emphasized that any difficulty in establishing discriminatory intent will be held against the *Batson* movant who has "the ultimate burden of persuasion regarding racial motivation."[233] Yet, "guessing" is precisely what the Court requires of trial courts before they are permitted to find a *Batson* violation.

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229 *See* Charlow, *supra* note 209, at 60 (highlighting "the absence of the kinds of procedural protections, such as heightened burdens of proof, that accompany more formal determinations of mental state").

230 *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 578, 707 & nn.606–07 (1997) (explaining that "[t]here is little evidence that regular people do much better than chance at separating truth from lies" and describing studies in which "experimental subjects rarely perform much better than chance at distinguishing truth from falsehood"); Dan Simon, *The Limited Disagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 174–80 (2011) (summarizing empirical evidence regarding ability to detect deceit).

231 The Supreme Court has rejected inquiries into subjective intent in other contexts. *See* Henning, *supra* note 48, at 793 (stating that the *Batson* doctrine's emphasis on the subjective intent of the prosecutor "sticks out like the proverbial sore thumb in the area of prosecutorial misconduct" because "[i]n other contexts, the Supreme Court has adopted tests that largely make judicial inquiry into prosecutorial motives irrelevant"); *cf.* Whren v. United States, 517 U.S. 806, 813 (1996) (explaining in Fourth Amendment context that previous cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved" and noting that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment").

232 Charlow, *supra* note 209, at 47.

233 *See* Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.").

Further, even if one accepts the unproven assumption that trial courts have an innate capacity to decipher attorney demeanor, the exceedingly grey area of modern race and gender bias will sorely test this capacity. Largely gone are the days when the Supreme Court can point to such smoking-gun evidence of purposeful discrimination as the training video discussed in the introduction to this Article, or "the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries."[234] Official policies of discrimination are fortunately a relic of a bygone era, replaced with modern concepts such as unconscious bias and cognitive shortcuts based on racial stereotypes.[235]

"[S]ometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype."[236] In fact, it is unlikely that a peremptory challenge is ever exercised based on a *single* discrete factor such as race or gender. Every juror brings a broad array of characteristics to the jury selection process, some of which will appeal to the prosecution and others to the defense. When, as is virtually always the case, a strike is motivated by a complex intuition-based algorithm that includes the weighing of perceived positive and negative factors—only one of which is race or gender—it is virtually impossible, even with perfect information, to discern whether an attorney's *true* motivation was race or gender.[237]

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234 *See* Miller-El v. Dretke, 545 U.S. 231, 253 (2005) (commenting on the policy in effect in 1988).

235 *See, e.g.*, Travis L. Dixon & Keith B. Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 J. APPLIED SOC. PSYCHOL. 1555, 1555 (2005) (concluding that participants who watched a crime-related newscast tended to remember the perpetrator more often when he was a dark-skinned black man); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998) ("[S]tereotyping, prejudice, and discrimination are enduring human phenomena."); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005) ("A burgeoning body of social science literature has empirically demonstrated the existence and prevalence of unconscious bias in today's society."); *cf.* Caperton v. A.T. Massey Coal Co. 129 S. Ct. 2252, 2263 (2009) (recognizing "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one" in determining whether a judge should have recused himself for conflict of interest and emphasizing that "[i]n lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias").

236 Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring); *see* Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 2 (1988) (noting that racism "in contemporary America[is] subtle and often unconscious").

237 *See Collins*, 546 U.S. at 343 (Breyer, J., concurring) (recognizing that "the exercise of a peremptory challenge can rest upon instinct not reason" and asking "[i]nsofar as *Batson* asks prosecutors to explain the unexplainable, how can it succeed?"). The Supreme Court has not explained how to apply *Batson* in circumstances where race plays some role

In sum, given the difficulty of determining the true reason for a strike and the paucity of information available, a trial court with mere human powers of cognition—and any measure of humility—will hesitate to make the stark findings of attorney misconduct necessary to declare a *Batson* violation.[238] Thus, if existing doctrine remains unchanged, it should come as no surprise that (as suggested by our survey) *Batson* will continue to fail to weed out reliance on race and gender in jury selection.

D. Revising the Step-Three Finding

As long as *Batson* and its progeny fail to empower trial courts to take remedial action absent a finding of pretext, those courts will be understandably reluctant to uncover *Batson* violations. Consequently, many strikes that appear unsavory will survive a *Batson* objection because the alternative—rejecting the strike—is even more unpalatable.

The solution to this dilemma is to decouple *Batson* violations from any finding regarding the striking attorney's subjective intent. Instead, basing *Batson* findings on the alternate grounds discussed below and narrowing the *Batson* remedy to the mere reseating of a juror (as discussed in Part V.A) will enable a robust implementation of *Batson* and carve out the necessary breathing space for the Equal Protection rights at issue to thrive.

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in a strike but is not necessarily the determinative factor. *See* Snyder v. Louisiana, 552 U.S. 472, 485 (2008) (noting that "[i]n other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative," but stating that "[w]e have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context"). The federal appeals courts split on the question; some adopt a "mixed motive" analysis and others following the "substantial motivating factor" approach. *See, e.g.*, Cook v. Lamarque, 593 F.3d 810, 815 (9th Cir. 2010) (summarizing the split and rejecting the "mixed-motives analysis" to adopt the rule that a *Batson* challenge should be granted whenever race was a substantial motivating factor in a strike).

[238] *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes."); Beckwith v. City of Daytona Beach Shores, Fla., 58 F.3d 1554, 1566 (11th Cir. 1995) (recognizing "the inherent difficulty of proving discriminatory intent"); Thomas v. Moore, 866 F.2d 803, 805 (5th Cir. 1989) ("The decision to exercise a peremptory challenge, in contrast to a challenge for cause, is subjective; and, often, the reasons behind that decision cannot be easily articulated."); Covey, *supra* note 219, at 322–23 (explaining that "courts have an inherent disincentive to uphold *Batson* challenges" because of the difficulty in determining whether an attorney's proffered justification "is a flat-out lie," a finding that "extends beyond a mere procedural ruling and implicates the attorney in ethical misconduct"); *cf. Miller-El v. Dretke*, 545 U.S. at 238 (recognizing "the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected").

To create this breathing space, we propose that a third alternative be added to the trial court's menu of options at step three of the *Batson* process. First, as always, the trial court can conclude that the attorney's justification is credible and race- or gender-neutral and accordingly (subject to the third option discussed below) permit the strike. Second, the trial court can, as under current doctrine, deem the proffered justification a pretext for discrimination and reject the strike, exposing the striking attorney to, *inter alia*, potential ethics charges. Third, as a new addition to the doctrinal menu, the trial court could disallow the peremptory challenge based on a finding that falls somewhere between these first two options. More specifically, a trial court could invalidate a peremptory challenge whenever the attorney's proffered justification, even if credited, is insufficient to rebut the prima facie case of discrimination established at *Batson*'s first step. Thus, contrary to current doctrine, the burden would shift to the striking party—the party who knows the most about the motivations for the challenged strike—not just to articulate a race-neutral reason at step two of the *Batson* inquiry but to actually *rebut* in some meaningful way the allegation that race (or gender) motivated the challenged strike.[239] Failure to do so—a failure to dispel the appearance of discrimination—would result in the court disallowing the strike.

Our proposal instills step one of the *Batson* process with the gravity it is due. Recall that for a *Batson* objection to survive the first step of the *Batson* process, the trial court must find "a prima facie case of purposeful discrimination"[240] such that there is "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."[241] Thus, a step-one finding of a prima facie case represents a common sense judgment that race or gender appears to motivate a party's strike. Such a circumstance is cause for great concern. It is because of this concern that the Supreme Court, after years of equivocation, allowed trial judges to disturb the peremptory nature of the "peremptory" challenge by demanding an explanation for the strike.[242] The Court intended this inquiry—step two of the existing *Batson* rubric—to dispel the appearance of discriminatory intent by opening a window into the otherwise hidden thought process of the striking attorney, perhaps revealing a valid, nonracial reason for the strike. If this window instead reveals a nonracial reason that is trivial,

[239] *Cf.* Wilkerson v. Texas, 493 U.S. 924, 927 (1989) (Marshall, J., dissenting from denial of certiorari) (emphasizing "the purely subjective nature of peremptory challenges").

[240] Batson v. Kentucky, 476 U.S. 79, 93–94 (1986).

[241] Johnson v. California, 545 U.S. 162, 170 (2005).

[242] *Cf.* Serr & Maney, *supra* note 236, at 41 (emphasizing that *Batson* represents a balance of competing interests—the prevention of racial discrimination and the "historical role of the peremptory challenge"—and that "[t]he prima facie case requirement is exactly that aspect of *Batson* which protects the peremptory nature of the challenge").

unsupported by the record, or strongly correlated with race, it does not accomplish its purpose of dispelling the inference of race discrimination. Even if subjectively believed by striking attorneys, race-correlated, nonsensical, or unsupported rationales for an apparent pattern of discriminatory strikes will do little to dispel the appearance of discriminatory intent established at step one of the *Batson* process.[243] In short, the fact that a reason offered is nonpretextual fails to resolve the constitutional inquiry, even if the reason is credited. The real question is whether there has been an adequate response to the allegation of discriminatory jury selection. Our proposal allows that question to be answered; current *Batson* doctrine obscures the answer behind an amorphous and unrealistic credibility determination.

In evaluating a *Batson* objection under this proposal, as under current practice, the court will not be required to look at only the particular strike that elicited a *Batson* objection but can also consider relevant prior strikes.[244] Reviewing a *Batson* objection in the context of all previous strikes will allow the trial judge to narrowly tailor a *Batson* remedy by disallowing only those strikes for which the striking attorney offers the flimsiest rationales. Reasons like facial hair and eye rolling will likely be assigned low significance, and more significant reasons, such as a hostile exchange between attorney and juror in voir dire or disputed for-cause rulings by the trial court, will be assigned high significance.[245] Further, the number of questionable strikes will

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243 *Cf. id.* at 61 (emphasizing in early *Batson* commentary that in ruling on a *Batson* objection, "a trial court should not disregard the evidence on which it based its initial finding that the defendant established a prima facie case").

244 *See* Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (recognizing that a trial court must consider "all of the circumstances that bear upon the issue of racial animosity," including strikes of other jurors (citing Miller-El v. Dretke, 545 U.S. 231, 239 (2005))).

245 Other commentators have suggested altering the *Batson* doctrine in analogous ways. *See* Cavise, *supra* note 8, at 549–50 (suggesting that judges require that a proffered justification "makes sense"); Henning, *supra* note 48, at 794–95 (suggesting that one method of improving *Batson* would be "to lower the standard by which the trial court can remove a juror for cause" by allowing the courts to "combine the prima facie requirement of *Batson* with the challenge for cause, requiring the attorney who appears to be striking jurors in a discriminatory manner to justify the peremptory challenges by something more than just a neutral explanation"); Nelson, *supra* note 8, at 1703 (arguing that a *Batson* challenge should be upheld "when the evidence fits a hypothesis of racial discrimination . . . better than the race neutral reason offered"); Page, *supra* note 8, at 260–61 (recognizing the benefits of an "objective" standard for *Batson* violations and suggesting that trial courts could find that although an attorney believed she "acted in good faith" she would not have exercised the peremptory challenge "but for the potential juror's race or gender" and is thus unconstitutional); Raphael & Ungvarsky, *supra* note 8, at 269 (contending that judges should reject explanations for strikes that are based on "unverifiable, subjective judgments"); Tetlow, *supra* note 209, at 165 (arguing that under a Sixth Amendment analysis, the inquiry could be not whether a pretext has been offered but whether a proffered justification is "sufficient to justify skewing the cross-section of the jury"). A judge appears to have implemented something like our proposal in a recent case. *See* Jennifer Emily, *Black Juror Seated: Judge Orders Change After All-White Panel Picked in Murder Case*, DALL. MORN-

play a central role in the analysis. An attorney may succeed in striking one or two members of a certain race or gender for relatively insubstantial reasons, but as the number increases—particularly in relation to the number of remaining jurors of the targeted race or gender—the substantiality of the proffered justification would need to increase accordingly to offset the increased appearance of discrimination.

Under our proposal, the trial court will not be required to make a determination as to the striking attorney's subjective intent or credibility in order to find a *Batson* violation. The trial court may simply assume that the striking attorney has offered a justification in good faith; subjective good faith has no significance to the proposed inquiry. Of course, should the trial court determine that an attorney is not being candid with the court, it has inherent power to take appropriate action, such as rejection of the strike or referral to the appropriate disciplinary authority. Much more commonly, however, the court will understandably decline to make such a drastic finding, and this reluctance will no longer hamstring the *Batson* inquiry.[246]

An example illustrates how the trial courts could evaluate a challenge under this proposal. A prosecutor strikes five black jurors, and then, when the fifth strike draws a *Batson* objection and the court finds a prima facie case, the prosecutor offers five rationales of varying plausibility for each of the strikes. Rather than attempt to divine the attorney's true motivation for the strikes from the paltry information that will become available during a *Batson* hearing, the trial court instead evaluates the strikes as a whole, along with the justifications offered, to determine the degree to which there appears to be a racial component in the overall pattern of strikes. If this analysis reveals a significant *appearance* of discrimination, the trial court should proceed to evaluate whether, with respect to each of the strikes, the proponent has rebutted this prima facie case of discrimination. Depending on the rationales the proponent has offered, the court might disallow only one of the strikes or perhaps all of them. Importantly, the trial court can invalidate strikes without ever making a finding that the striking attorney lied or engaged in purposeful race or gender discrimination. Rather, with the principles of *Batson* as a guide for each particular strike, the trial court would merely find that the strike's proponent failed to rebut the appearance of discrimination established by the *Batson* movant in establishing a prima facie case.

ING NEWS, July 31, 2009, LexisNexis Academic (reporting a trial judge's ruling that, although "he did not think that prosecutors gave false reasons for the dismissal" of a black juror, "he was troubled by an all-white jury judging" the case and therefore ordered the stricken potential juror be seated on the jury).

246 *See infra* note 247 and accompanying text.

It is likely, and indeed intended, that this proposal will result in a greater number of findings of *Batson* violations. Common sense dictates that giving trial judges a mechanism for finding *Batson* violations that neither relies on a finding of misconduct nor requires the court to divine the attorney's subjective intent will result in the "discovery" of an increased number of *Batson* violations. Indeed, experimental research in other contexts suggests that simply by virtue of giving the trial courts a third "compromise" choice, the courts will select that choice in a greater number of cases.[247]

The short-term increase in findings of *Batson* violations should be somewhat palatable to attorneys because the specter of attorney misconduct is largely removed from such findings and the remedy imposed (the rejection of a strike) is relatively minor. A juror subject to a disallowed peremptory challenge is, after all, qualified to serve on the jury, and thus there is no constitutional basis for the peremptory challenge.[248] All that is lost when the trial court disallows a peremptory challenge is a speculative tactical advantage—an advantage that similar constraints placed on one's opponent largely cancels out.

In addition, as distinct from proposals to abolish peremptory challenges, under this proposal the striking party is deprived only of the peremptory challenges for which the least persuasive rationales are offered. The vast majority of peremptory strikes will survive. Indeed, many strikes will go unchallenged. In addition, even when a movant invokes *Batson*, the trial court may still reject the motion or may void only a portion of the strikes at issue. Where the proponent has proffered a substantial, permissible reason for a strike, such as where the attorney and the prospective juror clashed during voir dire or the attorney believes that trial court's refusal of a for-cause challenge was erroneous, the peremptory challenge will survive even if the court disallows other peremptory challenges. More significantly, the proposal outlined above will remediate numerous instances of race-

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[247] This is because judges who might be unwilling to choose the drastic finding now required to support a *Batson* violation could be more comfortable choosing what appears to be a middle ground position—one that still protects the constitutional rights of the excluded jurors. *See* Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL. STUD. 287, 288, 303 (1996) (describing "compromise effects" and contending that providing a third "compromise" choice to judges and jurors is likely to influence them to choose the perceived compromise choice).

[248] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137 n.7 (1994) ("Although peremptory challenges are valuable tools in jury trials, they 'are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.'" (quoting Georgia v. McCollum, 505 U.S. 42, 57 (1992))); *see also* Georgia v. McCollum, 505 U.S. 42, 57 (1992) ("This Court repeatedly has stated that the right to a peremptory challenge may be withheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.").

and gender-influenced selection that the current *Batson* regime overlooks.

Decreasing the focus on the attorney's subjective intent and emphasizing instead whether a proffered justification serves to rebut a prima facie case also allows trial courts to sidestep one of the most unpleasant aspects of current *Batson* practice—judicial inquiry into jurors' race. As the dissenters in *Batson* emphasized, a "painful paradox" of *Batson* is that it "interject[s] racial matters back into the jury selection process" as "[p]rosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion."[249] Establishing such a record can often entail "asking jurors to state their racial background and national origin for the record, despite the fact that 'such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire.'"[250] By allowing the trial judge to focus objectively on whether the prima facie case of discrimination has been dispelled, our proposal minimizes the need for inquiry into the race of the jurors. The only thing the trial court must evaluate is the appearance of discrimination—something the court should generally be able to perceive without reference to the subjective beliefs of the striking attorney or the actual race (or gender) of the jurors.

E. The Current Proposal Under Existing Law

The proposed alteration of the *Batson* framework, while admittedly a change from current doctrine, is not without doctrinal support. This is because the Supreme Court's case law is torn by conflicting themes. For example, there exists support in the Court's case law for a requirement that the justification for a strike offered at step two must, in fact, rebut the prima facie case. *Batson* itself references the prosecutor's need to "rebut the defendant's prima facie case of discrimination."[251] It stands to reason that a paltry or fanciful ex-

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249 Batson v. Kentucky, 476 U.S. 79, 129 (1986) (Burger, C.J., dissenting).

250 *Id.* at 129–30; *see also* People v. Motton, 704 P.2d 176, 180 (Cal. 1985) ("Finally, it is unnecessary to establish the true racial identity of the challenged jurors; discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be [b]lack would establish a prima facie case . . . ."). The *Batson* framework presumes that the race of the prospective jurors will be apparent, but in fact, the parties may dispute these facts and create the need for judicial inquiry. *See, e.g.*, People v. Estrada, No. 04-9579, 2008 WL 2406496, at *2 (Cal. Ct. App. June 16, 2008) (noting that after "[t]he prosecutor disputed defense counsel's characterization of the races of the excluded jurors," a "wide-ranging discussion of the various ethnicities of the excluded jurors ensued" with one of the jurors "later inform[ing] the court that she was not Hispanic, but from Guam").

251 *Batson*, 476 U.S. at 97. Other courts have adopted the rhetorical formulation that a strike's proponent must rebut the prima facie case. *See, e.g.*, Rico v. Leftridge-Byrd, 340 F.3d 178, 184–85 (3d Cir. 2003) (stating that the question upon the articulation of a race-neutral explanation is did "the party defending the challenges rebut the prima facie case

planation of a peremptory challenge, while easily satisfying the race-neutrality criterion of *Purkett v. Elem*,[252] will nevertheless fail to "rebut" the allegation of discrimination.

Batson also suggested that an acceptable justification for a challenged strike would be one that is "clear and reasonably specific," race-neutral, and "*related to the particular case to be tried*."[253] Under this standard, reasons such as hair color or demeanor arguably come up short absent some bearing on the facts of a particular case. The Court in *Elem* later retreated from the language quoted above, ruling that honest race neutrality was all that was required, regardless of whether the reason given could be tied to the specific case to be tried.[254] Nevertheless, the existence in *Batson* of language supporting the current proposal would make it easier for the courts to reverse course.

As the preceding discussion suggests, *Elem* is the largest doctrinal obstacle to our proposal. In that decision, the Court emphasized that the burden of persuasion never shifts from the party challenging a strike and that ultimate resolution of a *Batson* challenge turns not on the persuasiveness of the justification offered for a strike but on "an assessment of credibility."[255] While lower courts have generally interpreted these statements to constitute a repudiation of any requirement that a race- or gender-neutral justification be both offered in good faith *and* at least marginally persuasive, even *Elem* offers mixed signals on this point.[256] The *Elem* opinion emphasizes that while nothing more than good faith race neutrality is required, it states that "the

by tendering a race-neutral explanation for the strikes?" (emphasis omitted)); Aki-Khuam v. Davis, 339 F.3d 521, 526 (7th Cir. 2003) (explaining that at step three, "the trial court must determine whether the parties have satisfied their respective burdens of proving or rebutting purposeful racial discrimination"); Bui v. Haley, 321 F.3d 1304, 1318 (11th Cir. 2003) (concluding that defendant was "denied equal protection of the law by the State's failure to rebut his prima facie case of race discrimination in jury selection, in violation of the principles established in *Batson v. Kentucky* and its progeny").

252 514 U.S. 765, 769 (1995) (per curiam).

253 Batson v. Kentucky, 476 U.S. 79, 98 & n.20 (1986) (emphasis added).

254 514 U.S. at 769 (per curiam). For this reason, Justice Stevens dissented, arguing that the decision "overrule[d] a portion of our [*Batson*] opinion" by eliminating the requirement that the prosecutor's race-neutral reason be related to the case to be tried. *Id.* at 770, 775 (Stevens, J., dissenting); *see also* Elem v. Purkett, 64 F.3d 1195, 1198 (8th Cir. 1995) (highlighting, on remand from the Supreme Court, the inconsistency between its decisions in *Batson* and *Elem*); Serr & Maney, *supra* note 236, at 14 (writing prior to the Court's decision in *Elem* and emphasizing that the prosecutor's justification for a challenge must be "*related to* the particular case").

255 *Elem*, 514 U.S. at 769 (per curiam); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (concluding that an employer's race-neutral rationale for an employment decision was sufficient to discharge its burden of proof "and to meet [the employee's] prima facie case of discrimination").

256 *See, e.g.*, *Aki-Khuam*, 339 F.3d at 527 (reversing, under *Elem*, the trial court's granting of Batson challenge on the basis that the proffered reasons were "'terrible,' unsupported in the record, based on a prospective juror's response to a 'trick question,' or due to defense counsel's introduction of the word 'slickster'").

persuasiveness of the justification [is] relevant" and that ultimately "implausible or fantastic justifications may (*and probably will*) be found to be pretexts for purposeful discrimination."[257] This suggestion that trial courts "probably will" reject nonpersuasive justifications during the *Batson* inquiry is not borne out by our analysis, but it can be given effect under our proposal.[258]

F. Meeting a Doctrinal Objection

Finally, we acknowledge a doctrinal objection to the proposal. Our proposal would allow a constitutional remedy—the rejection of a statutorily authorized peremptory challenge—even in situations where there is insufficient proof to establish the existence of a constitutional violation. This is because *Batson* and its progeny establish that an Equal Protection violation occurs only when an attorney engages in "purposeful" discrimination.[259] If, as we propose, a trial court can invalidate a peremptory challenge after finding an unrebutted *appearance* of discrimination, it could be contended that the proposal is insufficiently tethered to *Batson* and, thus, the constitutional right that *Batson* enforces.[260] To the extent this criticism is valid, it can be answered by analogy to *Miranda* warnings and the decades of practice that have shown that a robust enforcement of the *Batson* right must of necessity sweep more broadly than the constitutional right itself.

The analogy to *Miranda* is fairly straightforward. Under established legal doctrine, police questioning of a detained suspect without "*Miranda* warnings" requires suppression of the suspect's responses in later trial proceedings.[261] The suppression of this evidence is a constitutional remedy (it applies even in state court proceedings),[262] and yet it is applied in circumstances where there may not have been any constitutional violation.[263] Under the Fifth Amendment (or Fourteenth Amendment's Due Process Clause), police questioning is forbidden only if it compels involuntary responses, an occurrence that is often not present simply because the police fail to provide proper *Mi-*

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257 *Elem*, 514 U.S. at 768 (per curiam) (emphasis added).

258 *See supra* Part III.

259 *See Batson*, 476 U.S. at 93–94.

260 Even if valid, however, this criticism would only eliminate the possibility that *courts* could implement the proposal. It would still leave open the possibility of legislative action in state or federal jurisdictions.

261 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

262 Dickerson v. United States, 530 U.S. 428, 438 (2000) (ruling that *Miranda* is a constitutional decision because, "first and foremost," the rule it announced has been applied "to proceedings in state courts").

263 *See* Oregon v. Elstad, 470 U.S. 298, 306 (1985) (noting that a violation of the *Miranda* rule may occur "even in the absence of a Fifth Amendment violation").

randa warnings (e.g., the unwarned suspect is an attorney or a police officer).[264]

The Court has resolved this doctrinal puzzle by explaining that "*Miranda* establishes a prophylactic rule that 'sweeps more broadly than the Fifth Amendment itself.'"[265] Thus, "[t]he prophylactic *Miranda* warnings" are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[266]

Miranda's reasoning (as well as the language of the opinion) fits neatly into the *Batson* context. Just as "in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm,"[267] the remedy proposed here would invalidate some strikes absent any Equal Protection violation. This overcorrection is necessary, however, as in *Miranda*, to remedy constitutional violations that would otherwise go unremedied due to the virtual impossibility of discovery.[268] The collateral damage of this broad sweep would be that the trial court will disallow some peremptory strikes despite the absence of a constitutional violation. In comparison to the collateral damage of *Miranda*—that a suspect's voluntary confession to a crime may be excluded from trial—the damage is quite minor.[269]

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264 *See* U.S. CONST. amend. V (protecting the accused from being "compelled . . . to be a witness against himself"); David Huitema, Miranda*: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL'Y REV. 261, 294 (2000) (noting that it is not the case that "every confession given without the warnings prescribed by *Miranda* is involuntary"); David Strauss, Miranda*, the Constitution, and Congress*, 99 MICH. L. REV. 958, 961 (2001) (recognizing that "it is possible to imagine relatively realistic situations in which custodial questioning without [*Miranda*] warnings would produce answers that we would not characterize as 'compelled' in the ordinary sense of that term").

265 Michigan v. Harvey, 494 U.S. 344, 362 (1990) (Stevens, J., dissenting); *see also Elstad*, 470 U.S. at 306 ("The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation."); *cf.* United States v. Hasting, 461 U.S. 499, 505 (1983) ("'[G]uided by considerations of justice,' . . . and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." (first alteration in original)); Strauss, *supra* note 264, at 963 (defending *Miranda* by noting that "[m]any established principles of constitutional law have the same 'prophylactic' character as *Miranda*," and providing examples).

266 New York v. Quarles, 467 U.S. 649, 654 (1984) (alterations in original) (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

267 *Elstad*, 470 U.S. at 307.

268 *See* Dickerson v. United States, 530 U.S. 428, 442 (2000) (explaining that the *Miranda* court imposed a broadly sweeping protection for the right against compulsory self-incrimination because "reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession").

269 *See id.* at 444 ("The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result.").

The methodological justifications for *Miranda* warnings also parallel justifications that apply in the *Batson* context. Just as *Miranda* warnings are designed to eliminate egregious examples of police misconduct that while "undoubtedly the exception now, . . . are sufficiently widespread to be the object of concern,"[270] *Batson* is designed to eliminate the persistent use of race in jury selection that, while perhaps the exception, continues to plague jury selection.[271] As in *Miranda*, "[u]nless a proper limitation upon [race-based peremptory challenges] is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future."[272]

Conclusion

In our adversary system, the arbitrary nature of peremptory challenges and the salience of race in modern society combine to create a formidable obstacle to the eradication of race-based jury selection. Yet the elimination of racial juror exclusion is necessary to defendants' constitutional right to a jury of their peers, the Equal Protection rights of the jurors themselves, and the integrity of the jury as a representative symbol of American society. When attorneys dismiss citizens from juries based on race, or when citizens see their fellow citizens dismissed from juries based on race, the criminal justice system suffers a body blow regardless of the outcome of the trial to follow.

Unfortunately, there is little evidence that the primary guarantor of race-neutrality in jury selection, the three-part test set forth in *Batson v. Kentucky*, is equal to the critically important task it has been given. Our proposal seeks to alter this status quo by making trial court findings of *Batson* violations more prevalent and less significant for the parties involved. By removing any finding of attorney misconduct and ensuring the availability of a simple remedy (juror reseating), our proposal should prove more palatable to those who vigorously object to

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270 Miranda v. Arizona, 384 U.S. 436, 447 (1966).

271 *See supra* Parts III, IV.

272 *See Dickerson*, 530 U.S. at 435 (recognizing that modern police interrogation had "blur[red] the line between voluntary and involuntary statements"); *Miranda*, 384 U.S. at 447; *cf.* United States v. Hasting, 461 U.S. 499, 505 (1983) (asserting the powers of federal courts to "formulate procedural rules not specifically required by the Constitution or the Congress" in order to "implement a remedy for violation of recognized rights"; "preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury"; and serve "as a remedy designed to deter illegal conduct" (citations omitted)). We are not the first commentators to propose that broad remedies for *Batson* violations can be justified by analogy to *Miranda*. *See* Johnson, *supra* note 26, at 1694 (proposing that aggressive judicial intervention to prevent race-based jury bias was justified by analogy to "[t]he Supreme Court's reasoning in *Miranda* that prophylactic measures were required to counteract the inherent compulsion of custodial interrogation"); *cf.* Ogletree, *supra* note 192, at 1117–18 (advocating dismissal of prosecution as remedy for *Batson* violation and analogizing to other judicial remedies for constitutional violations, such as exclusionary rule applied to violations of Fourth, Fifth, and Sixth Amendments).

more transformative reforms, such as abolishing peremptories, applying racial quotas in the jury box, or increasing sanctions for *Batson* violations. It will also provide trial courts with a workable tool with which to push back as zealous attorneys strategically attempt to shape the racial composition of juries.

If, as we suggest, trial courts reseat stricken jurors whenever the appearance of racial discrimination outweighs the proffered reason for strikes without having to brand counsel a lying bigot, then *Batson* can finally fulfill its promise to eradicate race-based jury selection. In addition, little will be lost. The striking party loses only a small tactical advantage, which is balanced by the removal of that same advantage from the party's adversary. Moreover, by focusing the inquiry on the appearance of discrimination, our proposal minimizes the need for trial court inquiry into potential jurors' race and ethnicity as well as into the animus of counsel. In sum, our proposal furthers what is arguably one of the most elusive goals of our jury system: "to impress upon [every] criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."[273]

[273] Powers v. Ohio, 499 U.S. 400, 413 (1991).