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Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy

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Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy

Lonnie T. Brown, Jr.*

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I. INTRODUCTION

Although many regard the duty and privilege of participating in our judicial process through jury service with about as much warmth and respect as they view telemarketing calls at suppertime,¹ it is nevertheless an opportunity that must be afforded to all citizens, regardless of race, ethnicity,² or gender.³ Furthermore, Supreme

1. See, e.g., JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 111 (1977) ("Although jury service is supposed to be a right and privilege, most people consider it a nuisance."); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 193 (1989) (observing that the opportunity to serve as a juror is one that "many . . . would gladly decline").

2. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (striking down as unconstitutional a state statute that limited jury service solely to White male citizens over twenty-one years of age); *Hale v. Kentucky*, 303 U.S. 613, 616 (1937) (holding unconstitutional the "systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color").

3. See *J.E.B. v. Alabama*, 511 U.S. 127, 145-46 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. . . . It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy.") (footnote omitted). For a discussion of the historical exclusion of women from juries and the changes in the law that subsequently removed the legal impediments to jury service for women, see *id.* at 131-36. Although this Article will focus solely on the issue of racial discrimination by lawyers in jury selection,

Court jurisprudence over the years has established that the mere “opportunity” to serve on a jury through inclusion on jury lists or venires is not enough.⁴ The Constitution also requires that potential jurors not be excluded from actual juries as a result of intentional racial or gender-oriented discrimination.⁵ The Supreme Court embarked on the development of this constitutional principle in *Swain v. Alabama*,⁶ in which it held that prosecutors’ use of their discretionary strikes of prospective jurors, commonly referred to as “peremptory challenges,” to systematically exclude Blacks from petit juries in “case after case” might be deemed unconstitutional.⁷ Later, in *Batson v. Kentucky*,⁸ the Court narrowed and strengthened this concept by holding that it was unconstitutional for a prosecutor to exercise his or her peremptory challenges in a fashion that *intentionally* discriminated against Blacks on the basis of race, even within the context of a single case.⁹

The Court’s prohibition against the discriminatory use of peremptory challenges was originally founded on the concept of safeguarding the equal protection rights of criminal defendants alone,¹⁰ but later shifted to a focus on the protection of these rights with regard to prospective jurors.¹¹ In addition, the Supreme Court

the arguments and observations that will be raised are equally applicable to gender discrimination by attorneys in this context.

4. See, e.g., *Smith v. Texas*, 311 U.S. 128, 130 (1940) (“The fact that the written words of a state’s laws hold out a promise that no . . . discrimination [in jury selection] will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be *given—not merely promised.*”) (emphasis added).

5. See *infra* Part II.C. Furthermore, in addition to the constitutional basis for the prohibition, there is statutory support, specifically, the Civil Rights Act of 1875, codified at 18 U.S.C. § 243 (2000). See also 28 U.S.C. § 1862 (2001) (civil provision to the same effect).

6. 380 U.S. 202 (1965).

7. See *id.* at 223. For a detailed discussion of *Swain*, see *infra* Part II.C.1.

8. 476 U.S. 79 (1986).

9. *Id.* at 95. For a detailed discussion of *Batson* and its progeny, see *infra* Part II.C.2.

10. See *Swain*, 476 U.S. at 86 (discussing the implications of discrimination in jury selection upon the criminal defendant’s equal protection rights).

11. See *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (“An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.”); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618 (1991) (emphasizing that in *Powers* the Court made it clear that “a prosecutor’s race-based peremptory challenge violates

gradually expanded *Batson*'s initial reach beyond addressing discriminatory conduct by prosecutors only. The dictates of *Batson* now apply equally to criminal defense counsel¹² as well as civil trial attorneys.¹³

Hence, attorneys'¹⁴ striking of jurors in an intentionally discriminatory fashion has unequivocally and in all respects been deemed improper and indeed unconstitutional. In light of the systematic and wholesale exclusion of Blacks and other minorities from juries throughout American history, and the apparent injustices to litigants that not infrequently resulted therefrom,¹⁵ few would

the equal protection rights of those excluded from jury service"); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 835 (1997) (observing that the Supreme Court's decisions in *Powers* and *Georgia v. McCollum*, 505 U.S. 42 (1992) "shifted the focus [of the *Batson* doctrine] from a defendant's right not to have prospective jurors excluded because of race, to the rights of the prospective jurors not to be excluded"). See generally Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 727 (1992) (arguing that the real injury caused by racial discrimination in jury selection is inflicted upon the excluded jurors and, therefore, that they are justifiably the appropriate focus of the analysis in these cases). But see Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 485 (1998) [hereinafter Johnson, *Batson Ethics*] (opining that it is "intuitively obvious that in the context of a criminal trial, fairness to the defendant is more morally compelling than is creating an appearance of neutrality among jurors"); see also Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 76-82 (1993) [hereinafter Johnson, *Not to Say Race*] (arguing against a "juror-focused" approach to *Batson* challenges, as well as the significance of the alleged harm, to the community that results from race-based jury selection).

12. *Georgia v. McCollum*, 505 U.S. 42, 55 (1992).

13. *Edmonson*, 500 U.S. at 616.

14. The Court's restrictions, of course, apply to pro se litigants as well, but the focus of this Article will be only on the impact of such restrictions on the conduct of lawyers.

15. See, e.g., Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 88 (1990) (discussing President Lyndon Baines Johnson's comments regarding the "recurring 'injustice to Negroes at the hands of all-white juries'"); Michael J. Klarman, *Is the Supreme Court Sometimes Irrelevant? Race and the Southern Criminal Justice System in the 1940s*, 89 J. AM. HIST. 119, 135 (2002) ("Judging from the cases that were appealed, and from the case files preserved in the NAACP Papers, farcical trials in which possibly-innocent black defendants were sentenced to death remained a common occurrence, notwithstanding the Supreme Court's celebrated criminal procedure decisions."); Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to*

dispute that the Supreme Court appropriately sought to interdict jury selection techniques that would prolong this regrettable legacy.

Unfortunately, notwithstanding its necessity and propriety, the Court's ban on the discriminatory use of peremptory challenges has, in practice, been decidedly ineffective in achieving its original goals.¹⁶ A jury selection process free from invidious discrimination

Professor Butler, 44 UCLA L. REV. 109, 140 n.106 (1996) (“[W]hite defendants often have received the extra-evidence benefits of a white jury, and there is no reason to believe that this practice has disappeared.”). See generally Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 704-07 (1995) (recounting various classic examples of racial injustice associated with criminal cases decided by all-White, or virtually all-White juries); Colbert, *supra*, at 13-32, 39-43, 75-93 (discussing the historically unjust nature of the American legal system with regard to both the treatment and participation of Blacks); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-51 (1985) [hereinafter Johnson, *Black Innocence*] (giving a detailed analysis of evidence suggesting unequal treatment of Blacks and Whites by the criminal justice system); Klarman, *supra*, at 131-37 (discussing various capital cases in which the absence of Blacks from the petit jury unquestionably was responsible for or at least contributed significantly to convictions of Black defendants who were quite possibly innocent).

16. 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 (2001) (concluding from an examination of 317 capital murder cases 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”); Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 371 (1990) (noting that *Batson*’s somewhat unworkable standards, which are easily satisfied by most prosecutors, “leads one to believe that the protection erected by [the decision] has been largely illusory”); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire By Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1009 (1996) (describing a survey of practicing lawyers in San Diego, California, that revealed that many “believe that *Batson* does not effectively prevent unlawful discrimination”); Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory: Batson’s Unfortunate Failure To Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 641 (1994) (“The important goal of *Batson*—to achieve the end of discrimination in jury selection—has not been accomplished.”); Charles J. Ogletree, *Just Say No!: A Proposal To Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1105 (1994) (observing that “*Batson* has . . . become impotent in preventing discrimination”). For general discussions of the perceived hollowness of the legal ban on discriminatory peremptory challenges, see 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 (1999); Andrew G. Gordon, Note, *Beyond Batson v. Kentucky: A Proposed Ethical Rule*

certainly was and is an ideal worthy of attainment; however, the attention and commitment needed to achieve this end have remained lacking. Disturbingly, both the bench and bar have seemingly neglected to effectively utilize and understand the legal, ethical, and procedural protections currently associated with these anti-discrimination principles,¹⁷ let alone to implement additional measures that might serve as more meaningful safeguards.

To make matters somewhat worse, the Supreme Court has actually eased the burden of avoiding a charge of discrimination in jury selection by requiring only a race-neutral explanation for a peremptory strike that has been properly challenged, rather than one that is both race-neutral and rational.¹⁸ As a result, some commentators have posited, and evidence suggests, that judges have become more willing to accept proffered race-neutral explanations for alleged discriminatory use of peremptory challenges, no matter how suspect.¹⁹ Furthermore, even if a violation of *Batson*'s dictates

Prohibiting Racial Discrimination in Jury Selection, 62 FORDHAM L. REV. 685 (1993).

17. See *infra* notes 203-04 and accompanying text; *infra* text accompanying note 205; see also *Miller-El v. Cockrell*, 584 U.S. 1122 (2002) (mem.) (granting certiorari), *cert. amended*, 122 S. Ct. 1202 (2002). In amending the grant of certiorari in *Miller-El*, the Court limited the case to consideration of the question: "Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claim under *Batson v. Kentucky*?" *Miller-El*, 122 S. Ct. at 1202. For further discussion of *Miller-El*, see *infra* notes 133, 174 and accompanying text.

18. See *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (per curiam) ("What [is] mean[t] by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."); see also Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 36 (1997) (observing that the Court in *Elem* appeared to place the focus on "subjective honesty, not objective sensibility").

19. Professor Cavise has pointedly argued that:

[A]llow[ing] charges of race or sex discrimination to be disposed of on the most subjective, unverifiable, near-pretextual grounds and, at the same time, to permit disposition on the thinnest of voir dices is convincing proof that the Court is not the least bit interested in the fairness of voir dire or the racial, ethnic, or sexual composition of American juries.

Cavise, *supra* note 16, at 546; see also Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 465 (1996) (observing that even though most courts do not appear to be rubber stamping neutral explanations for the striking of prospective

is found by a court, the modest penalties imposed on offending lawyers provide little incentive to refrain from such behavior in the future.²⁰

Not surprisingly, these systemic developments have in turn created a sense of futility, or possibly cynical desperation, within the litigation bar with regard to *Batson* objections. Why waste the effort given the low probability of success and the minimal potential benefits?²¹ Or, why not unselectively raise any and all potential *Batson* objections because one is bound to be sustained sooner or

jurors, those explanations are more likely to be accepted when the *Batson* challenge relates to a Black or Hispanic venireperson); Ogletree, *supra* note 16, at 1107 (making the pre-*Purkett v. Elem* observation that “many courts frequently accept explanations that appear to be no more than after-the-fact rationalizations for challenges which appear to have been made on subconsciously racial grounds”); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 16 (1992) (“[M]any trial courts automatically accept the prosecutor’s ‘race-neutral’ explanations without critical evaluation.”); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 236 (1993) (observing that “courts are often uncritical in evaluating neutral explanations”); Eric N. Einhorn, Note, *Batson v. Kentucky and J.E.B. v. Alabama ex rel. T.B.: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 189 (1994) (showing that out of 113 federal appellate court decisions surveyed, courts “found the proffered race-neutral explanation[s] sufficient, as a matter of law, in all but five cases”); Gordon, *supra* note 16, at 710 (“Through the use of pretextual reasoning, attorneys remain free to strike jurors predicated on clear, yet sometimes subtle, racial stereotypes.”); *infra* notes 130, 207, 209, 216 and accompanying text.

20. See *infra* notes 231-43 and accompanying text (discussing the weak penalties that courts impose for *Batson* violations); see also *infra* note 134 and accompanying text. But see *infra* note 232 (noting that some courts have taken violations more seriously and instituted monetary penalties, for example).

21. See Baldus et al., *supra* note 16, at 123 (describing an empirical study of peremptory challenges in capital murder cases in Philadelphia suggesting that one reason why *Batson* claims are infrequently raised is that “both sides have little expectation that the courts will sustain a claim of discrimination even if it is based on solid evidence”); Cavise, *supra* note 16, at 545 (“It is inevitable that, as the futility of the *Batson* challenge becomes more evident to the trial bar, lawyers already in the heat of battle will simply forego making any challenge to avoid an unnecessary complication for no apparent purpose.”); cf. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 174 (1997) (observing that prior to *Batson*, White lawyers in the South were reluctant to raise the issue of discriminatory exclusion of Blacks from juries because of the potential backlash against them and possibly against the Black defendants that they had been appointed to represent).

later?²² The latter approach may actually be more damaging because it has the potential to condition judges to be generally skeptical with regard to the possible merit of *Batson* challenges.

Equally troubling is the apparent insulation now provided by the ethics rules to attorneys who engage in the discriminatory use of peremptory challenges, notwithstanding alleged efforts by bar authorities to the contrary.²³ Specifically, Rule 8.4(d) of the American Bar Association's (ABA) Model Rules of Professional Conduct prohibits lawyers from engaging in conduct that is "prejudicial to the administration of justice,"²⁴ but provides in the Rule's explanatory comments as follows:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of

22. See Melilli, *supra* note 19, at 461 ("[C]riminal defense lawyers are relatively unselective about raising *Batson* challenges."); see also *id.* at 465 (suggesting that the lack of selectivity in raising *Batson* claims as to Blacks and Hispanics may partially explain the low success rate). But see Baldus et al., *supra* note 16, at 123 (concluding that *Batson* challenges are generally not raised very often in capital cases in Philadelphia).

23. See *infra* Part III.

24. See MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2001), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2002 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 106 (2002) [hereinafter SELECTED STANDARDS]. The ABA's Model Rules are, of course, not binding on the states. Rather, state supreme courts possess the ultimate authority to promulgate ethical rules and standards for the states' bar members. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 2 n.1 (1990) ("Before a code or rule of ethical conduct can be enforced against a lawyer, it must be adopted by the jurisdiction in which the lawyer is practicing."). Nevertheless, the vast majority of American jurisdictions have adopted some version of the Model Rules. See SELECTED STANDARDS, *supra*, at 145-47 (revealing through the use of the Chart on Lawyer Screening that as of 2001, 44 states and the District of Columbia had either adopted or were on their way to adopting some version of the Model Rules); see also RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2000-2001 ed.) § 1-1.5.4 [hereinafter ROTUNDA, LEGAL ETHICS] ("[O]ver 80% of the states (and the District of Columbia) had adopted the Model Rules."). As a result of this, and for the sake of consistency and clarity, this Article will focus primarily on the Model Rules. For a discussion of the state variations of Model Rule 8.4(d) and its Comments, see *infra* notes 272-73 and accompanying text.

justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.²⁵

The first emphasized sentence of this Comment seems to beg the question of how words or conduct that intentionally manifests bias or prejudice regarding one or more of the protected categories can ever constitute "legitimate advocacy," so as to be exempt from discipline.²⁶ Should not such behavior constitute professional misconduct per se, particularly in the context of the exercise of peremptory challenges?

The next sentence of the Comment underscores that the answer to this question is "no." Even if a lawyer is found to have committed a *Batson* violation by a trial court, according to the Comment, that finding "alone" would not subject the lawyer to discipline. There is no indication, however, as to how much weight, if any, should be given to such trial-level determinations. As a result, this sentence seems to undermine the importance of these findings and give the impression that something more than intentional discrimination must be established before an attorney can be subject to discipline under Rule 8.4(d).²⁷ One cannot overlook,

25. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) cmt. [2], *reprinted in* SELECTED STANDARDS, *supra* note 24, at 27 (emphasis added).

26. *See* ROTUNDA, LEGAL ETHICS, *supra* note 24, § 55-2.5.1 (noting that the "Comment does not define when advocacy is 'illegitimate'"). Of course, it is possible that this statement was intended to cover situations such as a lawyer representing a racist and advocating the client's First Amendment right to hold and espouse his or her bigoted beliefs. *See infra* note 262. In addition, it could be that the "legitimate advocacy" in question encompasses lawyers' acting in the zealous pursuit of their clients' interests. *See infra* notes 342-44 and accompanying text. Indeed, some might argue that a lawyer's duty to zealously represent a client may require that a lawyer act in a way that manifests bias or prejudice, particularly if the client is a criminal defendant, and certainly when there is no constitutionally protected status involved (e.g., sexual orientation or economic status). *See infra* note 345. Nevertheless, to broadly insulate behavior that constitutes a knowing manifestation of bias or prejudice based on race or other factors under the potentially pretextual rubric of "legitimate advocacy" seriously undermines the force of the Comment's first sentence.

27. Of course, this provision could simply represent an acknowledgment that trial courts make mistakes and, therefore, that their findings should not automatically give rise to discipline. *But see infra* note 266 (noting the wariness of

however, the fact that this type of intentional misconduct constitutes a violation of the Constitution,²⁸ and therefore is supremely worthy of the attention of lawyers, as well as those who regulate them.²⁹ Unfortunately, this has not been the reality of the situation.

Hence, both the meaningful protection of the constitutional rights of citizens to serve as jurors through an aggressive commitment to the goals of *Batson* and its progeny and the preservation of the integrity of the legal profession through the active condemnation of discriminatory conduct in litigation remain unachieved ideals of the adversary process and the disciplinary system, respectively. Though likely unintentional, this failure is nonetheless troubling, and it inevitably engenders cynicism and perhaps even contempt for our judicial system.³⁰ Put simply, if

the criminal bar that peremptory challenges of jurors might be viewed as discriminatory). However, even if this is all that sentence means, further elaboration is needed to counteract the “diluting” message that it sends with regard to the significance of *Batson* violations. See, e.g., *infra* Part IV.B.

28. It is also significant to note that a *Batson* violation likewise constitutes a crime under 18 U.S.C. § 243. For further discussion of this point, see *infra* note 376 and accompanying text.

29. See ROTUNDA, LEGAL ETHICS, *supra* note 24, § 55-2.5.1 (observing that Comment [2] “gives less protection to a lawyer who expresses pure speech complaining about the idle rich than it gives to a lawyer who engages in unconstitutional and racist conduct when choosing a jury”); see also *infra* note 352; cf. Underwood, *supra* note 11, at 760 (contending that discrimination in “jury selection is so pernicious, so antithetical to our deepest constitutional ideals, so indisputably violative of the rights of jurors, and so clearly harmful to the public interest, that all litigants should have standing to challenge [it]”). For further discussion of this Comment to Model Rule 8.4 and its effect, see *infra* notes 266-69 and accompanying text.

30. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (“Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.”) (citations omitted); *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (“[R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.”); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”); KENNEDY, *supra* note 21, at 230 (“If attorneys are allowed to easily evade the prohibition [against discrimination in jury selection], their success will generate destructive cynicism.”); Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1185-86 (1994) (observing that racial discrimination in jury selection may contribute to some jurors having “decreased confidence in jury proceedings”); Melilli, *supra* note 19, at 501 (observing that discrimination in jury

judges and lawyers appear casual or indifferent with regard to the enforcement of legal and ethical principles that apply to them, how can the public have confidence in the fairness and reliability of the system as a whole?³¹ This Article examines the paradox between the adversary and disciplinary systems' outward condemnation of discrimination in jury selection and their apparent simultaneous inward acceptance of such conduct as legitimate advocacy.

Part II traces the evolution of the Supreme Court's major decisions regarding racial discrimination against prospective jurors and details the inefficacy of the Court's efforts in this respect. The latter point is underscored by an analysis of actual *Batson* decisions handed down during 2000 and 2001,³² which tend to support the conclusion that *Batson* alone, as implemented, cannot and does not

selection "makes underrepresented groups less accepting of the court system and its results, and injures society as a whole by frustrating the ideal of equal citizen participation in the jury process"); Perea, *supra* note 19, at 50 ("Acceptance of the kinds of reasons too frequently accepted as 'race-neutral'—demeanor, dress, accent—demonstrates a casual acceptance of discrimination in its many covert forms, and breeds cynicism and distrust of the judicial system."); *see also* Cavise, *supra* note 16, at 512 ("[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process.'") (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). *But see infra* note 336 (citing authorities for the theory that using stereotypes is not unethical but a form of zealous advocacy to promote the client's interest).

31. *See supra* note 30; *see also* FLA. RULES OF PROF'L CONDUCT R. 4-8.4(d) cmt. ("Such conduct . . . subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality."); Underwood, *supra* note 11, at 748-50 (discussing various ways that discrimination in jury selection can undermine the public's perception of the integrity of the judicial process); Gordon, *supra* note 16, at 713 (proposing an ethical rule and a comment to that rule stating that "discriminatory use of peremptory challenges not only harms litigants and the excluded juror but undermines public confidence in our judicial system").

32. Specifically, we examined reported *Batson* decisions from 2000 and 2001 that involved the allegedly racially discriminatory exercise of peremptory challenges. *See infra* note 177. For a similar, but more in-depth analysis of *Batson* decisions between 1986 and 1993, *see* Melilli, *supra* note 19. *See also* Raphael & Ungvarsky, *supra* note 19, at 234-68 (analyzing *Batson* decisions through 1992, focusing on how courts dealt with the neutral explanation component of the process); Einhorn, *supra* note 19, at 187-97 (examining 113 federal appellate decisions with regard to proffered race-neutral explanations); Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Jury Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 357-61 (1993) (surveying seventy-six federal appellate decisions, focusing on the nature and treatment of articulated race-neutral explanations).

effectively address the discriminatory use of peremptory challenges. Part III looks at the overly cautious and unsuccessful efforts by the ABA and state disciplinary bodies to address the issue from an ethical standpoint. Most jurisdictions do not have a specific rule that subjects lawyers to discipline for *Batson* violations,³³ and those that do seemingly have not utilized it.³⁴ In addition, Part III explores the potential explanations for the apparent insulation of *Batson* violations from concentrated regulatory attention.

Part IV offers various proposals to address the concerns raised by the continued inefficacy of the ban on the discriminatory use of peremptory challenges, as well as the delicate approach taken with regard to such matters by disciplinary authorities. Specifically, this Article proposes that trial courts adopt a uniform practice of instructing prospective jurors prior to the commencement of voir dire with regard to two major aspects of the law: the general importance of their right to serve as jurors and the constitutional prohibition against their being eliminated from the jury venire on the basis of their race.³⁵ To reinforce the significance of these instructions, counsel should also be required to identify openly the targets of their peremptory strikes.³⁶ Moreover, if a *prima facie* *Batson* violation is established, the alleged violator should be required to state his or her race-neutral explanation(s) to the court in the presence of all

33. See *infra* note 272 and accompanying text.

34. See, e.g., *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001) (recommending against the imposition of discipline upon a judge who failed to list prior *Batson* violations on judicial appointment application in response to a question regarding whether his professional conduct had ever been the subject of comment), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html), *aff'd*, Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission (Aug. 8, 2002), at [http://www.iardc.org/newfilings_top_copy\(174\).html](http://www.iardc.org/newfilings_top_copy(174).html); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 1006 n.293 (1998) [hereinafter Leipold, *Constitutionalizing Jury Selection*] ("The *Batson* case law is remarkable for the apparent lack of consequences flowing to lawyers from a violation."); see also *infra* notes 270-86 and accompanying text. For further discussion of *In re Hynes*, see *infra* notes 288-315 and accompanying text.

35. See *infra* text accompanying notes 359-62. Obviously, this instruction should also alert potential jurors to the unconstitutional nature of a strike based on gender. As noted previously, this Article will only focus on racial discrimination in the jury selection process, but the points made and conclusions reached are equally applicable to gender discrimination in this context. See *supra* note 3.

36. See *infra* Part IV.A.

prospective jurors.³⁷ In the alternative, at a minimum, jury selection procedures should be adjusted in some fashion to make them more open and accessible so as to create greater accountability.

Furthermore, the ABA and every state should enact an ethical rule expressly articulating that a *Batson*-type violation is a disciplinable offense³⁸ and, therefore, one that lawyers and judges have a clear obligation to report to the appropriate disciplinary authorities.³⁹ Under this proposed rule, any lawyer found to have violated *Batson* should automatically be reported to the proper disciplinary body.⁴⁰ In addition, with respect to any subsequent disciplinary proceeding, there should be a presumption that the attorney in question has violated the applicable ethical provision.⁴¹

As a minimum uniform sanction, one possibility might be to require violators to represent a low-income client of a different race, or in connection with certain designated subject matter (e.g., matters

37. See *infra* Part IV.A.

38. See *infra* text accompanying notes 378-82; see also *infra* note 273; Gordon, *supra* note 16, at 713 (suggesting a proposed ABA Model Rule prohibiting discrimination against prospective jurors on the basis of “race, sex, religion or national origin”). For an insightful discussion regarding the impropriety of imposing personal discipline or other liability on lawyers for the discriminatory exercise of peremptory challenges, see Charlow, *supra* note 18, at 58-64.

39. The ethical duty to report the misconduct of fellow members of the bar is contained in Model Rule 8.3(a) and provides, in relevant part, as follows:

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 105; see also *infra* note 383; cf. Ogletree, *supra* note 16, at 1122 (suggesting that courts should consider taking disciplinary action against prosecutors who violate *Batson*, by, among other things, making referrals to the proper disciplinary authority). For a thorough discussion of the ethical duty to report in the context of violations of Federal Rule of Civil Procedure 11, see Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555 (2001).

40. See *infra* notes 383-85 and accompanying text; see also *supra* note 39.

41. See *infra* notes 386-90 and accompanying text.

involving alleged discrimination), on a pro bono basis.⁴² Furthermore, or in the alternative, a very public reprimand should follow any violation.⁴³ Finally, *Batson* violators should be required to attend a continuing legal education program devoted to the ethics of jury selection.⁴⁴

The increased accountability created by the proposed procedural innovations will cause counsel to give greater consideration to their exercise of peremptories ex ante⁴⁵ and will thereby serve as a deterrent for those predisposed to strike jurors for racial reasons.⁴⁶ Furthermore, in instances in which prophylactic measures are unsuccessful and *Batson* violations occur, the recommended disciplinary modifications more appropriately treat and denominate such behavior as what it truly is—professional misconduct.

42. See *infra* notes 392-99 and accompanying text. For prosecutors, the required representation would obviously have to be in the civil context in order to avoid inevitable conflicts of interest. See *infra* note 394. In addition, there may be constitutional concerns that hamstring the enforcement of this type of discipline. See *infra* note 395. Such concerns, however, should not foreclose consideration of this novel remedy.

43. See *infra* note 400 and accompanying text.

44. See *infra* notes 401-02 and accompanying text. To the extent that such programs are not currently offered by state bar associations, they should be implemented.

45. See Ogletree, *supra* note 16, at 1116 (contending that a “[d]isincentive that exacts a more substantial cost [than the typical *Batson* remedy] for prosecutors’ discriminatory use of peremptory challenges is needed”); cf. Johnson, *Black Innocence*, *supra* note 15, at 1694 (discussing approvingly the underlying logic of *Miranda v. Arizona*, 384 U.S. 436 (1966), which is that “[w]hen serious breaches of constitutional norms frequently occur in a setting where they cannot be discovered (and thus cannot be remedied after the fact), prophylactic protections of those norms is appropriate”); KENNEDY, *supra* note 21, at 187 (observing that the “broader aim” of recognizing the seemingly extraordinary remedy of voiding a conviction when there was racial discrimination at the grand jury phase, but not at the trial phase, is to “deter future constitutional violations”) (emphasis added).

46. See, e.g., Part IV.A.

II. THE INCOMPLETE EVOLUTION OF ANTI-DISCRIMINATION PRINCIPLES IN THE CONTEXT OF JURY SELECTION

A. *Early Recognition of the Constitutional Right to Jury Service*

In the landmark case of *Strauder v. West Virginia*,⁴⁷ the Court held that the exclusion of Blacks from jury service under state law entitled a defendant to remove “his case from a State court, in which the right [was] denied . . . , into a Federal court, where it [would] be upheld.”⁴⁸ In particular, the Court essentially held that such state-sanctioned exclusion constituted a denial of the defendant’s constitutional right to equal protection of the law and that, under these circumstances, the opportunity for removal was appropriate to give meaning to that protection.⁴⁹

Significantly, the majority opinion stressed the importance of jury service as a means of eliminating the stigma that had been attached to the Black race throughout history.⁵⁰ Specifically, the Court observed that: “The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence.”⁵¹ Moreover, the express denial to Black citizens of the right to serve on juries only served to reinforce and perpetuate these negative perceptions:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of

47. 100 U.S. 303 (1879).

48. *Id.* at 311.

49. *Id.* at 311-12.

50. *See id.* at 306; *see also* Powers v. Ohio, 499 U.S. 400, 413-14 (1991) (“A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character.”); Colbert, *supra* note 15, at 16 (arguing that the disqualification of Black jurors based on their race constitutes a badge and incident of slavery denoting their subordinate status); Melilli, *supra* note 19, at 453 (“Any group of citizens which suffers exclusion from the jury system is marked as inferior and publicly humiliated, and is thereby alienated from its own government process.”); Underwood, *supra* note 11, at 746 (“[W]hen the task in question is widely understood as a fundamental aspect of citizenship, as is jury service, then rejection amounts to a judgment of unfitness for citizenship.”).

51. *Strauder*, 100 U.S. at 306.

their color, though they are citizens, and may be in other respects fully qualified, is practically 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 to individuals of the race that equal justice which the law aims to secure to all others.⁵²

According to the Court, the Fourteenth Amendment was designed to ensure that Blacks enjoyed the same civil rights afforded to Whites by protecting the Black race against state sponsored oppression calculated to maintain the inequitable status quo. Even more powerfully, the Court proclaimed that besides being prohibitory in content, the Fourteenth Amendment also:

[C]ontain[s] a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.⁵³

The strong language of *Strauder* appeared to open the door for Blacks, at least through jury service, to cast off the burdensome label of inferiority and to strive to command the much-needed respect to which the Supreme Court had alluded. In actuality, however, the Court's opinion in *Strauder* was decidedly narrow—it simply recognized that the Constitution guaranteed Blacks freedom from “unfriendly legislation”⁵⁴ directed toward them solely on account of their race. Hence, even though state laws expressly prohibiting Blacks from serving on juries did not comport with the guarantees of the Fourteenth Amendment and, therefore, could be avoided through removal to federal court,⁵⁵ there were certainly

52. *Id.* at 308.

53. *Id.* at 307-08 (emphasis added).

54. *Id.* at 308 (emphasis added).

55. See *supra* text accompanying note 49.

other means available under the law for states to continue the tradition of racial subjugation in the jury selection process.⁵⁶

B. “Unlegislated” Discrimination with Regard to the Composition of Prospective Juror Lists

The Supreme Court first addressed the issue of “unlegislated” state discrimination against prospective jurors in *Ex parte Virginia*.⁵⁷ In that case the Court upheld the prosecution of a judge under the Civil Rights Act of 1875⁵⁸ for excluding from the county’s list of prospective jurors (“jury pool” or “jury roll”) all Black men.⁵⁹ In so doing, the Court indicated that individuals acting as agents on behalf of the states were the ones who should appropriately be held accountable for acts that violated the statute; otherwise, the Fourteenth Amendment’s “prohibition [would have] no meaning.”⁶⁰ The Court thereby gave some substance to the equal protection guarantees of the Constitution in the milieu of jury pool composition, at least when the state conduct constituted overt discrimination against Blacks.⁶¹

Some jurisdictions, however, employed what might be labeled “pretextual” criteria for omitting Black citizens from their prospective juror lists rather than blatant discriminatory exclusion. For example, in Delaware, the officials in charge of compiling jury

56. See *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (noting that after *Strauder*, “[s]tate officials then turned to somewhat more subtle ways of keeping blacks off jury venires”); KENNEDY, *supra* note 21, at 172 (“Although *Strauder* established the constitutional right of blacks to be free of racial exclusion in jury selection, state officials in many locales consistently disregarded this right until rather recently.”).

57. 100 U.S. 339 (1879).

58. 18 U.S.C. § 243 (2000).

60. *Ex parte Virginia*, 100 U.S. at 348-49.

60. *Id.* at 347. Specifically, the Court stated that enforcement legislation such as that in question “must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured.” *Id.*; accord *Carter v. Texas*, 177 U.S. 442, 447 (1900); *Neal v. Delaware*, 103 U.S. 370, 397 (1880).

61. But see *Virginia v. Rives*, 100 U.S. 313, 320-22 (1879) (holding that the remedy of removal to federal court was unavailable when the exclusion of Blacks from juries resulted from the conduct of state officials rather than state law itself or state court decisions); see also *Colbert*, *supra* note 15, at 67-68 (discussing the *Rives* holding regarding the inability of removal to federal courts when exclusion was the result of a state official).

lists apparently operated under the presumption that Blacks “were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.”⁶² In other words, “race” was not the reason for excluding Blacks, it was the absence of the necessary qualifications—it just so happened that all Delaware Blacks lacked the required attributes, or at least that’s what the Delaware officials presumed. Such a presumption was inconsistent with the Supreme Court’s proclamation in *Strauder* regarding the importance of jury service, among other things, as a means of dispelling the badge of inferiority then worn by Blacks,⁶³ and in *Neal v. Delaware*⁶⁴ the Court deemed this presumption “violent” and unconstitutional.⁶⁵

Unfortunately, the Court handicapped the potential positive impact of its decision in *Neal* by imposing an unduly onerous burden on defendants to establish a prima facie denial of equal protection.⁶⁶ Specifically, “a defendant was required to show uncontroverted evidence of the total exclusion of African-Americans from juries over a substantial period of time.”⁶⁷

In *Norris v. Alabama*,⁶⁸ however, the Court relaxed this evidentiary burden somewhat.⁶⁹ Here, as in *Neal*, statutory criteria were being subjectively utilized to systematically exclude Blacks

62. *Neal*, 103 U.S. at 397.

63. See *supra* notes 50-52 and accompanying text.

64. 103 U.S. 370 (1880).

65. *Id.* at 397.

66. See Colbert, *supra* note 15, at 70 (stating that a defendant must “show uncontroverted evidence of the total exclusion of African-Americans from juries over a substantial period of time”); see also KENNEDY, *supra* note 21, at 175 (“[M]any judges overlooked or ignored *Neal* or interpreted it with crippling stinginess.”).

67. Colbert, *supra* note 15, at 70; see also KENNEDY, *supra* note 21, at 175 (discussing examples of cases in which the requisite evidentiary showing was seemingly made, but courts still refused to find that discriminatory exclusion had occurred).

68. 294 U.S. 587 (1935). This case arose out of the notorious Scottsboro Boys’ saga in which nine Black young men (including Clarence Norris) were indicted for allegedly raping two White women. See *id.* at 588. As with all of the defendants, the evidence against Norris was extremely weak. Nevertheless, an all-White jury convicted Norris, which led to this appeal. *Id.* at 588-89. For a detailed account of the Scottsboro Boys’ story, see DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

69. See Colbert, *supra* note 15, at 83 (observing that *Norris* “eased the evidentiary burden for establishing a prima facie case of purposeful discrimination”).

from jury service.⁷⁰ Not surprisingly, one or more of the specified qualifications could be seized upon conveniently in order to keep Blacks off the jury roll and out of the jury box. Indeed, in *Norris*, the editor of the local newspaper testified that he believed the “good negroes” in Jackson County lacked “sound judgment.”⁷¹ Even more telling, the Morgan County jury commissioner proclaimed that he did not know a single Black in the county who possessed all of the required qualifications.⁷²

Contrary to such “sweeping characterization[s],”⁷³ there were apparently a number of Blacks who met the requisite criteria in both Jackson and Morgan Counties.⁷⁴ Notwithstanding this, the defendant, Norris, presented evidence tending to establish that no Blacks had served on either a grand or petit jury in Jackson County

70. The provision in question directed that:

The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

Norris, 294 U.S. at 590-91 (quoting 1931 Ala. Acts 47). Apparently, most other jurisdictions likewise had statutes at this time that allowed for similar discriminatory determinations regarding who was qualified to serve as a juror. See Colbert, *supra* note 15, at 75-78, 89-90 & n.442 (observing various statutory requirements used to exclude Black jurors); see also KENNEDY, *supra* note 21, at 182-86 (discussing the Supreme Court’s apparent reluctance to invalidate state jury selection provisions that contained subjective criteria highly susceptible to discriminatory application).

71. *Norris*, 294 U.S. at 592. Jackson County was the county from which the indictment issued, and Morgan County was where the defendant Norris’s trial actually took place. Norris challenged both his indictment and conviction on the basis of the alleged “long-continued, systematic, and arbitrary exclusion of qualified negro citizens from service on juries, solely because of their race and color, in violation of the Constitution” *Id.* at 588.

72. *Id.* at 598-99.

73. *Id.* at 599.

74. *Id.* at 591-92, 597.

“within the memory of witnesses who had lived there all their lives.”⁷⁵ The Supreme Court held that such evidence was sufficient to establish a strong *prima facie* case of racial discrimination—one that the state failed to rebut.⁷⁶

Although cases such as *Neal* and *Norris* unequivocally established that the intentional, systematic, and complete exclusion

75. *Norris*, 294 U.S. at 591. Similar evidence existed with respect to Morgan County.

76. *Id.* at 598. The Court specifically held that the “general assertions” offered by the jury officials were not adequate, and thus reversed and remanded the case for further proceedings. *Id.* at 598-99. For examples of other cases in which Blacks were systematically excluded from jury service notwithstanding a seemingly non-discriminatory statutory scheme, see *Smith v. Texas*, 311 U.S. 128, 131 (1940) (noting that the Texas statutory scheme regarding grand jury selection was not facially unfair, but it was “capable of being applied in a such a manner as practically to proscribe any group thought by the law’s administrators to be undesirable”).

Following *Norris*, to establish a *prima facie* case of discrimination, a defendant needed to “present[] statistical evidence of the total exclusion of blacks from juries.” Colbert, *supra* note 15, at 83. The state then had the burden of coming forward with nondiscriminatory reasons for the all-White nature of its juries. Colbert, *supra* note 15, at 83. It should be noted, however, that even under this approach, states could effectively avoid successful challenges by Black defendants to trial jury composition by merely permitting a few token Blacks to sit on jury venires. See KENNEDY, *supra* note 21, at 178 (observing that some state officials who actually “heed[ed] the [Supreme] Court’s rulings merely moved from racially excluding *all* blacks to racially excluding *almost all* blacks” (i.e., “tokenism”)); Klarman, *supra* note 15, at 126 (“[S]outhern courts in racially explosive criminal cases that were likely to attract attention on appeal sometimes placed a black or two on the trial venire to secure against reversal.”). Furthermore, among some trial courts (possibly many), a similar perception apparently still exists that the presence of a few token Blacks on an actual jury panel somehow precludes the possibility that peremptory strikes were utilized in an intentionally discriminatory fashion. See, e.g., *Lockett v. Kemna*, 203 F.3d 1052 (8th Cir. 2000) (describing trial court finding that defendant failed to establish a *prima facie* case of intentional racial discrimination because the prosecution had not used all of its peremptory strikes to exclude *all* Blacks from the jury); see *State v. Walker*, 742 N.E.2d 1173, 1175 (Ohio Ct. App. 2000) (observing, in overruling a *Batson* objection by the defendant, that “there are three jurors still on the panel at this point that are African-Americans”); see also Montoya, *supra* note 16, at 1007-08 (“[L]awyers can get away with discrimination if they accept even one minority . . . ; and if only one or two members of a cognizable group are panelists, which is often the case, it is almost impossible to show a pattern or practice of excluding the group.”); Perea, *supra* note 19, at 18 (“[M]any courts accept the notion that if one or two Latinos or persons of color are left on a jury, this fact rebuts any inference of discrimination by a prosecutor who peremptorily challenges other prospective minority jurors.”).

of Blacks from the pool or list of potential jurors, or from the actual venire out of which jurors were selected in a given case, or from both, was constitutionally intolerable,⁷⁷ they did not signal the end of racial exclusivity in jury selection. Rather, the general absence of Blacks from the locus of jury participation persisted long after these decisions.⁷⁸ Most significantly, even if and when Blacks were allowed onto jury venires, the racial purity of actual juries was maintained through the lawful exercise of peremptory challenges.⁷⁹

C. *Peremptory Challenges—The Last Bastion of Legal Discrimination in the Jury Selection Process*⁸⁰

Two types of challenges are afforded to parties during the jury selection process (or “voir dire,”⁸¹ as it is commonly called) to

77. See, e.g., *Hale v. Kentucky*, 303 U.S. 613, 615 (1938); *Smith v. Texas*, 311 U.S. 128, 130 (1940) (“For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government.”) (footnote omitted); *Hill v. Texas*, 316 U.S. 400, 404 (1942) (noting that racial discrimination in the selection of grand jurors is forbidden by the equal protection clause). For a discussion of the significance of these cases, see KENNEDY, *supra* note 21, at 178.

78. See, e.g., *Avery v. Georgia*, 345 U.S. 559 (1953) (describing a system of printing the names of Black citizens on yellow tickets and White citizens on white tickets in connection with the purportedly random selection of prospective jury panel that resulted in a venire of 60 White men); Hoffman, *supra* note 11, at 831 (“States continued to enforce facially neutral de facto exclusions, and state court venires continued to be overwhelmingly white.”); see also Klarman, *supra* note 15, at 125 (questioning the efficacy of Supreme Court decisions in this area and observing that such decisions following *Norris* “did not impel southern white jury commissioners and judges to select juries in a color-blind fashion, but only to take those steps necessary to avoid reversal on appeal”).

79. See Colbert, *supra* note 15, at 93 (“[P]rosecutors relied on the unfettered exercise of peremptory challenges as the ultimate trump card for attaining all-white juries.”); Hoffman, *supra* note 11, at 831 (describing peremptory challenges as being “well entrenched as the last line of defense against increasing pressures for desegregation of the [jury] venire”); see also Klarman, *supra* note 15, at 125 (noting that “prosecutors . . . used peremptory challenges . . . to exclude the token number of blacks appearing on trial venires by the 1940s”).

80. See Alschuler, *supra* note 1, at 167 (“[T]he truly unrestricted, truly peremptory challenge apparently had become the last bastion of undisguised racial discrimination in the criminal justice system.”); see also Colbert, *supra* note 15, at 12 (referring to the peremptory challenge as “the most recent incarnation of the anti-democratic impulse to keep juries all-white”).

eliminate individuals from the panel of prospective jurors: challenges for cause and peremptory challenges.⁸² Challenges for cause may be used in an unlimited fashion,⁸³ but their scope is quite narrow; “the challenging party must [establish] a sufficient likelihood that the prospective juror is biased in some way.”⁸⁴ Peremptory challenges, on the other hand, may be founded on any perceived bias that a potential juror may possess against or in favor of a party to an action.⁸⁵ Further, as noted in *Swain v. Alabama*, the “essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”⁸⁶ Moreover, though not constitutionally mandated,⁸⁷ the right to strike such prospective jurors in this manner

81. Translated, “voir dire” means “to speak the truth” or “to see what is said.” VAN DYKE, *supra* note 1, at 140; *see also* KENNEDY, *supra* note 21, at 181 (describing “voir dire” as “a process during which the attorneys or the judge pose questions designed to reveal conflicts of interest, sources of prejudice, or other information bearing upon a person’s fitness to serve on a jury in a given case”). For an interesting discussion and analysis of the voir dire process, *see* Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power”*, 27 STAN. L. REV. 545 (1975).

82. *See generally* VAN DYKE, *supra* note 1, at 139 (describing the purposes behind peremptory challenges); *see also* *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1459-60 (1997) [hereinafter *The Civil Jury*] (stating that no explanation is needed for a peremptory challenge).

83. *See* VAN DYKE, *supra* note 1, at 140 (observing that though unlimited, such challenges typically end up being relatively few in number); *see also* *The Civil Jury*, *supra* note 82, at 1460 (expounding upon the differences between challenges for cause and peremptory challenges).

84. WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 22.3(a), at 289 (2d ed. 1999 & 2000 Supp.); *see also* *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (“[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality”); Babcock, *supra* note 81, at 549-50 (emphasizing that challenges for cause are traditionally allowed in narrow circumstances, such as when a juror is related to one of the parties or has previously sat in the same case that ended in a mistrial).

85. LAFAVE ET AL., *supra* note 84, § 22.3(a), at 289; *see also* *The Civil Jury*, *supra* note 82, at 1460 (observing that peremptories “allow a party to act on mere suspicion of unfavorable bias when the party does not possess enough proof to establish a cause challenge”); *infra* note 128.

86. *Swain*, 380 U.S. at 220. It is important to note, however, that although peremptories are broader in scope than challenges for cause, they are typically subject to a numerical limitation of some sort. *See* VAN DYKE, *supra* note 1, at 140.

87. *See Swain*, 380 U.S. at 219; *see also* Hoffman, *supra* note 11, at 825 (discussing the absence of constitutional support for the peremptory challenge); Melilli, *supra* note 19, at 447 (noting the lack of a “federal constitutional right to

is considered an invaluable and, indeed, sacred tool of litigators to ensure that the parties involved receive a fair trial.⁸⁸

Ironically, this “sacred tool” for ensuring fairness also represented the last legally permissible mechanism for maintaining the racial and ethnic purity of juries.⁸⁹ Peremptory challenges were by their very nature discriminatory,⁹⁰ and one’s basis for exercising them could not be called into question.⁹¹ In fact, these two fundamental characteristics are likely responsible for the longstanding force and appeal of peremptories in America. What litigator would not value the ability to eliminate “undesirables” from a jury pool, free from any worry or concern that his or her decision might be called into question? Not until its decision in *Swain v. Alabama* did the Supreme Court even acknowledge the possibility that peremptory challenges might be utilized in a manner unworthy of complete protection.⁹² The Court’s decision, however, represented only a modest incursion into this last bastion of legal discrimination in the jury selection process.

1. A Modest Step Forward—*Swain v. Alabama*

In *Swain v. Alabama*, the defendant, Robert Swain, who was Black, was convicted and sentenced to death by an all-White jury for the rape of a White woman.⁹³ In an effort to overturn his conviction,

exercise peremptory challenges”). *But see* Leipold, *Constitutionalizing Jury Selection*, *supra* note 34, at 982 n.197 (noting some debate among the drafters of the Constitution that may have reflected a perception that the right to peremptory challenges was implicitly included).

88. *See Swain*, 380 U.S. at 219 (“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise.”); *cf.* VAN DYKE, *supra* note 1, at 139 (“Many attorneys believe that trials are frequently won or lost during [the jury selection] process.”). For a discussion of the history of the peremptory challenge in England and the United States, see Hoffman, *supra* note 11, at 816-27.

89. *See supra* note 80.

90. The challenges were “discriminatory” in the sense that prospective jurors could be stricken based on any perceived or speculative notion, no matter how inaccurate or irrational. *See* Melilli, *supra* note 19, at 449 (“The entire process of jury selection is one of discrimination. The real issue is whether the criteria upon which the discriminations are based are reasonable and acceptable.”).

91. *See supra* text accompanying note 86.

92. 380 U.S. 202, 224 (1965).

93. *See id.* at 231 (Goldberg, J., dissenting).

he contended that Blacks had been intentionally excluded from the grand jury, the jury venire, and the petit jury.⁹⁴ The Supreme Court ultimately concluded that Swain had failed to come forward with sufficient evidence to establish a *prima facie* case of purposeful discrimination with regard to the racial composition of the grand jury or the jury venire.⁹⁵ The Court apparently based this decision on the finding that “Alabama [*had*] *not totally excluded* a racial group from either grand or petit jury panels,”⁹⁶ and there had also been a small, but not insignificant, number of jurors who had served as venirepersons.⁹⁷ This was evidently enough to overcome the fact that no Blacks had actually served on a petit jury in the county in question since about 1950.⁹⁸ To paraphrase the Court, the system may not have been perfect, but that was not necessarily synonymous with intentional discrimination.⁹⁹ This observation suggested the disturbing proposition that so long as a state at least appeared to be trying to permit integration of juries, albeit imperfectly and unsuccessfully, that would be constitutionally adequate. Fortunately, there was a bit more to the majority’s decision.

Besides raising arguments concerning the manner in which the pool of potential grand and petit juries were comprised, Swain also asserted the somewhat novel contention that there was intentional discrimination in the selection process itself. Specifically, he argued that the prosecution had utilized its peremptory challenges to exclude every Black individual from the jury venire solely on the basis of race.¹⁰⁰ In response, Alabama essentially contended that unimpeachable peremptory challenges were necessary to ensure fair and impartial jurors.¹⁰¹ In other words, the very nature of peremptories themselves wholly justified their use to strike “any group of otherwise qualified jurors in any given case,

94. *Id.*

95. *Id.*

96. *Id.* at 206 (emphasis added).

97. *Swain*, 380 U.S. at 205.

98. *Id.* The Supreme Court’s decision was rendered in 1965.

99. *Id.* at 209.

100. *Id.* at 210. As a part of this contention, Swain also alleged that the “systematic and arbitrary method of selecting the names of qualified male citizens by the jury commission of [the county] . . . [made] it . . . impossible for qualified members of the negro race to serve as jurors in [his] cause or any cause.” *Id.* at 211 n.6.

101. *Id.* at 211-12.

whether they be Negroes, Catholics, accountants or those with blue eyes.”¹⁰²

The Supreme Court acknowledged that the essence of the peremptory challenge was to eliminate prospective jurors on a somewhat arbitrary and unquestioned basis; otherwise, the challenge would not serve its noble function of assisting in the attainment of a fair trial.¹⁰³ Notwithstanding the historically lopsided, systematic, and wrongful exclusion of Blacks from juries, the Court equated them with Whites and other groups who had not suffered through a legacy of jury discrimination, remarking that “[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause.”¹⁰⁴ This observation, however, appeared to ignore the fact that Blacks, intentionally or unintentionally, made up a small portion of almost any jury venire and therefore could easily be eliminated entirely in order to obtain all-White juries.¹⁰⁵ Nevertheless, the Court concluded that to preserve the integrity of peremptories, a prosecutor’s basis for the exercise thereof in a particular case should not be questioned.¹⁰⁶

Although the Court’s pronouncement seemed to place legal imprimatur on intentional racial discrimination in jury selection through the use of peremptory challenges, it stopped short of fully

102. *Swain*, 380 U.S. at 212.

103. *See id.* at 220 (commenting that strikes are often made for arbitrary reasons).

104. *Id.* at 221.

105. *See supra* note 100. In a similar vein, Professor Randall Kennedy has aptly described the argument that “so long as everyone was subject to [peremptory challenges], . . . they could not be properly viewed as invidiously discriminatory” as “hauntingly reminiscent of segregationist logic which reasoned that governmental bans on interracial fornication, marriage, or transportation did not invidiously discriminate against blacks because whites, too, were burdened by the same laws.” KENNEDY, *supra* note 21, at 206, 207-08 (criticizing Justice Rehnquist’s dissent in *Batson v. Kentucky*, which was founded on this flawed reasoning); *see also* Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 70-81 (1993) (discussing the flaws associated with the theory of “colorblind constitutionalism”). The Supreme Court rejected this logic in *Batson*. *See* KENNEDY, *supra* note 21, at 208.

106. *Swain*, 380 U.S. at 222. Specifically, the Court held that the “presumption in any particular case must be that that the prosecutor is using the State’s challenges to obtain a fair and impartial jury to try the case before the court.” *Id.*

insulating such conduct by prosecutors. No matter how sacred, the Court recognized that there was a point at which the exercise of the peremptory challenge might constitute a violation of the Fourteenth Amendment. In particular, it held that:

[W]hen [a] prosecutor . . . , in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors . . . and who have survived challenges for cause, with the result that *no Negroes ever serve on petit juries*, [a] Fourteenth Amendment claim takes on added significance.¹⁰⁷

In other words, if it could be shown that prosecutors used their peremptory challenges to systematically prevent Blacks from serving on petit juries, then such strikes could be deemed unconstitutional, though not necessarily.

The Court was careful to note, however, that “[i]f the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.”¹⁰⁸ According to the Court, a defendant must, at a minimum, establish “the prosecutor’s systematic use of peremptory challenges against Negroes over a period of time.”¹⁰⁹ Robert Swain failed to meet this heavy burden,¹¹⁰ as did, no doubt, most if not all defendants who subsequently sought to prove the unconstitutional use of peremptories.¹¹¹ As observed by the dissent in *Swain*, the

107. *Id.* at 223 (emphasis added). Despite the seemingly absolute nature of the emphasized language, the Court’s decision likely requires something less than the complete and total exclusion of Blacks from petit juries over a substantial period of time. See Hoffman, *supra* note 11, at 831 (stating that in order to overcome the presumption that peremptory challenges were legitimately exercised, there must be a showing that some exclusion, but less than total, occurred over a substantial amount of time); see also *infra* text accompanying note 109.

108. *Swain*, 380 U.S. at 224.

109. *Id.* at 227.

110. *Id.* at 224-25; see also KENNEDY, *supra* note 21, at 196 (“The Court constructed a high evidentiary bar that defendants would have to surmount in order to substantiate any claims of illicit prosecutorial racial discrimination . . .”).

111. See *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986) (observing that lower courts’ interpretation of the holding in *Swain* “placed on defendants a crippling burden of proof,” which essentially immunized prosecutors’ peremptory challenges “from constitutional scrutiny”); Colbert, *supra* note 15, at 94 (noting

majority tacitly acknowledged the well established precedent outlawing discrimination within the jury selection process,¹¹² but simultaneously undermined the efficacy of that prior case law by erecting “additional barriers to the elimination of jury discrimination practices”¹¹³ These additional barriers remained in place, and the discriminatory use of peremptory challenges continued with the implicit approval of the high Court¹¹⁴ until its decision in *Batson v. Kentucky*.

2. The End of Racial Discrimination in Jury Selection?—*Batson v. Kentucky* and Its Progeny

In *Batson*, the Supreme Court reaffirmed its previous decisions soundly condemning the practice of excluding potential

that in the twenty-one years following *Swain*, “state and federal courts regularly rejected” claims regarding the alleged discriminatory use of peremptory challenges); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 782 (1999) (“*Swain*’s burden was intolerably high . . . and permitted prosecutors to exercise peremptory challenges to remove racial minorities from serving on a particular petit jury without fear of reversal.”); Hoffman, *supra* note 11, at 832-33 (discussing the extreme difficulty in meeting the *Swain* standard which prompted efforts by other courts, as well as Congress, to better regulate discrimination in the jury selection process); McMillian & Petrini, *supra* note 16, at 365 (observing that *Swain* “placed the state’s peremptory challenges beyond realistic scrutiny and effectively legitimized the exclusion of potential jurors for racial reasons alone”); *see also Swain*, 380 U.S. at 242 (Goldberg, J., dissenting) (noting that the majority “imposes substantial additional burdens upon Negro defendants . . . , because of its view of the importance of retaining inviolate the right of the State to use peremptory challenges”).

112. *See Swain*, 380 U.S. at 229-31 (Goldberg, J., dissenting) (using *Strauder* to articulate the Court’s reasoning in applying the Fourteenth Amendment to previous racial discrimination cases).

113. *Id.* at 231 (Goldberg, J., dissenting); *cf. Alschuler, supra* note 1, at 164 (observing that in “places like Talladega County [Alabama], the regime of peremptory challenges upheld in *Swain* reduced the requirement of nondiscrimination at earlier stages of the jury selection process to a mere symbol”).

114. *See KENNEDY, supra* note 21, at 197 (pointing out that the Court’s decision in *Swain* “effectively isolated from judicial review a device susceptible of extraordinarily efficient use in the Southern States’ [as well as other States’] effort to perpetuate the all-white jury”) (quoting Comment, *Swain v. Alabama: A Constitutional Blueprint for Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1174-75 (1966)).

jurors on the basis of race as repugnant to the Constitution,¹¹⁵ but departed from *Swain* with regard to the appropriate evidentiary criterion for determining whether peremptory challenges were utilized in a racially discriminatory fashion.¹¹⁶ Most importantly, the Court held that “a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.”¹¹⁷ Thus, defendants would no longer have to engage in the burdensome, and likely futile, undertaking of proving a historical pattern of racial exclusion in jury selection by a given prosecutor as required by *Swain*.¹¹⁸ As the Court noted, “[f]or evidentiary requirements to dictate that ‘several must suffer discrimination’ before one could object . . . would be inconsistent with the promise of equal protection to all.”¹¹⁹

Since *Batson*, in order to make a prima facie showing that a prosecutor has intentionally utilized peremptory challenges in a racially discriminatory manner, a defendant must first demonstrate that he or she is “a member of a cognizable racial group . . . and that the prosecutor . . . exercised peremptory challenges to remove from the venire members of the defendant’s race.”¹²⁰ In addition, the defendant who raises an objection is entitled to rely on a presumption that “peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to

115. *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

116. See Colbert, *supra* note 15, at 95 (observing that in *Batson* “the Supreme Court modified *Swain*’s ‘crippling burden of proof’”). The defendant James Kirkland Batson was Black and had objected to the prosecution’s use of its peremptory challenges to eliminate all Blacks from the petit jury in the context of his trial on charges of second-degree burglary and receipt of stolen goods. *Batson*, 476 U.S. at 82-83.

117. *Batson*, 476 U.S. at 96. Although the defendant apparently limited his argument solely to the Sixth Amendment, the Court nevertheless addressed and centered its holding around the Fourteenth Amendment’s prohibition against intentional discrimination based on race. The dissent strongly took issue with the majority’s so-called “judicial activism.” See *id.* at 112-18.

118. See *supra* text accompanying notes 107-09.

119. *Batson*, 476 U.S. at 95-96 (quoting *McCray v. New York*, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting)); see also Melilli, *supra* note 19, at 449 (noting that after *Batson*, criminal defendants could “establish a prima facie case of purposeful racial discrimination based upon the exercise of peremptory challenges in a single case, rather than by showing a pattern over many cases”).

120. *Id.* at 96. But see *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that a White defendant possessed standing to challenge the discriminatory striking of a Black prospective juror); *infra* text accompanying notes 135-37.

discriminate.”¹²¹ Lastly, a defendant must demonstrate that the foregoing “and any other relevant circumstances raise an inference that the prosecutor . . . exclude[d] veniremen from the petit jury on account of their race.”¹²² Considered together, such information establishes a prima facie case of intentional discrimination with regard to the jury selection process.¹²³

At this point the burden shifts to the prosecution to articulate a neutral explanation for the strikes exercised against prospective Black jurors in the case in question.¹²⁴ Other than requiring some relationship to the actual trial, the Court was not clear with regard to what would constitute an acceptable explanation.¹²⁵ The Court did, however, indicate that a simple denial of any discriminatory purpose, or reliance on the assumption that Black jurors would be more sympathetic toward Black defendants, would not be adequate.¹²⁶ In the final analysis, it would be the trial court’s province to determine the sufficiency of such explanations and, consequently, whether a defendant had met his or her burden of persuasion with regard to the establishment of intentional discrimination.¹²⁷

On its face, the *Batson* decision appeared to be a very positive step in the right direction. Nevertheless, as Justice Marshall indicated in his concurrence, despite the best of intentions on the Court’s part, there was little, if any, hope that *Batson* would actually “end the racial discrimination that peremptories inject into the jury-

121. *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

122. *Id.* Some of the relevant circumstances that a court might consider include, but are not limited to: (i) a pattern of challenges exercised against Blacks or questions posed; and (ii) comments made by the prosecution during voir dire. *See id.* at 97.

123. *Id.* at 96. Although the Supreme Court appeared to be endeavoring to set forth a straightforward formula for establishing a prima facie case, in the end its pronouncement was quite vague and gave little clear direction to litigants or to trial judges. *See KENNEDY, supra* note 21, at 210.

124. *Batson*, 476 U.S. at 97-98. This obviously overturned the holding in *Swain* that the prosecution’s peremptory strikes of Blacks were entitled to a presumption of legitimacy. *See id.* at 100 (White, J., concurring).

125. *See id.* at 98 (explaining that the “trial court . . . will have the duty to determine if the defendant has established purposeful discrimination,” but failing to set forth guidelines for the trial court in making that determination).

126. *See id.* at 97-98.

127. *Id.* at 98.

selection process.”¹²⁸ Justice Marshall accurately predicted that prosecutors would easily circumnavigate the “neutral explanation”

128. *Id.* at 102-03 (Marshall, J., concurring). Justice Marshall believed that the only avenue for truly eliminating racial discrimination during voir dire was through the complete abolition of the peremptory challenge. *See id.* at 107-08. Although persuasive, I do not agree with Justice Marshall’s conclusion and instead argue that peremptories serve a valuable purpose and should be retained; however, the mechanics for enforcing and monitoring racial discrimination in the jury selection process must be revised and strengthened. *See infra* Part IV; *see also* Colbert, *supra* note 15, at 100 (arguing that the abolition of peremptory challenges would “undermine[] the central role of the defendant’s peremptory challenge as an effective safeguard against governmental stacking of a trial jury”); Leipold, *Constitutionalizing Jury Selection*, *supra* note 34, at 983-84 (observing that peremptory strikes “can . . . serve as a useful back-up to the imperfect science of challenges for cause”); Melilli, *supra* note 19, at 486 (noting that judges “rely upon the peremptory challenge as a substitute for the meaningful examination of challenges for cause, which in turn causes trial lawyers to rely so heavily upon their peremptory challenges”); Montoya, *supra* note 16, at 985-86, 1000-03 (discussing important purposes served by peremptory challenges and results of a survey of practicing attorneys that supported these); Gordon, *supra* note 16, at 711 (discussing the importance of retaining peremptory challenges). For various arguments in favor of abolishing the peremptory challenge, *see* Alschuler, *supra* note 1, at 209 (contending that peremptory challenges “are not worth saving”); Hoffman, *supra* note 11 (arguing for the complete elimination of the peremptory challenge); Melilli, *supra* note 19, at 503 (examining reported *Batson* decisions from 1986 through 1993 and concluding that the time has arrived for “the peremptory challenge to go”); Morehead, *supra* note 16, at 640-41 (suggesting that peremptory challenges should be eliminated and possibly replaced with expanded challenges for cause); Ogletree, *supra* note 16, at 1148 (proposing the abolition of the government’s peremptory challenges in criminal cases and of all parties in civil cases, and the replacement thereof “with an expanded for-cause system”); Perea, *supra* note 19, at 50 (observing that the “best response to the potential for discrimination inherent in the peremptory challenge is to eliminate it altogether”). *But see* KENNEDY, *supra* note 21, at 230 (noting that, notwithstanding the arguments in favor of abolishing peremptory challenges altogether, such abolition is unlikely to occur). Another interesting argument for curtailing discrimination in jury selection is simply to reduce the number of available peremptories, rather than eliminating them altogether. *See* Baldus et al., *supra* note 16, at 121 (concluding from empirical study of capital murder cases in Philadelphia that “a dramatic reduction in the number of strikes available to each side, plus a larger share for defense counsel (10 vs. 5) would . . . eliminate the adverse effects of overly aggressive strike strategies”); Nancy J. King, *Batson for the Bench? Regulating the Peremptory Challenge of Judges*, 73 CHI.-KENT L. REV. 509, 524 (1998) (noting that an “option available to those interested in preserving the peremptory challenge in the jury context while minimizing its abuse is to reduce the number of peremptories available to litigants, making the challenge a much less effective tool for manipulating jury demographics”); *see also* Pam Frasher, Note, *Fulfilling Batson and its Progeny: A Proposed Amendment To Rule 24 of the Federal Rules*

requirement¹²⁹ and implied that the majority may have naively overlooked the powerful effect of unconscious racism on the exercise of peremptory strikes as well as on the judiciary's willingness to accept proffered neutral explanations.¹³⁰ Furthermore,

of Criminal Procedure To Attain a More Race- and Gender-Neutral Jury Selection Process, 80 IOWA L. REV. 1327, 1346-47 (1995) (stating that "increased voir dire with a reduced number of peremptory challenges would encourage informed choices . . . rather than the systematic exclusion of certain groups from the jury"); David D. Hopper, Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection*, 74 VA. L. REV. 811, 836-37 (1988) (noting that, if used in conjunction with the *Batson* inquiry, "fewer available challenges would translate into fewer opportunities to discriminate"). Though appealing and practical, such a proposal would nevertheless permit improper discrimination during voir dire, albeit at a reduced level. I believe that such egregious misconduct must not be tolerated, not even in small doses. Furthermore, the proposal would unduly curtail the beneficial use of peremptory challenges. See Gordon, *supra* note 16, at 712.

129. *Batson*, 476 U.S. at 106 (Marshall, J., concurring); see also Colbert, *supra* note 15, at 96 (observing that the "*Batson* remedy has proven to be ineffective against prosecutors whose trial strategy involves the elimination of prospective black jurors"); Morehead, *supra* note 16, at 633 (predicting that "[d]espite the *Batson* rule's noble purpose, it cannot prevent clever lawyers from using peremptory challenges to strike potential jurors based upon impermissible rationales so long as they pretend to use other, permissible bases"); see *infra* notes 207, 209, 215-16.

130. See *Batson*, 476 U.S. at 106 ("[A]n attorney may lie to himself in an effort to convince himself that his motives are legal."); see also KENNEDY, *supra* note 21, at 211 (observing that because of the quasi-judicial status of prosecutors as well as the strong negative implications that accompany a finding of a *Batson* violation, "judges tend to give the benefit of the doubt to prosecutors" in this regard); Colbert, *supra* note 15, at 99 (discussing examples supporting the accuracy of Justice Marshall's prediction regarding the likely effect of "unconscious racism"); Henning, *supra* note 111, at 792. As Professor Henning explained:

Given the problem with labeling a prosecutor as having engaged in intentional discrimination under *Batson*, and the effect of giving the prosecutor's explanation too close a review to create a record that might invite appellate reversal regardless of the fairness of the trial, a judge may well accept any modestly plausible explanation for the strike without pause.

Id.; see also *supra* note 19; *infra* notes 197, 209, 215-16. In one recent case, a judge stated on the record that his familiarity with the prosecutor supported the denial of defendant's *Batson* challenge. See *State v. Pennington*, No. 78878, 2001

any predisposition on the part of trial judges to believe the prosecution's race-neutral explanations would arguably be fortified by the fact that trial court decisions in this regard are entitled to great deference on appeal.¹³¹ Consequently, although the burden of establishing intentional racial discrimination in the exercise of peremptories would now be less onerous than under *Swain*, it would remain a significant hurdle.¹³² Moreover, when a *Batson* violation is established, there is no guarantee that a meaningful remedy will be granted, as the Court expressly declined to issue instructions regarding the implementation of its decision¹³³ or to specify an appropriate sanction. Instead, it left such critical determinations largely to the discretion of trial courts.¹³⁴

WL 1352648, at *5 (Ohio Ct. App. 2001). Specifically, the judge in *Pennington* stated:

I have to interject here not only the rationale of the prosecutor, which I find to be legitimate to an extent, but also knowing [the prosecutor], and I don't know if this is proper or not proper but I will say I do know him to be a fair man, maybe tough at times, but fair in the sense he doesn't look at race as a deciding factor in the case. And I found that because I have done multiple, multiple trials with him.

Id.

131. See *Batson*, 476 U.S. at 98 n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.").

132. See, e.g., KENNEDY, *supra* note 21, at 210-11 (observing that the difficulty in establishing a *Batson* violation stems from an inability to satisfy the Supreme Court's vague prima facie case standard as well as the even more onerous burden of demonstrating that a proffered race-neutral explanation for a peremptory strike was pretextual).

133. The Court currently has an opportunity to fill this void in its *Batson* decision. In *Miller-El v. Cockrell*, 112 S. Ct. 981 (2002) (mem.) (granting certiorari), *cert. amended* 122 S. Ct. 1202 (2002), it appears that, among other things, the Court may finally articulate what sort of evidence is appropriate, adequate, or both, to establish that a race-neutral explanation is pretextual. See *infra* notes 174-75 and accompanying text. This case was argued on October 16, 2002, and as of the publication deadline for this Article, a decision had not yet been rendered.

134. See *Batson*, 476 U.S. at 99. In particular, the Court stated that:

In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the

Notwithstanding its problems, *Batson* still represented a significant step toward eliminating racial discrimination from the jury selection process. In addition to expressly denouncing the racially discriminatory use of peremptories, the Court emphasized that the injury caused by this sort of discrimination impacts not only the criminal defendant in the case, but also, and perhaps more importantly, the excluded prospective juror and indeed the community as a whole.¹³⁵ This important point was underscored and extended by the Court in *Powers v. Ohio*,¹³⁶ in which the Court held that a White defendant possessed standing to assert a *Batson* challenge with regard to the striking of Black venirepersons. The Court reasoned that the discriminatory exclusion of Black jurors caused cognizable harm to the defendant, irrespective of his race, because such discrimination “casts doubt on the integrity of the judicial process . . . and places the fairness of a criminal proceeding in doubt.”¹³⁷ More importantly, not allowing a defendant to raise a *Batson* challenge in this context would mean that the true victims of the discriminatory conduct—the excluded juror(s) and the system itself—would effectively be without any remedy.¹³⁸

The *Powers* Court, however, stopped short of equipping its broadened version of *Batson* with any heretofore unarticulated procedural tools or potential remedies¹³⁹ that could have enhanced its efficiency in combating racial discrimination in jury selection. Instead, the Court, as in *Batson*, ceded the responsibility for developing such implementation-oriented details to the nation’s

venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.

Id. at 99 n.24 (citation omitted); *see also infra* Part II.D.4-5 (discussing the non-intimidating penalties imposed upon *Batson* violators).

135. *Batson*, 476 U.S. at 87.

136. 499 U.S. 400 (1991).

137. *Id.* at 411 (citations omitted).

138. *See id.* at 414-15 (noting that an excluded juror could institute a subsequent civil suit to vindicate his or her rights, but the difficulties associated with such actions make them very unlikely). *See also* Alschuler, *supra* note 1, at 194 (discussing the inability of an excluded juror to obtain any meaningful relief).

139. *See supra* note 134 and accompanying text; *see also infra* notes 230-32 and accompanying text.

innumerable and disparate trial courts.¹⁴⁰ Further, by giving White defendants the right to challenge the alleged striking of Black jurors,¹⁴¹ the Court commenced down a path of *Batson*-expansion that created a strong potential for over-challenging in the future—a development that would predictably breed skepticism regarding such challenges on the part of trial judges,¹⁴² whose determinations are essentially insulated from any meaningful appellate review.¹⁴³ When combined with the subsequent decisions that swelled the scope of the ban on the discriminatory use of peremptory challenges, the *Powers* holding actually diluted the strength of *Batson*'s original pronouncement and made it increasingly less likely that prospective *Batson* challenges would succeed.¹⁴⁴

Specifically, in *Hernandez v. New York*,¹⁴⁵ the Court appeared to ease the government's burden of articulating a race-neutral explanation for the alleged racially discriminatory use of peremptory strikes and granted even greater deference to trial court determinations regarding the legitimacy of such explanations. There,

140. See *Powers*, 499 U.S. at 416 ("It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice."); see also *Koo v. McBride*, 124 F.3d 869, 873 (7th Cir. 1997) ("[T]he Supreme Court has made it clear that the fashioning of a remedy is a matter upon which state courts are to be accorded significant latitude."); Ogletree, *supra* note 16, at 1105 ("[T]he actual consequences of *Batson* are largely up to widely divergent federal circuit and state supreme courts (at best), or to hundreds of trial judges in their capacity as finders of fact.").

141. The Court's decision was, of course, not simply limited to recognizing the right of White defendants to raise *Batson* objections with respect to the exclusion of prospective Black jurors. The *Powers* holding obviously applies to any defendant's ability to object to the racially discriminatory use of peremptory challenges to eliminate individuals of any race from the venire, whether or not the stricken juror's race matches that of the defendant. See *Powers*, 499 U.S. at 415 ("We conclude 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.") (emphasis added).

142. Though stated to make a different point, Justice Scalia's criticism of the majority's decision seems appropriate with regard to the effect of the Court's extension of *Batson*: "Today's supposed blow against racism, while enormously self-satisfying, is unmeasured and misdirected." *Id.* at 431 (Scalia, J., dissenting).

143. See *supra* note 131 and accompanying text.

144. See *Johnson, Batson Ethics*, *supra* note 11, at 482 (observing that *Batson*'s progeny "reveal a concomitant decrease in emphasis on the minority-race defendant's rights that ultimately detracts from the likelihood of reversals in even egregious cases").

145. 500 U.S. 352 (1991).

the Court held that a proffered non-racial rationale for exercising peremptory challenges that results in a disparate impact on a specific race of jurors would be sufficient to rebut a prima facie showing of a *Batson* violation.¹⁴⁶ According to the Court, “[u]nless the government actor adopted a criterion with the *intent* of causing the impact asserted, the impact itself does not violate the principle of race neutrality.”¹⁴⁷ The irony of this holding is that the Court seemingly failed to appreciate fully that disparate impact can itself constitute evidence of discriminatory intent,¹⁴⁸ and it thereby undermined the ability of defendants to make the necessary showing of intent.¹⁴⁹ In other words, the Court basically held that a reason for striking jurors that could give rise to an inference of intentional discrimination may actually be an acceptable response to a defendant’s establishment of an inference of intentional discrimination (i.e., proof of a prima facie case).¹⁵⁰ To top this off, the Court also held that the trial court’s determination in this context cannot be overturned unless clearly erroneous.¹⁵¹

In *Edmonson v. Leesville Concrete Co.*,¹⁵² the Court further emphasized that the racially discriminatory use of peremptory

146. See *id.* at 362-63. The defendant in this case objected to the prosecution’s use of four peremptory challenges to exclude potential Latino jurors. *Id.* at 356. Even prior to the finding that a prima facie case had been established, the prosecutor volunteered that his “race-neutral” reason for striking the jurors was a fear that they might not “accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses . . .” *Id.*

147. *Id.* at 362 (emphasis added).

148. The majority did concede that: “If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor’s stated reason constitutes a pretext for racial discrimination.” *Hernandez*, 500 U.S. at 363. This observation, however, still fails to acknowledge the inconsistency inherent in the Court’s holding. See *id.* at 375-78 (Stevens, J., dissenting). For an interesting discussion regarding the impact of the *Hernandez* decision on pretext analysis, see Gordon, *supra* note 16, at 696-99.

149. For a thorough discussion and analysis of *Hernandez* and its potential impact, see Perea, *supra* note 19.

150. But see *Hernandez*, 500 U.S. at 376 (Stevens, J., dissenting) (“An avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose.”).

151. *Id.* at 369.

152. 500 U.S. 614 (1991).

challenges violated the equal protection rights of the excluded juror¹⁵³ and also extended the reach of *Batson* to voir dire in civil cases.¹⁵⁴ The latter holding was not necessarily a negative development, but, as Justice Scalia noted, the Court's decision preordained the inevitable extension of *Batson* to criminal defense attorneys,¹⁵⁵ which occurred one year later in *Georgia v. McCollum*.¹⁵⁶ This modification, according to Justice Scalia, would "prevent the defendant from [using race-based strikes]—so that the minority defendant [could] no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible."¹⁵⁷ Thus, the Court's well-meant augmentation of *Batson* actually made it more difficult for Black litigants to obtain "racially diverse jur[ies]."¹⁵⁸

153. *Id.* at 618.

154. *Id.* at 618-29. This case involved a negligence suit by a Black construction worker against a concrete company whose employee allegedly allowed one of the company's trucks to roll backward and trap him against some equipment. *Id.* at 616. The defendant used two of its three peremptory strikes to eliminate prospective Black jurors, and the plaintiff requested that a race-neutral reason be offered for these strikes. The trial court and the court of appeals (en banc) held that *Batson* did not apply in the civil context because there was no state action involved. *Id.* at 617. The Supreme Court reversed. *Id.* at 631.

155. *Edmonson*, 500 U.S. at 644 (Scalia, J., dissenting).

156. 505 U.S. 42 (1992). Interestingly, this case involved two White defendants charged with the aggravated assault and simple battery of two Black victims. The defendants' counsel, concerned about the particular circumstances of the case, apparently expressed an intention, as well as a right, to utilize peremptory strikes to eliminate prospective Black jurors, which the State challenged. *Id.* at 44-45. The trial court held that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." *Id.* at 45. The Supreme Court ultimately reversed this decision. *Id.* at 59.

157. *Edmonson*, 500 U.S. at 644 (Scalia, J., dissenting).

158. *Id.* (Scalia, J., dissenting); see also *McCollum*, 505 U.S. at 69 (O'Connor, J., dissenting) ("In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions.") It should also be noted that the Court later expanded *Batson* in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), to protect against intentional gender-based discrimination in voir dire and thereby moved even farther away from the original premise of that decision. *Id.* at 155 (Rehnquist, J., dissenting) ("*Batson* is best understood as a recognition that race lies at the core of the commands of the Fourteenth Amendment."); cf. Johnson, *Batson Ethics*, *supra* note 11, at 482 (noting that the cases expanding *Batson* "reveal a concomitant decrease in emphasis on the minority-race defendant's rights that ultimately detracts from the likelihood of reversals in even egregious cases").

Furthermore, to make matters worse from this perspective, in *Purkett v. Elem*¹⁵⁹ the Court arguably facilitated an alleged *Batson* violator's ability to explain away his or her discriminatory peremptory challenges. In particular, the Court held that to rebut a prima facie showing of a *Batson* violation, one need not articulate an explanation for the allegedly discriminatory strike that is persuasive or even plausible.¹⁶⁰ According to the Court, it is not until the third step of the *Batson* analysis, a determination of whether or not the explanation offered is pretextual, that the issue of plausibility or persuasiveness comes into play.¹⁶¹ As described by the dissent, the Court seemingly held that "any neutral explanation, no matter how 'implausible or fantastic,' even if it is 'silly or superstitious,' is sufficient to rebut a prima facie case of discrimination."¹⁶² The Court did acknowledge that such justifications "may (and probably will) be found to be pretexts for purposeful discrimination,"¹⁶³ but that does little to temper the negative message communicated by its holding, i.e., that even the most ridiculous of rationales can, at least as an initial matter, overcome an inference of intentional racial discrimination.¹⁶⁴ If that is the case, how seriously can the public

159. 514 U.S. 765 (1995) (per curiam).

160. *Id.* at 768.

161. *Id.*

162. *Id.* at 775 (Stevens, J., dissenting) (citations omitted).

163. *Id.* at 768. The Court's observation, however, does not appear to be borne out by the case law. In particular, it seems as though most trial judges fail to even consider whether or not a proffered race-neutral explanation might be pretextual. See *infra* notes 207, 209 and accompanying text.

164. In fact, one would be hard-pressed to maintain that the explanations offered by the prosecution in *Purkett* were anything other than ridiculous, not to mention offensive and insulting. Specifically, the prosecution volunteered the following reasons for striking two Black prospective jurors:

I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. And number twenty-four had been in a robbery in a

really take the system's commitment to eradicating discrimination in the jury selection process?

Although it would be an exaggeration to lament that the Supreme Court's post-*Batson* decisions represent a return to *Swain v. Alabama* or earlier related precedents, it is not hyperbole to contend that Black litigants' ability to avoid all-White juries, or at least to impanel a reasonably diverse body of individuals, has not advanced significantly since that decision.¹⁶⁵ Admittedly, an all-White jury in 2003 certainly does not represent the seemingly insurmountable impediment to justice for African-Americans that it once did.¹⁶⁶ However, the perception of unfairness created by homogenous juries,¹⁶⁷ as well as the stigma of unworthiness or inferiority that

supermarket with a sawed-off shotgun pointed at his face, and I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have robbery you have to have a gun, and there is no gun in this case.

Purkett, 514 U.S. at 771 n.4 (Stevens, J., dissenting) (quoting Appendix to Petition for Certiorari at A-41); see also *infra* notes 209, 215 and accompanying text. Nevertheless, on remand, the court of appeals found no evidence of intentional bias. See *Elem v. Purkett*, 64 F.3d 1195, 1201 (8th Cir. 1995) (finding prosecutor's reasons to be "facially race-neutral" and that the petitioner made no effort to establish pretext). This appears to contradict the Court's prediction that farfetched explanations would likely be deemed pretextual. *Purkett*, 514 U.S. at 768.

165. See generally KENNEDY, *supra* note 21, at 232-55 (discussing continued under-representation of Blacks on juries, the causes therefor, and possible solutions). One commentator has observed that: "[W]hen African-Americans are included on a jury venire with an understanding that they will never serve as trial jurors, the humiliation of participating in this legal charade is as great 'a stimulant to . . . race prejudice [and] an impediment to securing . . . equal justice' as when black jurors were never even on the jury roll." Colbert, *supra* note 15, at 117 (citations omitted) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)) (omissions in original).

166. See *supra* note 15.

167. This perception of unfairness takes on a sense of reality when an all-White jury convicts a Black defendant, or acquits a White defendant accused of a crime against a Black victim. This may be the case even if the jury's verdict has some arguable basis in law and fact. A prime contemporary example of this is the verdict in the criminal trial of the police officers accused in the notorious Rodney King beating. There, the acquittal of the White defendants as to ten of the eleven charges against them by a jury devoid of any Black representation served as the catalyst for a spree of random violence and rioting that will not soon be forgotten. For discussions of the cases against the police officers, see Alschuler, *supra* note 15, at 706-07; Morehead, *supra* note 16, at 632-33; Nunn, *supra* note 105, at 63-67; Perea, *supra* note 19, at 1-2. See also KENNEDY, *supra* note 21, at 241 (noting

accompanies being stricken from a jury solely because of one's race, still remain.¹⁶⁸

As Justice Kennedy eloquently stated in *Edmonson*:

If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes. Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and

that "it was not simply the substance of the verdict that triggered rioting in the aftermath of the first trial of the police officers who beat Rodney King; it was that no blacks participated in finding an absence of criminal wrongdoing on the part of the officers"); King, *supra* note 30, at 1184 (observing that many attributed the acquittals of the police officers that beat Rodney King "to the lack of minority representation on the jury"); Underwood, *supra* note 11, at 748 n.107 (describing a case in Florida in which the governor cited the exclusion of Blacks from juries as a reason for riots).

In a similar vein, Professor Barbara Underwood has noted that racial stereotypes held by the public may lead to the belief "that an all-white jury will be biased against a black defendant, or . . . in favor of a white defendant accused of a crime against a black victim," which alone can undermine confidence in the fairness of verdicts. Underwood, *supra* note 11, at 748; *see also* King, *supra* note 30, at 1184 ("One of the central findings of procedural justice researchers is that procedures, independent of verdicts and sentences, influence the acceptance of criminal proceedings."). This harmful perception is solidified and exacerbated when an all-White jury in such cases appears to be the product of a race-based selection process. Underwood, *supra* note 11, at 749; *see also* Colbert, *supra* note 15, at 117 ("Unless black jurors are significantly represented on juries deciding [cases involving black defendants or crime victims], the thirteenth amendment's intent to ensure equal justice for African-Americans and to eliminate the stigma of racial inferiority will remain just another 'promise the Nation cannot keep.'") (quoting 4 W. BLACKSTONE, COMMENTARIES 343 (1760)); *cf. infra* note 170.

168. *See, e.g.,* Colbert, *supra* note 15, at 116 (maintaining that the "[p]eremptory striking of prospective black jurors is a badge and incident of slavery because it perpetuates blacks' inferiority"); *see also supra* notes 30-31 and accompanying text.

unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror.¹⁶⁹

Such profound recognition and condemnation of the problem of racial discrimination in jury selection is admirable and appropriate, as is the acknowledgment that a courtroom represents the ideal setting for dispelling race-based misconceptions. The latter observation, however, makes the continued existence of racial discrimination in the context of the “quiet rationality of the courtroom” all the more troubling. If racial equity cannot be expected in such an environment, how much faith and trust can Blacks and other minorities really place in our justice system?¹⁷⁰

The Supreme Court has obviously given thoughtful and sincere consideration to the constitutional prohibition on the racially discriminatory use of peremptory challenges. However, as Part II.D reveals, and as one might predict based upon the content of the Court’s *Batson* decisions, the enforcement of this constitutional ban has not been uniform, vigorous, or effective. Indeed, many palpable race-based peremptory strikes have been accepted by trial courts as

169. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

170. Professor Underwood has also aptly observed the damaging hypocrisy reflected by judges who do not adequately monitor racial discrimination against prospective jurors in their courtrooms:

Courts that permit race-based jury selection present themselves to the public as hypocrites. Courts in America today police almost every other major institution for compliance with antidiscrimination laws. The courts jeopardize their moral authority as chief enforcer of antidiscrimination norms, unless they impose the same requirements on themselves.

Underwood, *supra* note 11, at 749 (footnote omitted); *see also id.* at 758 (“[Jury discrimination] deprives the litigants of the confidence in the verdict that the jury system is meant to provide. It undermines the authoritativeness of both acquittals and convictions, and of civil verdicts as well.”); Henning, *supra* note 111, at 793 (“[A]sking prosecutors to defend their actions, and permitting judges to accept explanations that on occasion are, at best, barely plausible, does nearly as much harm to the integrity of the judicial system as peremptory challenges based on racial or sexual stereotype.”); *cf.* Colbert, *supra* note 15, at 125 (“[T]he racially mixed verdict would be a step towards legitimizing the criminal justice system in the eyes of the African-American community, which currently has little faith in the legal system’s ability to be fair and to dispense evenhanded justice.”); *see also* King, *supra* note 30, at 1183-85 (discussing how diversity in the composition of a jury may affect perceptions of fairness).

legitimate,¹⁷¹ and on the relatively rare occasions when *Batson* violations are actually found, the remedy normally granted is typically too ineffectual to deter future abuse.¹⁷² Furthermore, the Supreme Court's litany of cases in this area has so complicated the *Batson* doctrine that it is likely under-utilized and frequently misused or misconstrued when objections are raised.¹⁷³ In the currently pending case of *Miller-El v. Cockrell*,¹⁷⁴ the Court has yet another opportunity to clarify the *Batson* quagmire,¹⁷⁵ but whether it will and, if so, how far it will go remain unanswered questions at present.

171. See *infra* notes 204, 206, 212-14 and accompanying text; see also *supra* note 19.

172. See *infra* notes 228-40 and accompanying text.

173. See *infra* notes 203-05 and accompanying text; see also Cavise, *supra* note 16, at 541 ("The Supreme Court's requirements have created an excess of confusing procedure with little regard for the efficacy or utility of the result."); Einhorn, *supra* note 19, at 163 ("The Court's continuous chipping away of the peremptory challenge through expansion of the reach of the Equal Protection Clause [has] further complicate[d] this area of law.").

174. 122 S. Ct. 981 (2002) (mem.) (granting certiorari), *cert. amended* 122 S. Ct. 1202 (2002). In this Texas case, a Black defendant was convicted of capital murder in March 1986, shortly before the Court's decision in *Batson*. See *Miller-El v. Johnson*, 261 F.3d 445, 447-50 (5th Cir. 2001) (decision as to which Supreme Court granted certiorari). The prosecution used its peremptory challenges to remove ten of eleven Black prospective jurors, purportedly because of their views regarding the death penalty. See Linda Greenhouse, *Court Revisits Question of Jury Selection Bias*, N.Y. TIMES, Oct. 17, 2002, at A25. The trial court accepted these explanations notwithstanding evidence of longstanding and widespread racial discrimination in jury selection by the Dallas County prosecutor's office. See *id.* After exhausting his post-conviction relief efforts, the Supreme Court stayed the defendant's scheduled execution and granted certiorari to consider whether or not the court of appeals erred in evaluating his *Batson* claim. The Court heard oral argument on October 16, 2002, with the focus apparently on the propriety of a court's considering evidence of a previous pattern of racial discrimination in assessing whether a proffered race-neutral explanation is pretextual. See *id.*

175. See Greenhouse, *supra* note 174 (observing that the defendant's counsel "told the justices . . . that it was 'surpassingly important' for the court to use this case to demonstrate how the *Batson* decision's 'abstract rules' were supposed to work in practice").

D. *What the Cases Reveal—An Analysis of Batson Decisions in 2000 and 2001*

This Article's analysis of the *Batson* case law is limited to reported decisions¹⁷⁶ involving challenges based on alleged racial discrimination¹⁷⁷ for the years 2000 and 2001. Generally speaking, the results are unsurprising and continue to suggest that *Batson*, despite its undeniable importance, may currently be little more than a procedural hurdle that can readily be overcome, particularly by

176. As one might expect, these cases are mostly appellate decisions, but federal habeas corpus determinations are included as well. In addition, "reported decisions" encompasses cases retrieved from LEXIS and WESTLAW databases, regardless of whether or not they have been or will be officially published in a reporter.

177. In particular, the reviewed cases are those in which any party (plaintiff, defendant, or prosecutor) raised a *Batson* objection that was founded on racial discrimination, and in which the trial court actually addressed the objection. Ten cases were analyzed, but not included in the statistics, because the *Batson* objections were either waived or not substantively considered by the trial court as an initial matter. It may also have been simply unclear what the trial court did. No cases that involved challenges based on gender or other protected categories were analyzed. Nevertheless, I suspect that an analysis of those cases would probably produce similar results, and, as alluded to previously, the proposals suggested in this Article can and should be utilized with regard to all unlawful discrimination that occurs in the context of the jury selection process. Further, because my focus is primarily on what is being done at the trial court level in the first instance, we have not, for the most part, cited, analyzed, or considered subsequent appellate or remand histories beyond what is discussed in the decisions actually surveyed for the years 2000 and 2001.

In addition, it is certainly possible that my research assistant and I may have overlooked some cases that involved the racially discriminatory use of peremptory challenges, as our choice of search terms may not have been all-encompassing. However, even if the 318 opinions that were reviewed and analyzed do not constitute the entire universe of *Batson* racial discrimination decisions in 2000 and 2001, they nonetheless comprise a very representative and inclusive sampling. All of the cases that were considered pertinent are contained in two lengthy tables prepared by my very capable research assistant, Andrew Vail. Besides the style of the cases and citations, these tables also include, among other things: (1) discussion regarding whether or not the trial courts found that the objecting parties established *prima facie* cases; (2) discussion of the race-neutral explanations, if any, that were offered; (3) the trial courts' holdings; and (4) the reviewing courts' holdings. The substance of this Part of the Article is based in large part upon the contents of these tables, which, for purposes of citation, will hereafter be referred to respectively as "2000 *Batson* Table" and "2001 *Batson* Table." The tables are on file with the author.

prosecutors.¹⁷⁸ Consequently, the equal protection rights of prospective jurors are not being effectively protected. In fact, under the existing legal regime, the decisions analyzed seem to suggest that courts and lawyers may fail to fully appreciate the significance of such rights to potential jurors, as well as to the system as a whole.¹⁷⁹

1. Limitations Regarding the Scope of the Analysis

Before proceeding to discuss the reported *Batson* decisions from the past two years, it is essential to acknowledge some obvious limitations with regard to the scope of this information. First, all of the decisions in criminal cases, which will be the principal focus of my analysis,¹⁸⁰ consist of direct appeals or habeas petitions by convicted defendants. As such, these cases almost without exception involve either or both of two alleged “error scenarios”: (1) defense counsel’s *Batson* challenges being denied; and/or (2) prosecutors’ *Batson* challenges being granted. Consequently, the decisions analyzed shed virtually no light on how frequently trial courts grant *Batson* objections by defense counsel or deny them with regard to prosecutors.

Nevertheless, given the tone and content of many of the decisions, one can reasonably speculate that trial courts are not likely granting a large percentage of defense counsel’s challenges. One might also suspect that trial courts typically grant *Batson* objections raised by prosecutors. This latter suspicion, however, does not actually appear to be the case. Empirical and anecdotal evidence suggest that courts generally deny *Batson* challenges, whether broached by the defense or the prosecution.¹⁸¹ Notwithstanding this,

178. See *infra* notes 207, 209, 215-17 and accompanying text; see also Raphael & Ungvarsky, *supra* note 19, at 266 (“*Batson*’s neutral explanation requirement is, regrettably, a relatively simple hurdle for prosecutors to clear.”); *supra* note 19.

179. Cf. Baldus et al., *supra* note 16, at 123 (“[E]ach side tolerates the other side’s discriminatory use of peremptories out of fear that if they raise a claim, the other side will reciprocate with a claim, with the outcome uncertain for both sides.”).

180. See *infra* note 185 and accompanying text.

181. See Baldus et al., *supra* note 16, at 84 (observing that empirical data regarding capital murder cases in Philadelphia from 1981 through 1997 indicate that *Batson* claims are “rarely successful”); Melilli, *supra* note 19, at 465

the substance of the surveyed cases seems to indicate that courts are more likely to grant the prosecution's challenges than defense counsel's challenges.¹⁸²

One additional potential limitation or qualification on the case analysis which bears noting is that although the surveyed decisions were rendered in 2000 and 2001, the attorney behavior in question obviously occurred in preceding years. These cases, however, still represent the best reported evidence of recent *Batson* activity. As discussed later in this Article, a major failing with regard to the ban on the discriminatory use of peremptory challenges is the lack of accountability for one's conduct in this regard.¹⁸³ Until there is some system for tracking violations, reported decisions will remain the only real source for examining the scope and extent of such misconduct.¹⁸⁴

2. Prosecutors' Peremptory Challenges

The overwhelming majority of the cases analyzed involve *Batson* challenges raised by criminal defendants with regard to prosecutors' exercise of peremptory strikes.¹⁸⁵ Of course, in all of

(observing that "the odds are not with the *Batson* complainant ultimately prevailing"); Montoya, *supra* note 16, at 1002 (reporting that survey responses of prosecutors and defense attorneys indicated that one reason why the efficacy of peremptory strikes has not changed after *Batson* is that *Batson* challenges are rarely granted); William C. Smith, *Challenges of Jury Selection*, 88 A.B.A. J. 34, 37 (2002) (noting the observation of one federal district court judge in Kansas that "[m]ost challenged jury strikes easily survive judicial scrutiny"); *see also* Interview with Margareth Etienne, Professor, University of Illinois College of Law (April 12, 2002) (Professor Etienne is a former federal public defender in Atlanta, Georgia.); Interview with Patrick Keenan, Professor, University of Illinois College of Law (April 19, 2002) (Professor Keenan formerly defended death penalty cases as an attorney for the Southern Center for Human Rights).

182. *See, e.g., infra* note 222 and accompanying text; *see also* Melilli, *supra* note 19, at 457-61 (indicating much greater success rate for prosecutors as opposed to defense counsel with regard to *Batson* objections between 1986 and 1993); *supra* note 19.

183. *See infra* note 365 and accompanying text.

184. For a discussion of the need for the implementation of litigation misconduct databases to track misconduct that is routinely overlooked, *see generally* Brown, *supra* note 39.

185. Of the 318 cases reviewed, 301 were criminal cases, and 275 of those involved objections to prosecutors' exercise of peremptory challenges. *See generally* 2000 and 2001 *Batson* Tables; *see also* Melilli, *supra* note 19, at 457 (noting that "*Batson* is a tool used almost exclusively by criminal defendants").

these cases the prosecutors were necessarily at least partially successful in overcoming defendants' objections;¹⁸⁶ otherwise, the cases would not have been appealed.¹⁸⁷

Most notably, a relatively significant number of these decisions favoring prosecutors were reversed on appeal (or through habeas petitions) and/or remanded—a total of thirty.¹⁸⁸ Although

Because of the small number of reported civil cases involving *Batson* challenges, these decisions will not be discussed and analyzed separately, though at times references will be made to them.

186. There were a few cases in which the trial court granted in part and denied in part defendants' *Batson* challenges.

187. It should also be noted that there were eight instances in which both sides raised *Batson* objections at the trial level, and in these, the trial courts denied all of those raised by the defense. See *Overton v. Newton*, 295 F.3d 270 (3d Cir. 2002); *United States v. Randolph*, No. 98-5729, 2000 WL 92263 (6th Cir. Jan. 18, 2000); *Ex parte Pressley*, 770 So. 2d 143 (Ala. 2000); *People v. Box*, 5 P.3d 130 (Cal. 2000); *Humphrey v. State*, 759 So. 2d 368 (Miss. 2000) (defendant's *Batson* challenge was to an allegedly gender-based strike by the prosecution; trial court accepted the prosecutor's explanation); *People v. Harrison*, 708 N.Y.S.2d 433 (2000); *State v. Braxton*, 531 S.E.2d 428 (N.C. 2000); *Chavarria v. State*, No. 05-98-0595-CR, 2000 WL 567072 (Tex. App.—Dallas, May 9, 2000, pet. ref'd). The prosecution was successful, at least in part, on three occasions. See *Harrison*, 708 N.Y.S.2d 433; *Chavarria*, 2000 WL 567072; *Humphrey*, 759 So. 2d 368.

188. See *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001); *Eagle v. Linahon*, 279 F.3d 926 (11th Cir. 2001); *United States v. Raysor*, Nos. 99-1503, 99-1504, 2001 WL 357030 (2d Cir. April 10, 2001) (on remand, the trial court made specific findings and reaffirmed its decision denying defendant's *Batson* challenges, *Raysor*, No. 96 CR 339(S-2), 2001 WL 761185 (E.D.N.Y. May 14, 2001)); *Hardcastle v. Horn*, No. 98-CV-3028, 2001 WL 722781 (E.D. Pa. 2001) (habeas); *Durant v. Strack*, 151 F. Supp. 2d 226 (E.D.N.Y. 2001) (habeas); *United States v. Page*, No. 97 C 1079, 2000 WL 1466204 (N.D. Ill. Sept. 29, 2000) (habeas); *Harris v. Kuhlmann*, 115 F. Supp. 2d 326 (E.D.N.Y. 2000) (habeas); *Yancey v. State*, 813 So. 2d 1 (Ala. Ct. Crim. App. 2001); *McElemore v. State*, 798 So. 2d 693 (Ala. Ct. Crim. App. 2000); *Giles v. State*, 815 So. 2d 585 (Ala. Ct. Crim. App. 2000); *State v. Lucas*, 18 P.3d 160 (Ariz. Ct. App. 2001); *Burnett v. State*, 27 S.W.3d 454 (Ark. Ct. App. 2000); *People v. Silva*, 21 P.3d 769 (Cal. 2001); *People v. Reynoso*, 114 Cal. Rptr. 2d 635 (Cal. Ct. App. 2001), review granted, 41 P.3d 2 (Cal. 2002); *People v. Johnson*, 105 Cal. Rptr. 2d 727 (Cal. Ct. App. 2001), review granted, 26 P.3d 1039 (Cal. 2001); *State v. Rigual*, 771 A.2d 939 (Conn. 2001); *People v. Martinez*, 740 N.E.2d 1185 (Ill. Ct. App. 2000) (remanded for specific findings); *People v. Crockett*, 731 N.E.2d 823 (Ill. Ct. App. 2000) (habeas); *Graham v. State*, 738 N.E.2d 1096 (Ind. Ct. App. 2000); *State v. Bolton*, 23 P.3d 824 (Kan. 2001) (remanded for *Batson* hearing); *State v. Myers*, 761 So. 2d 498 (La. 2000); *Tanner v. State*, 764 So. 2d 385 (Miss. 2000); *Robinson v. State*, 761 So. 2d 209 (Miss. 2000) (remand); *Bogan v. State*, 811 So. 2d 286 (Miss. Ct. App. 2001); *People v. Pierrot*, 735 N.Y.S.2d 589 (2001); *People v. Lopez*, 725 N.Y.S.2d 339 (2001);

this “reversal” rate of 11%¹⁸⁹ may seem fairly small, it actually falls somewhat toward the high end of the typical range in criminal cases generally.¹⁹⁰ Moreover, the number seems particularly noteworthy in light of the degree of deference accorded to trial courts in these matters.¹⁹¹ This highlights the fact that there are definite problems with the application of *Batson* at the trial level—thirty potential errors were detected, but what about the other 244 cases, as well as the cases not included in this survey?¹⁹²

People v. Parson, 722 N.Y.S.2d 412 (2001); State v. McCord, 538 S.E.2d 633 (N.C. Ct. App. 2000) (remand); State v. Walker, 742 N.E.2d 1173 (Ohio Ct. App. 2000); State v. McClaney, No. 99AP-1035, 2000 WL 868582 (Ohio Ct. App. June 30, 2000).

It should also be noted that in one case, *Overton v. Newton*, 146 F. Supp. 2d 267 (E.D.N.Y. 2001), the district court granted defendant’s habeas petition, but that grant was reversed in 2002 by *Overton v. Newton*, 295 F.3d 270 (2d Cir. 2002). In addition, some initial reversals ultimately resulted in affirmances of findings that the prosecutors in question had not violated *Batson*. See, e.g., *Jordan v. Lefevre*, 206 F.3d 96 (2d Cir. 2000), *aff’d after remand*, 293 F.3d 587 (2d Cir. 2000) (on remand, trial court found that prosecution had not violated *Batson*, and Second Circuit held that this finding was not clearly erroneous). These cases have not been included in the thirty reversals. See also *Rodriguez v. Greiner*, No. 01CIV2161LAPDF, 2001 WL 1646305, at *1 (S.D.N.Y. Dec. 20, 2001) (granting motion for appointment of counsel to allow for briefing on *Batson* issue presented by pro se defendant); *Weaver v. Bowersox*, 241 F.3d 1024, 1032 (8th Cir. 2001) (reversing lower court’s granting of habeas petition on *Batson* claim); *State v. Jordan*, No. M1999-00813-CCA-R3-CD, 2001 WL 1218314, at *5-6 (Tenn. Ct. Crim. App. Oct. 11, 2001) (stating that trial court’s decision denying defendant’s *Batson* challenge would have been reversed and remanded for apparent failure to conduct hearing, but the court of appeals had other grounds on which to base reversal).

189. The percentage has been rounded up to the nearest whole number.

190. LAFAVE ET AL., *supra* note 84, § 27.1(a) (noting that the current general reversal rate in criminal cases ranges from 4% to 13%). It must be noted, however, that all of these decisions may not necessarily have been outright reversals or remands with regard to the *Batson* issue involved. In some, the *Batson* issue may have been one of several warranting reversal, or remand, or a component part of a broader issue. See, e.g., *Eagle v. Linahan*, 279 F.3d 926, 944 (reversing district court’s denial of habeas petition based on finding of ineffective assistance of counsel for failing to raise *Batson* claim on appeal).

191. See *supra* note 131 and accompanying text. In addition, as discussed later, none of the prosecutors (to the extent that any of them may actually have been found to have violated *Batson*) were apparently subjected to any sort of parallel disciplinary action for their *Batson* violations. See *infra* Part III.B. The remedy granted was one directed toward the system only—a new trial in many instances—and not the prosecutor individually. See *infra* notes 233-35.

192. See *supra* notes 177, 181 and accompanying text.

In terms of the substance of these decisions, it was often difficult to determine whether or not the trial courts expressly determined that defendants met their initial burden of establishing a prima facie case of racial discrimination under the *Batson* formulation.¹⁹³ Even in the absence of such express findings, however, it appears that trial courts routinely elicited race-neutral explanations from prosecutors, seemingly out of an abundance of caution.¹⁹⁴ Indeed, in some instances, the prosecutors offered race-neutral explanations for their allegedly racially discriminatory strikes

193. As the Supreme Court noted in *Hernandez v. New York*, however, “[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.” 500 U.S. 352, 359 (1991).

194. See, e.g., *United States v. Novaton*, 271 F.3d 968, 1003 (11th Cir. 2001) (finding that defendant failed to establish prima facie case, but still allowing prosecutor to offer reasons); *State v. Mitchell*, 808 So. 2d 664, 669-70 (La. Ct. App. 2001) (commenting that the trial court requested race-neutral explanations from prosecution even in the apparent absence of a prima facie showing of racial discrimination); *Gates v. State*, 789 So. 2d 117, 118 (Miss. Ct. App. 2001) (requiring prosecutor to state race-neutral explanations without ruling on the establishment of a prima facie case); *Sharpe v. State*, 531 S.E.2d 84, 89 (Ga. 2000) (finding that no prima facie case had been established, but still requiring prosecutor to articulate race-neutral explanations for challenged peremptory strikes); *People v. Easley*, 736 N.E.2d 975, 988 (Ill. 2000) (making no determination with regard to whether or not a prima facie case had been established by defendant and instead simply permitting the prosecutor to offer race-neutral explanations in response to *Batson* challenge); *Lockett v. Kemna*, 203 F.3d 1052, 1054 (8th Cir. 2000) (finding that, despite the fact that defendant failed to establish a prima facie case, the trial court nevertheless considered the prosecutor’s proffered race-neutral explanations in making its decision); see also *Smith v. State*, 797 So. 2d 503, 511 (Ala. Crim. App. 2000) (requiring that attorneys justify each peremptory strike exercised without the establishment of a prima facie case of a *Batson* violation); *State v. Evans*, 998 P.2d 375 (Wash. Ct. App. 2000) (holding as error the trial court’s requirement that parties make a preliminary showing of a race-neutral basis for the exercise of any peremptory challenge to be used against a prospective juror “of color”); Leipold, *Constitutionalizing Jury Selection*, *supra* note 34, at 1006 n.292 (observing that cautious judges require explanations for peremptory challenges even in the absence of the establishment of a prima facie case); Melilli, *supra* note 19, at 466 (noting “a pattern by some jurisdictions to either ignore the prima facie case threshold or to merge it with the *Batson* respondent’s explanations into a single criterion”); *supra* note 193. But see *Graham v. State*, 738 N.E.2d 1096, 1100 (Ind. Ct. App. 2000) (reversing trial court where it “offered its own race-neutral reasons for the State’s challenges of . . . two African-American potential jurors.”).

without any decision or prompting by the trial court.¹⁹⁵ It is also significant that, whether founded on the absence of a *prima facie* case or on the prosecution's articulation of acceptable race-neutral explanations, the final determination regarding *Batson* challenges at the trial level favored prosecutors, even when an inordinate number of minority prospective jurors had been stricken.¹⁹⁶

195. See, e.g., *State v. Murphy*, 747 N.E.2d 765 (Ohio 2001) (illustrating that prosecutor voluntarily articulated "race-neutral" reasons after striking two Black jurors); *United States v. Miles*, No. 99-50353, 2000 WL 968301, at *1 (9th Cir. July 13, 2000) (showing that prosecutor immediately offered race-neutral explanations for peremptory strikes following defendant's *Batson* objection). Such explanations were, of course, almost always accepted by trial courts in the context of the cases surveyed. See also Melilli, *supra* note 19, at 461 (noting high acceptance rate for prosecutors' explanations); Raphael & Ungvarsky, *supra* note 19, at 235 (revealing that a very small number of race-neutral explanations were rejected by courts according to an empirical study of *Batson* decisions through 1992).

196. See *United States v. Novaton*, 271 F.3d 968, 1000 (11th Cir. 2001) (prosecutor used six out of six strikes against Hispanic jurors); *Luckett v. Kemna*, 203 F.3d 1052, 1054 (8th Cir. 2000) (describing how, although prosecutor used eight of nine strikes to exclude Black jurors, the trial court found that this did not establish a *prima facie* case for a *Batson* violation because, among other reasons, the prosecution had not used *all* of its peremptory challenges to exclude all Blacks from the jury—the jury consisted of eleven Whites and one Black, as well as one Black alternate); *Birdine v. Hubbard*, No. C99-037 MJJ, 2000 WL 1229112, at *1 (N.D. Cal. Aug. 21, 2000) (prosecutor struck eight Black jurors); *United States v. Hartwig*, No. 99C5312, 2000 WL 1015935, at *3 (N.D. Ill. May 22, 2000) (prosecutor used five of seven available peremptory strikes to exclude Black jurors); *Ex parte Travis*, 776 So. 2d 874, 880 (Ala. 2000) (prosecutor utilized eleven out of twelve strikes against potential Black jurors); *Yancey v. State*, 813 So. 2d 1, 2 (Ala. Crim. App. 2001) (prosecutor used twelve of fifteen strikes to remove Black jurors); *Giles v. State*, 815 So. 2d 585, 586 (Ala. Crim. App. 2000) (prosecutor used eight out of eight strikes to eliminate Black jurors); *Jackson v. State*, 791 So. 2d 979, 1005 (Ala. Crim. App. 2000) (prosecutor struck four out of four Black jurors); *McElemore v. State*, 798 So. 2d 693, 696 (Ala. Crim. App. 2000) (prosecutor struck eight Black jurors); *People v. Ayala*, 6 P.3d 193, 201 (Cal. 2000) (prosecutor struck seven non-White jurors); *People v. Coulter*, 748 N.E.2d 240, 243 (Ill. Ct. App. 2001) (prosecutor used nine out of ten strikes against Black jurors); *State v. Alexander*, 1 P.3d 875, 883 (Kan. 2000) (prosecutor struck four out of four Black prospective jurors); *State v. Tilley*, 767 So. 2d 6, 13 (La. 2000) (prosecutor used eight out of eleven challenges to eliminate Black jurors, leaving but one on the ultimate panel); *State v. Jacobs*, 803 So. 2d 933, 960 (2001 La. Ct. App. 2001) (prosecutor struck nine out of eleven Black jurors); *Puckett v. State*, 788 So. 2d 752, 757 (Miss. 2001) (prosecutor struck four out of four Blacks); *Robinson v. State*, 761 So. 2d 209, 213 (Miss. 2000) (prosecutor used five out of five strikes against Black jurors); *Tanner v. State*, 764 So. 2d 385, 393 (Miss. 2000) (prosecutor used eleven of twelve strikes to eliminate Black

Some might argue that such determinations in favor of prosecutors with regard to alleged *Batson* violations stem from trial courts simply being “pro prosecution,” and therefore somewhat predisposed to believe ostensibly race-neutral explanations offered by prosecutors.¹⁹⁷ Others might contend that prosecutors have generally become more skillful at the art of subterfuge, as predicted by Justice Marshall in his *Batson* concurrence,¹⁹⁸ and possess an array of race-neutral rationales to volunteer when necessary.¹⁹⁹

jurors); *State v. Cherry*, 541 S.E.2d 205, 208 (N.C. Ct. App. 2000) (trial court found that defendant had failed to establish a prima facie case notwithstanding the fact that the *Batson* objection was made after prosecution had stricken the twelfth of fifteen African-American jurors); *State v. McKeithan*, 537 S.E.2d 526, 534 (N.C. Ct. App. 2000) (prosecutor struck eight potential Black jurors).

197. Of course, this appears to be precisely what the Supreme Court authorized in its decision in *Purkett v. Elem*, 514 U.S. 765 (1995). See also *supra* note 129 and accompanying text; Ogletree, *supra* note 16, at 1107-13. Notably, the Southern Center for Human Rights made the following observation regarding the receptivity of trial judges to explanations offered by prosecutors in Georgia:

Many judges are former prosecutors who may have hired the district attorneys appearing before them. Even if the judge is not personally close to the prosecutor, he or she may be dependent upon the prosecutor's support in the election to win re-election and remain in office. Thus, it may be personally difficult and politically dangerous for a judge to reject a reason proffered by a prosecutor for striking a person of color.

THE SOUTHERN CENTER FOR HUMAN RIGHTS, A PREFERENCE FOR VENGEANCE: THE DEATH PENALTY AND THE TREATMENT OF PRISONERS IN GEORGIA—A REPORT ON HUMAN RIGHTS VIOLATIONS IN GEORGIA 15 (1996).

Furthermore, in two seemingly extreme pro-prosecution examples, trial courts actually permitted prosecutors to proffer their race-neutral explanations in the context of ex parte hearings, and in one of these (*People v. Silva*), many of the explanations offered by the prosecutor were unsupported by the record. See *People v. Silva*, 21 P.3d 769, 796 (Cal. 2001) (reversing trial court's decision); *People v. Ayala*, 6 P.3d 193, 204 (Cal. 2000) (finding that trial court abused discretion in conducting ex parte hearing, but error was harmless); see also Ogletree, *supra* note 16, at 1129 (“If *Batson* is ever to deter prosecutors from exercising veiled race-based challenges (rather than simply punishing them for having already done so), the presence of defense counsel at the hearing where a prosecutor is first required to explain her conduct will be the swiftest way to create such an effect.”). It is also important to acknowledge that in some of these cases, defendants may have represented themselves, and thus would have been the ones who raised the *Batson* objections. In such cases, it would obviously be even more unsurprising that trial courts accepted the proffered race-neutral explanations.

198. *Batson v. Kentucky*, 476 U.S. 79, 102 (1986); see *supra* note 129 and accompanying text; *infra* note 216; see also Baldus et al., *supra* note 16, at 10

At the other extreme, some might maintain that prosecutors, by and large, simply do not discriminate on the basis of race in jury selection,²⁰⁰ or that defense counsel are almost uniformly inept in carrying their burden of proof with regard to *Batson* challenges. Still others might contend that trial courts are suspicious of *Batson* challenges, viewing them as tactical legal maneuvering that wastes the court's time and taxpayers' money.²⁰¹ As a result, they approach each objection with a virtual presumption in favor of a finding of no violation. In a similar vein, it is possible that some trial judges may be either overtly or subconsciously prejudiced in their racial views,²⁰² further contributing to their feelings of skepticism and strengthening their predisposition toward overruling *Batson* objections.

One final explanation may be that trial judges, and lawyers as well, often do not fully understand the law. For example, it does not appear to be uncommon for trial courts to overrule *Batson* objections because of a failure on the part of defense counsel to establish a pattern of racial discrimination in jury selection,²⁰³ which, even

(concluding that "prosecutors are considerably more successful than defense counsel in their attempts to control jury composition").

199. There is actually documented support for this view apart from mere anecdotal evidence. The Philadelphia District Attorney's Office was fairly recently taken to task for its apparent use of a training video to "school" its prosecutors with regard to overcoming *Batson* challenges. See Baldus et al., *supra* note 16, at 41-43; *Fear of a Black Jury*, HARPER'S MAG. 26 (July 2000) [hereinafter *Black Jury*]; see also *infra* note 218.

200. This, of course, is belied by the fact that thirty reversals, remands or habeas grants in 2000 and 2001 resulted from at least the possibility that prosecutors used peremptory challenges in a racially discriminatory manner. See *supra* notes 177, 181, 188-90 and accompanying text.

201. See *supra* note 22 and accompanying text.

202. See, e.g., Johnson, *Not to Say Race*, *supra* note 11, at 67-68 (discussing the potential for and possible problems associated with an unconsciously biased judge, as well as a consciously biased one, in the *Batson* context).

203. See, e.g., State v. Bolton, 23 P.3d 824, 825-26 (Kan. 2001) (outlining how a trial court relied on the absence of a *pattern* of discrimination in overruling defendant's *Batson* objection and was reversed and remanded for failure to conduct a proper *Batson* hearing); State v. Neal, 796 So. 2d 649, 654-55 (La. 2001) (recounting a colloquy between trial court and prosecutor indicating a clear belief on the trial judge's part that one must show a *pattern* of discrimination in order to establish a *Batson* violation); State v. Taylor, 781 So. 2d 1205, 1211 (La. 2001) (relating that court accepted prosecution's argument that no race-neutral explanation need be offered until a *pattern* of strikes had been established); Eagle v. Linahan, 279 F.3d 926, 931, 944 (11th Cir. 2001) (commenting that trial court denied defendant's *Batson* challenge despite observing that "I think both of you

though it may enhance one's effort to make a prima facie showing, is clearly not a prerequisite under the case law.²⁰⁴ Of course, any confusion that exists regarding the state of the law in this area may be attributable, at least in part, to the confounding nature of the Supreme Court's *Batson* jurisprudence itself.²⁰⁵

were doing what you could to get the different races off"; habeas petition granted because of this statement, among other things); *Jamison v. Duncan*, No. 01CIV2909(WHP)(GWG), 2001 U.S. Dist. LEXIS 18589, at *6 (S.D.N.Y. Nov. 20, 2001) (stating trial court denied *Batson* challenge because it didn't "see any pattern given the whole make-up of the twenty-two people that were selected") (emphasis added); *People v. James*, 2d Crim. No. B146461, 2001 WL 1468937, at *1 (Cal. Ct. App. Nov. 20, 2001) (reviewing trial court's denial of defendant's *Batson* challenge because "there was no pattern of race-based challenges") (emphasis added); *State v. Walker*, 742 N.E.2d 1173, 1175 (Ohio Ct. App. 2000) (discussing trial court's refusal of defendant's *Batson* challenge seemingly based upon the prosecutor's statement that a "pattern of discriminatory exclusion based on race has to be established by the defendant before a challenge can be considered") (emphasis added); see also *State v. Rigual*, 771 A.2d 939, 944 (Conn. 2001) (holding that trial court erred in denying *Batson* objection by Hispanic defendant based on finding that he was legally precluded from raising such a claim as to a Portuguese juror being struck); *Durant v. Strack*, 151 F. Supp. 2d 226, 236-38 (E.D.N.Y. 2001) (recommending that habeas petition be granted because the state trial court misapplied *Batson* by first noting the possibility that the prosecution's race-neutral explanation was pretextual and then backing up and overruling the defense's objection based upon a failure to establish a prima facie case of racial discrimination); *Bogan v. State*, 811 So. 2d 286, 288 (Miss. Ct. App. 2001) (evaluating trial court's statement that the "[s]tate must articulate some race neutral reason . . . [t]hat's all"); *State v. Myers*, 761 So. 2d 498, 502 (La. Ct. App. 2000) (reversing and remanding for new trial as a result of trial court completely ignoring defendant's *Batson* challenge); *Oblander v. USAA Casualty*, 792 So. 2d 1103, 1107 (Ala. Civ. App. 2000) (noting the trial court's indication that it would accept lawyer's statement as to the appropriate procedure for considering a *Batson* challenge); *State v. Evans*, 998 P.2d 373, 383-84 (Wash. Ct. App. 2000) (holding that trial court erred in sua sponte raising a *Batson* objection with regard to the defendant in the absence of a prima facie case of discrimination); *State v. Winkfield*, No. 99AP-555, 2000 WL 329016, at *3 (Ohio Ct. App. Mar. 30, 2000) (discussing an instance where the prosecutor erroneously argued that *all* Black jurors must be stricken before *Batson* applies). In many instances, errors of this nature were addressed on appeal or through collateral attack; however, one cannot help but suspect that numerous similar legal mistakes go uncorrected.

204. Indeed, the striking of a single juror could be sufficient to establish a *Batson* violation, depending on the facts involved. See, e.g., *Eagle v. Linahan*, 279 F.3d 926, 942 (11th Cir. 2001) (quoting *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986)).

205. See *supra* note 173 and accompanying text.

Though there may be a kernel of truth, if not more, to each of the aforementioned potential explanations, the unavoidable reality exposed by the cases, regardless of the reasons therefor, is that racial discrimination in jury selection is not being adequately addressed.²⁰⁶ Indeed, the analyzed decisions suggest that *Batson*'s inefficacy could potentially be assisting in the maintenance of an environment in which racial discrimination in jury selection is tantamount to a legitimate adversarial tool. This is evidenced in the cases by the somewhat routine manner in which trial courts seem to accept race-neutral explanations offered by prosecutors, often without even specifically examining whether the explanations were pretextual,²⁰⁷ as required by *Batson*.²⁰⁸ By failing to consider the possibility that a proffered explanation may merely constitute a pretext for racial discrimination, courts are, wittingly or unwittingly, essentially condoning such conduct, or at least facilitating it.²⁰⁹

In *United States v. Ramirez-Soberanes*,²¹⁰ for example, the trial court accepted as "race-neutral" prosecutorial explanations that quite obviously appeared to be nothing of the sort. The defendant in this case was a Mexican citizen charged with possession of a firearm

206. Even when there are reversals of convictions, one must still question how adequately that type of remedy actually addresses the constitutional harm inflicted on the juror, not to mention the professional misconduct of the prosecutors. See *infra* notes 235-37; see also *supra* note 16.

207. See, e.g., *Jones v. State*, 801 So. 2d 751, 760 (Miss. Ct. App. 2001) (affirming trial court's holding on remand that the state's explanations were not pretextual); *People v. Martinez*, 748 N.E.2d 1185, 1188 (Ill. App. Ct. 2000) (remanding to trial court because it failed to evaluate race-neutral reason offered by prosecutor); *Baldus et al.*, *supra* note 16, at 80 (describing an empirical study of capital murder cases, suggesting that trial courts are generally "extremely tolerant in accepting as valid the 'legitimate' explanations offered up for . . . challenged strikes"); *supra* note 181. But see *Wolfe v. State*, 544 S.E.2d 148, 152 (Ga. 2001) (noting that trial court found defendant's race-neutral reason to be pretextual).

208. See *supra* note 124 and accompanying text.

209. See *Raphael & Ungvarsky*, *supra* note 19, at 267 (outlining an empirical study of *Batson* decisions that revealed that courts appear to "lean far too heavily towards accepting prosecutors' rationalizations for their peremptory challenges and demanding few limitations on prosecutors' discretion to use strikes"); *Gordon*, *supra* note 16, at 699-710 (discussing the apparent willingness of trial courts to accept what seem to be pretextual "race-neutral" explanations for allegedly discriminatory peremptory strikes); see also *Melilli*, *supra* note 19, at 461 (noting that prosecutors' "neutral" explanations were believed by trial courts almost 80% of the time in published cases between 1986 and 1993); *supra* notes 19, 130, 197; *infra* notes 215-16.

210. No. 99-4097, 2000 WL 369348 (10th Cir. Apr. 11, 2000).

and ammunition by an illegal alien.²¹¹ During voir dire, defendant objected to the prosecution's exercise of a peremptory challenge against a Black woman.²¹² Outside the presence of the prospective jurors, the prosecutor explained to the court that he had stricken this particular woman not because of her race, but because of the possibility that she might sympathize with the defendant by virtue of her employment at McDonald's. In particular, the prosecutor sought to justify his strike as follows:

Well, I'm not prejudiced against her for being black If she was white, if she was Hispanic, if she was any other ethnicity, it is my experience that people who work at McDonald's have a lot of dealings with a large group of people, including aliens. And I don't know if there's any sympathies one way or the other, but because there is a propensity for her to have dealings with a large group of people, that may or may not have prejudiced her. I don't know. I just feel that it's sufficient.²¹³

The trial and appellate court's acceptance of this explanation as being "race-neutral" certainly seems inconsistent with the fundamental objectives of the ban on the discriminatory use of peremptory challenges. Indeed, as persuasively articulated by the dissent, the court's decision emasculates *Batson*, stripping it of any "practical significance."²¹⁴ Specifically, the dissenting judge contended that:

To justify the exercise of peremptory challenges, parties seeking to exclude minority venirepersons from juries, in deliberate contravention of the Supreme Court's *Batson* jurisprudence, henceforth need offer only "sympathy for minorities," by virtue

211. *Id.* at *1 (finding no error in district court's crediting the government's proffered race-neutral explanation for the peremptory challenge).

212. *Id.*

213. *Id.* at *2. In addition, the prosecutor noted in his defense that he had not exercised peremptory challenges as to two Hispanic jurors who had been on the venire. *See id.*

214. *Id.* at *8. (Lucero, J., concurring in part, dissenting in part).

of residence, family connections, or place of employment, as a transparent proxy for venirepersons' race, thereby eviscerating "the very idea of a jury . . . composed of the peers or equals of the [defendant]; that is, of his neighbors, fellows, [and] associates."²¹⁵

The bottom line appears to be that trial courts may look to the "race-neutral" explanation as the easiest or most efficient manner for dealing with *Batson* challenges.²¹⁶ Prosecutors are undoubtedly aware of this and recognize that they need only offer a moderately plausible (or possibly implausible)²¹⁷ rationale that avoids directly mentioning race in order to survive virtually any *Batson* objection.²¹⁸

215. *Ramirez-Soberanes*, 2000 WL 369348, at *8 (quoting *Batson*, 476 U.S. 79, 86 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879))) (alterations in original). For a recent case in which explanations having racial overtones were accepted by a trial court as "race-neutral," see *People v. Pierrot*, 735 N.Y.S.2d 589, 589-90 (N.Y. App. Div. 2001) (relating how trial court erroneously accepted as "race-neutral" the prosecutor's explanation that a strike was made because of the juror's "job as a corporate trainer in the affirmative action program of her employer . . . and her background in equal opportunity"). See also *Ogletree*, *supra* note 16, at 1110-13 (discussing *Wilkerson v. Texas*, 493 U.S. 924 (1989), and *Hernandez v. New York*, 500 U.S. 352 (1991)); *supra* notes 19, 130 and 209; *infra* note 216 and accompanying text.

216. See *supra* notes 19, 130, 207, 209 and accompanying text; see also *Montoya*, *supra* note 16, at 1006 (observing that a survey of practicing attorneys revealed a general belief that prima facie cases of *Batson* violations can easily be rebutted); *Raphael & Ungvarsky*, *supra* note 19, at 266 ("Even a prosecutor who has dismissed jurors for racial reasons can concoct a neutral explanation for his actions that the courts will accept as proof that his strikes were not racially motivated."); *Gordon*, *supra* note 16, at 698 ("So long as attorneys do not blatantly discriminate, they can offer pretextual reasons confidently, knowing that courts will not delve beyond an explanation's facial validity.").

217. See *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam); see also *supra* notes 130, 197, 215-16.

218. For example, a former Philadelphia assistant district attorney apparently offered the following advice to new prosecutors in a training video:

My advice is that when you do have a black jury [sic], question them at length. And mark something down that you can articulate at a later time if something happens, because only after a prima facie showing can the trial judge order you to show why you're not striking them on a racial basis.

Therefore, they keep a host of commonly offered and accepted reasons in their arsenal to be used whenever necessary.²¹⁹

Have them marked down so if the judge does come to you and says, "What about it, McMahon?" you can say, "Judge, these are my reasons, and I have them marked down here."

You want to ask more questions of those people so that you have more ammunition to make an articulable reason as to why you are not striking them for race.

Black Jury, *supra* note 199, at 26; *see also* *Commonwealth v. Basemore*, 744 A.2d 717, 732, 739 (Pa. 2000) (remanding case for an evidentiary hearing regarding *Batson* objection in light of the training videotape); *supra* notes 19, 216 and accompanying text; Cavise, *supra* note 16, at 532-35 (discussing examples of a number of "neutral" explanations that could serve as surrogates for race); Ogletree, *supra* note 16, at 1108 ("Many state trial courts have accepted explanations that are based on . . . characteristics that correlate with race." Examples of such characteristics include "[u]nemployment, lower education, and crime."); Gordon, *supra* note 16, at 699-705 (discussing various commonly accepted "surrogates" for race, such as residence, religion, membership in organizations, unemployment, and lack of education, among others). *But see* Melilli, *supra* note 19, at 482 ("Some explanations are so manifestly surrogates for targeted groups as to be plainly unacceptable.").

219. *See supra* note 215. The following are a few examples of the "race-neutral" rationales that were offered and apparently accepted in the cases analyzed: "might be overly sympathetic toward criminal defendants," *United States v. Hill*, 249 F.3d 707, 719 (8th Cir. 2001); "unemployed, had three children, watched soap operas, and did not exhibit activity in the community outside the home," *United States v. Jones*, 224 F.3d 621, 624 (7th Cir. 2000); wearing "blue jeans with holes," has an earring, and single with two children, *State v. Johnson*, 783 So. 2d 520, 526 (La. Ct. App. 2001); lived in a "bad neighborhood," *Baldwin v. State*, 784 So. 2d 148, 155 (Miss. 2001); "virtually unintelligible," "unemployed," "did not maintain eye contact," among others, *Harris v. Artuz*, No. 99 CIV 11229 DLC, 2001 WL 435636, at *1-2 (S.D.N.Y. April 30, 2001); concerned that juror would be "empathetic," *State v. McKinzie*, No. 00AP-1182, 2001 WL 604212, at *6 (Ohio Ct. App. June 5, 2001); indicated that the O.J. Simpson murder trial verdict was fair, *Shelling v. State*, 52 S.W.3d 213, 219 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd); wearing earring, rings, and a "gold medallion surrounded by at least twelve diamonds," suggested "liberal tendencies," *Sauls v. State*, Nos. 05-00-00538-CR, 05-00-00593-CR, 05-00-00638-CR 2001 WL 406582, at *1 (Tex. App.—Dallas Apr. 23, 2001, no pet.). In one case, *State v. Moody*, No. 98AP-1371, 2001 WL 242547, at *3-4 (Ohio Ct. App. Mar. 13, 2001), the court actually asked the prosecutor whether race factored into the decision to strike the Black panelist in question. A response of "no" seemed sufficient to satisfy the judge, notwithstanding the questionable nature of other explanations offered, such as that "certain answers" to the prosecutor's questions "didn't set" and that the panelist was "unemployed." *Id.* It should be noted that more than one explanation was

3. Defendants' Peremptory Challenges

The problems with the application of *Batson* are further elucidated by an analysis of the cases involving challenges made by prosecutors to defense counsel's exercise of peremptory challenges. Of the cases surveyed, there were only eighteen cases in which defendants'²²⁰ peremptory strikes were challenged as being exercised in a racially discriminatory fashion. In addition, there were eight cases in which both the prosecution and the defense made *Batson* challenges; the trial courts granted prosecutors' challenges in three of those, as compared to zero for defendants.²²¹

Although the number of reported decisions is small, trial courts' treatment of *Batson* challenges asserted against defense counsel seems to lend support to some of the possible explanations offered in Part II.D.2 for prosecutors' success in this regard. Indeed, the cases reviewed reveal that trial courts seem more likely to reject race-neutral explanations offered by defense counsel than by prosecutors,²²² possibly the result of the latter being viewed as

frequently offered, and it is typically unclear whether a court accepted all, some, or just one of the reasons offered. See Raphael & Ungvarsky, *supra* note 19, at 235. For a general discussion of various rationales that have been accepted by courts, see Raphael & Ungvarsky, *supra* note 19, at 237-66. Notably, however, there were some examples where acceptable reasons offered by the prosecution were rejected when offered by defense counsel. See, e.g., *infra* note 222.

220. It should be noted that in one case, the trial court raised the *Batson* objection sua sponte. See *State v. Evans*, 998 P.2d 373 (Wash. Ct. App. 2000) (holding that it was acceptable for a trial court to raise a *Batson* challenge sua sponte, but only when a prima facie case of discrimination exists). In addition, in at least one other case the defendant appeared to be acting without counsel. See *People v. Jones*, 720 N.Y.S.2d 509, 509 (N.Y. App. Div. 2001) (stating that the defendant acted pro se, but did have a "legal advisor"). Another interesting point in *People v. Jones* is that the appellate court actually found that the trial court erred in rejecting one of the defendant's race-neutral explanations. That error, however, was deemed harmless. See *id.* at 510-11.

221. See *supra* note 187. It should be noted, however, that in one case, *Humphrey v. State*, 759 So. 2d 368, 384 (Miss. 2000), the defendant's *Batson* objection, which the court denied, was based on gender rather than race.

222. Compare *People v. Sprague*, 721 N.Y.S.2d 205, 206 (N.Y. App. Div. 2001) (reversing trial court's determination that defense counsel's explanation that he struck a Black juror because she had her arms folded across her chest was pretextual), with *State v. Joseph*, 802 So. 2d 735, 741 (La. Ct. App. 2001) (relating that trial court accepted prosecutor's explanation that she struck juror because "[h]e sat with his arms crossed, looking at her with an air of dislike," among other reasons). Compare *Weeks v. State*, 804 So. 2d 980, 988-89 (Miss. 2001) (recounting that defense counsel's explanations that a juror was struck because of

having greater credibility in light of their roles as “attorneys for the government.”²²³ Significantly, eight out of the eighteen decisions in which defendants raised *Batson* objections were ultimately reversed on appeal, suggesting that trial courts may have too readily discounted the explanations of defense counsel in those cases.

The cases also imply that, generally speaking, unlike prosecutors, defense counsel may not have mastered the knack of proffering explanations that are more likely to be viewed as race-neutral by trial courts.²²⁴ Such attorneys undoubtedly have fewer opportunities to test their explanations than prosecutors²²⁵ and likely do not have a cadre of experienced counsel at their disposal, as

membership in the Republican Party, membership in the First Baptist Church, and support of the death penalty were rejected by the trial court), *with* *Russell v. State*, No. 05-99-02056-CR, 2000 WL 1758413, at *2 (Tex. App.—Dallas Nov. 30, 2000, no pet.) (commenting that prosecutor’s striking of juror based upon employment with business owned by Ross Perot, whom prosecutor deemed to be “very liberal,” was an acceptable race-neutral explanation for the trial court). *Compare* *State v. Stout*, No. 02C01-9812-CR-00376, 2000 WL 202226, at *7-8 (Tenn. Crim. App. Feb. 17, 2000) (explaining that trial court rejected as not sufficiently race-neutral defense counsel’s explanations of “not responsive” and not making eye contact, among others), *with* *Robinson v. State*, 761 So. 2d 209, 212 (Miss. 2000) (noting trial court’s acceptance of prosecutor’s reasons of inattentiveness and lack of eye contact, among others, as race-neutral, but remanding for failure to make the necessary findings). *But see* *Baldus et al.*, *supra* note 16, at 80 (concluding from Philadelphia-based empirical study that trial courts are *generally* tolerant of proffered explanations) (emphasis added); *supra* note 181.

223. *See supra* notes 130, 197, 209 and accompanying text.

224. *See, e.g.*, *United States v. Blanding*, 250 F.3d 858, 860 (4th Cir. 2001) (disagreeing with trial court’s finding that Black defendant’s counsel’s explanation that a White juror was peremptorily stricken because he had a Confederate flag bumper sticker was not race-neutral); *United States v. Allen-Brown*, 243 F.3d 1293, 1296 (11th Cir. 2001) (explaining that the White jurors were stricken because the venire was predominantly White and “we have no chance”); *People v. Willis*, 104 Cal. Rptr. 2d 450, 454 (Cal. Ct. App. 2001) (remarking that defense counsel argued, as a justification for strikes, that White males are not a protected class), *rev’d*, 43 P.3d 130 (Cal. 2002); *Williams v. State*, 548 S.E.2d 63, 65 (Ga. Ct. App. 2001) (pointing out that defense counsel indicated that one White juror was stricken because he was an architect who lived in North Macon, Georgia, and would not be familiar with the culture of the Black defendant); *United States v. Gordon*, No. 99-3679, 2000 WL 1785905, at **8 (6th Cir. Nov. 22, 2000) (supporting trial court’s rejection of defense counsel’s explanation for striking Black prospective juror because his client did not like the expression on the juror’s face, when counsel followed this up with the statement that “I would be the first to tell you that’s not a whole lot there to work with”).

225. *See supra* note 185.

prosecutors do, to offer advice in this regard.²²⁶ It is interesting to note that, of the cases in which prosecutors raised *Batson* challenges against defense counsel,²²⁷ a number involved defendants of color striking White prospective jurors. This, of course, may simply reflect that defense counsel in these cases indeed intentionally discriminated based on race, or else were unable to articulate acceptable race-neutral reasons for their challenged strikes.²²⁸ However, other more subtle influences could possibly have been involved, as well.²²⁹

4. The Modest Penalties Imposed for *Batson* Violations

In the instances in which *Batson* violations were found by trial courts in the cases surveyed,²³⁰ the penalties or remedies for such conduct seemed highly ineffectual in light of the important constitutional principles involved.²³¹ It appears that courts typically respond to *Batson* violations by either impaneling an entirely new group of potential jurors and recommencing voir dire, or placing the unlawfully stricken prospective juror on the jury.²³² Neither of these

226. See *supra* notes 199, 218. This is certainly not to say that defense counsel do not have resources to tap into for guidance in this regard, but likely not to the same extent as prosecutors.

227. This does not include the cases in which *Batson* challenges were raised by both sides. See *supra* note 187.

228. See Melilli, *supra* note 19, at 465 (“*Batson* respondents are less successful in generating acceptable explanations for peremptory challenges exercised on the basis of gender or against whites, as compared with peremptory challenges exercised against blacks or Hispanics.”).

229. For example, as suggested previously, some level of conscious or unconscious favoritism or bias could potentially affect *Batson* decisions. See *supra* note 202 and accompanying text.

230. These were situations where *Batson* challenges were granted in part and denied in part.

231. Cf. Baldus et al., *supra* note 16, at 77 (“[A]n absence of meaningful enforcement of *Batson* and *McCullum* supports a perception that only egregious patterns of discrimination will trigger a corrective response from the courts.”).

232. See *supra* note 134 and accompanying text; see also Alschuler, *supra* note 1, at 178 (criticizing both remedies); Cavise, *supra* note 16, at 544 (discussing problems associated with each remedy); Meagen R. Sleeper, *Recent Decisions: The Maryland Court of Appeals—Maryland’s Unfortunate Attempt To Define a Batson Remedy*, 57 MD. L. REV. 773, 779-80 (1998) (noting that in most states trial courts possess the discretion to select “between reseating the improperly challenged juror or striking the venire and beginning jury selection anew”); see,

represents a significant deterrent to exercising peremptory challenges in a racially discriminatory fashion. Indeed, one so inclined to utilize strikes in this fashion might reasonably conclude that the possible benefits actually outweigh the risks.

Specifically, if a trial court impanels a new body of prospective jurors in response to the unlawful exercise of peremptory challenges, the violator may be in a better position than if he or she had refrained from the wrongful conduct—i.e., the objectionable potential jurors will still have been excluded.²³³ On the other hand,

e.g., *United States v. Blanding*, 250 F.3d 858, 860 (4th Cir. 2001) (remanding case where trial court seated juror upon incorrectly finding that defendant had violated *Batson* in striking him). In addition, some jurisdictions appear to require one of the two remedies, rather than allowing for a choice as between either. *See Sleeper, supra*, at 780-81. It is also important to note, however, that a few courts seem to have taken *Batson* violations even more seriously and have been somewhat more creative in their responses thereto. In *People v. Willis*, 43 P.3d 130 (Cal. 2002), for example, the Supreme Court of California sustained the trial court's decision to sanction defense counsel monetarily for engaging in the discriminatory use of peremptory challenges against White male prospective jurors, rather than impose the typical remedy of dismissing the entire venire. The court held that, under *Batson*, trial courts possess the discretion to craft such non-traditional remedies, but only when "the complaining party waive[s] the usual remedy of outright dismissal of the remaining venire." *Id.* at 138; *see also* *Batson v. Kentucky*, 476 U.S. 76, 99 & n.24 (1986) (noting the diverse jury selection practices employed by various trial courts and refraining from articulation of specific instructions regarding the implementation of its decision); *McCrory v. Henderson*, 82 F.3d 1243, 1247 (2d Cir. 1996) (suggesting that one possible remedy for a *Batson* violation might be to call additional jurors to the venire and grant the objecting party additional peremptory strikes); *Gordon, supra* note 16, at 712 (discussing one case in which a court imposed a monetary sanction for a *Batson* violation); *cf.* *Hunt v. Harrison*, 707 N.E.2d 232 (Ill. Ct. App. 1999) (reversing trial court's dismissal of personal injury action with prejudice as sanction for a *Batson* violation).

233. *See, e.g., Willis*, 43 P.3d at 137 ("[S]ituations can arise in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial."); *see also* *Cavise, supra* note 16, at 544 ("[D]ismissal of the entire jury panel as tainted . . . gives the attorney a fresh start . . ."); *Ogletree, supra* note 16, at 1116 ("A prosecutor is no worse off after having attempted to exercise peremptory challenges against minorities based on their race than if he had not done so."); *Hopper, supra* note 128, at 837 ("Aside from lost time and potential reversal on appeal, the prosecutor faces little disincentive to remove minority members from the jury."). In fact, it is plausible that this remedy could encourage attorneys to commit *Batson* violations when they are generally unhappy with a given venire. *See* Cheryl A. C. Brown, Comment, *Challenging the Challenge: Twelve Years After Batson, Courts Are*

placing an improperly stricken juror on the jury avoids rewarding the wrongdoer in this manner and therefore certainly constitutes a more meaningful penalty. Nevertheless, this remedy is not very daunting to the *Batson* violator to the extent that he or she believes the juror in question to be strongly predisposed against his or her position in the case.²³⁴

There is, of course, another remedy that appellate courts can and do impose: reversal and the granting of a new trial.²³⁵ Though at first blush this seems like an aggressive remedy, the deterrent effect that may flow therefrom is minimal at best. Most significantly, it seems unlikely that the particular prosecutor in question will be personally singled out for his or her misconduct.²³⁶ Indeed, there is a

Struggling To Fill in the Gaps Left by the Supreme Court, 28 U. BAL. L. REV. 379, 409 (1999) (“[T]he possibility of a new jury venire may act as an incentive for using peremptory challenges in a discriminatory manner.”). Of course, it is also possible that the *Batson* violator could end up with a replacement venire that is less favorable than the original one, which might serve as a check on *Batson* violations. I suspect, however, that this potentiality does little to actually dissuade one inclined to exercise peremptories in a racially discriminatory fashion.

234. This, of course, will not always be the case, particularly if peremptory strikes are made in front of the venire members. Reseating wrongfully stricken jurors who know the identity of the “discriminatory striker” obviously can have negative repercussions with regard to the attorney’s case. See, e.g., Sleeper, *supra* note 232, at 774, 780, 784, 787 (explaining that reseated jurors may develop a feeling of resentment or rejection toward the challenger); see also Brown, *supra* note 233, at 410 (warning of the danger that a reseated juror may suspect that the challenge was discriminatory and might thus harbor hostility against both the attorney who made the challenge and that attorney’s client). Nevertheless, I think that such openness in the process is a good thing insofar as it serves as an ex ante check on the racially discriminatory use of peremptories. See *infra* notes 363-65 and accompanying text; Brown, *supra* note 233, at 410 (“[P]otential reinstatement of an excluded juror is a strong incentive for avoiding discriminatory challenges because the jury may no longer be impartial once [that] juror has been reseated.”). But see Sleeper, *supra* note 232, at 786 (noting that reseating wrongfully stricken jurors when voir dire is conducted in the open is “at odds with the defendant’s Sixth Amendment right to a fair trial”).

235. See Henning, *supra* note 111, at 787-88 (noting that, following *Batson*, “when an appellate court determines that the trial court should not have permitted the exercise of the peremptory challenge, the defendant receives a new trial automatically”). Professor Charles Ogletree has suggested that a more severe remedy should be granted when prosecutors are found to have violated *Batson*: “dismissal of the criminal prosecution with prejudice.” Ogletree, *supra* note 16, at 1117.

236. See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 404 (2002) [hereinafter Green & Zacharias, *Prosecutors’ Ethics*] (“[A]ppellate reversals based on prosecutorial

high probability that by the time a court issues an opinion in a given case, the prosecutor will have moved on to another position.²³⁷

An analogy to a common evidentiary objection, relevance, helps elucidate how these seemingly mild responses to the racially discriminatory use of peremptory challenges serve to trivialize the issue.²³⁸ In particular, a lawyer has little to lose by attempting to introduce evidence that is arguably not relevant.²³⁹ If an objection is not made, or if an objection is made and overruled, the evidence is admitted. On the other hand, if an objection is made and sustained,

misconduct rarely identify the misbehaving prosecutor by name.”); *see also id.* at 403 & n.80 (observing that remedies for prosecutorial misconduct are generally “ineffective because they do not impose consequences directly on an offending prosecutor”); Henning, *supra* note 111, at 830 (“If a message needs to be sent to a prosecutor, it must be transmitted directly and not by incidental means of granting relief to a defendant.”).

237. *See* Green & Zacharias, *Prosecutors' Ethics*, *supra* note 236, at 404 & n.80 (“Reversals frequently occur after the prosecutor has left office, so that even administrative reprisals will have no effect on him.”).

238. Such responses are plainly inappropriate in light of the seriousness of the violation. *See, e.g., infra* notes 375-76 and accompanying text.

239. Of course, if the evidence is plainly irrelevant, a lawyer seeking to introduce it would violate Model Rule 3.4(e). *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 67 (prohibiting a lawyer from alluding to any matter not reasonably believed to be relevant or “supported by admissible evidence”). Nevertheless, experience suggests that such evidence is offered on a fairly common basis. *See, e.g.,* WILLIAM H. FORTUNE, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY § 11.10 (2d ed. 2001) (noting that “such conduct may be commonplace in some courts,” but still may run afoul of Model Rules 3.4(c) and (e)). It must be noted, however, that prosecutors, unlike private attorneys, have a special obligation to “prevent or correct judicial and other procedural error.” Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 228 (2000) [hereinafter Zacharias & Green, *Uniqueness*]. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f (2000) [hereinafter RESTATEMENT] (noting that courts have observed that “lawyers representing a government client may not engage in certain practices that would arguably be permissible if engaged in by lawyers representing nongovernmental clients”); Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 632 n.115 (1999) [hereinafter Green, *Seek Justice*] (noting the prosecution’s “obligation to refrain from offering inadmissible evidence and to refrain from making erroneous legal arguments”). As a result, a prosecutor ideally should never intentionally seek to introduce evidence that he or she knows to be irrelevant. Furthermore, when irrelevant evidence is admitted, there arguably is a prosecutorial duty to apprise the court of the error. Such obligations, however, must be extremely difficult, if not impossible, to police.

the evidence is simply excluded—the offeror is probably no worse off for having tried.²⁴⁰ If a large number of such relevance objections are sustained, the offering attorney may receive some type of rebuke or warning, but likely little else.²⁴¹ Given the adversarial nature of our process, I suspect that few would regard such behavior, when not engaged in repeatedly, as anything other than legitimate advocacy. It is generally not viewed as an advocate's primary responsibility to discriminately sift the plainly admissible from the objectionable;²⁴² it is the duty and role of the opposing advocate to raise appropriate objections when necessary.

The same rationalization, however, is not directly transferable to the racially discriminatory use of peremptory challenges. Such so-called “advocacy,” by definition, constitutes the intentional deprivation of one's constitutional right to equal protection of the law. Treating such wrongful behavior in the same perfunctory manner as other aggressive litigation practices commonly engaged in by zealous advocates is truly to add insult to palpable injury from the perspective of the wrongfully stricken juror.²⁴³

240. *But see supra* note 239.

241. *See, e.g.,* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 89 (1995) [hereinafter Green, *Policing*] (“[S]tate disciplinary authorities generally seek to reserve resources for cases of the most egregious wrongdoing.”); *see also supra* note 239. Lawyers who engage in such abusive litigation behavior should certainly be dealt with in a more meaningful manner by both the court and the appropriate professional disciplinary authorities. Besides being procedurally repugnant, these types of courtroom practices likewise potentially run afoul of various ethical rules. *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.2, 3.4, 4.4 (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 62, 66-67, 79 (setting forth duty to expedite litigation, duty of fairness to opposition, and obligation to refrain from embarrassing or harassing third parties, respectively). For a discussion of a possible solution for one form of litigation misconduct (i.e., frivolous filings), *see Brown, supra* note 39.

242. *But see supra* note 239.

243. *See infra* notes 352, 375-76 and accompanying text; *see also* Montoya, *supra* note 16, at 1004-05 (indicating that courts spend little time dealing with *Batson* challenges).

5. Upshot—Good Intentions Are Admirable but Unavailing

Strong expressions of disapproval of racism in jury selection by the Supreme Court are significant, but its decisions seem to have been ineffective in adequately addressing the issue and indeed appear to have allowed for the legitimization, or at least insulation, of jury discrimination.²⁴⁴ It may have been possible and appropriate for the Supreme Court to have done more to effectuate meaningful enforcement of the anti-discrimination principles that it pronounced; however, whether or not that is true, the substance of its opinions firmly establishes the constitutional impropriety of a lawyer utilizing peremptory challenges in an intentionally discriminatory fashion. An ineluctable by-product of this fact is that any such behavior necessarily should constitute professional misconduct, at a minimum. As a result, states' professional disciplinary machinery can and should serve as a meaningful parallel source for reinforcing the prohibition against racial discrimination in jury selection.²⁴⁵ Unfortunately, as Part III of this Article reveals, the ABA and most states have failed to effectively address the issue as well.

III. PROFESSIONAL DISCIPLINE'S CIRCUMSPECT AND UNSUCCESSFUL FORAY INTO THE REGULATION OF DISCRIMINATION IN JURY SELECTION

A. *The Efforts of the ABA*

Over the past eight years, the ABA has made clear its position that discriminatory conduct exercised by a member of the bar is highly inappropriate and reflects negatively on the

244. Cf. Johnson, *Batson Ethics*, *supra* note 11, at 485 (arguing that in transferring the focus of the analysis from criminal defendants to jurors, "the rationales of the cases that expand *Batson*'s scope diminish the apparent moral weight of the obligation created by *Batson* . . . [and] . . . [t]he Supreme Court is clearly responsible for that diminution").

245. *But see* Charlow, *supra* note 18, at 62 (noting the difficult, if not insurmountable, task of asking courts to assess the intent and culpability of attorneys who make seemingly discriminatory strikes, and thus arguing that personal sanctions should not be imposed).

profession.²⁴⁶ Notwithstanding its unequivocal condemnation of this wrongful behavior, the ABA has refrained from actually making those who carry it out subject to professional discipline.²⁴⁷ Various proposals have been made in this regard, but all were either withdrawn or significantly diluted.

First, at the ABA's midyear meeting in February of 1994, it was proposed that Model Rule 8.4 be amended by adding a new paragraph that would render a lawyer guilty of "professional misconduct" if he or she "commit[ted] a discriminatory act prohibited by law or . . . harass[ed] a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status, where the act of discrimination or harassment [was] committed in connection with a lawyer's professional activities."²⁴⁸ This proffered amendment was submitted to the House of Delegates but withdrawn,²⁴⁹ as was a similar, though somewhat more circumscribed, proposal that would have made it improper for a lawyer to

knowingly manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. This paragraph does not apply to a lawyer's confidential communications to a client or preclude legitimate advocacy with respect to the foregoing factors.²⁵⁰

246. See generally American Bar Association Standing Committee on Ethics and Professional Responsibility Criminal Justice Section, Report 117 (Nov. 1997).

247. Of course, it should be kept in mind that the ABA is not itself an attorney disciplinary body, nor does it promulgate binding ethical rules; only states can do that. See *supra* note 24. However, the ABA's model provisions have been and remain the standard upon which most states base their ethical precepts. See *supra* note 24. As such, it is always appropriate to begin any discussion regarding the standards that govern the profession with the ABA's contribution.

248. ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982-1998 at 333 (1999) [hereinafter LEGISLATIVE HISTORY].

249. For a discussion of this proposal and the reasons for its withdrawal, see Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 796-800 (1996).

250. LEGISLATIVE HISTORY, *supra* note 248, at 334. The withdrawal apparently stemmed from concerns over whether such a rule would comport with the First Amendment. See Taslitz & Styles-Anderson, *supra* note 249, at 785.

This latter suggested revision was intended to address the concern that a lawyer's exercise of legitimate advocacy on behalf of a client not be unduly curtailed. Notably, in the proposed Comment to this amendment, the drafters indicated that the "best example of [such legitimate advocacy] is when a lawyer employs these factors, when otherwise not prohibited by law, in the selection of a jury."²⁵¹ Subsequent efforts to amend Model Rule 8.4 maintained this commitment to protecting a lawyer's freedom in the jury selection process.²⁵²

It is also significant to note that the ABA based the second proposed revision to Model Rule 8.4 on a similar provision in its 1990 Model Code of Judicial Conduct ("Judicial Code"), which prohibits judges from engaging in the same types of bias and prejudice.²⁵³ In addition, the revised version of Model Rule 8.4 was

251. LEGISLATIVE HISTORY, *supra* note 248, at 334. In all likelihood, the ABA was trying to permit lawyers to "discriminate" when not expressly unlawful and when designed to further the intent of the client. *See infra* notes 262-66. It is still difficult to reconcile this statement with an earlier one in the same Comment: "Discriminatory conduct toward others on bases that are generally viewed as unacceptable manifests a lack of respect for the law and undermines a lawyer's professionalism." LEGISLATIVE HISTORY, *supra* note 248, at 334.

252. *See generally* LEGISLATIVE HISTORY, *supra* note 248, at 335-39 (outlining successive attempts to address discriminatory behavior and illustrating the tension in narrowing the prohibitive scope to exclude only conduct that is "prejudicial to the administration of justice" and not based solely upon a court's finding that a peremptory challenge had a discriminatory basis). The ABA was also concerned about potentially violating the First Amendment rights of lawyers and therefore endeavored to tailor its proposed restrictions as narrowly as possible. *See, e.g., id.* at 338 ("[B]ecause manifestations of bias and prejudice sometimes include protected speech and because race, gender and other factors are sometimes legitimate subjects of consideration and comment in the legal process, the Model Rules have not been amended to prohibit such conduct.").

253. *See id.* at 334. The relevant section of the Judicial Code provides as follows:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) (1990), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 744.

also consistent with, and seemingly a necessary corollary to, Canon 3B(6) of the Judicial Code, mandating that

[judges] shall require lawyers in proceedings before [them] to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.²⁵⁴

Although each of the 1994 amendment efforts was unsuccessful, at the 1995 midyear meeting the ABA adopted a “policy statement” condemning all acts of discrimination by attorneys, whether in the courtroom or elsewhere.²⁵⁵ While

254. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3B(6) (1990), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 744.

255. *See* LEGISLATIVE HISTORY, *supra* note 248, at 335. The ABA’s policy statement reads as follows:

Resolved, That the American Bar Association:

- (a) condemns the manifestation by lawyers in the course of their professional activities, by words or conduct, of bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors and others, based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, *unless such words or conduct are otherwise permissible as legitimate advocacy on behalf of a client or a cause*;
- (b) opposes unlawful discrimination by lawyers in the management or operation of a law practice in hiring, promoting, discharging or otherwise determining the conditions of employment, or accepting or terminating representation of a client;
- (c) condemns any conduct by lawyers that would threaten, harass, intimidate or denigrate any other person on the basis of the aforementioned categories and characteristics;

undoubtedly a positive and laudable gesture, one cannot help but question the message that the ABA sent by relegating its condemnation of such inexcusable conduct to a mere statement of policy.²⁵⁶ This point is further underscored when one considers other types of behavior that the ABA has deemed worthy of blackletter prohibition, such as dilatory trial tactics,²⁵⁷ charging unreasonable fees,²⁵⁸ filing frivolous claims or defenses,²⁵⁹ or commingling client and attorney funds.²⁶⁰

Possibly not oblivious to the aforementioned inconsistencies, in 1998 the ABA again considered the prospect of amending Model Rule 8.4. This version contained the same general anti-discrimination principles, though limited only to race, ethnicity, and gender. However, unlike the prior iterations, the 1998 amendment provided that it could only be violated when a lawyer discriminated with the intent to abuse or to obtain a tactical advantage, or engaged in a continuing course of discriminatory conduct, provided that “such

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- (d) discourages members from belonging to any organization that practices invidious discrimination on the basis of the aforementioned categories and characteristics;
 - (e) encourages affirmative steps such as continuing education, studies, and conferences to discourage the speech and conduct described above.

Id. (emphasis added). The emphasized portion of this quote demonstrates the ABA’s consistent position that certain forms of bias or prejudice in the courtroom may constitute “legitimate advocacy.” For further discussion of the circumstances and debates surrounding the ABA’s decision to adopt a “policy statement” in lieu of a rule, see Taslitz & Styles-Anderson, *supra* note 249, at 800.

256. See Taslitz & Styles-Anderson, *supra* note 249, at 825-26 (“A statement . . . is particularly likely to fail in regulating racism, sexism and ethnic bias, which may be as comfortable and familiar as slippers to some, and which may long have proven to be an effective tool of bullying, brutalization and factfinder appeal.”).

257. See MODEL RULES OF PROF’L CONDUCT R. 3.2 (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 62.

258. See MODEL RULES OF PROF’L CONDUCT R. 1.5, *reprinted in* SELECTED STANDARDS, *supra* note 24, at 14-16.

259. See MODEL RULES OF PROF’L CONDUCT R. 3.1, *reprinted in* SELECTED STANDARDS, *supra* note 24, at 61.

260. See MODEL RULES OF PROF’L CONDUCT R. 1.15, *reprinted in* SELECTED STANDARDS, *supra* note 24, at 46-47.

conduct constitut[ed] harassment.”²⁶¹ Despite this very narrow focus,²⁶² which would have no doubt rendered it virtually impossible to enforce, the ABA did not adopt this proposed change either.²⁶³

At the same meeting, the ABA also proposed an alternative revision to Rule 8.4, one which would have added the following Comment but left the text of the rule unaltered:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).”²⁶⁴

261. LEGISLATIVE HISTORY, *supra* note 248, at 335-36. In particular, according to the amendment, it would be professional misconduct for an attorney to:

- (1) commit, in the course of representing a client, any verbal or physical discriminatory act, on account of race, ethnicity, or gender, if intended to abuse litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage; or
- (2) engage, in the course of representing a client, in any continuing course of verbal or physical discriminatory conduct, on account of race, ethnicity, or gender, in dealings with litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, if such conduct constitutes harassment.

LEGISLATIVE HISTORY, *supra* note 248, at 335-36.

262. There was apparently a sense that prior versions had too broadly defined what would constitute a violation. This amendment would permit “lawyers to advocate racist, sexist or otherwise discriminatory views of a client in or out of court . . . [and to] state their own racist, sexist or otherwise discriminatory views in most forums.” LEGISLATIVE HISTORY, *supra* note 248, at 337. The drafters hoped that the narrower focus would avoid successful constitutional challenge to the provision. See LEGISLATIVE HISTORY, *supra* note 248, at 337.

263. As with the previous amendments, it was submitted to the House of Delegates but subsequently withdrawn. LEGISLATIVE HISTORY, *supra* note 248, at 335.

264. LEGISLATIVE HISTORY, *supra* note 248, at 338; *accord supra* note 255.

This represented an undisguised effort to address the issue by carefully tip-toeing around it. Indeed, the discussion accompanying this proposal openly acknowledged this fact:

[B]ecause manifestations of bias and prejudice sometimes include protected speech and because race, gender and other factors are sometimes legitimate subjects of consideration and comment in the legal process, the Model Rules have not been amended to prohibit such conduct.

This amendment sought to *sidestep* the issue by proclaiming in the Comment that biased and prejudiced conduct can “prejudice the administration of justice” and therefore subject a lawyer to disciplinary action.²⁶⁵

The ABA’s watered-down Comment was not adopted until it added one final self-defeating limitation, purportedly to appease the criminal bar, which emphasized that a *Batson* violation standing alone would not establish a breach of Model Rule 8.4(d).²⁶⁶ This constraint, combined with the exception for discriminatory conduct that constitutes “legitimate advocacy,” as well as the provision’s mere status as a “Comment”²⁶⁷ to the rule, effectively renders the ABA’s well-intentioned efforts practically meaningless. In particular, under the current version of Model Rule 8.4, even if one

265. LEGISLATIVE HISTORY, *supra* note 248, at 338 (emphasis added).

266. See LEGISLATIVE HISTORY, *supra* note 248, at 339. The discussion accompanying the proposed Comment stated: “The last sentence was in deference to the criminal bar, which was wary that a decision by a lawyer to use a peremptory challenge to a juror might be viewed as discriminatory rather than one based on ‘instinct’ or some other subjective reasons.” LEGISLATIVE HISTORY, *supra* note 248, at 339; see also ANNOTATED MODEL RULES OF PROF’L CONDUCT 584 (4th ed. 1999) (explaining that the rationale for not making the finding of a *Batson* violation professional misconduct per se is “because of the difficulty of determining whether subjective reasons for striking a juror—such as body language, eye contact, or tone of voice—are neutral or indicative of the lawyer’s conscious or unconscious discrimination”). For the full text of the adopted Comment, see *supra* text accompanying note 25.

267. See MODEL RULES OF PROF’L CONDUCT Scope (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 7 (“The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”).

ascribes some authoritative, binding effect to the relevant Comment,²⁶⁸ it is virtually inconceivable that a lawyer would be disciplined for having committed a *Batson* violation.²⁶⁹ An examination of state disciplinary authorities' treatment of this sort of litigation behavior confirms this assessment.

B. *The Efforts of State Disciplinary Authorities*

Although the ABA frequently sets the standard for the ethical regulation of attorneys, only the regulatory machinery of the various states possesses the authority to enact and enforce binding rules of conduct.²⁷⁰ As such, state responses to the discriminatory use of peremptory challenges represent the true measure of the attention being paid to this problem. Unfortunately, a survey of what states have done in this regard reveals that they may share the same tentativeness as the ABA with respect to subjecting *Batson* violators to discipline.

State rule-making forays into this area seem to fall into one of two categories: (1) no specific rule that makes it a disciplinable offense for an attorney to engage in the racially²⁷¹ discriminatory use of peremptory challenges, but a general rule that arguably can be interpreted to address such misconduct;²⁷² or (2) an express rule that

268. *But see* MODEL RULES OF PROF'L CONDUCT Scope (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 7.

269. Not only does the language of the Comment itself seem to insulate those who commit *Batson* violations, it also discourages attorneys from even reporting such behavior to the appropriate disciplinary authorities, thus undermining the ethical duty to report. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3 (2001), reprinted in SELECTED STANDARDS, *supra* note 24 at 105; *cf.* Brown, *supra* note 39 (discussing how the current version of Federal Rule of Civil Procedure 11 serves to insulate certain litigation misconduct by discouraging reporting).

270. *See supra* note 24. The ultimate authority in this regard typically rests with the highest court of the state; however, the actual procedures for adopting ethical rules and disciplining attorneys varies from jurisdiction to jurisdiction. At present, 44 states and the District of Columbia have adopted versions of the Model Rules. *See* SELECTED STANDARDS, *supra* note 24, at 145-47.

271. I specifically focused on the racially discriminatory exercise of peremptory challenges, but, not surprisingly, the provisions in these states do not appear to vary with regard to the issue of gender-oriented discrimination.

272. For example, many states have general provisions fashioned after Model Rule 8.4(d) that prohibit conduct prejudicial to the administration of justice but fail to specifically address the issue of discrimination in jury selection either in the blackletter rule or the comments thereto. *See, e.g.,* ARIZ. RULES OF PROF'L CONDUCT R. 8.4(d); COLO. RULES OF PROF'L CONDUCT R. 8.4(d); CONN. RULES

explicitly delineates conduct constituting a *Batson* violation as at least potentially exposing a lawyer to professional discipline.²⁷³

OF PROF'L CONDUCT R. 8.4(d); LA. RULES OF PROF'L CONDUCT R. 8.4(4); ME. CODE OF PROF'L RESPONSIBILITY 3.2(f)(4); OR. CODE OF PROF'L CONDUCT DR 1-102(A)(5). Some other states that do not have a counterpart to Model Rule 8.4(d) do include versions of the Model Rule 8.4(c) prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation," which could arguably cover the discriminatory use of peremptory challenges as well. *See, e.g.*, ALASKA RULES OF PROF'L CONDUCT R. 8.4(c); GA. RULES OF PROF'L CONDUCT R. 8.4(a)(4); KY. RULES OF PROF'L CONDUCT R. 8.3(c); WIS. SUPREME COURT RULE 20:8.4(c). Rule 4.4 is another general provision that many states have adopted from the Model Rules that could be interpreted to address *Batson* violations. The ABA version of this provision states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." MODEL RULES OF PROF'L CONDUCT R. 4.4 (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 79. Some state versions of this rule, however, are much more specific with regard to the issue of discrimination. *See infra* note 273. Finally, several jurisdictions also have retained a provision that makes it professional misconduct to engage in any conduct that "adversely reflects on a lawyer's fitness to practice law." *See, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 8.4(g); KAN. RULES OF PROF'L CONDUCT R. 8.4(g); N.M. RULES OF PROF'L CONDUCT R. 16-804(h).

273. States have taken varying approaches to specifically addressing this type of conduct. For example, Missouri makes it professional misconduct to "manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability or age." MO. RULES OF PROF'L CONDUCT R. 4-8.4(g). States with this type of provision, however, typically include some type of limiting or qualifying language in the rules themselves or in the comments thereto that water down the force of the prohibition in a fashion similar to that of Model Rule 8.4(d). *See supra* notes 264-67 and accompanying text. Missouri's Rule 4-8.4(g), for instance, provides that it "does not preclude legitimate advocacy when race, sex, religion, national origin, disability or age, or other similar factor, are issues." MO. RULES OF PROF'L CONDUCT R. 4-8.4(g); *accord* ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(5); NEB. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5); N.M. RULES OF PROF'L CONDUCT R. 16-300; N.D. RULES OF PROF'L CONDUCT R. 8.4(d); WASH. RULES OF PROF'L CONDUCT R. 8.4(h). Ohio's provision does not contain this sort of qualifying language; however, its general scope only reaches conduct that is "prohibited by law." OHIO CODE OF PROF'L RESPONSIBILITY DR 1-102(B); *see also* IOWA CODE OF PROF'L RESPONSIBILITY DR 1-102(7) (prohibiting engaging in "sexual harassment or other unlawful discrimination on the basis of sex, race, natural origin, or ethnicity in the practice of law").

Rhode Island has a prohibition against discrimination that specifically mentions jurors and provides for no "legitimate advocacy" exception. Lawyers must not "engage in conduct that is prejudicial to the administration of justice, including but not limited to harmful or discriminatory treatment of litigants, jurors,

witnesses, lawyers, and others based on race, nationality, or sex.” R.I. RULES OF PROF’L CONDUCT R. 8.4(d) (emphasis added). Florida has a similar provision that goes even further with regard to the categories protected and the scope of the conduct prohibited. Lawyers “shall not . . . engage in conduct . . . that is prejudicial to the administration of justice, including to *knowingly*, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.” FLA. RULES OF PROF’L CONDUCT R. 4-8.4(d) (emphasis added). The comments to the Florida Rule, however, do contain some limiting language, though more narrow than that found in the Model Rules or other state provisions. The provision “does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.” *Id.* Texas also has an explicit rule prohibiting discrimination “in connection with an adjudicatory proceeding.” TEX. DISCIPLINARY R. PROF’L CONDUCT 5.08(a), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (Vernon 1998). However, such conduct in the context of jury selection is expressly exempt from the rule’s coverage—it “does not apply to . . . the process of jury selection . . .” TEX. DISCIPLINARY R. PROF’L CONDUCT 5.08(b). It should be noted, though, that the comment to this rule warns that lawyers must be mindful that “the use of peremptory challenges to remove persons from juries based solely on some of the factors listed in paragraph (a) raises separate constitutional issues.” TEX. DISCIPLINARY R. PROF’L CONDUCT 5.08 cmt. 4.

In New Jersey, a lawyer must not “engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.” N.J. RULES OF PROF’L CONDUCT R. 8.4(g). New York appears to focus more on discrimination in employment, making it professional misconduct to “[u]nlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation.” N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(6). California’s applicable rule has a similar focus, providing, “In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of a client.” CAL. RULES OF PROF’L CONDUCT R. 2-400(B).

Minnesota’s anti-discrimination provision appears to cover any discriminatory conduct by a lawyer, whether or not committed while acting in a professional capacity. This rule makes it professional misconduct for a lawyer to:

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- (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities;
 - (h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.

MINN. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.4(g), (h). Michigan's applicable rule provides that:

A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

MICH. RULES OF PROF'L CONDUCT MR 6.5(a).

In addition to its general prohibition against conduct that is prejudicial to the administration of justice, Colorado has a specific anti-discrimination provision that appears to proscribe the injection of race or related issues into a case when designed to create bias. Specifically, the rule makes it misconduct for a lawyer to engage "in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process." COLO. RULES OF PROF'L CONDUCT R. 1.2(f); *see also* IDAHO RULES OF PROF'L CONDUCT R. 4.4 (prohibiting "conduct intended to appeal to or engender bias against a person on account of . . . gender, race, religion, national origin, or sexual preference, whether . . . directed to other counsel, court personnel, witnesses, parties, *jurors*, judges, judicial officers or any other participants") (emphasis added).

The only jurisdiction that appears to expressly and unequivocally address the discriminatory use of peremptory challenges is the District of Columbia, and its rule only applies to prosecutors who "peremptorily strike jurors on grounds of race, religion, national or ethnic background, or sex." D.C. RULES OF PROF'L CONDUCT R. 3.8(h). The District of Columbia also has a more general provision that makes it professional misconduct to "discriminate against any individual in conditions of employment because of the individual's race, color, religion, national

However, irrespective of the scope of a given state's rule, no lawyers appear to have ever been disciplined for exercising peremptory challenges in a discriminatory fashion,²⁷⁴ and only one seems to have been subject to a formal disciplinary charge relating to allegations of this type of misconduct.²⁷⁵

The foregoing conclusions are based on telephone interviews or e-mail interviews, or both, with the representatives of the

origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap." D.C. RULES OF PROF'L CONDUCT R. 9.1.

For an interesting discussion of the possible constitutional problems posed by some of the broader versions of these anti-discrimination rules, see Brenda Quick Jones, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response To Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 18-49 (1993) [hereinafter Jones, *Ethical Rules*].

274. My research assistant and I intended and attempted to survey all fifty states and the District of Columbia; however, we were unfortunately unable to obtain a 100% response rate from the various disciplinary authorities that we contacted. Additionally, some of the authorities were never successfully contacted. Nevertheless, fairly definitive responses were received from thirty-five separate jurisdictions. These include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and Tennessee. Based on the uniformity of the answers obtained from this significant sampling, it seems reasonably safe to speculate that no lawyers have likely been disciplined for the racially discriminatory exercise of peremptory challenges. Notwithstanding this conclusion, it must be noted that there have been some instances of discipline with regard to conduct in violation of more general prohibitions regarding discrimination during the course of a representation. See, e.g., *In re Monaghan*, 743 N.Y.S.2d 519 (N.Y. App. Div. 2002) (censuring attorney for racially offensive verbal abuse of Black female opposing counsel); *In re Vincinti*, 554 A.2d 470 (N.J. 1989) (suspending lawyer for three years, in part, for comments that reflected racial innuendo); cf. *Cincinnati Bar Assoc. v. Young*, 731 N.E.2d 631 (Ohio 2000) (imposing discipline on lawyer for engaging in sexually harassing conduct, among other things); *Principe v. Assay Partners, HRO*, 586 N.Y.S.2d 182 (Sup. Ct. 1992) (sanctioning attorney \$500 for offensive and abusive comments to female attorney).

275. One lawyer in Illinois was formally charged for allegedly committing *Batson*-type violations. See *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html), *aff'd*, Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission (Aug. 8, 2002), at [http://www.iardc.org/newfilings_top_copy\(174\).html](http://www.iardc.org/newfilings_top_copy(174).html). But see *supra* note 274; *infra* notes 279, 285 and accompanying text. For a detailed discussion of *In re Hynes*, see *infra* text accompanying notes 287-315.

appropriate disciplinary authorities in a number of jurisdictions,²⁷⁶ as well as traditional legal research. The specific *Batson*-related questions posed in the interviews were the following:

- (1) Have any lawyers in your state been disciplined for racial discrimination in jury selection?
- (2) If so, how many and what were the details, including the nature of the discipline imposed, if any?²⁷⁷

Although I am reasonably confident that no jurisdictions have disciplined lawyers for this particular type of misconduct,²⁷⁸ several limitations on the survey must nonetheless be acknowledged. First, many jurisdictions do not maintain specific statistical records that could be readily consulted for accurate answers to the questions.²⁷⁹

276. See *supra* note 274. The bulk of these interviews were conducted and memorialized by my very competent research assistant, Rebecca Goldman. See *infra* note 277.

277. Two additional, more general questions were also asked: (1) Have any lawyers in your state been disciplined for any racially discriminatory conduct, generally?; and (2) If so, how many, and what were the details, including the nature of the discipline imposed, if any? For the most part, responses to these questions were the same as with regard to the first two, but there were definitely some instances of lawyers being disciplined for more general discriminatory conduct. See, e.g., *supra* note 274; cf. Randall Kennedy, "Nigger!" As a Problem in the Law, 2001 U. ILL. L. REV. 935, 940-44 (2001) (discussing termination of a prosecutor in North Carolina for using racial epithets in a local bar).

The results of this survey are contained in a log prepared by my research assistant, Rebecca Goldman. This log is on file with the author, as are e-mail responses from the disciplinary authorities that responded in that manner. For purposes of citation, the log will hereafter be referred to as "Discipline Log."

278. See *supra* note 274; see also *supra* note 34 and accompanying text.

279. See, e.g., Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1010-11 n.171 (2002) [hereinafter Zacharias, *Underenforced Professional Rules*] (discussing the difficulties of obtaining information with regard to disciplinary matters that do not appear in law reports). Indeed, jurisdictions that maintain statistics with regard to disciplinary matters do not typically keep track of violations in a specific enough manner to allow one to determine whether discipline may have been imposed for racial discrimination in jury selection. Cf. *id.* at 1020 n.219.

As a result, a number of the respondents based their replies on institutional memory or office practice, or both.²⁸⁰

In addition, a related limitation is that the information obtained was often qualified with provisos such as “to the best of my recollection” or “not to my knowledge,” or “not aware of any.”²⁸¹ These “wiggle” phrases leave open the possibility that some lawyers may have been disciplined for *Batson* violations, but the persons with whom we communicated were simply unaware of any.

With regard to the single formal disciplinary complaint against a lawyer for engaging in the racially discriminatory use of peremptory challenges,²⁸² it is probably not possible to proclaim with any degree of certainty that there have in fact been no others. In particular, states vary with regard to the level of confidentiality accorded throughout the various stages of the disciplinary process; thus in some instances there may be no way to determine whether such complaints were filed unless subsequent disciplinary action was taken.²⁸³ Furthermore, even where unsuccessful disciplinary complaints are not entitled to confidentiality protection,²⁸⁴ there is

280. For example, one jurisdiction indicated that it simply did not discipline lawyers for discrimination in jury selection, seemingly because of the absence of a specific ethical rule in this regard—a rationale that quite possibly informed other similar responses to the survey. See Discipline Log at 13.

281. See, e.g., Discipline Log at 1, 8, 12, 14. It should also be noted that a few respondents simply did not know whether or not such discipline had ever been imposed or else suggested that we conduct independent research to ascertain the answer.

282. See *supra* note 275.

283. See, e.g., DEL. LAWYERS' RULES OF DISCIPLINARY PROCEDURE R. 13 (stating that, with limited exceptions, disciplinary and disability proceedings and the official records of such matters are confidential); TENN. RULES OF DISCIPLINARY ENFORCEMENT § 25 (stating that all proceedings involving misconduct by an attorney shall be kept confidential, subject to very limited exceptions); DISCIPLINARY CODE FOR THE WYO. STATE BAR R. XXIV (stating that all proceedings involving allegations of misconduct by attorneys shall be kept confidential, subject to limited exceptions); see also *supra* note 279.

284. It appears that a number of states allow public access to certain disciplinary information once the process has reached the formal charging stage. See, e.g., ILL. RULES ON ADMISSION AND DISCIPLINE OF ATTORNEYS R. 766; N.C. DISCIPLINE AND DISABILITY RULES 1B § .0129; W. VA. RULES OF LAWYER DISCIPLINARY PROCEDURE R. 2.6; see also ABA CENTER FOR PROF'L RESPONSIBILITY, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(A) (1996) (providing that public access should be allowed following “a determination that probable cause exists to believe that misconduct occurred and after the filing and service of formal charges, unless the complainant or respondent obtains a protective order”). Oregon, however, appears to be the only jurisdiction

still no efficient way to determine whether certain categories of complaints were pursued unless the inquirer knows the specific name of the alleged offender.²⁸⁵ Nevertheless, as with the absence of any actual discipline, it seems relatively safe to conclude that the number of additional formal complaints for *Batson*-type misconduct is extremely small, if not non-existent.²⁸⁶ An examination of the content and tone of *In re Hynes*²⁸⁷—the one case that I was able to find—tends to support the reasonableness of this conjecture.

with a completely open system, permitting public review when a request for investigation is filed. See Lawrence H. Averill, Jr., *The Revised Lawyer Discipline Process in Arkansas: A Primer and Analysis*, 21 U. ARK. LITTLE ROCK L. REV. 13, 40 (1998) (stating that most states now restrict confidentiality more than in the past); Betty Weinberg Ellerin, *Open Disciplinary Hearings*, 69 N.Y. ST. B.J. May-June 1997, at 46 (citing the Oregon State Bar President's defense of openness in disciplinary procedures as beneficial to both lawyers and the public); Kristina Serafini Pennex, Note, *Lifting the Veil of Secrecy by Opening Michigan's Disciplinary System*, 73 U. DET. MERCY L. REV. 569, 578-79 (1996) (stating that, in Oregon, complaints about lawyers are available for public inspection as soon as the state bar receives the complaint).

285. See Zacharias, *Underenforced Professional Rules*, *supra* note 279, at 1020 n.219 (noting that almost no jurisdictions record information regarding the nature or the frequency of complaints with any specificity). Many jurisdictions do not appear to maintain such information online. Furthermore, with regard to those states that do maintain computerized records in this area, one would still have to scan every complaint, or description thereof, in order to determine the nature of the allegations of misconduct. Annual reports issued by disciplinary authorities are likewise not very helpful because of the broad and somewhat ambiguous categories designated. See, e.g., Annual Report of the Illinois Attorney Registration and Disciplinary Commission (2001) (describing possibly pertinent categories of complaints as "sexual harassment/abuse or violation of law prohibiting discrimination" or "conduct prejudicial to the administration of justice"), at <http://www.iardc.org/images/annreport01/chart2.gif> (last visited on June 20, 2002); see also *supra* note 279. For a proposal for the institution of "litigation misconduct databases" that would keep detailed track of this type of information electronically, see Brown, *supra* note 39, at 1555 (arguing for such a mechanism in order to curb the abuses of the so-called "safe harbor" provision).

286. See, e.g., Green, *Policing*, *supra* note 241, at 89 (noting that with regard to the discipline of federal prosecutors, "the dearth of reported disciplinary proceedings brought by state authorities . . . reflects that not only are they rarely reported, but such proceedings are also rarely initiated").

287. Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html), *aff'd*, Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission (Aug. 8, 2002), at [http://www.iardc.org/newfilings_top_copy\(174\).html](http://www.iardc.org/newfilings_top_copy(174).html). For an interesting commentary regarding the allegations

Although *In re Hynes* involved and addressed the issue of whether or not a *Batson* violation constitutes professional misconduct, the actual issue presented was narrower in light of the context of the case. Specifically, in his application for a judicial appointment in Illinois, John (“Jack”) Hynes had to disclose whether his “professional conduct or ability had been the subject of comment, favorable or unfavorable in a written opinion by any judge, court or other tribunal.”²⁸⁸ He responded in the negative,²⁸⁹ despite the fact that as a prosecutor²⁹⁰ he had previously been found, on two separate occasions, to have committed *Batson* violations, which were the subject of two Illinois Appellate Court decisions.²⁹¹ As a result of

against Judge Hynes, see Steven Lubet, *Racial Discrimination in Jury Selection*, CHI. TRIB., Nov. 14, 1999, at 21.

288. See *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html) (finding that Judge Hynes had no duty to disclose the previous violations and therefore did not commit any misconduct).

289. See *id.* The application had boxes that were designated “yes” or “no.” Judge Hynes simply checked the box marked “no.”

290. Judge Hynes was an Assistant State’s Attorney for Cook County, Illinois. See *id.*

291. *Id.* In the first case, *People v. Morales*, 719 N.E.2d 261 (Ill. App. Ct. 1999), the appellate court found that Judge Hynes (and his fellow prosecutor) had “failed to provide nonpretextual race-neutral explanations” for two peremptory challenges. See *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html). Notably, this case had been the subject of a previous appellate court decision in which it was determined that the defendants had established a *prima facie* case of the racially discriminatory use of peremptory challenges, in light of an intervening Supreme Court decision, *Powers v. Ohio*, 499 U.S. 400 (1991), that eliminated the requirement that the objecting defendant be of the same race as the challenged juror(s). See *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html). On remand, the trial court accepted the prosecution’s race-neutral explanations for the alleged improper strikes. See *id.* The case was then appealed again, and that decision is the one in which Judge Hynes was found to have violated *Batson*. It should be noted that the latter opinion was not rendered until after Judge Hynes had submitted his application. Furthermore, the “application, on its face, did not request that the applicant update the information supplied.” *Id.*

The second case that Judge Hynes failed to disclose, *People v. Walls*, 581 N.E.2d 264 (Ill. Ct. App. 1991), involved a trial of two Black defendants in which they sought a mistrial based on the prosecution’s alleged racially discriminatory use of peremptory challenges. See *In re Hynes*, Report and Recommendation of

his failure to reveal these court opinions in which his intentional discriminatory use of peremptory challenges was commented upon, Judge Hynes' application response was deemed to be false.²⁹² Accordingly, he was formally charged with having committed the following misconduct:

[1] conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(a)(4) of the Illinois Rules of Professional Conduct; [2] conduct which is prejudicial to the administration of justice, in violation of Rule 8.4(a)(5);²⁹³ and [3] conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute in violation of Supreme Court Rule 771.²⁹⁴

In his defense to these charges, Judge Hynes did not dispute the fact that he had previously violated *Batson* or that the appellate court had twice commented in writing upon his actions.²⁹⁵ Instead,

the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html). The trial court overruled their objection, finding that Judge Hynes (and his fellow prosecutor) had legitimately stricken three out of five prospective Black jurors for tactical reasons. See *id.* The appellate court reversed and remanded, holding that the trial judge's finding was clearly erroneous. See *id.* In particular, that court held that "the trial court erred, to the extent that it assessed the State's reasons at all, in finding that no discriminatory intent remained after the State proffered its rationale for excluding three of the five black jurors." *Walls*, 581 N.E.2d at 271-72.

292. See *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html) (stating that Hynes' response was false because his conduct had indeed been the subject of comment by Illinois courts in two separate criminal cases).

293. In addition to a general prohibition regarding conduct prejudicial to the administration of justice, this provision specifically provides that lawyers shall not: "engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, sex, religion, [or] national origin." ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(5). The provision, however, also contains the proviso that it "does not preclude legitimate advocacy when these or other factors are issues in the proceeding." *Id.*

294. *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html).

295. *Id.*

he asserted the technical argument that his “professional conduct” had not actually been the subject of comment in the court’s decisions.²⁹⁶ In particular, Judge Hynes believed that the application question sought only information regarding “ethical or moral conduct.”²⁹⁷ Furthermore, according to him, neither appellate court opinion “condemned his *ethical conduct* or commented on his *professional conduct*.”²⁹⁸ Apparently, other questions in this section of the application specifically inquired into “sanctionable conduct and discipline,”²⁹⁹ which suggested to Judge Hynes that this was the quality or nature of the conduct that would have been responsive to the inquiry in question.³⁰⁰

Judge Hynes’ interpretation was supported by the testimony of the very judge who authored one of the relevant opinions—Judge Robert C. Buckley.³⁰¹ Judge Buckley’s expression of his intent in the opinion, as well as his impression of the seriousness of a *Batson* violation, are quite revealing. Specifically, he testified that

he did not intend to make an unfavorable comment about [Judge Hynes’] professional conduct. He stated that “professional misconduct” refers to an action that is outrageous or that violates a moral code, such as baiting a judge into committing an error, hiding witnesses, misstating the record, borrowing money from clients, or committing sexual harassment.³⁰²

Although Judge Buckley did acknowledge that discrimination against a juror or litigant is “wrong,” he nevertheless maintained that

296. *Id.*

297. *Id.*

298. *Id.* (emphasis added).

299. *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html). In particular, this portion of the application (Part E) also asked such questions as whether the applicant had ever had his license to practice denied, revoked or suspended; or “whether [he] had ever been formally censured, adjudged or held in contempt or otherwise disciplined by a court.” *Id.*

300. *Id.*

301. Judge Buckley actually authored both appellate decisions in *People v. Morales*. See *id.*; see also *supra* note 291.

302. *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html).

no “professional misconduct” was committed in the case at issue—*People v. Morales*.³⁰³ He inexplicably attested that there was no finding made in *Morales* that the prosecution was guilty of racial discrimination.³⁰⁴ Judge Buckley also emphasized the difficult burden that the prosecution bore to articulate race-neutral reasons for the allegedly discriminatory strikes quickly.³⁰⁵ In addition, he somewhat disturbingly pointed out that the only ground for ruling that such explanations were pretextual is if the “same race-neutral reasons were not used for another juror.”³⁰⁶

In finding that Judge Hynes was not guilty of any misconduct, the Hearing Board maintained that it reached this conclusion without regard to Judge Buckley’s testimony.³⁰⁷ Notwithstanding this representation, the Board seemed to give due consideration to Judge Buckley’s statements and ultimately appeared

303. *See id.*

304. *See id.* Possibly, Judge Buckley was referring to the absence of any express statement in the opinion that Judge Hynes or his fellow prosecutor had acted in a racially discriminatory manner during jury selection. Of course, this ignores the incontestable fact that a finding of a *Batson* violation is indeed a finding of intentional discrimination, here, on the basis of race. Moreover, Judge Buckley’s opinion in the case actually states that “[t]he conclusion that best explains [the prosecution’s] inconsistent use of peremptory challenges is *racial motivation*.” *People v. Morales*, 719 N.E.2d 261, 269 (Ill. Ct. App. 1999) (emphasis added). *But see* Charlow, *supra* note 18, at 37 (noting that “pretext and discriminatory intent are often closely related, but not always coexistent”).

305. *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html).

306. *Id.* The Judge’s statement is troubling because, even though a lack of consistency with regard to peremptory strikes across racial lines is very strong evidence of pretext, it seems far too limiting to characterize it as the lone evidentiary basis for determining that a race-neutral explanation was pretextual. *See* Melilli, *supra* note 19, at 480 (noting that this lack of consistency in peremptory strikes “should not become the exclusive test for the adequacy of proffered explanations; otherwise many *Batson* violations can escape detection, either by chance or by design”); *see also* Gordon, *supra* note 16, at 706 (“Pretext . . . is much more likely when unequal application of a ‘peremptory policy’ is demonstrated.”). *But see* Gordon, *supra* note 16, at 706 (discussing examples of courts accepting ostensibly race-neutral explanations even when a non-minority juror with the same alleged disqualifying characteristic was not stricken).

307. *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html).

to fully adopt his view of the matter. Specifically, it focused exclusively on the issue of whether or not the omitted appellate decisions fell within the scope of the pertinent question on the judicial appointment application.³⁰⁸ According to the Hearing Board, revelation of those opinions was not required, because Judge Hynes' "actions were not criticized as being immoral, unethical or improper," nor was there any finding that "the prosecutors engaged in racial discrimination."³⁰⁹ Oddly, the Board contended that the appellate decisions concerned trial court error, rather than the conduct of Judge Hynes or the other prosecutors.³¹⁰ This, of course, ignores the fact that the errors in question involved the failure to find that the *prosecutors* had exercised peremptory challenges in a racially discriminatory manner.³¹¹

Ultimately, in recommending that Judge Hynes not be disciplined, the Hearing Board seems to have found that, when a lawyer is held to have violated *Batson*, one cannot automatically infer therefrom that the lawyer also engaged in racial discrimination; nor should one endeavor to extrapolate any sort of negative message from such a ruling in isolation. In the Board's view, Judge Hynes (or any other applicant for judicial appointment) would have only been required to disclose "opinions in which [his] behavior . . . [was] specifically focused on as an issue and a judgment was rendered in a manner which clearly and unmistakably singled out [his] personal character or conduct."³¹²

Judge Buckley and the Hearing Board were clearly reluctant to characterize the discriminatory use of peremptory strikes as professional misconduct. What Judge Hynes did in the two cases at issue was sufficiently egregious to warrant reversal of the convictions, but somehow not bad enough to necessitate disclosure thereof in the judicial appointment process.³¹³ The logic of this is, at

308. *Id.*

309. *Id.*

310. *Id.*

311. See Lubet, *supra* note 287, at 21 ("The case against Judge Hynes is not based on a couple of honest mistakes . . . [but] [r]ather . . . upon an established history of intentional discrimination.").

312. *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html). But see *supra* note 236.

313. Cf. Zacharias, *Underenforced Professional Rules*, *supra* note 279, at 1014 ("[W]hen a prosecutor engages in questionable public conduct or is castigated for misconduct in an appellate decision without being professionally

best, counterintuitive,³¹⁴ and further demonstrates the almost innate tendency within the litigation bar to treat the exercise of peremptory challenges as legitimate advocacy, whether used improperly or not.³¹⁵

The question that remains, of course, is: Why do lawyers, judges, and disciplinary officials seem to consistently regard racial discrimination in jury selection as not deserving of meaningful

disciplined, observers inevitably perceive that the codes implement a double standard.”); accord Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 773 (2001) [hereinafter Zacharias, *Discipline of Prosecutors*].

314. See Lubet, *supra* note 287, at 21 (observing that the charges against Judge Hynes would make it “extremely difficult for the public to have confidence in his ability to serve as an impartial judge”).

315. Even the dissent in the Hearing Board’s Report and Recommendation appeared unwilling to directly address Judge Hynes’s adjudicated misuse of peremptories, noting that his conclusions as to the Judge’s misconduct “should not be extended beyond the specific issue raised in this hearing, that is, whether [Judge Hynes] engaged in dishonesty or misrepresentation by failing to disclose opinions which were responsive to the question on the application form.” *In re Hynes*, Report and Recommendation of the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Nov. 21, 2001), at [http://www.iardc.org/newfilings_top_copy\(36\).html](http://www.iardc.org/newfilings_top_copy(36).html) (Bonds, dissenting). Nevertheless, the dissent did note that “[t]he observations and assessments of the appellate courts pertaining to [Judge Hynes’s] failure to provide race-neutral reasons for challenging jurors [were, in his mind], clear examples of comments on [Judge Hynes’s] professional conduct.” *Id.*

Furthermore, the Review Board of the Illinois Attorney Registration and Disciplinary Commission subsequently affirmed the Hearing Board’s Report and Recommendation in this matter. See *In re Hynes*, Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission (Aug. 8, 2002), [http://www.iardc.org/newfilings_top_copy\(174\).html](http://www.iardc.org/newfilings_top_copy(174).html). Although the Review Board’s decision adds little in terms of substance to the Hearing Board’s Report and Recommendation, the Review Board did find that the Hearing Board erred in admitting Judge Buckley’s (the appellate judge) testimony; however, that error was deemed harmless. *Id.*

The lone individual who focused directly on the *Batson* aspect of Judge Hynes’ conduct, rather than his failure to disclose the appellate decisions, was the dissenter from the Review Board’s Report and Recommendation, who rhetorically noted, “If a finding of a *Batson* violation, that is a failure of the attorney for the State to provide racially neutral reasons for excluding certain members of the venire, is not a showing that the attorney engaged in the conduct prohibited by Rule 8.4(a)(5), what would be?” *Id.* (Niro, dissenting in part and concurring in part).

attention from a professionalism standpoint? Part III.C ponders some possible answers to this query.

C. *Why Is Racial Discrimination in Jury Selection Not Viewed as Professional Misconduct?*

The preceding Parts established that lawyers are being found to have violated *Batson*, albeit on a relatively infrequent basis.³¹⁶ Furthermore, in many instances, even though not officially found to have committed such violations, lawyers undoubtedly still engage in the racially discriminatory use of peremptory challenges.³¹⁷ Nevertheless, as just discussed, attorneys are not being subjected to professional discipline for this misconduct. There are various possible, though unsatisfying, explanations for this troubling reality.³¹⁸

With regard to *Batson* violations that have actually been found, there is, in all likelihood, no subsequent discipline because no report is ever made to the appropriate professional authority.³¹⁹ As already suggested, at the trial court level, *Batson* challenges appear to be treated in a fashion similar to evidentiary or other relatively routine objections,³²⁰ the sustaining of which would result in a disciplinary referral in only the most egregious of circumstances.³²¹ Basically, conduct that may technically constitute a disciplinary violation is simply endured as a component part of our adversary system, or else judges and lawyers view the sustaining of an objection (whether under *Batson* or on some other ground) and the

316. See, e.g., *supra* notes 188-91 and accompanying text.

317. See generally *supra* Part II.D.

318. For a thorough discussion of possible explanations for the general lack of discipline with regard to prosecutors, see Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 755-65.

319. Lawyers and judges are, of course, ethically obligated to report certain professional misconduct of attorneys to the proper disciplinary authority. See MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 105; MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (1990), reprinted in SELECTED STANDARDS, *supra* note 24, at 747-48; see also Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 749 (noting that with regard to prosecutors, "[d]efense lawyers hesitate to antagonize adversaries with whom they must deal on a regular basis"). For a general discussion of some of the possible reasons that lawyers and judges fail to fulfill this duty, see Brown, *supra* note 39.

320. See *supra* text accompanying notes 238-43.

321. See *supra* note 241 and accompanying text.

granting of whatever relief goes along with that as sufficient to address the improper behavior in question.³²² Another possibility is that the bench and bar are unaware, or more likely do not believe, that the racially discriminatory exercise of peremptory strikes rises to the level of professional misconduct.³²³ *In re Hynes* is a vivid example of this latter point.³²⁴

Similar explanations are also plausible in situations where there has been no official finding of a *Batson* violation, but the conduct in question arguably still violates the applicable ethical rule prohibiting racial discrimination in the context of the representation of a client. Under these circumstances, a lawyer certainly has an ethical duty to report the misconduct to the extent that he or she reasonably believes it to have occurred, notwithstanding the trial court's overruling of his or her *Batson* challenge.³²⁵ This will most assuredly not occur. Lawyers will invariably view the judge's decision as the end of the matter, possibly establishing a basis for appeal, but undoubtedly not worthy of whistleblowing.³²⁶

322. As already discussed, the remedies that accompany findings of *Batson* violations are largely inadequate, particularly to the extent that the intent is to deter lawyers from engaging in similar conduct in the future. See *supra* Part II.D.4.

323. Indeed, Comment 2 to Model Rule 8.4 itself lends ample support to this perception by expressly indicating that a *Batson* violation does not necessarily constitute conduct prejudicial to the administration of justice in breach of Model Rule 8.4. See MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. [2] (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 107. In addition, it is possible that some judges believe that to the extent lawyers engage in professional misconduct in the context of litigation, that is simply a matter for the disciplinary authorities to uncover and address. Cf. Green, *Policing*, *supra* note 241, at 93 ("Federal district courts . . . regard prosecutorial misconduct as a problem to be addressed primarily by state disciplinary committees, if not by self-policing."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 47 (1991) [hereinafter Zacharias, *Structuring*] ("Courts have declined to strengthen legal and constitutional controls, based in part on the belief that independent professional regulation best constrains prosecutorial behavior.").

324. See *supra* notes 288-314 and accompanying text.

325. See *supra* note 39. But see Ogletree, *supra* note 16, at 1123 ("[W]hen facially neutral explanations are accepted in *Batson* hearings, there is nothing left to punish, and therefore no remedy for racism.").

326. One might reasonably perceive that filing a grievance against an attorney for the discriminatory use of peremptory challenges following the denial of a *Batson* challenge is an insurmountable hurdle to overcome in the disciplinary context. See *infra* note 241.

One final explanation for the dearth of professional disciplinary action with respect to the discriminatory use of peremptory challenges is that disciplinary authorities themselves do not take such misconduct seriously, or at least not as seriously as they should. First, as previously noted, many jurisdictions do not even have a rule that specifically designates such behavior as disciplinable, thus effectively removing this conduct from the misconduct “radar screen.”³²⁷ Second, some states that have enacted an express rule in this regard undercut the rule’s force in the same fashion as the ABA by unduly narrowing the scope of sanctionable behavior.³²⁸ Finally, and overarchingly, the crux of this apparent reluctance to exert ethical authority is more likely than not a widespread, though inaccurate, impression that this sort of litigation misconduct either rarely happens or, when it does, is really not that bad³²⁹ and is being adequately addressed by the trial and appellate courts.³³⁰ Admittedly, these latter rationalizations may be inspired, in part, by necessity. Given the limited resources of disciplinary authorities, they must pick and choose which offenses are most worthy of their attention.³³¹ This explanation, however, seems

327. See *supra* notes 271-72 and accompanying text.

328. See *supra* note 273 and accompanying text.

329. See *supra* text accompanying note 280; *supra* notes 301-13 and accompanying text; see also Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 754 (contending that in criminal cases, disciplinary authorities seem less likely to impose discipline “because of the heightened sense of combat that occurs” in this context).

330. See Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 754, 770 (noting also that disciplinary authorities “may be leery of interfering with, or having an undue effect on, the judicial process”); see also Green & Zacharias, *Prosecutors’ Ethics*, *supra* note 236, at 398 (“Disciplinary agencies often seem to conclude that, if the federal district court was not sufficiently troubled by the prosecutor’s conduct to impose a sanction, the apparent misconduct does not warrant a state disciplinary proceeding.”); Green, *Policing*, *supra* note 241, at 92 (noting that disciplinary committees may interpret a “district court’s silence as a determination that the [federal] prosecutor’s conduct was acceptable and, understandably, hesitate to take a contrary view”). But see *supra* note 323. For an insightful examination of the underenforcement of professional rules generally, and advertising prohibitions in particular, see Zacharias, *Underenforced Professional Rules*, *supra* note 279.

331. See Zacharias, *Underenforced Professional Rules*, *supra* note 279, at 997 (mentioning that “resource constraints prevent disciplinary authorities from fully enforcing” the professional rules); Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 756 (speculating that alternative remedies “may obviate” the need for disciplinary bodies to use their resources).

inapposite to the discriminatory use of peremptory challenges in light of the egregious and highly offensive nature of this form of professional misconduct.³³²

Nevertheless, whatever the reasons therefor, *Batson* violators are not being subjected to discipline, and hence there is really no disincentive for exercising peremptory challenges in a discriminatory fashion.³³³ As a matter of fact, considering the low probability of judicial detection or ethical censure, there are actually incentives or justifications that exist for engaging in this type of litigation misconduct.³³⁴

D. Justifications for Discrimination—Zealous Advocacy and the Special Role of the Prosecutor

One possible justification for why lawyers engage in the discriminatory use of peremptory challenges is their ethical commitment to the fulfillment of the duty of zealous advocacy.³³⁵

332. See Zacharias, *Underenforced Professional Rules*, *supra* note 279, at 997 (observing that disciplinary officials look to factors such as “the severity of the offense, the deterrent effect of prosecution on this and other offenders, the likely cost of prosecution, the nature of the offender, and the effect of enforcement or lack of enforcement on the image of the bar”); Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 765 (noting with regard to prosecutors that “[w]hen violations are particularly serious and the prosecutors involved are unlikely to be punished by other means, the bar’s intervention may be required to maintain society’s confidence in the disciplinary system”); see also *id.* at 767-68 (pointing out the possible need for disciplinary authorities to focus on violations known or believed to recur frequently).

333. See Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 772 (noting that “when disciplinary agencies fail to enforce the codes altogether, or fail to enforce them against a segment of the bar, they encourage disrespect for the codes’ letter and spirit”); cf. Zacharias, *Underenforced Professional Rules*, *supra* note 279, at 1006 (observing that significant underenforcement of the rules pertaining to advertising “breeds disrespect for professional regulation . . . [and] may encourage lawyers to violate or bend other professional rules”).

334. See, e.g., Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 771 (observing that in the absence of a meaningful threat of court sanctions or professional discipline, “prosecutors have every incentive, and little disincentive, to engage in violations that will help them produce convictions”). See also *supra* note 333.

335. See Abbe Smith, “Nice Work If You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 *FORDHAM L. REV.* 523, 565-67 (1998) [hereinafter Smith, *Nice Work*] (arguing for this justification with regard to criminal defense lawyers); see also *infra* note 342. Generally speaking, Canon 7

Succinctly stated, the argument is that a lawyer is duty-bound to do whatever it takes to obtain the best result for his or her client, even if that means overtly or covertly taking race into account in selecting jurors.³³⁶ To do otherwise, would, in essence, constitute a betrayal of the client.³³⁷ There are a number of problems with this rationalization.

First, and foremost, the Supreme Court has unequivocally recognized that a lawyer who engages in the discriminatory use of peremptory challenges violates the equal protection rights of prospective jurors.³³⁸ Similarly, the jurisdictions that have enacted ethical provisions prohibiting discrimination in the course of the

of the ABA Model Code of Professional Responsibility exhorts lawyers to represent their clients "zealously within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1981), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 203. Although this blackletter aspiration is not as prominently featured in the Model Rules, being relegated to the status of a Comment, that reference is more than enough to keep this time-honored principle in the forefront of most lawyers' minds. In particular, the applicable Comment to Model Rule 1.3 provides that: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. [1] (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 12; *see also infra* note 345.

336. *See* Smith, *Nice Work*, *supra* note 335, at 531 ("[I]t is unethical for a defense lawyer to disregard what is known about the influence of race and sex on juror attitudes in order to comply with *Batson v. Kentucky* and its progeny.") (footnotes omitted); *see also* Baldus et al., *supra* note 16, at 127 (observing that "trial lawyers perceive their reliance on race and gender stereotypes to be a long-standing, appropriate, and necessary means of promoting the legitimate interests of their clients"); *infra* note 345; *cf.* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 954 (2000) [hereinafter Smith, *Defending*] ("There is nothing unethical about using racial, gender, ethnic or sexual stereotypes in criminal defense. It is simply an aspect of zealous advocacy."). *But see generally* Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001) (arguing for a more socially-conscious approach to representation in criminal matters—one that does not exploit race or "racialized narratives" in the so-called interest of zealous advocacy).

337. *See* Smith, *Nice Work*, *supra* note 335, at 529-30 ("In my view, I have no obligation as an attorney to fight cultural stereotypes unless they are being used against my client, or to serve the interests of the broader community, unless this somehow also serves my client."). *But see* Alfieri, *supra* note 336, at 2269-70 (arguing that lawyers have such an obligation independent of whatever the interest of their clients might be).

338. *See supra* note 11 and accompanying text; *supra* text accompanying notes 135, 150.

representation of a client have intended those provisions to protect third parties, including jurors, from such wrongful conduct.³³⁹

Hence, the only way that the mantra of “zealous advocacy” can truly justify the commission of *Batson* violations is if that ethical precept is somehow deemed to completely trump the constitutional rights of jurors, as well as the parallel ethical obligation to abjure such discriminatory behavior.³⁴⁰ If this were in fact the case, however, both *Batson* and the pertinent ethical provisions would be superfluous. Unfortunately, as already discussed, this is likely an accurate characterization of the reality of the situation.³⁴¹ Indeed, the ABA appears to have placed its imprimatur on the predominance of a lawyer’s client-centered zeal in this context by carving out an exception for discriminatory conduct that is carried out under the auspices of “legitimate advocacy.”³⁴² Reasonable minds can certainly differ with regard to the meaning of “legitimate advocacy” (which the ABA fails to define) in this Comment,³⁴³ but, at a minimum, its inclusion allows for the defense or justification of “zealous representation.”³⁴⁴

339. See, e.g., *supra* note 273 and accompanying text.

340. See Smith, *Nice Work*, *supra* note 335, at 542 (“However insulted or diminished a prospective juror might feel as a result of not being selected for a jury on account of race or gender, it is a fleeting experience compared to that of the accused.”).

341. See generally *supra* Part III.A-B.

342. See MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. [2] (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 107 (“Legitimate advocacy respecting the foregoing factors [i.e., race, sex, etc.] does not violate paragraph (d).”); cf. Alfieri, *supra* note 336, at 2259 (“[R]ace-neutral ethics codes tolerate color-coded criminal defense narratives.”).

343. See Ronald D. Rotunda, *Racist Speech and Lawyer Discipline*, 6 PROFESSIONAL LAW. 1, 5 (1995) [hereinafter Rotunda, *Racist Speech*]; see also *supra* note 26. The legislative history of Comment [2] seems to suggest that “legitimate advocacy” may have been intended to encompass situations where race (or other protected status) was actually at issue in a proceeding. See *supra* note 252; cf. *supra* note 273 (giving examples of state provisions that are more explicit in this regard). There is, however, no such indication in the Comment itself or in the definitional section of the Model Rules. Moreover, even if race is at issue in a proceeding, that may provide a basis for discussing race in a potentially offensive manner, but it certainly should never justify the knowing manifestation of bias or prejudice. See MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. [2] (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 107 (indicating what constitutes professional misconduct).

344. In addition, whether or not the phrase “legitimate advocacy” was intended to include “zealous representation,” it is still ambiguous at best and

Another problem with reliance on the zealous advocacy rationale is that it is largely inapplicable to prosecutors.³⁴⁵ The role of the prosecutor is not merely to zealously advocate the position of the government,³⁴⁶ but rather to pursue justice³⁴⁷ and to serve the

therefore makes enforcement of the anti-discrimination principles of Model Rule 8.4(d) extremely difficult. See Rotunda, *Racist Speech*, *supra* note 343, at 5 (noting the ABA's "reference to 'legitimate' advocacy is . . . disquietingly vague"). The virtual complete absence of any disciplinary action for such conduct certainly supports this contention. See *supra* notes 274-315 and accompanying text.

345. As already discussed, "zealous advocacy" does not represent a legitimate justification for the racially discriminatory use of peremptory challenges when employed by defense counsel either. However, given the fact that one's personal liberty is at stake in a criminal prosecution, more plausible arguments can be made to rationalize defense lawyers pulling out all stops on behalf of a client. Indeed, some contend that a defense lawyer would be failing in his or her ethical and professional responsibilities should he or she do otherwise. See FREEDMAN, *supra* note 24, at 213-15 (noting various instances in which defense counsel may be professionally obligated to do that which is clearly impermissible with regard to the prosecution); Green, *Seek Justice*, *supra* note 239, at 617 ("Criminal defense lawyers play close to the line . . . [while] . . . [p]rosecutors play in the center of the court."); Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 754 (observing that many commentators are of the opinion that "criminal defense lawyers have a higher than normal duty to press ethical boundaries to the limits when that is in the interest of their clients"); see also *infra* notes 347-48; Smith, *Nice Work*, *supra* note 335, at 565 ("No matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients."); Smith, *Defending*, *supra* note 335, at 954 ("There is nothing unethical about using racial, gender, ethnic or sexual stereotypes in criminal defense."). But see generally Alfieri, *supra* note 336 (proposing a positive race-conscious approach to representation in criminal cases—one that avoids using racial narratives in such a way as to convey negative messages and images); Smith, *Nice Work*, *supra* note 335, at 564 n.179 (noting that "in [her] experience, there are more defense lawyers who demonstrate a woeful lack of zeal than prosecutors whose zeal is appropriately restrained").

346. Prosecutors cannot realistically be expected to operate completely devoid of zeal in the context of a trial. The exhibition of a certain amount of zealous advocacy is inevitable and appropriate within the framework of the adversary system and can ensure that the proper result is achieved. Nevertheless, a prosecutor's unique role requires that his or her zeal be tempered. See Henning, *supra* note 111, at 727-29; Zacharias, *Structuring*, *supra* note 323, at 57-65.

347. See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. [1] (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 74 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981), reprinted in SELECTED STANDARDS, *supra* note 24, at 209 ("[The prosecutor's] duty is to seek justice, not merely to convict."); Zacharias & Green, *Uniqueness*, *supra* note 239, at 227 (contrasting the traditional view that a private litigator "should do almost

public interest.³⁴⁸ Although a prosecutor no doubt wishes to select a jury most likely to render a guilty verdict,³⁴⁹ that obviously should not be his or her sole aim in light of the government's special role in the criminal justice process. A prosecutor's objective is not conviction, regardless of the costs; it is the securing of a fair and just result.³⁵⁰ Moreover, as a servant of the people, it goes without saying that a prosecutor owes a distinctive obligation to the citizenry:

everything legally permissible to win a case on behalf of a client" with the prosecutor's "overarching duty to seek justice"); Henning, *supra* note 111, at 727 (singling out prosecutors "as the only participants who must adhere to a special duty beyond that of representing zealously their 'client'"); *see also* Zacharias, *Underenforced Professional Rules*, *supra* note 279, at 998, 1013 (doubting the enforceability of this duty, but acknowledging that this fact should not encourage prosecutors to seek "injustice"); Henning, *supra* note 111, at 720 (discussing the legal origin of the "do justice" standard and its status as the vague benchmark for what constitutes prosecutorial misconduct). *See generally* Green, *Seek Justice*, *supra* note 239 ("Prosecutor's offices . . . officially accept the existence of a duty to 'do justice' which entails special responsibilities like those identified in the Model Rules."); Zacharias, *Structuring*, *supra* note 323 (describing prosecutors as "ministers" with an ethical duty to do justice). *But see* Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1453 (2000) (arguing that the ethical standards of criminal prosecutors are not starkly distinguishable from those that apply to other lawyers).

348. *See* RESTATEMENT, *supra* note 239, § 97 cmt. f ("Courts have stressed that a lawyer representing a governmental client must seek to advance the public interest in the representation . . ."); Underwood, *supra* note 11, at 760 (referring to prosecutors as "guardian[s] of the public interest").

349. *See* Leipold, *Constitutionalizing Jury Selection*, *supra* note 34, at 985 (observing that prosecutors seek "to find the most conviction-prone jurors, removing those who might favor the defense"); Melilli, *supra* note 19, at 453 ("In the exercise of peremptory challenges, the lawyers . . . seek not an impartial jury, but rather jurors most favorable to their client's interests."); Perea, *supra* note 19, at 12 (discussing positions of some prosecutors to obtain jurors "who, fairly or otherwise, will vote to convict"); Zacharias, *Structuring*, *supra* note 323, at 99 n.235 (observing that "[l]ike defense counsel, the prosecutor's job is to select the most favorable and eliminate the most unsympathetic" from the array of potential jurors); *see also* Baldus et al., *supra* note 16, at 11 ("[T]he operative goal of the parties [in jury selection] is to eliminate venire members they consider to be biased against them and a threat to their prospects of success.").

350. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.4 (1986) (noting that the prosecutor's objective "is to secure the result, whether conviction or acquittal, indicated by a good faith inspection of the facts and the law"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981), *reprinted in* SELECTED STANDARDS, *supra* note 24 (noting that a prosecutor's duty "is to seek justice, not merely to convict"); Green, *Seek Justice*, *supra* note 239, at 608.

to protect and defend the interest of the public good.³⁵¹ As a result, when a prosecutor, on the basis of race, intentionally removes from a jury venire, those whom he or she is obligated to serve, whether to secure a conviction or otherwise, an extraordinarily serious breach of public trust and professional responsibility has been committed.³⁵²

Given the inherent power and credibility that attends the office of prosecutor as a branch of the government,³⁵³ conscientious dedication to the fulfillment of that position's duties is paramount. By engaging in the discriminatory use of peremptory challenges, a prosecutor utilizes governmental authority to intentionally deprive citizens of their constitutional right to serve as jurors and thereby undermines the integrity of the process.³⁵⁴ To make matters even worse, when a prosecutor offers race-neutral explanations for strikes that are ultimately deemed to be pretextual, he or she compounds the

351. See WOLFRAM, *supra* note 350, § 13.10.4 (“His function is to vindicate the right of the people as expressed in the laws and give those accused of crime a fair trial.”) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 n.49 (1974)); ABA/BNA LAWYERS’ MANUAL ON PROF’L CONDUCT 61:607 (2000) (“[A] prosecutor has a special obligation to . . . assure that the rights of citizens, including the rights of criminal defendants, are afforded protection.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1981), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 209 (“[D]uring the trial the prosecutor is not only an advocate but also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all.”); Green, *Seek Justice*, *supra* note 239, at 612 (“The office of the Attorney-General is a public trust”) (quoting Hon. George Sharswood, AN ESSAY ON PROFESSIONAL ETHICS (F. B. Rothman 5th ed. 1993) (1854)); Underwood, *supra* note 11, at 760 (observing that a “prosecutor has not only an interest in, but a responsibility for, the enforcement of the rights of the jurors”).

352. See Lubet, *supra* note 287, at 21 (“The methodical removal of minorities from the jury pool is insidious and destructive.”); Melilli, *supra* note 19, at 459 (observing that “[t]he number of prosecutors who have been determined to have acted in violation of the law as set down in *Batson* [165 between 1986 and 1993] is a dismal report card” with regard to the prosecutorial obligation to seek justice); Underwood, *supra* note 11, at 760 (noting the extremely offensive nature of discrimination in jury selection and the clear harm that it causes to the public interest); see also Johnson, *Batson Ethics*, *supra* note 11, at 505-06 (“For the prosecutor, doing justice when poised to strike a minority-race juror means, ‘When in doubt, don’t!’”); Taslitz & Styles-Anderson, *supra* note 249, at 798 (observing that “discriminatory behavior has especially pernicious effects on the justice system and that a lawyer’s role as ‘officer of the court’ is inconsistent with permitting those effects”); *supra* notes 30-31.

353. See *supra* notes 130, 197 and accompanying text.

354. Cf. Henning, *supra* note 111, at 793 (noting the harm caused to the integrity of the process when courts accept questionable explanations for allegedly discriminatory peremptory challenges).

offense by also betraying the trust of the court in making what amounts to material misrepresentations of fact.³⁵⁵ It is disconcerting that conduct so antithetical to the prosecution's role within our system of justice is tolerated and rationalized away by lawyers and judges alike.³⁵⁶

In the end, there is no truly legitimate rationale for engaging in the racially discriminatory use of peremptory challenges, whether carried out by the prosecution or defense counsel. All lawyers have roles and obligations within the system, but nothing requires or justifies intentionally depriving members of the public of their constitutional right to participate in the process.³⁵⁷ The persistence of such misconduct in the twenty-first century genuinely conjures up images of our former jury system, in which homogeneity was not only the norm, but the law.³⁵⁸ The American justice system will continue to be perceived by many as untrustworthy and unfair until all people, regardless of race, gender, or other characteristic, are afforded a meaningful opportunity to participate therein.

355. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 62; *see also supra* notes 247-48; Charlow, *supra* note 18, at 13-14 (observing that a pretextual explanation constitutes a material misrepresentation that would violate applicable ethical rules prohibiting such conduct). For a discussion of the application of state ethics rules to federal prosecutors, see generally Zacharias & Green, *Uniqueness*, *supra* note 239.

356. As indicated earlier, it appears that prosecutors, not infrequently, may violate *Batson* and get away with it altogether, or else are found to have violated *Batson* and still receive no meaningful response or sanction.

357. See *supra* note 345. *But see* Smith, *Nice Work*, *supra* note 335, at 565-67 (arguing that defense counsel's special obligations to his or her client not only justify, but may require, circumvention of the prohibition against the discriminatory exercise of peremptory challenges).

358. See, e.g., *supra* note 50 and accompanying text; *supra* text accompanying notes 47-49, 51-53.

IV. PROPOSAL FOR PROCEDURAL AND ETHICAL INNOVATIONS TO ADDRESS RACIAL DISCRIMINATION IN JURY SELECTION MORE EFFECTIVELY

A. *Creating Greater Accountability in the Jury Selection Process*

The first change to the current method of dealing with the racially discriminatory exercise of peremptory challenges is to open up the jury selection process and subject it to the scrutiny of the prospective jurors themselves. As individuals whose constitutional rights are at stake,³⁵⁹ it makes little sense for them to be kept in the dark with regard to the existence of those rights as well as possible violations thereof. Prior to the commencement of voir dire, trial judges should issue uniform instructions to the members of the venire, impressing upon them the importance of their roles as jurors, explaining the process generally, and explicitly informing them that it is a violation of their constitutional right to equal protection of the laws for the attorneys to intentionally exclude them based upon their race (or gender).³⁶⁰ Although the practices of judges vary widely, I am confident that to some extent they all instruct prospective jurors with regard to the selection process. However, I am similarly convinced that few, if any, issue specific instructions to jurors regarding their *Batson* rights. I recommend an instruction along the lines of the following:

Ladies and gentlemen, although you have no absolute right to be selected as a juror in this case, you do possess a right to a selection process that is free from intentional discrimination based upon race (or gender). These lawyers [state names of lawyers and who they represent] are permitted to ask you questions and to have you removed if your answers to those questions demonstrate to the court's satisfaction that you may find it unacceptably difficult to be fair and impartial in serving as a juror notwithstanding the

359. See *supra* note 11 and accompanying text; *supra* text accompanying notes 135, 153.

360. Again, my proposal focuses on race because that defined the scope of my research, but the proposal is certainly equally applicable to discrimination in jury selection based on gender.

evidence presented. This may be because of your relationship with or familiarity with the parties involved; because of your firmly and sincerely held beliefs or opinions with regard to some significant aspect of the litigation; or because of other similar reasons. Removal based on such factors is referred to as a “challenge for cause,” and it is the lawyers’ obligation to raise objections in this regard so as to ensure the fairness and integrity of the process. I, as the judge, will decide whether or not a challenge for cause is justified.

The lawyers also are permitted to eliminate [] prospective jurors without cause, essentially for any reason. These are called “peremptory challenges.” The one limitation on these challenges is that they may not be exercised intentionally in a racially (or sexually) discriminatory manner. A lawyer who is found to have done so has violated the constitutional right of the juror(s) in question to equal protection of the law, and is guilty of a very serious form of professional misconduct.

This type of instruction would have three positive consequences. First, it will make lawyers more thoughtful and conscientious with regard to their bases for exercising peremptory challenges because they will no longer be accountable only to opposing counsel and the court, but also to the very individuals who are the targets of their strikes. Second, the mere fact that the court instructs prospective jurors in this regard adds an air of credibility and trustworthiness to the process—it sends the positive message that our court system does not tolerate discriminatory behavior. Finally, it at least has the potential to likewise enhance citizens’ desire to serve on juries. In other words, informing individuals that it is unconstitutional for them to be excluded from jury service based on certain protected criteria could make them more interested in participating—i.e., if people are going to try to keep me out because of my race, then I want in.

It seems that employers accomplish similar goals by prominently displaying their “affirmative action” statements for both

internal and external consumption.³⁶¹ In essence, these statements generally restate the law with regard to discrimination in the employment context, although some include categories not yet granted legally protected status.³⁶² What is accomplished by employers' adopting and actively touting these types of policy statements? Most significantly, it proclaims (as with the proposed *Batson* Rights instruction) that the inappropriate and illegal behavior discussed in the policy will simply not be tolerated by the institution in question. A commitment to this message is by no means the antidote for the ills of illegal discrimination, but it at least serves to discourage violations and inspire greater confidence in the employer. This is equally true of the proposed *Batson* Rights instruction.

Besides instructing jurors with respect to their rights, the entire selection process should take place in the open. Specifically, the common practice of permitting lawyers to exercise their strikes outside the presence of the prospective jurors should be eliminated. Indeed, the *Batson* Rights instruction would be completely hollow if jurors were kept uninformed with regard to how peremptory challenges were being exercised. The only way that lawyers are going to feel truly accountable is if they are aware that each of their strikes will be scrutinized by all members of the venire. This will inevitably force them to think long and hard with regard to whether their exercise of a given peremptory strike is motivated by race.

In addition, all *Batson* challenges and hearings with regard thereto should similarly be conducted in the presence of the prospective jurors.³⁶³ After all, since their constitutional rights are

361. See, e.g., University of Georgia, Policy Statement: *Equal Opportunity and Affirmative Action*, available at <http://www.uga.edu/eoo/EOOStatement.html> (last visited on June 25, 2002).

362. Sexual orientation, for example, is one typically unprotected category that is included in the language of some anti-discrimination policy statements.

363. But see Leipold, *supra* note 34, at 1006 (suggesting that an open process "can hardly inspire confidence in defendants or the public"); see also ABA STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND TRIAL BY JURY, 15-2.7(a) (maintaining that both peremptory challenges and challenges for cause "should be addressed to the court outside the presence of the jury, in a manner so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge"); Sleeper, *supra* note 232, at 786-90 (discussing the negative aspects of an open process with regard to courts in Maryland). In capital cases in which voir dire is conducted individually, an adjustment or exception to my proposal for an open system may be warranted. See, e.g., Baldus et al., *supra* note 16, at 40-41 (discussing Philadelphia's system

being argued, it only seems reasonable that they should be a part of the discussion, at least as an observer. This creates even greater accountability with regard to the attorneys, because not only the identities of those whom he or she strikes will be known, but also the reasons for those strikes in the event of a challenge. Under such a regime, it seems doubtful that many lawyers would risk eliminating a juror intentionally on the basis of race.³⁶⁴ If a completely open system proves infeasible, then, at a minimum, the process should be made more open than is currently the norm. The bottom line is that *Batson* will be most effective if it operates largely as a deterrent, and it can only do so if lawyers realistically believe that they will be held meaningfully accountable in some manner for their discriminatory conduct.³⁶⁵

The prophylactic measures proposed should have the desired effect, but at what cost? One could certainly argue that the suggested changes will unduly restrict a lawyer's ability to select the best jury possible.³⁶⁶ For example, even though Lawyer W has a legitimate, non-discriminatory reason for striking Juror B, who happens to be Black, Lawyer W may refrain from doing so out of fear that his challenge will be viewed as discriminatory. His decision will most assuredly be inspired by a desire to avoid

of conducting individual voir dire and striking in capital cases). However, all other recommended reforms should apply.

364. For a contrary proposal, see Montoya, *supra* note 16, at 1015-16 (proposing that voir dire be conducted solely by questionnaire and that peremptory challenges be exercised "without the opportunity to confront the jury panelists in person").

365. By proposing an open process for jury selection, I do not mean to supplant the remedies that courts currently impose when an actual *Batson* violation is found—i.e., dismissing the venire or placing the wrongfully stricken jurors on the panel. See *supra* note 232 and accompanying text. Courts should still possess the discretion to order either remedy; however, I believe that the better remedy from a deterrence standpoint is to place the jurors who were the targets of the *Batson* violations on the jury. But see Sleeper, *supra* note 232, at 786 (arguing that this remedy may inappropriately compromise a criminal defendant's Sixth Amendment rights when voir dire is conducted completely in the open). For a discussion of a proposed remedy that places primary emphasis on the defendant's Sixth Amendment rights when the selection process is an open one, see Sleeper, *supra* note 232, at 787.

366. Cf. Charlow, *supra* note 18, at 43 ("An attorney concerned about the court's perception of strikes against members of a particular race or sex and faced with sanctions for a miscalculation will think twice about going forward with the strikes.").

alienating remaining jurors—a concern that is reasonable, but which might not outweigh the negative impact of leaving Juror B on the panel. Accordingly, a lawyer could be placed in a catch-22 that may cause him or her to act in a fashion detrimental to the client. Potentially even more troubling, particularly from the perspective of a criminal defendant, is the prejudice that might result when counsel exercises a peremptory strike that is deemed to be racially discriminatory.³⁶⁷ This problem may actually be exacerbated if the court finds no violation, for then the remaining prospective jurors might be left with the impression that the attorney got away with discrimination.³⁶⁸

While I recognize these potential difficulties, I believe that their specter will have the positive effect of encouraging lawyers to exercise their peremptory challenges in a lawful manner. Concerns about the rights and perceptions of prospective jurors ought to be considerations in the process if *Batson* is ever to be taken seriously.³⁶⁹ If a lawyer has concerns with regard to how jurors may react to a peremptory strike, that may be indicative of an improper motivation for the challenge.³⁷⁰ Should the lawyer choose to forego that strike, then that is a good thing.³⁷¹ If the lawyer chooses not to

367. See Sleeper, *supra* note 232, at 774, 786 (discussing the Sixth Amendment concerns posed by an open system); see also *supra* note 340; cf. Baldus et al., *supra* note 16, at 38 (observing that without peremptory challenges, a prospective juror unsuccessfully challenged for cause “would likely harbor resentment toward the party who sought to remove her from the panel”). But cf. Alfieri, *supra* note 336, at 2275 (maintaining that prosecutors and defense attorneys “can rise to meet a higher standard of accountability, even if the standard imposes upon criminal defendants and their victims an unwieldy and unjust burden of considering the identity-inscribed dignity of the other and the aspiration of community”).

368. See *supra* note 354.

369. But see Smith, *Nice Work*, *supra* note 335, at 566 (“The preeminent obligation of criminal defense lawyers is zealous advocacy, putting the government to its burden of proof and fighting for the individual accused above all others.”); see also *supra* note 336.

370. Cf. Johnson, *Batson Ethics*, *supra* note 11, at 501-05. Johnson proposes that prosecutors should ask themselves various questions during voir dire to ascertain whether a potential strike is discriminatory and should avoid striking on that basis. An example of such a question is: “Would I allow this person to sit as a juror if she were white?” Johnson, *Batson Ethics*, *supra* note 11, at 501.

371. See *id.* at 506 (“[I]f a case is so marginal that the effect of one doubtful juror is to be dispositive, the case should not have been prosecuted at all, at least not without further investigation.”).

forego the strike, then he or she must rightfully suffer the consequences.³⁷²

Moreover, rather than a mere hortatory ethical aspiration, I view the obligation to avoid the racially discriminatory exercise of peremptory challenges as being on par with a lawyer's duty of candor to the court.³⁷³ That duty is an unequivocal one that is designed to ensure the integrity of the process and trumps even a lawyer's sacred obligation to protect a client's confidences.³⁷⁴

Racial discrimination in jury selection likewise impugns the integrity of the process, both in fact and in perception.³⁷⁵ In addition, there is a countervailing constitutional right at stake—that of the prospective juror—that must be safeguarded by the court, as well as the court's officers, the attorneys. Otherwise, the constitutional right is essentially meaningless. Lastly, the seriousness of a *Batson* violation is further underscored by the fact that it constitutes a criminal,³⁷⁶ as well as a constitutional, offense.

372. Cf. Charlow, *supra* note 18, at 44 (“[I]f it is vital that advocates scrupulously honor their obligation to be truthful to the court, then perhaps we should hold lawyers personally accountable if they appreciate the risk that they are being untruthful but speak recklessly anyway.”). Furthermore, to the extent that voir dire questioning takes place in front of the entire jury venire, lawyers already must take into account the potential impact that their line of inquiry may have on prospective jurors. The additional concern of considering the effect that a particular strike may have on possible panel members hardly seems like much of an added burden, particularly in light of the important constitutional rights at issue.

373. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 62-63 (establishing attorneys' disclosure obligations to a tribunal).

374. See MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 62 (stating that the duty to disclose information to a tribunal applies “even if compliance requires disclosure of information otherwise protected by rule 1.6 [Duty of Confidentiality]”). When adhering to this duty impacts a criminal defendant's constitutional rights, special considerations obviously come into play, but the lawyer is still not necessarily relieved of his or her required candor with the court. See MODEL RULES OF PROF'L CONDUCT R. 3.3(b) cmt. [12], *reprinted in* SELECTED STANDARDS, *supra* note 24, at 65 (“[T]he definition of a lawyer's ethical duty . . . [with regard to the disclosure of client perjury] may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.”).

375. See *supra* notes 30-31, 170, 354.

376. See 18 U.S.C. § 243 (2000). Section 243 provides that:

[N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror

B. *Changes to the Ethical Rules and Disciplinary Mechanics*

Besides creating greater accountability in the jury selection process, there also need to be some parallel modifications made in the context of the disciplinary system. The first step must be the states' enactment of a uniform rule that unequivocally establishes that *Batson* violations constitute professional misconduct.³⁷⁷ Unlike most of the extant versions of this type of provision, the new rule should have no exceptions for so-called "legitimate advocacy,"³⁷⁸ nor should it avoid directly characterizing a *Batson* violation as misconduct. In addition, its comments should encourage lawyers to avoid all forms of intentional discrimination in jury selection, whether constitutionally protected at present or not. The desired prohibition should be separate from the general rule present in most jurisdictions that makes it professional misconduct to engage in conduct prejudicial to the administration of justice³⁷⁹ and should read something like this:

In representing a client in litigation, a lawyer shall not engage in intentional harassment or discrimination on the basis of race, gender, or any other protected

in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors; excludes or fails to summon any citizen for the cause, shall be fined not more than \$5,000.

Id. This statute signifies the seriousness with which such offenses are viewed, although *Ex parte Virginia*, 100 U.S. 339 (1874), appears to be the only reported example of a prosecution under this provision. See KENNEDY, *supra* note 21, at 172.

377. See Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 736 ("[I]t is difficult and expensive to establish general misconduct that does not involve direct rule violations as grounds for professional sanctions . . . [and] . . . discipline authorities are loath to pursue such cases."); see also Gordon, *supra* note 16, at 716 (noting the important symbolic message sent by adoption of a blackletter rule regarding the discriminatory use of peremptory challenges). But see Smith, *Nice Work*, *supra* note 335, at 568 ("[C]riminal defense lawyers must not regard *Batson*, *J.E.B.*, and *McCullum* as an ethical mandate.")

378. See *supra* note 273.

379. See *supra* note 272.

category during the jury selection process.³⁸⁰ This prohibited conduct includes, but is not limited to, the exercise of peremptory challenges in a racially or sexually discriminatory manner.³⁸¹

There should also be an accompanying comment that points out that intentionally discriminating against persons on the basis of race (or gender) in the use of peremptory challenges has been held unconstitutional by the Supreme Court and therefore represents particularly egregious misconduct when engaged in by attorneys. No acceptable exceptions should be listed in the comment, but it should be noted that, to the extent that race or gender is directly at issue in a case (e.g., a claim of racial discrimination in employment, or prosecution for a hate crime), it is understandable that certain statements and evidence concerning race or gender will be a part of the proceeding.³⁸² That, however, in no way justifies any type of intentional harassment or discrimination directed toward prospective or selected jurors or any other individual involved in the proceeding, including parties, lawyers, judges, witnesses, and court personnel.

Once a uniform rule of this nature has been adopted, it follows that whenever a lawyer is found to have committed a *Batson* violation, there should be an obligation to promptly report the offending lawyer to the appropriate disciplinary authorities. Rather

380. National origin and ethnicity also seem to constitute protected categories following *Hernandez v. New York*, 500 U.S. 352, 355 (1991). See Perea, *supra* note 19, at 10 (observing that the *Hernandez* plurality stated that “a prosecutor’s use of peremptories to exclude Latinos ‘by reason of their ethnicity’ would violate the Equal Protection Clause”) (quoting *Hernandez*, 500 U.S. at 355). Other categories such as religion and sexual orientation should, in my opinion, likewise be entitled to protection.

381. For another possible version of this rule, see Gordon, *supra* note 16, at 713.

382. Many jurisdictions that have specific rules prohibiting discrimination by lawyers in the context of a representation contain an exception to this effect. See *supra* notes 273 and 343. However, none of these provisions make it clear that the exception *does not* grant a lawyer free rein to discriminate or harass generally in the context of a case merely because the subject of race may be at issue. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. [2] (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 107 (providing simply that “[l]egitimate advocacy respecting the foregoing factors does not” constitute conduct prejudicial to the administration of justice). The language proposed in this Article is a better example of the level of clarity that is needed in this regard.

than the non-uniform, vague, and watered-down duty to report that exists in most states,³⁸³ the obligation to report *Batson* violators should be unequivocal and mechanical. Following a violation, the offending lawyer's name, along with a description of the misconduct in question (*Batson* violation), should be forwarded to the proper authorities for entry into "litigation misconduct databases" that should be created and maintained by all jurisdictions.³⁸⁴ These databases should be fully accessible to the public at all times³⁸⁵ and should be searchable by category of violation (e.g., "*Batson* violation" or "Rule 11 violation"), as well as by a particular lawyer's name.

Besides simply having his or her name entered into and maintained in the litigation misconduct database, the *Batson* violator should also be subject to subsequent disciplinary action.³⁸⁶ However, the mechanics of the proceeding should be somewhat different from the typical case. Given the low probability of a finding of a *Batson* violation³⁸⁷ and the likely deterrent effect that the foregoing proposals will have, when a lawyer has been found to have engaged in the racially discriminatory use of peremptory challenges, that finding should carry great weight in the disciplinary arena. Under the proposed system, lawyers would have strong incentive to vigorously oppose any objection to their use of peremptory strikes. Hence, in the context of the disciplinary proceedings, following a court's finding of a *Batson* violation, there should be a presumption

383. Most jurisdictions currently have some form of reporting requirement with regard to all members of the bar for at least certain levels of attorney misconduct. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 105 (mandating that attorneys report misconduct of other attorneys that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" about which a lawyer possesses knowledge); Green & Zacharias, *Prosecutors' Ethics*, *supra* note 236, at 404-05 (noting that in federal court "[w]hen a prosecutor engages in conduct that violates governing ethical rules, the presiding judge can refer the prosecutor to the state bar for discipline").

384. For a more detailed discussion of the concept of litigation misconduct databases, see Brown, *supra* note 39, at 1609-13.

385. See Brown, *supra* note 39, at 1612 (arguing that if the information contained in the database is publicly accessible in some fashion, it will certainly impact attorney behavior).

386. But see Charlow, *supra* note 18, at 45 (contending that although elimination of discrimination from jury selection is important, "it does not seem so overriding as to warrant personally punishing individuals who do not act with conscious, invidious discriminatory intentions").

387. See *supra* Part II.D.

that the *Batson* violator likewise has run afoul of the applicable ethical provision.³⁸⁸ This presumption can only be overcome by a clear and convincing showing by the *Batson* violator that he or she did not engage in the discriminatory use of peremptory challenges.³⁸⁹ Thus, the only real issue for the reviewing body will typically be the evaluation of the egregiousness of the particular conduct in question.³⁹⁰ In addition, mitigating factors should be taken into account in determining what level of discipline is appropriate.

388. Cf. N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(6) ("A certified copy of a determination [of unlawful discriminatory conduct], which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, . . . shall constitute *prima facie* evidence of professional misconduct in a disciplinary proceeding.") (emphasis added). But see Charlow, *supra* note 18, at 58 (noting that some might argue "that the prospect of incurring personal liability on a strict liability basis will dampen even appropriately ardent advocacy").

389. The presumption should only come into play when there has been a finding of a violation by the court. In other words, an "exonerated" alleged *Batson* violator would not be entitled to an affirmative presumption of innocence in his or her favor in the event that subsequent disciplinary action is pursued. This only seems appropriate given that it is obviously much more difficult to succeed on a *Batson* challenge than to overcome one. Furthermore, if the "accused" were entitled to a positive presumption, it is possible that some courts might be even more predisposed to deny *Batson* objections.

390. Some commentators have expressed the view that automatic discipline might cause courts to be more reluctant to make findings of constitutional violations if they are aware that such decisions will have the additional effect of subjecting attorneys to professional discipline. See Charlow, *supra* note 18, at 60-61 (noting the personal connections between many judges and lawyers and the resulting reluctance to impose sanctions on friends); Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 754, 769 (noting the "anything goes" attitudes of courts in criminal prosecutions). I agree that this is a realistic concern, but my proposal does not go quite so far as to impose "automatic" discipline. Furthermore, it is my hope that the proposed system will, in most instances, deter the conduct on the front end. Hence, courts should not frequently face the quandary of whether or not to make a decision that is tantamount to an official finding of misconduct. Notwithstanding this, *Batson* violations need to be treated seriously, and any judge who abjures condemning, or at least exposing, the discriminatory use of peremptory challenges is failing in his or her responsibilities. See Underwood, *supra* note 11, at 749 (discussing the negative message sent by courts tolerating discrimination within the very process established to address such wrongful behavior).

In fact, judges who deny *Batson* challenges and are reversed on appeal are arguably subject to professional discipline themselves. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(6) (1990), reprinted in SELECTED STANDARDS, *supra* note 24, at 744.

C. *Implementation of Meaningful Remedial Disciplinary Sanctions*

The final suggested change for dealing with *Batson* violations in the disciplinary context is the implementation of sanctions that will serve to deter, and more importantly, enlighten and rehabilitate those predisposed to utilize peremptory challenges in a racially discriminatory fashion. The appropriate level of discipline should necessarily vary depending on the seriousness of the circumstances. For instance, a *Batson* violator who is a repeat offender may need to receive discipline of a more punitive nature.³⁹¹ However, assuming the absence of any aggravating factors beyond the intentional discrimination itself, two forms of automatic discipline should be imposed.

First, all lawyers who are found to have intentionally discriminated against prospective jurors on the basis of race should be required to devote a minimum of fifty hours of pro bono representation³⁹² on behalf of a client of another race, preferably the race of the juror against whom the lawyer discriminated.³⁹³ I am sure that local legal aid organizations, or other similar programs, would be receptive to this form of “mandatory volunteerism,” and I cannot imagine that it would be difficult to establish some sort of ongoing referral relationship. For rather obvious potential conflict of interest reasons, offending prosecutors could not be assigned to criminal matters, but I see no obstacle to requiring them to represent clients in civil matters.³⁹⁴ One might legitimately question whether

391. See WOLFRAM, *supra* note 350, § 3.5.2, at 122 (“Known repetition [of misconduct] clearly implies incorrigibility.”).

392. Fifty hours is actually the aspirational goal already contained in Rule 6.1 with regard to a lawyer’s obligation to perform pro bono legal services. See MODEL RULES OF PROF’L CONDUCT R. 6.1 (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 87-88. Completion of these hours as a disciplinary sanction, however, should not be considered as fulfillment of this professional aim. Indeed, this type of discipline ideally will encourage lawyers to donate more of their time to the provision of legal services to the less fortunate.

393. Hopefully, this will be the case in most instances, but if such an arrangement is impossible, or otherwise seems inappropriate under the circumstances (e.g., White lawyer violating *Batson* by striking White jurors), then the attorney should ideally be assigned to some matter in which the legal issue involved relates to alleged discrimination of some sort.

394. See David Jackson DeVries, *Public Sector Obstacles Are Vanishing*, A.B.A. J., Dec. 2000, at 66 (“Many state attorneys general and governors, county

the imposition of such discipline exceeds the scope of states' authority in this regard. Although it is certainly different from the typical discipline imposed (i.e., disbarment, suspension, reprimand, etc.), it is by no means any more punitive, and its viability as a sanction should at least be considered.³⁹⁵

Various potential benefits could flow from this type of constructive discipline. Most evident is the provision of legal services to individuals who might not otherwise receive representation. Despite the aspirational pro bono requirements in most jurisdictions,³⁹⁶ access to legal resources remains a major problem for the less fortunate throughout our nation. In addition, this form of discipline forces the offending attorney to confront what he or she did in a very profound way. In essence, the individual whom the lawyer is assigned to represent is the "human personification" of the juror that the attorney unlawfully struck, and now he or she must deal with that person on an intimate level. Some lawyers will find this to be an enlightening and rewarding experience, while others undoubtedly will not. However, regardless of the level of positivity that is generated by the experience, the attorney will almost assuredly take the ethical and legal obligation to refrain from discriminating in the jury selection process more seriously in the future. Moreover, having these lawyers provide legal services in disadvantaged communities should have the added benefit of enhancing the perception of the justice system in these areas.

attorneys, solicitors and prosecutors have established policies to enable their lawyers to do pro bono work.").

395. There could be concerns regarding the constitutionality of this form of discipline—i.e., the Fifth, Thirteenth, and Fourteenth Amendments. In response to calls for a "mandatory pro bono" ethical rule, some have argued that it would constitute a "taking" under the Fifth and Fourteenth Amendments and might also rise to the level of a deprivation of liberty without due process in specific cases. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 50.2 (3d ed. 2001 & 2002 Supp.); see also ROTUNDA, *LEGAL ETHICS*, *supra* note 24, §§ 42-2.2 to 42-2.4 (discussing mandatory pro bono service). One could also argue that forcing attorneys to provide free services would amount to "involuntary servitude." These concerns, however, seem less persuasive here. Given the seriousness of the violation in question, it seems that the pro bono sanction would be analogous to the imposition of community service as a sentence for a crime, which is constitutionally permissible.

396. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 6.1 (2001), *reprinted in* SELECTED STANDARDS, *supra* note 24, at 87-88.

On the other hand, one could argue that it is unwise and potentially detrimental to pair a *Batson* violator with someone of the same race as the juror(s) against whom he or she discriminated. Won't this simply visit the lawyer's "evils" on yet another victim? I think that the answer is "no" for a few reasons. First, the lawyer still has an ethical obligation to represent his or her pro bono client competently³⁹⁷ and zealously.³⁹⁸ While willful neglect is possible, it would seem highly unlikely under the circumstances. Furthermore, to the extent that it is a concern, the lawyer and client could be required to report the results of the representation to the appropriate disciplinary authority. In addition, if the violation is particularly egregious (e.g., repeat offender), then this type of discipline obviously may not be appropriate.³⁹⁹

If pro bono discipline proves infeasible, an alternative, and additional, form of automatic discipline would be public reprimand, which should not only be made public through the "litigation misconduct database," but also via the local press, as well as any other traditional publicizing vehicle utilized by the jurisdiction. The prospect of the stigma associated with the publication of such a repugnant ethical violation could have a powerful deterrent effect.⁴⁰⁰

The second form of automatic discipline for a *Batson* violation should be required completion of an approved Continuing Legal Education (CLE) program devoted to jury selection, with special emphasis on the law and ethics concerning the discriminatory use of peremptory challenges. This type of educational discipline seems particularly appropriate and necessary given that a lack of understanding of *Batson* and its progeny may be a contributing cause to lawyers' violation thereof.⁴⁰¹ In fact, it would be a good idea to

397. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 8 (requiring "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

398. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. [1] (2001), reprinted in SELECTED STANDARDS, *supra* note 24, at 12 ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

399. See *supra* note 391 and accompanying text.

400. Cf. Ogletree, *supra* note 16, at 1122 ("Disciplinary actions should ensure that prosecutors are personally accountable for their racially discriminatory practices.").

401. See *supra* notes 202-04 and accompanying text. See also Brenda Quick Jones, *Regulating Lawyers' Discriminatory Conduct: Constitutional Limitations*, 21 OHIO N.U. L. REV. 897, 911 (1995) (recognizing the need for bar associations

require all litigators to complete such a program within their first year of practice, at a minimum.⁴⁰²

As already acknowledged, there may be situations in which other more traditional forms of discipline, such as suspension or even disbarment, might be warranted depending on the severity or frequency of the violations.⁴⁰³ At the other extreme, it must also be recognized that there may be some situations in which disciplinary authorities might decide against the imposition of any discipline.⁴⁰⁴ Although I expect that those circumstances will be extremely rare, it nevertheless seems appropriate for the decision-makers to retain that discretion.⁴⁰⁵ The emphasis, however, should clearly be on the imposition of constructive sanctions that will curb future misconduct of this sort not through fear, but through understanding.

V. CONCLUSION

Racial discrimination in jury selection constitutes very serious professional misconduct and it must be treated as such. The prevailing perception that the intentional, racially discriminatory use of peremptory challenges somehow constitutes “legitimate advocacy” is simply untenable. This type of behavior needs to be viewed with the same or greater disdain than commingling funds,

“to work hard at educating lawyers so that [discriminatory] misconduct does not occur in the first instance”).

402. See Jones, *Ethical Rules*, *supra* note 273, at 56 (contending that “[i]f a state bar can require a lawyer to take a designated number of continuing legal education hours in ethics and drug abuse, there is no reason why the bar cannot adopt a similar requirement to educate lawyers about the effects of discrimination”). Judges would also benefit from such training, and similar requirements for new members of the judiciary should likewise be implemented.

403. See *supra* notes 391, 399 and accompanying text.

404. For example, because of the presence of compelling mitigating factors or, of course, if the *Batson* violator overcomes the presumption against him or her.

405. However, even if no discipline is imposed, the attorney’s name should remain in the litigation misconduct database for a minimum of four years, along with a description of the disposition of the matter. If the lawyer is found to have violated *Batson* again within that time frame, the prior violation should be taken into account in the subsequent disciplinary proceeding. Cf. Zacharias, *Discipline of Prosecutors*, *supra* note 313, at 768 (“[E]ven if [rule] violations [by prosecutors] are not particularly serious when considered alone, their recurrent nature demands a greater measure of deterrence.”).

suborning perjury, or destroying evidence, all of which are not only uniformly recognized as wrong but also are likely to be met with appropriate discipline when detected.⁴⁰⁶

Our system of justice and the rules of professional conduct are both ostensibly designed to serve and protect the public good. If that objective is to have any credibility, the rights of citizens to participate in the process cannot be taken lightly. They are entitled to know what their rights are as prospective jurors, as well as when those rights are arguably being violated. This knowledge, coupled with a completely open system with regard to jury selection, will make lawyers directly accountable to the members of the venire and thereby positively affect their conduct during voir dire. This seems to be one plausible way to add teeth to the prohibitions of *Batson* and its progeny without completely eliminating the peremptory challenge from a lawyer's arsenal. The current ex post remedies of placing the wrongfully stricken juror on the panel, or dismissing the entire venire, or even granting a new trial, do little, if anything, to deter abuse in this area.⁴⁰⁷ The process itself needs to be altered if the misconduct is ever to be truly addressed.

Furthermore, when lawyers nevertheless engage in the discriminatory use of peremptory challenges, their conduct must be dealt with in a prompt and meaningful fashion. "Meaningful" in this sense means that the disciplinary process, including the sanctions imposed, should be geared towards enhancing the attorney's awareness of what he or she did wrong, while at the same time making constructive use of the lawyer's skills in a way that serves the public's interest and hopefully improves the image of both the justice system and the profession.

There may be other ways to address the problem examined in this Article, but the critical point to recognize is that there is a problem. Rationalizing, justifying, or ignoring it only serves to further de-legitimize what lawyers and courts do in the eyes of the public. If citizens cannot expect to be treated in a non-discriminatory fashion in a courtroom, the very venue in which justice is to be served, how can they have any confidence in the

406. See, e.g., ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION ANNUAL REPORT (2001) (describing the disbarment of twelve attorneys and the suspension of twenty-two others for improper management of client or third-party funds and the disbarment of fourteen attorneys and the suspension of fifteen others for engaging in criminal behavior).

407. See *supra* notes 233, 236-37 and accompanying text.

fairness of the process or of our society as a whole?⁴⁰⁸ As Justice Kennedy suggested: “By dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes.”⁴⁰⁹ For this hopeful observation to be a reality, something significant obviously must be done.

408. *See supra* note 170.

409. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).

