Hybrid Jury Strikes

*Aliza Plener Cover**

Modern jury selection is pulled in two directions. Equal protection prohibits racial discrimination, but the traditional peremptory strike permits exclusion of a juror without explanation. To reconcile this tension, the Court developed the Batson *framework, requiring lawyers to articulate ex post race-neutral justifications for suspicious strikes. But many doubt* Batson*'s efficacy at uncovering latent discrimination. During the 2015–16 term, while recognizing a* Batson *violation in* Foster v. Chatman*, the Supreme Court counter-intuitively reinforced this concern.* Foster *is the rare case in which prosecutors documented in writing their reliance on race. A framework that depends on such transparency is weak and ineffective. And the systemic persistence of discrimination, three decades after* Batson *was decided, has convinced many that the only solution is to eliminate peremptory strikes in their entirety.*

In this Article, I offer an alternative strategy. I introduce a new mechanism to reform — but not entirely eliminate — the system of peremptory challenges: the "hybrid jury strike." Hybrid strikes would fall in between traditional peremptory challenges, which may be exercised at the party's discretion, and challenges for cause, which may be granted only upon an adequate showing of juror bias or other basis for disqualification. Hybrid strikes would require ex ante justification but not a conclusive showing of bias; they could be used to exclude a set number of jurors who survived non-pretextual and meaningful cause challenges. Hybrid strikes could replace traditional peremptories wholesale or could be leveraged asymmetrically — for example, by preserving traditional peremptories for the defense while permitting only hybrid strikes for the prosecution.

Hybrid strikes offer an intermediate approach between the status quo and complete abolition of peremptory challenges. They would meaningfully curtail discrimination while preserving the most legitimate function of peremptory challenges: to foster jury impartiality by providing a buffer zone for cause challenges when evidence of bias is credible but insufficient or when judges erroneously reject them.

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INTRODUCTION

This past term, in *Foster v. Chatman*,[1] the Supreme Court handed down a *Batson*[2] victory to a black death-row inmate who was convicted and sentenced to death for the murder of a white woman by an all-white jury after the prosecution struck every qualified black member of the venire.[3] The prominence of this case had little to do with the novelty of the legal question presented; the case was resolved through a relatively straightforward application of legal principles announced in *Batson* and its progeny. Rather, the blatancy of the state's race-consciousness during jury selection made this case disturbing enough on its facts to grab the Supreme Court's attention: The prosecution's trial notes were riddled with unambiguous indicators of race-based decision-making. On the prosecution's venire lists, for example, black jurors' names were marked with a "B" and highlighted green.[4] On the prosecution's copies of the questionnaires filled out by prospective jurors, the race of black jurors was circled.[5] While it is certainly possible that Foster should have prevailed in his *Batson* appeal even without such explicit evidence,[6] the Court stressed the importance of the overt race coding when

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[1] 136 S. Ct. 1737 (2016).

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

[3] *Foster*, 136 S. Ct. at 1742; Brief of Petitioner at 2, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349) ("Timothy Tyrone Foster, an eighteen-year-old African-American, was charged in 1986 with killing Queen Madge White, an elderly white woman, in Rome, Georgia."). Interestingly, the Court's opinion in the case never mentions the race of the defendant or the victim.

[4] *Foster*, 136 S. Ct. at 1744.

[5] *Id.* There were several other indications of race-consciousness in the record, including a draft of an affidavit prepared by an investigator at the prosecutor's request which contained the following race-conscious text ultimately omitted from the court filing: "If it comes down to having to pick one of the black jurors, [this one] might be okay. This is solely my opinion . . . . Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that [this juror] be one of the jurors." *Id.* (citation omitted). Handwritten notes referred to black venire members as "B #1," "B #2," and "B #3." *Id.* On two lists of the jurors who were qualified during voir dire, all five remaining black jurors were marked with a notation to be struck. *Id.* Five of the six qualified jurors on a list of "definite NO's," were black. *Id.* Another document contained a note which read "*NO*. No *Black* Church." *Id*. (emphasis in original).

[6] The Supreme Court evaluated and rejected the race-neutral reasons proffered by the prosecution for striking two of the black jurors by drawing a side-by-side comparison of these black jurors to white jurors who were similarly situated but were not struck, and by pointing to

ruling in his favor.[7] And it is difficult to imagine that the case would have garnered four justices' support for a grant of certiorari without such dramatic documentary evidence.

While the opinion was an essential victory for Foster personally and an important symbolic statement from the Supreme Court against the race-based exclusion of jurors, the atypical facts limit the opinion's relevance to the larger systemic problem of discriminatory jury selection processes. *Foster*, the anomalous case in which prosecutors documented their consideration of race during jury selection, provided a forum for the Court to proclaim its commitment to racial equality, without being forced to confront the flaws in the *Batson* regime that allow for racial bias to persist in the run-of-the-mill case.[8] *Foster* does little to decrease the chance that prosecutors will make race-based peremptory challenges in the future; instead, it largely functions as a reminder not to leave behind written evidence of such misconduct. *Foster* is an individual success masking systemic failure. It props up *Batson*'s appearance of efficacy by highlighting its ability to succeed in rooting out racism in the rare case where that racism is explicit.

The *Batson* success story told by the *Foster* Court reveals no inkling of *Batson*'s deficiencies — which, as many commentators have noted, and as I explain in more detail below, are substantial. Concurring in *Batson*, Justice Marshall foretold the futility of its framework in eradicating systemic race discrimination in the exercise of peremptory strikes;[9] many judges, scholars, and advocates have come to agree with him.[10] The *Batson* test allows prosecutors to strike minority jurors[11] if, when challenged, they can point to a minimally plausible race-neutral reason for the exclusion that withstands a

"the shifting explanations [and] the misrepresentations of the record" in the prosecutor's justifications, in addition to the evidence of race coding. *Id.* at 1754.

[7] *Id.* at 1755 ("The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner. The sheer number of references to race in that file is arresting." (citation omitted)).

[8] Others have argued that *Batson* itself functioned in the same symbolic way. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199 (1989).

[9] Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

[10] *See infra* note 73.

[11] Today, the *Batson* framework also constrains the race-based exercise of peremptory strikes by defense attorneys, *see* Georgia v. McCollum, 505 U.S. 42, 59 (1992), and against jurors of any race, *see, e.g.*, United States v. Thompson, 528 F.3d 110, 117 (2d Cir. 2008). It also applies in the civil context, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991), and to strikes on the basis of gender, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994). My primary critique of *Batson*, however, lies in its failure to eradicate prosecutorial use of peremptory strikes to rid criminal juries of minority jurors. This prosecutorial misconduct has particularly pernicious effects on the criminal justice system's fairness and legitimacy, and poses a special danger to the defendant's constitutional right to a fair trial. I describe these claims in more detail below.

low level of judicial scrutiny.[12] Perhaps unsurprisingly, there is growing evidence that prosecutors still use peremptory strikes at vastly disproportionate rates against black prospective jurors, and generally suffer no consequence for doing so.[13] Some critics — including Justice Marshall — have argued that the only way to truly eliminate the exercise of peremptory strikes on the basis of race is to eliminate peremptory strikes altogether, or at least to end their exercise by prosecutors. But this argument has, in turn, been criticized as both unrealistic and undesirable because peremptory strikes, while vulnerable to abuse, serve as a long-standing and important protection against juror bias. Other reformers have advocated more modest avenues to strengthen the *Batson* standard or modify voir dire procedures.[14] Yet the Supreme Court has stayed true to the *Batson* model, expanding it into new territory[15] without pausing to reconsider whether it has achieved its underlying goals.

In this Article, I offer a new mechanism to reform — but not entirely eliminate — the system of peremptory challenges so as to limit the improper use of race-based strikes. I argue that traditional peremptory challenges should be replaced, either wholesale or on an asymmetrical basis, with "hybrid jury strikes" — challenges that lie between successful cause challenges and traditional peremptory strikes.[16] Like a traditional peremptory strike, a hybrid strike could be exercised on a discretionary basis without successfully establishing that a juror must be excluded for bias or other cause. But unlike a traditional peremptory strike, a hybrid strike could only be exercised after the ex ante articulation of a race-neutral and meaningful argument for exclusion. This innovation preserves the essence of the two most legitimate interests asserted in favor of peremptory challenges: providing a penumbral protection against jurors who have true bias and improving party confidence in the legitimacy of the trial. But, in order to curtail racial discrimination in jury selection, the hybrid strike abandons the effort to serve other asserted interests, such as the parties' gut-level satisfaction with the

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[12] I write "minimally plausible" even though, as will be discussed below, the race-neutral reason articulated at step two of the *Batson* test does not even need to meet that low standard. *See* Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring). However, when the judge decides at step three whether the strike is pretextual, an utterly implausible rationale may be rejected.

[13] *See infra* note 50 and accompanying text.

[14] *See infra* note 76 and accompanying text.

[15] *J.E.B.*, 511 U.S. at 129 (extending *Batson* framework to strikes exercised on the basis of gender); Powers v. Ohio, 499 U.S. 400, 415 (1991) (finding standing for defendant to challenge peremptory strikes violating equal protection rights of different-race jurors); *Edmonson*, 500 U.S. at 616 (extending *Batson* framework to civil jury system); *McCollum*, 505 U.S. at 59 (extending *Batson* framework to race-based strikes by defense counsel). The Ninth Circuit recently extended *Batson* to strikes based on sexual orientation. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014).

[16] It is worth clarifying that, although in my model hybrid jury strikes would grow closer to challenges for cause, I do not advocate eliminating cause challenges. Rather, I propose supplementing cause challenges with hybrid jury strikes, and eliminating traditional peremptory strikes.

composition of the jury. The hybrid jury strike is a feasible way of achieving significant improvements.

Part I provides a background on *Batson* and its progeny and summarizes some of the critiques of its regulatory regime and reforms proposed to date. Part II advances the new model of hybrid jury strikes and explains how their incorporation into jury voir dire would remedy some of the most problematic deficiencies in the current peremptory system while preserving some of its most important virtues. Part III explores some of the considerations involved in implementing this proposal, including the continuing role for a modified *Batson* in regulating hybrid strikes and possible asymmetrical applications between the prosecution and defense.

I. *Batson*'s Weak Regulation of Peremptory Strikes

In *Batson* and its progeny, the Court established a three-step process for adjudicating claims of racial and gender[17] bias in the exercise of peremptory strikes.[18] At step one, the moving party must make out a prima facie case of impermissible discrimination in the exercise of a peremptory strike.[19] At step two, the burden shifts to the non-moving party to offer a race- and gender-neutral explanation for the contested strike.[20] Although it must be "clear and reasonably specific,"[21] this explanation need not be "a 'persuasive, or even plausible,' one."[22]

At step three, the court evaluates whether the moving party has satisfied her burden of proving discrimination.[23] In determining whether the race- and gender-neutral explanation is pretextual, the trial court may consider information including the demeanor and credibility of the party defending

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[17] *J.E.B.*, 511 U.S. at 129 (holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality"). In this Article, I focus more heavily on the problem of race discrimination rather than gender discrimination, particularly because of the extensive documentation of persistent disproportionate strike rates along racial lines. To the extent that gender-based strikes are similarly difficult to identify and eradicate under the *J.E.B.* framework, my proposal of hybrid jury strikes would similarly help to address that problem.

[18] During jury selection, attorneys and/or the judge question the members of the jury pool in a process that culminates in the empanelment of a petit jury. Although the exact procedures vary in different jurisdictions, during voir dire, attorneys may move to strike jurors for cause if their responses to questioning demonstrate concrete, legally-specified bases for disqualification. Attorneys generally may also utilize a set number of discretionary challenges called peremptory challenges (also called peremptory strikes or simply peremptories). For a helpful and more in-depth explanation of how peremptory strikes fit into voir dire proceedings, see, e.g., 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, 10–15 (2001).

[19] Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 476–77 (2008)); Miller-El v. Dretke, 545 U.S. 231, 239 (2005) (quoting Batson v. Kentucky, 476 U.S. 79, 94, 96 (1986)).

[20] *Miller-El*, 545 U.S. at 239 (quoting *Batson*, 476 U.S. at 97).

[21] *Id.* (quoting *Batson*, 476 U.S. at 98 n.20).

[22] *Id.* at 267 (Breyer, J., concurring) (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) and *id.* at 766 ("'mustaches and the beards look suspicious'")).

[23] *Foster*, 136 S. Ct. at 1747 (quoting *Snyder,* 552 U.S. at 476–77).

the strike,[24] the implausibility or speculative nature of the asserted neutral explanation,[25] misrepresentations about the record in articulating the explanation,[26] the number or percentage of prospective jurors struck of a particular race or gender,[27] and the existence of similarly-situated venire members of a different race or gender who were not struck.[28]

In mandating this three-step process, the Court sought to root out invidious discrimination from jury selection while leaving the peremptory strike largely intact. In particular, the Court left undisturbed two key features of the historical peremptory strike: first, that it may be exercised irrationally, as long as not on the basis of race or gender; and second, that absent a prima facie case of discrimination, it may be exercised without the articulation of any explanation for its use.

Batson's asserted goals are laudable and compelling. The Court has identified three interests served by regulating peremptory challenges against discrimination: the participatory and equality rights of the individual excluded jurors;[29] the defendant's equal protection right to an impartial jury "whose members are selected pursuant to nondiscriminatory criteria";[30] and the community's interest in a fair and impartial criminal justice system.[31] Decisions following *Batson* have at times prioritized the first interest and at other times the second. *Batson* itself was limited on its facts to the prosecutor's race-based exercise of peremptory strikes against jurors who shared the minority race of the defendant.[32] The primary focus in *Batson* was on the

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[24] *Snyder*, 552 U.S. at 477 (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion)).

[25] *See*, *e.g.*, *id.* at 482.

[26] *See, e.g., Foster*, 136 S. Ct. at 1749–51 (analyzing how the prosecutor's race-neutral reasons misrepresented the record and concluding that an "independent examination of the record, however, reveals that much of the reasoning provided by Lanier has no grounding in fact").

[27] *See* Miller-El v. Dretke, 545 U.S. 231, at 240–41 (2005) (quoting Miller-El v. Cockrell, 537 U.S. 322, 342 (2003)) ("The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. 'The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity.'" (citations omitted)).

[28] *Id.* at 241 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step."); *see also Snyder*, 552 U.S. at 483–84 (conducting a side-by-side comparison of the struck African-American juror and two unstruck white jurors).

[29] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

[30] Batson v. Kentucky, 476 U.S. 79, 85–86 (1986).

[31] *Id.* at 87.

[32] *Id.* at 82–83 ("Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods . . . . The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected."); *id.* at 86 ("The Equal Protection Clause guarantees the defendant that the

defendant's own equal protection rights,[33] though the Court also recognized the broader harm done to the community by racially discriminatory jury selection, in "undermin[ing] public confidence in the fairness of our system of justice."[34]

Subsequent cases clarified that *Batson*'s salutary goals extended beyond the defendant. The Court in *Powers v. Ohio* explained:

> In *Batson,* we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But we did not limit our discussion in *Batson* to that one aspect of the harm caused by the violation. *Batson* "was designed 'to serve multiple ends,'" only one of which was to protect individual defendants from discrimination in the selection of jurors. *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.[35]

Thus *Batson* was expanded to apply to peremptory strikes exercised against jurors of a different race than the defendant,[36] to jury selection in civil cases,[37] and to peremptory strikes exercised by the defendant.[38] The constitutionally-aggrieved persons in these cases included the struck jurors themselves, who had a right not to be excluded from service on the basis of their race,[39] and their constitutional rights trumped the defendant's non-constitutionally-protected interest in securing a jury he considered optimal.[40]

Batson's tripartite objectives are particularly important today, and it is worth scrutinizing how well *Batson* is achieving them. We are at a historic moment of intense scrutiny into how racial discrimination impacts the operation of the criminal justice system. There is a crisis in community confidence in the criminal justice system, particularly among communities of color.[41] We have experienced a divisive national discourse on the discrimi-

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State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.").

[33] *Id.* at 85–87 ("But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.") (citations omitted).

[34] *Id.* at 87–88.

[35] Powers v. Ohio, 499 U.S. 400, 406 (1991) (citations omitted).

[36] *Id.* at 415.

[37] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

[38] Georgia v. McCollum, 505 U.S. 42, 59 (1992).

[39] *Edmonson*, 500 U.S. at 616.

[40] *See McCollum*, 505 U.S. at 57–59 (finding no harm to defendant's constitutional interests when *Batson* was extended to protect against race-based peremptory challenges by the defense).

[41] For example, a 2015 Harvard survey found that "nearly 1 in 2 18–29 year olds do not have confidence that justice system is fair" and that views differed strongly by race: 66% of

natory impact of stop-and-frisk policies,[42] and we have seen the rise of the Black Lives Matter movement in response to multiple publicized police shootings of unarmed African-American men.[43] We have seen critical attention to the phenomenon of racially disparate mass incarceration[44] and some long-awaited traction in sentencing reform.[45] Much of this national scrutiny into race has fallen upon policing practices — the point of entry into the criminal justice system — and sentencing practices — the endpoint of the criminal trial. The jury system, at the midpoint, could have a salutary or exacerbating impact on the perceived and factual inequality of the system

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blacks, 53% of Hispanics, and 43% of whites had not much or no confidence. HARVARD PUBLIC OPINION PROJECT, EXECUTIVE SUMMARY SURVEY OF YOUNG AMERICANS' ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE 7 (Apr. 29, 2015), http://iop.harvard.edu/sites/default/files_new/IOPSpring15PollExecSumm.pdf, *archived at* https://perma.cc/MQD3-YUF3. A June 2016 Gallup poll found that only 23% of Americans have "a great deal" or "quite a lot" of confidence in the criminal justice system. GALLUP, AMERICANS' CONFIDENCE IN INSTITUTIONS STAYS LOW (June 13, 2016), http://www.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx?g_source=Politics&g_medium=newsfeed&g_campaign=tiles, *archived at* https://perma.cc/XL7E-2XX6. The Department of Justice has issued several reports on communities with deep distrust of the police and criminal justice system, including one on Ferguson, Missouri. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5–6 (Mar. 4, 2015) [hereinafter DOJ FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf, *archived at* https://perma.cc/8WKQ-K4VB ("Our investigation has shown that distrust of the Ferguson Police Department is longstanding and largely attributable to Ferguson's approach to law enforcement. This approach results in patterns of unnecessarily aggressive and at times unlawful policing . . . . The confluence of policing to raise revenue and racial bias thus has resulted in practices that not only violate the Constitution and cause direct harm to the individuals whose rights are violated, but also undermine community trust, especially among many African-Americans."). Justice Sotomayor, dissenting in *Utah v. Strieff*, powerfully described the disproportionate and degrading impact of unconstitutional police actions on people of color. 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting). *See also* 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, 1194–95 (1994) (summarizing polling showing "disparities in perceptions of [criminal justice] fairness between African-Americans and whites").

[42] *See, e.g.*, Daniel Bergner, *Is Stop-and-Frisk Worth It?*, THE ATLANTIC (Apr. 2014), http://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644/, *archived at* https://perma.cc/BL7B-62EN.

[43] *See, e.g.*, Jelani Cobb, *The Matter of Black Lives*, THE NEW YORKER (Mar. 14, 2016), http://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed, *archived at* https://perma.cc/7SP8-TSSF.

[44] *See generally*, PRESIDENT BARACK OBAMA, REMARKS BY THE PRESIDENT AT THE NAACP CONFERENCE (Jul. 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference, *archived at* https://perma.cc/AQ7L-DE5Q; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[45] *See, e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (reducing the disparity in punishment of crack and powder cocaine); Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2016) (bipartisan bill that would have, among other things, reduced certain mandatory minimums for drug and gun offenses; and that, although ultimately unsuccessful, evidenced increased efforts by legislators from both parties to tackle sentencing reform); Nathaniel Herz, *Landmark criminal justice bill heads to Gov. Walker's desk*, ALASKA DISPATCH NEWS (May 13, 2016), http://www.adn.com/politics/article/landmark-criminal-justice-legislation-will-head-alaska-gov-walkers-desk/2016/05/13/, *archived at* https://perma.cc/2GKP-92E8.

overall.[46] When the jury is stripped of minority jurors through the race-based exercise of peremptory strikes, compounding damage is done to criminal justice legitimacy, for the jury — the structural bulwark erected by the Constitution between the citizen and governmental tyranny — appears rigged against minority defendants.[47] Perceived legitimacy aside, diversity can have a concrete impact on the quality of jury decision-making. A lack of minority representation on a jury may embolden racist discourse and decrease the quality of deliberation in the jury room.[48] In capital trials of black defendants accused of killing white victims, the presence of even a single black male on the jury has been shown to substantially decrease the likelihood of a death sentence.[49] Protecting against race-based peremptory strikes — and their tendency to diminish minority representation in the jury box — serves the individual constitutional rights of criminal defendants to a fair and equal trial; reaffirms the worth of minority jurors who may feel, in other ways, devalued and disserved by the criminal justice system; and fosters some measure of confidence in the community at large about the fair administration of justice.

The *Batson* reality, however, has failed to live up to its ideals. *Batson* does something, but quite simply not enough, to root out the invidious effects of race discrimination in jury selection. Studies in multiple jurisdic-

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[46] I say this even though I recognize the diminishing role of the jury in the criminal justice system overall. *See, e.g.*, Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. Times (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html, *archived at* http://perma.cc/2Q8T-5GR6; Suja A. Thomas, *The Missing Branch of the Jury*, Ohio St. L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2787426, *archived at* https://perma.cc/K7UK-35MR. The criminal jury trial itself has become a rare occurrence, as "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Missouri v. Frye, 566 U.S. 133, 143 (2012) (citations omitted). Under such circumstances, one could argue that protracted attention to the process of jury selection fails to meaningfully increase the legitimacy of the criminal justice system. The vanishing jury and its impact on the democracy, equality, and legitimacy of criminal punishment lies beyond the scope of this paper, but it is important to note how the decline of the jury in a world of racially-disparate policing and mass incarceration poses a special danger to the legitimacy of the criminal justice system.

[47] *See, e.g.*, Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1049 (2003) (reporting on empirical study and concluding that "[w]hen the jury was racially heterogeneous, [the] verdict did not influence ratings of the trial's fairness. However, when the jury did not include minority members, observers viewed the trial as less fair when it produced a guilty verdict than when it produced a not guilty verdict.").

[48] Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1180–81 (2012) (asserting that "in a more diverse jury, people's willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well" and summarizing a study which concluded that racially diverse juries have higher quality deliberations) (citing Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597 (2006)).

[49] William J. Bowers et. al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 193 (2001).

tions have convincingly shown that prosecutors continue to exercise peremptory strikes at significantly disproportionate rates against blacks compared to whites.[50] Despite these disparities, prosecutors making reverse *Batson* challenges to defense attorney strikes against white jurors have sometimes had more success in the courts than defense attorneys challenging prosecutors' strikes.[51]

Even when peremptory strikes are utilized disproportionately against minority jurors, it remains difficult to prevail on a *Batson* challenge.[52] *Batson*'s second step sets a low bar, as the race-neutral reason for the strike need not be "'persuasive, or even plausible.'"[53] Even when paired with step three, which requires a judicial assessment of discriminatory intent, this permissive standard makes it easy for savvy (or even not-so-savvy) prosecutors

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[50] *See* URSULA NOYE, BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY'S OFFICE, REPRIEVE AUSTRALIA 9 (Aug. 2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf, *archived at* https://perma.cc/KE3Q-KQAX (finding, in a decade-long study of preemptory strikes in Caddo Parish, Louisiana, that "Caddo parish prosecutors exercised peremptory challenges against black prospective jurors at more than three times the rate at which they exercised peremptory challenges against white prospective jurors"); RICHARD BOURKE, JOE HINGSTON & JOEL DEVINE, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE, LOUISIANA CRISIS ASSISTANCE CENTER (2003) (finding, in a study of peremptory strikes in Jefferson Parish, Louisiana, that "prosecutors chose to strike black prospective jurors at more than three times the rate of whites"); EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (Aug. 2010) http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf, *archived at* https://perma.cc/QMR5-2GCP (citing high strike rates of African-Americans by prosecutors in counties in Alabama and Georgia, and resulting capital trials by all-white juries); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533–34 (2012) (finding, in a study of "how prosecutors exercised peremptory challenges in capital trials of all defendants on death row in North Carolina as of July 1, 2010," that "[o]ver the twenty-year period we examined, prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black."). *See also* Miller-El v. Dretke, 545 U.S. 231, 268–69 (2005) (Breyer, J., concurring) ("I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson,* the discriminatory use of peremptory challenges remains a problem.").

[51] Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 465 (1996) ("[I]t is noticeable that *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.").

[52] *See, e.g.*, *Miller-El*, 545 U.S. at 269 (Breyer, J., concurring); *see also* Bidish Sarma, *First Impressions: When Will Race No Longer Matter in Jury Selection?*, 109 MICH. L. REV. 69, 72 (2011) ("[T]he dearth of recent cases in which courts have actually found racial discrimination in jury selection suggests not that such discrimination doesn't occur, but that the judiciary has failed to identify and remedy it."); *see also* Baldus, *supra* note 18, at 34–35. In the Baldus study, the authors concluded from the data that the *Batson* line of cases "had, at best, only a marginal impact on the peremptory strike strategies of each side" and that surprisingly few *Batson* challenges were even made despite extensive evidence of disparate strikes. *Id.* at 123.

[53] *See Miller-El*, 545 U.S. at 267 (Breyer, J., concurring) (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam)); *see also Purkett*, 514 U.S. at 766 ("'[M]ustaches and the beards look suspicious.'").

to strike jurors with near impunity.[54] Prosecutors who wish to exclude African-Americans from the jury can list infinite reasons for striking those jurors, some of which are closely-linked proxies for race. Prosecutors may object to a black juror on account of her church activities,[55] residence in a high-crime neighborhood,[56] type of employment,[57] or manner of dress.[58] Even easier, prosecutors may assert that a struck juror looked down while answering questions, seemed evasive (or nervous, or too eager), or hesitated before answering questions.[59] Perhaps the struck juror was the wrong age,[60] or not married,[61] or divorced.[62] Perhaps, in the attorney's view, the juror lacked intelligence.[63]

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[54] Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 (2011) (finding that, in a study of 269 federal decisions from 2000–2009, "prosecutors regularly respond to a defendant's prima facie case of racially motivated jury selection with tepid, almost laughable 'race-neutral' reasons, as well as purportedly 'race-neutral' reasons that strongly correlate with race. More significantly, we found that courts accept those reasons as sufficient to establish the absence of a racial motivation under *Batson*, and almost without exception, those reasons survive subsequent scrutiny in the federal courts . . . . Our study suggests that the *Batson* response is as ineffective as a lone chopstick." (citation omitted)).

[55] *E.g.*, State v. Jacobs, 32 So. 3d 227, 235 (La. 2010) ("Louisiana courts have found [to be] . . . a valid race-neutral reason . . . a prospective juror's involvement in church activities.").

[56] *E.g.*, Smith v. State, 448 S.E.2d 179, 181 (Ga. 1994) ("[T]he State's justification for the exercise of its peremptory strikes was the result of a racially-neutral belief that all residents, black or white, of a particular neighborhood might be biased against the State's witnesses. The prosecutor simply inferred that the two prospective jurors were more likely to have had direct exposure to gang activity than someone who did not live in their neighborhoods.").

[57] *E.g.*, United States v. Carter, No. 04-0404, 2006 WL 1128740, at *2 (W.D. Mo. Apr. 24, 2006) (accepting as race-neutral a strike based in part on the juror's unemployment); Crawford v. Zon, No. 04CV34, 2005 WL 857056, at *6 (W.D.N.Y. Apr. 14, 2005) (accepting as race-neutral a strike based in part on the juror's "occupation as a night club manager"); Carter v. Duncan, No. C 02-0586SBA, 2005 WL 2373572, at *10 (N.D. Cal. Sept. 27, 2005) (accepting as race-neutral a strike based in part on the juror's employment by the post office).

[58] *E.g.*, *Carter*, 2006 WL 1128740, at *2 (accepting as race-neutral the reason that "the venireperson was wearing baggy clothes that did not fit and a hat inside the courtroom"); State v. Crawford, 873 So. 2d 768, 783 (La. Ct. App. 2004) (upholding denial of *Batson* challenge where the prosecutor made "comments that she did not like the way Mr. Taylor was dressed and that he 'looked like a drug dealer'" and citing *State v. Banks,* 694 So. 2d 401, 408 (La. Ct. App. 1997), "where the prosecutor stated that he was excluding a potential juror because, *inter alia,* he was wearing gold jewelry and dressed in a T-shirt").

[59] *E.g.*, Green v. Travis, 414 F.3d 288, 300 (2d Cir. 2005) (noting that "the unfavorable demeanor of a venireperson has been held to be a race-neutral explanation for a peremptory challenge" and citing cases).

[60] *E.g.*, Crawford v. Zon, No. 04CV34, 2005 WL 857056, at *8 (W.D.N.Y. Apr. 14, 2005) (accepting as race-neutral the reason that one juror was "too young").

[61] *E.g.*, Lewis v. Bennett, 435 F. Supp. 2d 184, 192 (W.D.N.Y. 2006) (accepting as race-neutral reasons that struck jurors were "unmarried" and had "no children").

[62] *E.g.*, Cole v. Roper, No. 4:05CV131, 2007 WL 1460460, at *4 (E.D. Mo. May 16, 2007) (striking juror in part because he was divorced).

[63] The opportunity for invidious racial stereotyping in reaching this conclusion about lack of intelligence should be obvious. *See* Bellin & Semitsu, *supra* note 54, at 1097 (finding, upon a review of cases, that "[a] prosecutor's vague reference to the 'intelligence' of a venireperson . . . often withstood a *Batson* challenge even when the estimation of intelligence was not based on educational level, language barriers, IQ, vocabulary, Jeopardy winnings, or any other speci-

While a side-by-side comparison of struck jurors of one race against unstruck jurors of another race might make these justifications less credible and susceptible to rejection at step three, a competent prosecutor can readily articulate a series of weak but individualized, race-neutral reasons to strike *any* juror, because there is always a vast menu of identifiable characteristics, and combinations thereof, to choose from — occupation (or unemployment), age (too old or too young), education (too much or too little), familial status, residence, dress, speech, gestures, lack of eye contact, and so on. None may be particularly relevant to jury service, or particularly persuasive, but all are race-neutral and good enough for *Batson*. Because peremptory strikes may ordinarily be exercised for *any* purpose — including an irrational one — the bar for defeating a *Batson* challenge is necessarily low. An objectively weak reason for striking a juror can defeat a claim of pretext, even when race is a more plausible explanation for the prosecutor's choice because the very premise of a peremptory strike is that it can be exercised without a strong objective justification.

Indeed, the very inequalities in the criminal justice system that make jury diversity so important also, perversely, create formally race-neutral justifications for the exclusion of minorities under *Batson*. The cycle of disparate enforcement and distrust between law enforcement and minorities makes it more likely that (a) prosecutors will want to strike minority jurors, and (b) they will have formally race-neutral reasons for doing so. Because communities of color have a disproportionate rate of contact with law enforcement,[64] and because much of that contact leads to disillusionment with the criminal justice system,[65] prosecutors will often perceive — and successfully strike — minority jurors as distrustful of law enforcement or skeptical of the prosecution's case.[66] The very inequality of the criminal justice sys-

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fied way of gauging the venireperson's ability to follow the trial" and citing *Williams v. Norris*, 576 F.3d 850, 863–65 (8th Cir. 2009), as an egregious example).

[64] These disparities extend to law enforcement contact on the streets and rates of incarceration and probation. For example, New York City police "conducted an astounding 4.4 million stops between January 2004 and June 2012 . . . . In about 83 percent of cases, the person stopped was black or Hispanic, even though the two groups accounted for just over half the population." Editorial Board, *Racial Discrimination in Stop-and-Frisk*, N.Y. Times (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html?_r=0, *archived at* https://perma.cc/KAK5-JRM4. In 2014, the United States population was 13% black. United States Census Bureau, Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2015, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk, *archived at* https://perma.cc/6S8S-H595. However, "37% of the male prison population" was black, E. Ann Carson, United states Dep't of Justice, Bureau of Justice Statistics, Prisoners in 2014 (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf, *archived at* https://perma.cc/8GNG-98W7, and 30% of probationers were black, Danielle Kaeble Et Al., United states Dep't of Justice, Bureau of Justice Statistics, Probation and Parole in the United States, 2014 (Nov. 2015), http://www.bjs.gov/content/pub/pdf/ppus14.pdf, *archived at* https://perma.cc/PUD5-8EUZ.

[65] *See supra* note 41.

[66] *See, e.g.*, United States v. Rudas, 905 F.2d 38, 41 (2d Cir. 1990) (upholding the lower court's denial of a *Batson* motion where the struck juror, who was Hispanic, recounted exper-

tem provides cover for prosecutors to strike minorities on ostensibly race-neutral reasons.[67] For example, if more black citizens than white citizens are stopped and frisked or hassled by the police, prosecutors who question the venire about these interactions will find more "race-neutral" excuses to strike black jurors than white jurors. One commentator has recently advocated that jurors' arrest records should not qualify as race-neutral reasons under *Batson* for precisely this reason.[68]

Moreover, *Batson* provides little protection against implicit bias. Extensive social science research in recent decades has documented the prevalence of implicit racial bias, including by people whose consciously-held and professed beliefs are egalitarian.[69] Because of implicit bias, even a well-intentioned attorney who outwardly condemns racism may act upon latent stereotypes that cause her to perceive African-Americans as unfavorable jurors.[70] Particularly because peremptory strikes may be exercised based on *gestalt*, "seat-of-the-pants"[71] impressions, cognitive schemas that impact attorneys' gut-level responses to people of different races will impact whether they perceive minority jurors as "good" or "bad" jurors for their side. And because *Batson* sets a low bar for explaining the reasons for the strike, even if a prima facie case of discrimination is made out, such actions are easy to defend after the fact.

Batson's inadequacy in the face of race-based peremptory strikes was predicted from the moment of its inception. Justice Marshall, who concurred in the judgment handed down in *Batson*, argued that nothing short of the abolition of the peremptory strike would cure the problem of its race-based use.[72] Others following him have similarly called for the elimination of peremptory strikes altogether,[73] or have sought to asymmetrically abolish

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iencing excessive force by the police during voir dire, since possible "prejudice[ ] against law enforcement officers" was a race-neutral reason for the strike).

[67] *See, e.g.*, Green v. Travis, 414 F.3d 288, 300–01 (2d Cir. 2005) (approving the prosecutor's "general practice in exercising peremptory strikes during voir dire" of striking, in drug cases, "jurors who had family members who had either been arrested or undergone negative experiences with the police" or who "harbored negative feelings about the police").

[68] Vida Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 391 (2016).

[69] *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 949 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 (2006); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 181–82 (2005).

[70] Page, *supra* note 69, at 208 ("A challenge may, however, have been caused by a racial or gender-based stereotype that affected the way the attorney (decision-maker) processed information about the potential juror. In this case, the stereotype, or schema, acted as an implicit theory that affected how the attorney perceived, registered, stored, assigned meaning, and remembered information about the venire person, all without the attorney's awareness or intention.); *see also* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 819 (2012).

[71] Batson v. Kentucky, 476 U.S. 79, 138 (1986) (Rehnquist, J., dissenting).

[72] *Id*. at 102–03 (Marshall, J., concurring).

[73] Justice Breyer, concurring in *Miller-El*, examined *Batson*'s deficiencies and called for the Court to "reconsider *Batson*'s test and the peremptory challenge system as a whole." Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring). *See also* Judge Mark

peremptory strikes by prosecutors while reserving their exercise for criminal defendants.[74] Some have suggested pairing abolition with other systemic modifications, such as expanded voir dire proceedings and a lower standard of proof for cause challenges.[75]

Others have opposed eliminating peremptory strikes, both as detrimental to important principles of justice and as impractical to achieve.[76] Most convincingly, proponents of peremptory strikes have explained that they provide a "margin of protection" against selection of biased jurors by serving as a fallback when challenges for cause are rejected[77] or when sufficient evidence of bias cannot be amassed due to the inherent limitations of the question-and-answer voir dire process.[78] Peremptory strikes have also been defended as enhancing the parties' confidence in the verdict by facilitating their participation in the jury selection process.[79] Others have noted that, whatever the advantages of eliminating peremptory challenges, practical obstacles to that reform make it infeasible.[80]

Commentators have offered a number of reform proposals other than abolition to try to reduce or eliminate race-based peremptory challenges and increase diversity on seated juries — including affirmative juror selection

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W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 167 (2010); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 809–10 (1997); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).

[74] *E.g.*, Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164–65 (2014); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1147–48 (1994).

[75] *See, e.g.*, Ogletree, *supra* note 74, at 1151; Alschuler, *supra* note 8, at 208; Bennett, *supra* note 73, at 151.

[76] *E.g.*, Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 772–73 (1992); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553–54 (1975); Barbara L. Horwitz, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by Its Demise?*, 61 U. CIN. L. REV. 1391, 1439–40 (1993); Baldus, *supra* note 18, at 37–38 (summarizing arguments in favor of preserving peremptory strikes).

[77] Underwood, *supra* note 76, at 771.

[78] Baldus, *supra* note 18, at 37–38 ("The argument in favor of peremptories focuses primarily on the ineffectiveness of challenges for cause as a vehicle to identify and remove biased venire members. The first such claim is that many venire members either refuse to admit, or are unaware of, their biases. The second claim is that the legal standards applied in the evaluation of challenges for cause are excessively lenient in allowing rehabilitation of venire members that appear to be biased. The third claim is that courts are more likely to approve challenges for cause presented by the Government than by the defense; the use of peremptories by defense counsel, it is argued, is essential to overcome the adverse effects of those rulings. Finally, it is argued that peremptories are essential when a court rejects a challenge for cause. Without them, the juror so challenged would likely harbor resentment toward the party who sought to remove her from the panel.").

[79] Underwood, *supra* note 76, at 771–72.

[80] Baldus, *supra* note 18, at 38 ("In spite of the force of the arguments for the abolition of peremptories, critics have been unable to rally support for their abolition, and little change in that regard is now expected.").

rather than (or in addition to) juror strikes;[81] mandated minority representation on juries;[82] a more stringent standard in step two or three of the *Batson* test;[83] increased sanctions for *Batson* violations;[84] and a shift to analyze alleged race-based strikes under the Sixth Amendment right to an impartial jury rather than under Equal Protection.[85] One particularly interesting suggestion entails "jural districting," which, borrowing from the model of electoral districting, would seek to achieve a more diverse jury by requiring one representative from each of twelve geographic sub-districts to be seated on the jury.[86] Reformers have also stressed the importance of expanding voir dire to facilitate the informed exercise of peremptory strikes on individuated grounds other than race, gender, and physical appearance.[87]

There is much of value in many of the reform proposals to date, although each proposal also has its weaknesses. I am sympathetic to the call to eliminate peremptory strikes either in their entirety or, asymmetrically, by prosecutors, but I am skeptical that an asymmetrical approach — justifiable as it may be — is feasible given staunch opposition by members of the bench and bar. And I recognize that peremptory strikes, for all their susceptibility to discriminatory exercise, do serve several functions worthy of preserving. It is with this recognition that I advance a new proposal: the hybrid jury strike.

II. A New Model of Hybrid Jury Strikes

The logical goal in reforming the system of peremptory strikes should be to maximize its most beneficial features and minimize its most substantial

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[81] *See, e.g.*, Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and A Proposal for Change*, 74 B.U. L. Rev. 777, 806 (1994) ("I propose to provide each litigant with a certain number of affirmative peremptory choices, which litigants could use to include their 'peers' within the petit jury.").

[82] *See, e.g.*, Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1698–99 (1985) (arguing, before *Batson*, for a defendant's right to racially similar jurors and arguing, based on social science research about juror decision-making, that a defendant should be guaranteed "three racially similar jurors").

[83] *E.g.*, Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of A Delicate Balance*, 79 J. Crim. L. & Criminology 1, 63–64 (1988) (suggesting stronger criteria for evaluating both the prima facie case and its rebuttal); Paul H. Schwartz, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. Rev. 1533, 1567 (1991) ("[W]hen a prima facie inference of discrimination arises in the *Batson* context, the court should require the prosecutor to give at least some objective, verifiable reason for the questioned peremptory challenges.").

[84] *E.g.*, Ogletree, *supra* note 74, at 1117–23; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1740–41 (1977)

[85] Tania Tetlow, *Solving* Batson, 56 Wm. & Mary L. Rev. 1859, 1867–68 (2015).

[86] Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 Vand. L. Rev. 353, 359–60 (1999). For a discussion of this proposal, see *infra* text accompanying notes 161–65.

[87] Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1179, 1197–1201 (2003) (citing scholarship advocating expanded voir dire, including questionnaires, and discussing potential impact on implicit bias.); Page, *supra* note 69, at 254.

costs. I suggest that the best way of doing so would be to replace traditional peremptory strikes with so-called hybrid jury strikes. I define hybrid jury strikes as challenges that could only be exercised after a meaningful, race- and gender-neutral, and non-pretextual cause challenge was denied. These strikes would combine certain features of traditional peremptory challenges with other features of challenges for cause. Today, peremptory strikes may be exercised on a purely discretionary basis, pursuant to any whim as long as that whim does not violate equal protection. The reason for the strike is ordinarily unspoken; it must be articulated only if a prima facie case of racial discrimination can be established. By contrast, a system of hybrid jury strikes would require, ex ante and for every challenge, a meaningful[88] race- and gender-neutral justification that would tend to suggest a genuine risk of bias or disqualification on the part of the juror. In selecting which jurors to strike, attorneys would be discouraged from acting on gut instinct and would be oriented toward eliminating jurors who might be proven biased. However, the more stringent cause standard would not need to be satisfied; only a meaningful, not a winning, challenge for cause would be required.

In this section, I focus on the most straightforward way to incorporate hybrid strikes into voir dire: a one-for-one replacement of traditional peremptory strikes with hybrid strikes. In Part III.D, however, I discuss the possibilities for incorporating hybrid strikes into jury voir dire in different permutations and on an asymmetrical basis, such as by preserving traditional peremptory strikes for criminal defendants while restricting prosecutors to exercising hybrid strikes.

This proposal resonates in some ways with those that have suggested simultaneously abolishing the peremptory strike and lowering the for-cause standard,[89] but the hybrid challenge offers three key improvements over an attenuated for-cause regime. First, it does not require judges to internalize or

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[88] I describe below two possible standards for a "meaningful" challenge: "non-frivolous" or "substantial."

[89] *See e.g.*, Ogletree, *supra* note 74, at 1134–35 ("If peremptory challenges are eliminated, I would require the adoption of a new 'expanded for cause' standard for cause challenges. Under an expanded for-cause standard, judges would be willing to accept challenges on any basis that would cause a reasonable attorney to be confident that the challenged juror will be unable to render an impartial verdict: the judge need not (as now) share this belief, but he does have to find it reasonable rather than based on pure hunch, guesswork, or the desire to eliminate a large swath of society from the jury rather than a specific affiliation which might influence a juror unduly. (Taxicab drivers, for example, could be struck from a case involving a taxicab driver, but jurors over forty, or jurors who owned automobiles, or jurors who frowned when asked about automobiles, could not be struck for those reasons.)"); Alschuler, *supra* note 8, at 208 ("Abolishing the peremptory challenge might require courts to consider challenges for cause more carefully and to uphold them more frequently . . . ."); Jonathan B. Mintz, Batson v. Kentucky*: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection),* 72 CORNELL L. REV. 1026, 1042–43 (1987) (advocating for eliminating peremptories while "mak[ing] wider use of the 'catch-all' challenge for cause included in most statutes. . . .[and] always allow[ing] the attorneys to ask the voir dire questions."); Theodore McMillian, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 374 (1990); Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Pro-*

impose a new standard for cause — which may, in practice, devolve backward to the old cause standard or expand, unbounded, toward over-permissiveness. In a hybrid system, the judge would be required, in the first instance, to do what she had always done: assess whether there are adequate grounds to determine that the juror meets any of the statutory bases for disqualification. If not, the judge would make a secondary determination of whether the cause challenge was meaningful and non-pretextual. The judge would not need to endorse the reason for the challenge as ultimately meritorious, and would not need to rule that the juror was in fact unqualified.[90]

Second, and importantly, hybrid jury strikes would be limited in number, just as traditional peremptory strikes are today.[91] By contrast, relaxing the for-cause standard would apply to all challenges with unbounded effect. Under a hybrid strike regime, parties would have the opportunity to challenge jurors in a select number of instances when they were most convinced that the judge had failed to recognize bias or other source of disqualification. But there would be no wholesale diminution of the cause standard — which could ultimately result in the exclusion of *more* minority jurors than we see today.

Third, eliminating peremptory strikes while lowering the cause standard would leave no recourse against the discriminatory exercise of these watered-down cause challenges.[92] Hybrid jury strikes, by contrast, could be subject to a modified *Batson* framework as described in Part III.C, thus providing an extra layer of protection against pretext and impermissible discrimination.

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cess, 46 BAYLOR L. REV. 947, 1003–04 (1994); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1107–08 (1995).

[90] *See* Alschuler, *supra* note 8, at 206 ("On occasion, unexplained challenges have provided a gentle way of excluding prospective jurors who probably should not have been permitted to serve. When a prospective juror has told the court that he or she can be impartial, rejecting this assurance and excluding the juror for cause is likely to seem insulting. In this situation, the peremptory challenge has permitted both judges and prospective jurors to save face. Judges have resolved their doubts against exclusion, relying on the peremptory challenge to correct their errors and to do so without explicitly rejecting the jurors' protestations of impartiality.").

[91] The exception would be a jurisdiction such as Alabama's, which has unlimited peremptory challenges. The parties whittle down the qualified venire by striking jurors until a 12-person jury is selected. ALA. R. CRIM. P. 18.4(f)(1).

[92] Laura I. Appleman, *Reports of* Batson*'s Death Have Been Greatly Exaggerated: How the* Batson *Doctrine Enforces A Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 653 (2005) (critiquing proposals to lower the cause standard because "there would be essentially no mechanism for addressing one side's pattern of striking potential jurors for illegal bases. Simply because the strikes would then be done through the for-cause challenge, as opposed to the peremptory challenge, does not mean that trial counsel would not attempt to control jury selection as much as possible; instead, there would probably still be instances of discriminatory intent in for-cause challenges, either conscious or subconscious. With the revised for-cause challenge system, however, there would be no *Batson* procedure to eliminate these kinds of strikes.").

The hybrid strike model would preserve some of the most important interests served by the peremptory strike, while militating against some of its most perverse effects. I explore these dynamics below.

A. Preserving the penumbral function

The most convincing argument in favor of the peremptory challenge is what I call its "penumbral function": the buffer zone of impartiality that it can provide around the imperfect system of challenges for cause. Voir dire is a necessarily limited forum for unearthing jurors' partiality. Jurors may be reluctant to voice their biases and prejudices out loud in court — particularly socially unacceptable ones such as racism or sexism — and those who do may be formally rehabilitated through follow-up questioning by the judge or opposing party, yet still harbor partiality. As has been demonstrated by social science literature on implicit bias, some jurors may not even be aware of their biases; they may express genuine verbal adherence to egalitarian values while harboring strong yet unconscious biases.[93] Moreover, even when substantial evidence of partiality exists on the record, judges may be reluctant to reach a formal, stigmatizing, yet borderline conclusion that a juror is biased,[94] or may simply reach the wrong conclusion that a juror is qualified for service. More problematically, judges who are more sympathetic to the state than the defense may rule on defense cause challenges more strictly than on state challenges.[95] For all of these reasons, peremptory challenges create a penumbra of impartiality. They allow the parties to buffer the judge's rulings on cause challenges, making it less likely that a truly biased juror will be seated on the jury.

The penumbral peremptory has particular value in light of the substantial discretion afforded trial judges when ruling on for-cause challenges.[96]

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[93] *See supra* note 69.

[94] *See* Alschuler, *supra* note 8, at 206.

[95] *See* Baldus, *supra* note 18, at 38. The predominance of former prosecutors in the ranks of judges, both state and federal, contributes to actual or perceived sympathy by some judges toward the state. *See, e.g.*, Alliance for Justice, Broadening the Bench: Professional Diversity and Judicial Nominations 8–9 (2016), http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf, *archived at* https://perma.cc/T4FF-RFE7 (finding that "126 out of [President Obama's] 300 district court nominees (42.0%) have been state or federal prosecutors. Forty-five (15.0%) have been state or federal public defenders, while 62 (20.7%) have been private criminal defense attorneys" and "24 out of [President Obama's] 64 circuit court nominees (37.5%) have been prosecutors. Eleven (17.2%) have been private criminal defense attorneys, and five (7.8%) have been public defenders."). *See also* Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 Minn. L. Rev. 1985, 1995–2001 (2016) (discussing the possible implications of the of U.S. Supreme Court's shift toward justices with experience as prosecutors).

[96] Skilling v. United States, 561 U.S. 358, 386 (2010) ("Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record — among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty" (citing Reynolds v. United States, 98 U.S. 145, 156–57 (1878));

This discretion seems inevitable — judges are tasked with ruling on multiple challenges at every trial, some of which may involve credibility determinations that take into account demeanor of jurors and other intangibles that are difficult to put into the record for appellate review.[97] Judges need to be able to make these determinations with some leeway, or else the finality of every jury verdict would be cast in doubt. Yet in spite of the need for deference, a judge's choice to deny a cause challenge, if erroneous, may lead to the seating of a biased juror and may have serious consequences for the fairness of the trial. The peremptory challenge provides a partial solution. The harmful consequences of a discretionary, erroneous denial can be neutralized by a discretionary, contemporaneous party action rather than by an unlikely appellate reversal.

Jury selection is a rare scenario in which this type of non-appellate, bottom-up check on judicial discretion is possible. Each qualified juror, though unique and worthy of service, is also replaceable with another juror who is equally unique and worthy of service. Although individual and systemic harm is done when jurors are excluded on the basis of impermissible discrimination, there is no inherent need or right for any particular juror to serve on any particular jury. Thus an erroneous denial of a challenge for cause, which results in the seating of a biased juror, is more harmful than a peremptory exclusion of a juror whose impartiality is questioned — as long as that exclusion does not undermine other democratic and constitutional values, such as racial equality.[98]

The hybrid strike would preserve the essence of this penumbral function. Of course, it would be more difficult to exclude an actually biased juror in a hybrid strike regime than in a pure peremptory strike regime, because hybrid strikes must be supported by valid reasons and may not be exercised automatically; the judge, rather than the party, would retain ultimate control over their exercise. But the hybrid jury strike would still provide a safety net around the challenge for cause. If the judge exercised her

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Wainwright v. Witt, 469 U.S. 412, 429–30 (1985) (quoting Dennis v. United States, 339 U.S. 162, 168 (1950)).

[97] For example, if a juror retracts a biased viewpoint when rehabilitated during voir dire, it may be necessary for the judge to assess the credibility of the retraction by evaluating the demeanor of the juror.

[98] By contrast, in other situations when judges exercise discretion to grant or deny a party's motion, the subject of the motion cannot be replicated and a bottom-up check on deference is less feasible. For example, when judges exercise their substantial discretion under Rule 403 of the Federal Rules of Evidence to determine whether the probative value of a piece of evidence is substantially outweighed by the danger of unfair prejudice, the piece of evidence is irreplaceable. The trial judge's ruling is binary: the evidence will either come in or it won't. An appellate court will review that binary and discretionary determination under a highly deferential standard. Outside of appellate review, which is unlikely to succeed, there is no vehicle for the parties to check a judge's erroneous discretionary action. Because jurors, unlike pieces of evidence, are interchangeable, in the jury selection context the parties *can* check against erroneous or unfavorable discretionary judicial action through the exercise of peremptory strikes, without resorting to a likely losing effort at deferential appellate review. In this way, the peremptory strike is an unusual and valuable model for checking judicial deference.

discretion and made a close call denying a challenge for cause, the party would retain a check on that discretion. The penumbral protection would simply be narrowed to the cases in which bias was most plausible because substantial reasons could be garnered in favor of exclusion. The check would be moderated, but not eliminated, as it would be if the peremptory challenge were abolished entirely. And through the hybrid strike's narrowing of the buffer zone, there would be fewer "false positives" — situations in which jurors struck on the basis of an attorney's hunch or stereotype could actually have served as impartial jurors.

One lingering concern is that the shift to hybrid strikes would diminish the defendant's ability to enforce his right to a fair trial when faced with a particularly unsympathetic judge.[99] If, in practice, judges disfavored defendants when ruling on the permissibility of hybrid strikes, implementing jurisdictions may wish to consider one of the asymmetrical applications considered below in Part III.D.[100] Additionally, although reviewing courts would almost certainly need to give deference to trial judge rulings granting or denying hybrid strikes,[101] appellate courts should consider any apparent disparities in the trial judge's rulings on state and defense strikes when determining if the trial judge abused her discretion.

B. Preserving confidence in trial outcomes

Another argument that has been made in favor of the peremptory strike is that it promotes the parties' confidence in the outcome of the trial by providing them with some measure of control and input over the composition of the jury.[102] As I will explain below, in my view the traditional peremptory strike only partially serves this interest; in other ways it undermines it. The hybrid strike would continue to promote party input and confidence, but in a modified form that would actually enhance confidence in the legitimacy of the trial outcome.

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[99] *See* Ogletree, *supra* note 74, at 1143–47.

[100] Measuring such hostility to the defense would present challenges. However, one can imagine reviewing voir dire transcripts and demonstrating divergent rulings on similarly meritorious defense and prosecution challenges. Although a higher grant rate of prosecutorial strikes would not in and of itself denote judicial bias, it could also be evidence of more favorable treatment to the prosecution.

[101] *Cf.* Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (mandating deference to trial judges' determinations at step three of the *Batson* inquiry in light of the need to evaluate the credibility and demeanor of both the juror being challenged and the attorney making the strike).

[102] *See* Swain v. Alabama, 380 U.S. 202, 219–20 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986) ("The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way 'justice must satisfy the appearance of justice' " (citation omitted)); Underwood, *supra* note 76, at 771–72; Katherine Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in A Criminal Trial*, 102 HARV. L. REV. 808, 829 (1989) (on importance of input to the defense, in particular).

The traditional peremptory strike serves to increase party participation in the shaping of the jury and hence is sometimes thought to enhance party confidence in the outcome. When the parties are permitted to strike individual jurors whom they believe to be predisposed to rule against them, they may be more likely to accept the legitimacy of the final verdict that the jury reaches.[103] This acceptance of legitimacy is particularly important for the criminal defendant, who is impacted most coercively by the jury's verdict,[104] and whose acceptance of its legitimacy serves the underlying retributive and utilitarian purposes behind criminal punishment itself.

The narrative that the peremptory strike increases legitimacy through party participation, however, is undermined by its historical misuse to diminish racial diversity on the jury. Although the defendant may perceive some increased legitimacy through her own ability to strike jurors she dislikes, if the net effect of peremptory challenges is to make juries less diverse, the harm to the trial's legitimacy will vastly outweigh any participatory benefits — particularly for minority defendants. When, as in the case of Timothy Foster, a prosecutor is able to leverage peremptory strikes to secure an all-white jury that then convicts a black defendant and sentences him to death,[105] the peremptory strike undoubtedly diminishes the defendant's confidence in the outcome, as well as public confidence[106] in the fair administration of the criminal justice system.

The hybrid strike would provide some, but lesser, control to the parties in shaping the jury. Although each party's level of control would be reduced, thereby frustrating some degree of confidence that each party holds in the outcome, that confidence-deficit would be offset by the fact that the *other* party's level of control was also reduced. And, importantly, if the hybrid strike would make it more difficult to exclude jurors on the basis of race, the harm to legitimacy caused by racially-skewed juries would be mitigated.[107] By limiting both parties' degree of control over the jury composition, but still allowing some strikes of jurors that were not excluded for cause, the interest in party confidence would be *better* served than under the pure peremptory regime.

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[103] *See* Underwood, *supra* note 76, at 771–72.

[104] *See* Toni M. Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501, 561 (1986); Smith, *supra* note 74, at 1184.

[105] Foster v. Chatman, 136 S. Ct. 1737, 1742–43 (2016). See *supra* notes 1–5 & accompanying text for a discussion of the facts.

[106] *See* King, *supra* note 41, at 1184.

[107] Of course, other factors that lead to the racial skewing of juries may still persist, such as unrepresentative venires, differential impact of hardship challenges and cause challenges, and so forth. My claim is not that hybrid strikes are a panacea for racial disparities in jury selection, but rather an important improvement.

C. Imposing ex ante rationality

While preserving, in modified form, the interests in penumbral protection against juror bias and party confidence in the outcome, the hybrid system would end the practice of irrational and unexplained exclusion. Hybrid strikes would require ex ante articulation of meaningful reasons for their exercise in all cases and so would diminish reliance on stereotypes — including but not limited to those based on race and gender.[108]

Under the traditional peremptory strike system, unless a prima facie case of impermissible discrimination is set out at *Batson*'s first step, peremptory strikes may be exercised for any reason (or no reason) and without explication. The embrace of unarticulated irrationality creates several significant problems of equal protection.

The first problem is that of irrational government action — and this problem persists regardless of whether the strike is racially motivated. Rationality is the touchstone of equal protection law when suspect or quasi-suspect class is not at issue.[109] Traditional peremptory challenges may fail to satisfy even this low standard. Peremptory strikes are anti-rational: they were traditionally celebrated for their arbitrariness.[110] But how can arbitrariness be compatible with equal protection, even when strikes are not exercised on the basis of race or gender?[111]

Chief Justice Burger, dissenting in *Batson*, identified precisely this incompatibility, though he would have preserved the peremptory challenge at the expense of equal protection. He wrote:

> [U]nadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "'an arbitrary and capricious right,'"; a constitutional principle that may invalidate state action on the ba-

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[108] I do not suggest that hybrid jury strikes would entirely eliminate the risk of pretext, however, and I explain below in Part III.C how a *Batson*-like framework should be applied on top of the hybrid strike system as an additional protection against discrimination.

[109] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

[110] 4 WILLIAM BLACKSTONE, COMMENTARIES *346–47 ("But in criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."); Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) ("[P]eremptory challenges are often lodged, of necessity, for reasons 'normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.' Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of 'assumption' or 'intuitive judgment.'" (citations omitted)).

[111] "The Equal Protection Clause forbids the arbitrary classification of human beings, and peremptory challenges are inherently arbitrary. Even when exercised on grounds other than race, these challenges are unconstitutional." Alschuler, *supra* note 8, at 170.

> sis of "stereotypic notions," does not explain the breadth of a procedure exercised on the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'"[112]

The hybrid jury strike would enforce rationality and equal protection where it was previously lacking. This requirement of rationality is important not only for its own sake, but also because the irrationality of the peremptory strike provides cover for impermissible racism and sexism. And thus arises the second equal protection problem with the unarticulated irrationality of the peremptory strike: it frustrates the detection and eradication of impermissible racial and gender bias. It is enormously difficult to identify peremptory strikes that are based on race when they can be justified on grounds that are *legitimately* flimsy — even though race may be a more believable reason. Permissible irrationality obscures impermissible discrimination.

Thus, to make real headway in reducing the pretextual reliance on minimally plausible race-neutral reasons, *all* peremptory strikes must be rational, not only those strikes for which a prima facie case of discrimination can be raised. Some commentators have suggested simply strengthening the necessary showing of rationality at step two or three of *Batson* to require something more than simply a "race-neutral" reason.[113] Yet it is difficult to impose this requirement when there is otherwise no obligation to exercise peremptory strikes for "good" reasons.

Thus the hybrid strike's strong enforcement of rationality would make it more difficult to shield racial bias from discovery. Moreover, the requirement that such reasons be articulated before the strike is exercised would provide further protection against bias where *Batson* has failed. Ex ante reason-giving in all cases would serve several important purposes. First, it would sidestep the requirement that the moving party establish a prima facie case of discrimination (step one of the *Batson* test) — a requirement that insulates discriminatory strikes from attack "unless the challenges are . . . flagrant" in their discrimination.[114] Second, it would serve a self-filtering function. In the current system, parties may strike venire members with no well-formed reason in their mind other than a conscious or implicit categorization based on race and simply hope or expect that they will get away with it — that the strike will go unchallenged and stay under their opponent's

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[112] *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting) (citations omitted).

[113] *See supra* note 83.

[114] *Batson*, 476 U.S. at 105 (Marshall, J., concurring). *See also* Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring) ("At *Batson*'s first step, litigants remain free to misuse peremptory challenges as long as the strikes fall *below* the prima facie threshold level." (citing *Batson*, 476 U.S. at 105 (Marshall, J., concurring)). Although since *Batson*, the Court has clarified that the first step is not intended to be overly "onerous" and that "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred," Johnson v. California, 545 U.S. 162, 170 (2005), there still must be concrete evidence of discrimination in order to proceed.

radar.[115] Ex ante reason-giving would mitigate this type of risk-taking and prevent attorneys from even attempting to strike jurors when they lack confidence that they can credibly defend the strike. Third, the articulation requirement would change the attorneys' orientation. Instead of legitimating stereotypes and encouraging lawyers to act on them, the hybrid strike regime would direct attorneys — including prosecutors — toward evaluating jurors in terms that might satisfy the cause standard.

Ex ante articulation of reasons also ameliorates, though does not fully remedy, the problem of implicit bias in the exercise of peremptory strikes. By requiring attorneys to point in advance to concrete and substantial facts suggesting the partiality of the juror they wish to strike, hybrid strikes would prevent attorneys from relying solely on their instinctual feeling about that juror — an instinctual feeling that might be largely determined by their latent biases. Scholarship on implicit bias in various contexts, from criminal law to employment law to immigration law, has noted that implicit bias is particularly likely to lead to discriminatory behavior when individuals are given discretion to act without needing to provide reasons for their actions and with little accountability.[116] This is particularly true of good-faith actors who do not knowingly seek to discriminate.[117] Giving reasons ahead of time forces attorneys to deliberate and experience accountability before they strike the juror rather than afterwards, when they may attempt to defensively rationalize a discriminatory strike.[118]

I do not claim that hybrid strikes would eliminate the effects of implicit bias altogether, because the reasons articulated for the hybrid strikes might

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[115] This idea is supported by evidence that few litigants actually bring *Batson* challenges notwithstanding widespread discrimination. *See* Baldus, *supra* note 18, at 123.

[116] *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 487 (2010) ("[T]he accountability literature reveals that individuals who must explain their decisionmaking to others are less prone to various biases."); Kang, *supra* note 48, at 1142 (citation omitted) ("[T]he conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments."); Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 414 (2016) ("Research in the social sciences demonstrates that pausing to think through or articulate a reason for an action limits the effects of implicit biases on that action."); Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 244 (2015) ("When judges are exercising discretion, they often do not go through the exercise of explaining their reasoning, which eliminates one of the checks on implicit bias. Just as trial court judges have been found to rely more on intuitive processing when they have greater discretion and less when bound by a web of rules, immigration judges operating in the arena of discretion are more likely to express implicit attitudes").

[117] *See supra* note 69 & accompanying text (noting that even people whose conscious views are egalitarian may harbor implicit biases).

[118] *See* Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 257 (1999) ("Both cognitive dissonance theory and impression management theory predict that after people have irrevocably committed themselves to a decision, learning of the need to justify their actions will motivate cognitive effort — but this effort will be directed toward self-justification rather than self-criticism. . . . [P]ostdecisional accountability should prompt defensive bolstering in which people focus mental energy on rationalizing past actions.").

themselves be shaped by implicit bias. Researchers have explained that we tend to interpret other people's behavior in ways that confirm our unconscious stereotypes.[119] For example, imagine that a police officer harbors an implicit bias that African-Americans are prone to violence. Imagine, further, that the police officer observes an African-American exhibiting certain behavior — say, reaching to take something out of his pocket. The police officer may interpret that behavior in a manner consistent with her unconscious belief — in other words, as evidence of imminent violence that might justify self-defense by the police officer. The very same gesture by a Caucasian person may be perceived as non-threatening. And, if the police officer is asked to articulate the basis for her perception of hostility, he can point to the behavior that led to suspicion, without even realizing that implicit bias shaped her perception of the behavior's significance.[120] Similarly, attorneys may interpret jurors' behavior in ways consistent with their implicit biases, such that they can truthfully articulate concrete facts that led them to doubt the juror's impartiality, without even realizing that their interpretation of those facts is itself a product of implicit bias.[121] Nevertheless, even though it may not wholly solve the problem of implicit bias, ex ante reason-giving does push back against it by forcing attorneys away from purely impressionistic and largely unaccountable decision-making.

Thus, the hybrid strike offers important improvements over the peremptory strike in its enforcement of ex ante rationality. Some defenders of the peremptory challenge will argue that requiring attorneys to articulate reasons in all cases, and requiring that those arguments provide meaningful grounds for a cause challenge, rids peremptories of their historical value.[122] Yet *Batson* itself has already limited the assumption that peremptory strikes will never require an articulation of reasons.[123] More fundamentally, the right to

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[119] *See, e.g.*, Page, *supra* note 69, at 207–11.

[120] *See* L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1155 (2012) ("In sum, implicit biases may cause officers not only to pay more attention to Blacks than to Whites, but also to interpret identical acts differently based upon the race of the individual performing them. This demonstrates that an officer's suspicions are not necessarily based solely upon the ambiguous actions he observes. Consequently, the articulation requirement does not prevent actions based upon racial hunches caused by implicit bias."); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 278–79 (2012).

[121] *See* Page, *supra* note 69, at 228–29.

[122] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 121 (1986) (Burger, C.J. dissenting) (emphasizing the historical importance of "unexplained peremptories . . . as a means to strengthen our jury system" and quoting Professor Barbara Babcock's defense of the peremptory challenge, which "'avoids trafficking in the core of truth in most common stereotypes'" and which "'allows the covert expression of what we dare not say but know is true more often than not.'" (quoting Babcock, *supra* note 76, at 553–54)).

[123] Albert Alschuler wrote critically of the explicated, but still irrational, peremptory strike that came into existence after *Batson*. Alschuler, *supra* note 8, at 200. *See also* Underwood, *supra* note 76, at 762–63.

achieve a desired jury composition through stereotyping is not worth its substantial costs — nor is it consistent with equal protection.[124]

III. Reflections on Implementation

A. The choice of forum

There are two possible avenues for implementation of the hybrid strike regime: legislative reform (at either the federal or state level) or judicial decree.

First, Congress and, more likely, individual state legislatures, could reform their statutory schemes to replace traditional peremptories with hybrid strikes. The Supreme Court has made it clear that "peremptory challenges are not of federal constitutional dimension"[125] and that "[s]tates may withhold peremptory challenges 'altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.'"[126] Thus, federal and state governments may certainly reform, without entirely eliminating, peremptory challenges in any way otherwise consistent with the Constitution.

The legislative avenue would bring the benefits of gradual implementation: In the model of experimentation extolled by Justice Brandeis,[127] an individual state legislature could enact this reform as a pilot program, providing an opportunity to assess its success before it was mandated or emulated elsewhere. Moreover, there may currently be momentum to achieve such a legislative reform, with increased popular and political scrutiny into race and the criminal justice system.[128] In particular, reformers in a state with a documented history of disparate use of peremptory strikes against minorities could point to the concrete problem and take the lead in attempting a new approach, and subsequently study whether the racial composition of juries had improved as a result.

Alternatively, the Supreme Court[129] could decide, as a prophylactic measure to enforce equal protection, that no peremptory strikes would be permitted unless the proponent of the strike first provided meaningful reasons for its exercise. This constitutional limitation on the peremptory strike would, in turn, require the states and federal government to either eliminate

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[124] *See* Alschuler, *supra* note 8, at 201–03; *Batson*, 476 U.S. at 107–08 (1986) (Marshall, J., concurring).

[125] Rivera v. Illinois, 556 U.S. 148, 152 (2009) (quoting United States v. Martinez–Salazar, 528 U.S. 304, 311 (2000)).

[126] *Id.* (quoting Georgia v. McCollum, 505 U.S. 42, 57 (1992)).

[127] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[128] *See supra* notes 41–45 & accompanying text.

[129] Individual state supreme courts, of course, could also interpret their own state constitutional equal protection guarantees to prohibit traditional peremptory strikes.

the peremptory strike altogether or institute some form of hybrid strike regime.

There are at least two theories under which such a judicial outcome could occur. First, the Court could conclude that peremptory strikes as currently exercised violate the rights of jurors under an equal protection analysis upon rationality review, without ever touching upon the issue of race or gender. As government actions negatively impacting individuals' interests must be rational,[130] the "arbitrary and capricious" peremptory strike in its traditional form is inherently in tension with the constitutional rights of jurors, because it may be exercised irrationally on a whim, hunch, or stereotype, rather than a reasoned basis.[131] Indeed, it is precisely this irrationality which made the peremptory such a treasured practice by some who have historically supported it.[132] Requiring ex ante reason-giving would, at bottom, enforce rationality. A hybrid model would ensure that jurors would not be struck without a legitimate reason, even if that reason would not be adequate to prevail on a challenge for cause. Granted, the Court might choose, instead, to change the standard of the peremptory strike to satisfy rationality review but not to require articulation of those reasons unless the opposing side challenged the strike's rationality. And the Court might choose a slightly different standard — such as a "rational" basis for the strike, rather than a "non-frivolous" or "substantial" ground for a cause challenge. However, it would be within the Court's power to rule that peremptory challenges as currently practiced violate equal protection and to mandate reason-giving in order to prophylactically ensure their rationality.

Second, the Supreme Court could require ex ante, meaningful reason-giving in an acknowledgement that *Batson* has failed to remedy the problem of race-based peremptory strikes. Recognizing that race-conscious peremptory strikes too often satisfy the minimal standards set forth in *Batson*, the Court could conclude that *Batson* is insufficient to protect against equal protection violations and could instead require a stronger showing of race-neutrality through the articulation of a weightier interest for the strike. Again, it is possible that the Court would only modify step two of the *Batson* inquiry, strengthening the necessary showing of race-neutral reasons, but only after a prima facie case of discrimination had been made out. However, for the reasons articulated above, the requirement of ex ante reason-giving would provide important additional protections against discrimination. And mandating this type of ex ante reason-giving to root out impermissible discrimination would be well within the Court's legitimate authority. In other contexts, most famously, in *Miranda v. Arizona*,[133] the Court has required procedural mechanisms in order to protect a constitutional guarantee too eas-

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[130] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).
[131] See *supra* notes 109–111 & accompanying text.
[132] *See id.*
[133] 384 U.S. 436, 478–79 (1966).

ily evaded without them.[134] *Batson* itself requires reason-giving where none was previously necessary;[135] hybrid strikes would simply require that reason-giving occur at a different point in time and for all strikes. Justices Marshall and Breyer have already suggested that the Court may ban peremptory strikes altogether in order to enforce equal protection.[136] Modifying peremptory strikes to ensure rationality and protect against equal protection violations would be a feasible midpoint between that extreme and the current status quo.

B. The hybrid standard

Calibrating the standard for a successful strike — and judicial adherence to the standard set — is of considerable importance. If the standard for granting a hybrid strike is too permissive, it would lead us back toward arbitrary peremptory challenges, with a heightened risk of discrimination — although, due to the requirement of ex ante reason-giving, there would likely still be some beneficial self-censorship. If the standard is too stringent, we would see an increased risk that genuinely biased jurors might make it onto the jury, diminishing the penumbral value of the hybrid strike. Rather than presenting one standard as the necessary approach to take in order to achieve the goals of the hybrid strike system, I will propose two reasonable contenders, with the recognition that the preferred standard will depend on the value preferences of the enacting jurisdiction.

One possible standard would allow for the exercise of a hybrid strike any time the court rejected a *non-frivolous* cause challenge. This is a fairly permissive standard that could be developed through reference to case law on Rule 11 sanctions. Courts in this context have defined "frivolous" as "when the result is obvious or when the . . . argument is wholly without merit."[137] The word "frivolous" has been "used to denote a filing that is both baseless and made without a reasonable and competent inquiry."[138] Its touchstone is "objective unreasonableness."[139] When involving factual allegations, those allegations must be "utterly lacking in support," not merely "weak" and "unlikely to prevail."[140]

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[134] *See* New York v. Quarles, 467 U.S. 649, 654 (1984) (discussing prophylactic nature of *Miranda* warnings).

[135] *See* Underwood, *supra* note 76, at 762–63.

[136] Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring); Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring).

[137] Dadd v. Anoka Cty., 827 F.3d 749, 757 (8th Cir. 2016) (quoting Horton v. Conklin, 431 F.3d 602, 606 (8th Cir. 2005) (quoting Newhouse v. McCormick & Co., 130 F.3d 302, 305 (8th Cir. 1997))).

[138] Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990).

[139] Margo v. Weiss, 213 F.3d 55, 65 (2d Cir. 2000).

[140] Almeciga v. Ctr. for Investigative Reporting, Inc., 185 F. Supp. 3d 401, 427 (S.D.N.Y. 2016) (citations omitted).

It would be possible for a cause challenge to be frivolous because of either legal or factual insufficiency. If an attorney sought to challenge a juror for cause based on reasons that either misrepresented or were not supported by the record (as, for example, occurred in *Foster*[141]), the challenge would fail due to the frivolous factual allegations. If an attorney sought to challenge a juror on the basis of a characteristic that *was* factually supported by the record, but that could not reasonably suggest bias or disqualification as a legal matter, that strike would also be frivolous. For example, if there was a factual basis for concluding that a potential juror lived in a high-crime neighborhood, a judge may nonetheless deny as frivolous a challenge based on that fact, holding that it would be unreasonable to conclude, based merely on the neighborhood in which one lived, that the juror would be biased or was otherwise disqualified.

On the other hand, if a juror stated, and then retracted, a biased viewpoint, the judge could reasonably conclude that the cause challenge was not frivolous. For example, suppose that a juror stated her belief that police only arrest people who are guilty. When rehabilitated by the prosecution, she agreed that she could follow the law that a defendant is innocent until proven guilty, and that the burden of proof is on the prosecution beyond a reasonable doubt. If challenged for cause, a judge would likely deny the motion, because the juror retracted her initially expressed viewpoint and agreed to act lawfully. But the judge could reasonably find a sufficient basis in the record for concluding, as a factual matter, that the juror was unlikely to hold the prosecution to its burden of proof and that, as a legal matter, such an orientation if true could compromise the juror's impartiality. A hybrid strike would therefore be permissible.

An alternative, stricter standard would require the proponent of the strike to provide a *substantial* basis for a cause challenge upon which reasonable judges could reach different rulings. This standard would be akin to a "near miss" approach. It would bring to mind the substantial showing that must be made under the Antiterrorism and Effective Death Penalty Act in order to obtain a certificate of appealability. The Supreme Court recently articulated this standard as follows:

> A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." That standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." Obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application

[141] Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016).

> . . . merely because it believes the applicant will not demonstrate an entitlement to relief."[142]

Requiring this substantial showing of cause to exclude the juror as the predicate for a hybrid strike would set a more demanding standard than simply requiring a non-frivolous basis. It is difficult to point definitively to a canonical class of challenges that would satisfy the non-frivolous standard but not the substantial basis standard, as judicial rulings on for-cause challenges are often highly fact-intensive and not amenable to bright-line rules. But imagine, for example, that a juror's parent served in law enforcement, and the defense sought to exclude that juror for cause. A judge might conclude, in denying the challenge for cause, that it was not frivolous, but neither was it substantial. In this scenario, the defense would be permitted to exercise a hybrid strike under the non-frivolous standard, but not under the substantial basis standard.

As a result, if the substantial basis standard were adopted instead of the non-frivolous standard, there would be fewer "false positives" — jurors excluded who were not in fact biased — and there would be less room for pretext and impermissible discrimination. At the same time, the penumbral function of the peremptory strike would be weakened because it would be harder to secure a ruling from a judge authorizing the use of a peremptory challenge.

My preference would be for the stricter standard, in light of the troubling history that we have seen with discriminatory use of peremptory strikes and the concern that a weaker standard might collapse back toward the traditional peremptory model. It seems, however, that either standard would be a substantial improvement over the status quo in the traditional peremptory regime. Either one would serve to preserve the penumbral function while discouraging peremptory challenges based on gut instinct and unsubstantiated stereotypes.[143]

C. The new Batson

Even under the stronger formulation, requiring a substantial showing of bias or disqualification, a regime of hybrid strikes would not eliminate the

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[142] Welch v. United States, 136 S. Ct. 1257, 1263–64 (2016) (citations omitted).

[143] It may be helpful here to consider Barbara Underwood's typology of permissible rationales for exercising peremptory challenges. *See* Underwood, *supra* note 76, at 762–64. She identified the first two rationales as "imperfect" challenges for cause: first, when a juror stated, but then retracted, a biased viewpoint; and second, when a juror's group membership other than race or gender, such as occupation, suggested a higher probability of bias. *Id.* at 762–63. The third rationale, which she deemed least significant, was when an attorney chose, on a non-race-based whim, to exclude a juror. *Id.* at 763–64. In any conception of the hybrid system, this third type of peremptory strike would be eliminated. Precisely how many "imperfect" challenges for cause in the first two categories would be allowed would depend on the standard adopted and the strength and specificity of the facts that called into question the juror's impartiality.

possibility of pretextual, discriminatory strikes. While mandating ex ante articulation of meaningful reasons for the strike would make it more difficult to strike jurors based on race or gender, it would not make it impossible to do so, and some form of *Batson* challenge would still need to be available.

There are at least four ways in which discrimination could still impermissibly enter the hybrid strike framework. The first is through disparate questioning. During voir dire, an attorney may question venire members of different races differentially — consciously or unconsciously searching for reasons to legitimate the strike of a juror of a particular race.[144] Imagine, for example, that in a drug case, the prosecutor only perfunctorily questioned white venire members about the war on drugs while intensively questioning black venire members about the same subject matter and then used the information obtained to justify hybrid strikes against some or all of them. Each hybrid strike would be technically justified but the pattern of questioning would evidence pretext.

Second, an attorney may challenge for cause venire members of one race while not challenging venire members of another race, even though the same grounds for a challenge were present on the record. In challenging jurors disparately, the attorney would only receive judicial authorization to exercise hybrid strikes against jurors of one race. Using the drug case above as an example, imagine that the prosecution questioned jurors of all races about their qualms about drug criminalization; that some of these venire members, black and white, expressed their belief that no one should go to jail for drug possession; but that when rehabilitated by the judge or defense, they all professed their ability to follow the law and convict if the facts warranted it. Suppose, then, that the prosecutor only moved to strike the black jurors for cause. If the judge denied these challenges, but ruled that they were non-frivolous, the prosecutor might move forward to exercise hybrid strikes only against the black jurors, despite the presence of similarly situated white jurors.

Third, an attorney may exercise hybrid strikes disproportionately against venire members of one race, even though the judge had ruled that there were adequate grounds for a hybrid strike against jurors of all races. Thus imagine that the same prosecutor *did* challenge for cause all those who expressed qualms about drug criminalization, that the judge did rule that all could be struck with hybrid strikes, but that when the time came to exercise those strikes, the prosecutor only or disproportionately struck the minority jurors. This scenario introduces the complication of scarce resources into the discrimination inquiry. While cause challenges are unlimited, hybrid strikes are not. An attorney who has a set number of hybrid strikes must

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[144] This type of disparate questioning may be evidence of discrimination under the current *Batson* regime. *See* Miller-El v. Cockrell, 537 U.S. 322, 344 (2003). *See also* Page, *supra* note 69, at 218 (citing examples of court recognition of disparate questioning as evidence of discrimination and explaining how implicit bias can lead to disparate questioning).

exercise them strategically and may be unable to strike every juror against whom there are adequate grounds. The process of prioritization might reflect discrimination, or it might be based on some other legitimate rationale.

Fourth, the attorney may exercise hybrid strikes for reasons that are formally race-neutral, but are so closely correlated with race that they may in fact be a proxy for race. For example, suppose a prosecutor in Ferguson, Missouri, asked each juror during voir dire whether he or she had experienced any negative interactions with law enforcement. In a jurisdiction in which, "[d]espite making up 67% of the population, African Americans accounted for 85% of . . . traffic stops, 90% of . . . citations, and 93% of . . . arrests from 2012 to 2014,"[145] and in which African-Americans experienced "almost 90%" of excessive force by the police,[146] it would be highly probable that many more black than white jurors would answer "yes" to that formally race-neutral question.

Even without obviously engaging in these four practices, a party may exercise her strikes in such a disproportionate manner against members of one race that an inference of discrimination would arise. If, for example, the prosecutor exercised ten of her twelve hybrid strikes against African-Americans when the venire was only 30% African-American, this absolute statistical disparity would be evidence of discrimination, even without strong evidence of disparate questioning or disparate use of cause challenges or hybrid strikes against similarly-situated individuals.

Thus we can see that the hybrid strike regime by itself would not protect fully against the race-based exercise of peremptory strikes, and we can recognize that an additional protection would remain necessary. With these scenarios in mind, we can begin to map out how *Batson* could be modified to fit the context of the hybrid strike system.

The requirement of ex ante reason-giving that defines the hybrid jury strike system leads to a natural simplification and streamlining of the existing *Batson* test. At present, step one of the *Batson* test (a prima facie case of discrimination) is necessary to trigger the inquiry at step two (race-neutral reason-giving).[147] But under a hybrid strike regime, the need for steps one and two melts away, as the judge must rule prior to the exercise of every strike that it is supported by a non-frivolous or substantial and race-neutral reason. Thus, in a hybrid regime, the moving party challenging a strike would proceed directly to make her case that the already-delineated reasons for the strike were pretextual.

In so doing, the moving party would be able to present evidence of discrimination such as that described above: patterns of disparate questioning, disparate attempts to challenge for cause similarly-situated jurors of different races, disparate exercise of hybrid strikes against similarly-situated

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[145] DOJ Ferguson Report, *supra* note 41, at 62.
[146] *Id.* at 28.
[147] Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016).

jurors of different races, use of hybrid strikes for reasons closely correlated with race, and overall disproportionate exercise of strikes against members of one race. The moving party could also point to other evidence of race-consciousness revealed in the proceedings as a whole, as well as past patterns of race discrimination by the attorney or the office in which she works.

The judge would then allow the non-moving party to respond, after which, taking into account all evidence, including the credibility of the striking party, the judge would ultimately rule as to whether the *Batson* movant had satisfied her burden of proving purposeful discrimination. And, although the nonmoving party could try to explain differential exercise of a scarce resource against members of one race by pointing to previously unarticulated facts, the justification for the strike itself would be limited to the reasons provided ex ante.

Even in this modified *Batson* regime, *Batson* challenges still may often be unsuccessful. In order to prevail, the moving party would likely have to establish a highly suspicious pattern of behavior by the striking attorney against members of one race or gender, because every individual strike would by definition be justified by a substantial reason for exclusion. However, *Batson* would be a more streamlined tool, without the cumbersome three-step analysis, and it would be able to focus with more precision upon the ex ante reasons for the strike when assessing claims of discrimination. And the combination of ex ante articulation and the modified *Batson* regime would make it more difficult to shield racial motivations from judicial detection.

D. Asymmetrical applications

Some commentators have argued persuasively that traditional peremptory strikes should be allocated to the prosecution and defense on an asymmetrical basis. Most ambitiously, some have advocated abolishing the prosecutorial exercise of peremptory challenges, while retaining peremptory strikes for the defense. Against the background of rampant and seemingly intractable prosecutorial misconduct and judicial orientation against criminal defendants, some argue that the peremptory strike is a necessary and legitimacy-enhancing tool for the defendant, but is both non-essential and persistently abused when leveraged by the state.[148] There is considerable normative and historical support for asymmetrical abolition.[149]

My primary critique of asymmetrical abolition is one of feasibility. As much opposition as there has been to the idea of eliminating peremptory strikes altogether, an approach that would only eliminate peremptory strikes

[148] *See* Smith, *supra* note 74, at 1164–65.

[149] *See* Ogletree, *supra* note 74, at 1148 ("There is ample historical precedent for the allotment of peremptories to defendants but not to the government.").

for prosecutors may be impossible to achieve.[150] Even Justice Marshall, a staunch champion of criminal defendants' rights and a strong skeptic of the peremptory strike system, did not place too much stock in the feasibility or equity of asymmetrical abolition.[151]

Hybrid strikes, however, may provide opportunities for softer asymmetrical applications that might more feasibly enhance important values of impartiality, race-neutrality, and legitimacy. I discuss here several variations on the hybrid strike model that would achieve some of the goals advanced by proponents of asymmetrical abolition without its stark disparity and resulting pragmatic difficulties.

These moderate asymmetrical applications would also alleviate one of the primary critiques that I would anticipate from the criminal defense community against the hybrid strike model: the risk that a judge who is more sympathetic to the prosecution than to the defense will assess the merits of hybrid strikes more favorably when exercised by prosecutors than by defendants.[152] If prosecutorial hybrid strikes were accepted as non-frivolous, while equally-meritorious defense strikes were rejected as frivolous, the defense could be stripped of all the corrective benefits of the peremptory challenge[153] and saddled with all its deficiencies, with little recourse on appeal.[154] Incorporating some measure of asymmetry into the hybrid strike model could protect against this scenario of judicial asymmetry in enforcement.

The first two asymmetrical models would modify the strong suggestion of abolishing peremptory strikes only for the prosecution. Under one model, the defense would be permitted to exercise traditional peremptory strikes, while the prosecution would be limited to hybrid strikes, rather than no strikes at all. This approach would be more politically feasible than eliminating prosecutorial peremptories altogether, and would incorporate the benefits of ex ante rule-giving specifically for prosecutors, whose racially discriminatory exercise of peremptory strikes has a long and particularly damaging history. It would also alleviate the concerns that have been raised about eliminating traditional peremptory strikes for the defense and thereby ceding control over a traditional mechanism to enhance the impartiality of the jury.

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[150] *See* Anna Roberts, *Asymmetry As Fairness: Reversing A Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1542 (2015) ("[D]espite its theoretical appeal, [asymmetrical abolition] seems unlikely as a practical matter. Prosecutors, like other litigators, appear to be addicted to the peremptory challenge and are ready and able to lobby for its retention.").

[151] Batson v. Kentucky, 476 U.S. 79, 107–08 (1986) (Marshall, J., concurring) ("Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' We can maintain that balance . . . by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.").

[152] *See supra* note 95.

[153] For discussions of the importance of the peremptory challenge to the defense, see, e.g., Smith, *supra* note 74, at 1175–78; Ogletree, *supra* note 74, at 1147–48.

[154] As explained *supra* notes 96–97 & accompanying text, the standard of review of rulings on hybrid strikes would almost necessarily be highly deferential.

Another modified model of asymmetrical abolition would be to permit the defense to exercise hybrid strikes and to limit the prosecution to cause challenges. Under this model, the persistent problem of race-based peremptories by prosecutors would come to an end. Prosecutors would be denied even hybrid strikes, in recognition that they would still be able to skew the jury on racial lines by providing formally race-neutral reasons for hybrid or peremptory strikes such as distrust of the police that are closely correlated with race. And defendants would face some limitations, as well: They would not be allowed the unfettered discretion permitted by traditional peremptory strikes. Yet defendants would retain a safety valve for unduly narrow judicial rulings on cause challenges — the hybrid strikes would preserve the penumbral protection of the defendant's constitutionally guaranteed right to an impartial jury.

Even if these approaches were rejected and both sides were allowed to exercise hybrid strikes, there would be ways to allocate or assess those strikes asymmetrically to promote overall fairness and discourage prosecutorial abuse. One asymmetrical application would be an unequal distribution of hybrid strikes to the prosecution and defense. There is a long historical basis for allocating more peremptory strikes to the defense than to the prosecution,[155] and although there has been a trend away from asymmetry in recent years,[156] multiple jurisdictions currently allocate more peremptory strikes to the defense than to the prosecution.[157] It would be sensible to continue and/or return to that approach by similarly allocating more hybrid strikes to the defense.[158]

Another possibility is that both sides may be permitted to exercise hybrid jury strikes, but the standard for a successful prosecution strike would exceed the standard for successful defense strike. Perhaps the defense would be permitted to exercise a hybrid strike on the basis of any non-frivolous but unsuccessful cause challenge, while the prosecution would need to satisfy a higher standard of a "substantial" challenge upon which rational jurists could disagree.

Relatedly, it would be possible to categorically eliminate certain types of rationales as adequate bases for a hybrid strike. In particular, formally race-neutral but practically race-correlated reasons — such as distrust of or negative interactions with law enforcement — could be eliminated as legitimate bases for a hybrid strike.[159] More broadly, there could be good reason

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[155] *See* Roberts, *supra* note 150, at 1533–35 (tracing asymmetrical allocations of peremptory strikes to the government and defense from fourteenth century England to mid-twentieth century America).

[156] *See id.* at 1536–37.

[157] *See, e.g.*, FED. R. CRIM. P. 24(b)(2) (allowing the government six peremptory challenges and the defense ten peremptory challenges in non-capital felony cases).

[158] *See* Roberts, *supra* note 150, at 1507.

[159] *Cf.* Johnson, *supra* note 68, at 391 (arguing that, on account of racial disparities in arrest rates, "questions about arrests during voir dire should be precluded, as should the practice of using a person's arrest record as the sole basis for the exercise of peremptory strikes.").

to eliminate "distrust of government" as a basis for the exercise of a hybrid strike, in light of the structural and historical role of the jury within our democratic system. The jury's institutional role is to serve as a safeguard of individual liberty against tyrannical government.[160] The jury's constitutional status evidences the Founders' recognition that an unchecked government is susceptible to overreaching. Excluding jurors from service on the basis of their experiences with precisely that type of government overreach disserves the fundamental purpose of the jury itself. A jury stripped of members who have experienced draconian law enforcement tactics firsthand would undermine the jury's success in its role as a communitarian check against government excess.

These asymmetrical permutations, and others, display the flexibility with which the hybrid jury strike model could be implemented. The hybrid jury strike is a tool that can be deployed to modify the existing peremptory strike model in varying ways and to varying degrees. At the intersection of a cause challenge and a peremptory challenge, the hybrid jury strike can be used to soften some of the either-or alternatives presented by efforts to reform the traditional model.

E. Overlapping reforms

The hybrid jury strike may be layered on top of other reform initiatives to strengthen their chances of success at achieving neutrality, diversity, and impartiality. The hybrid strike is not a panacea; racial discrimination in jury selection has thus far been an intractable problem, and I do not claim that the hybrid strike regime would completely eradicate it. However, the hybrid strike's salutary effects would increase if paired with other reform efforts to maximize the representativeness of juries.

Take, for example, Professor Kim Forde-Mazrui's idea of jural districting, akin to electoral districting, which he summarized as follows:

> [T]his method divides a jury district into twelve sub-districts, drawn around "communities of interest," and requires that each petit jury contain one juror from each sub-district. Drawing on electoral districting experience, such a selection method would tend to create more consistently diverse juries than do current selection procedures that select jurors on an "at large" basis."[161]

This is a fascinating proposal worthy of consideration. It does have some weaknesses: for one, the drawing of district lines can itself be subject to manipulation to satisfy the line-drawer's racial and political preferences, as

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[160] *E.g.*, Oregon v. Ice, 555 U.S. 160, 168, (2009) ("The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense."); Duncan v. Louisiana, 391 U.S. 145, 151–56 (1968) (recounting the historical significance of the jury).

[161] Forde-Mazrui, *supra* note 86, at 359–60.

has been amply shown by the long history of racial and political gerrymandering in electoral districting.[162] Yet the proposal's insight and promise are significant. Juries are intended to represent an entire community. By selecting a jury in such a way as to ensure representation across the entire geographical span of the district, we would make it more likely that the jury contained voices from the entire community, in all of its racial, political, and economic diversity — including from the defendant's own sub-community.

However, one difficulty with Forde-Mazrui's proposal is that peremptory strikes could threaten to eradicate much of the diversity that jural districting hopes to achieve. Imagine that a jury district that is 25% black was further divided into twelve sub-districts, with one juror to be selected from each sub-district. Imagine further that three of these sub-districts (or 25%) are majority-black. We might hope that the jury representatives from these majority-black sub-districts would, themselves, be black, thus achieving proportional representation on the jury without employing race quotas that would be presumptively unconstitutional under the Equal Protection Clause.[163] This representative logic would have a strong chance of success in the electoral context. Assuming racial bloc voting, the majority-black electorate in these sub-districts would have the numbers and the power to elect their representative of choice. Yet, unlike in the majoritarian electoral context, it is the parties and the judge, not the people of the district, who select the representative in the jury selection context. And the peremptory strike endangers the chance that this proposal will actually achieve racial diversity. If each sub-district is represented by only one juror, and the prosecutor is able to leverage her peremptory strikes so that the juror selected from the majority-minority district is *white*, then she may be able to effectively strip the sub-districted jury of all, or most, minority participation.

Recognizing the danger to racial diversity posed by peremptory challenges, Forde-Mazrui suggested that a jurisdiction inclined to implement jural districting might be amenable to eliminating the peremptory in its entirety.[164] That hope aside, Forde-Mazrui asserted that sub-districting would diminish prosecutorial incentives to exercise peremptory strikes on the basis of race, because the challenged juror would be replaced with someone demographically similar.[165] That outcome is possible, but it is also possible that jural districting would do nothing to change, or might even increase, prosecutorial incentives to strike jurors on the basis of race.

Imagine now, however, that jural districting was paired with hybrid jury strikes. The prosecutor would need to articulate, ex ante, substantial — even if not ultimately disqualifying — reasons for every strike. It would be

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[162] *See* Vieth v. Jubelirer, 541 U.S. 267, 274–75 (2004); Shaw v. Reno, 509 U.S. 630, 640 (1993).

[163] *See* Forde-Mazrui, *supra* note 86, at 392–93 (analyzing the equal protection problems posed by racial quotas for juries).

[164] *See id.* at 391.

[165] *See id.* at 391–92.

much more difficult for prosecutors to undermine the diversifying effects of the jural districting through the use of pretextual peremptory strikes. Thus, pairing the hybrid strike reform with another structural reform to jury selection would improve the chances of securing a diverse jury in practice.

F. The broader voir dire

I anticipate the critique that hybrid jury strikes would take too much time during an already-cumbersome voir dire process. It is true that hybrid strikes would require the articulation of reasons ahead of time for every peremptory strike and would likely lead to an increased number of for-cause challenges. I doubt, however, that the net effect would be too burdensome. To begin with, hybrid jury strikes would likely reduce the amount of time spent on *Batson* motions, because substantial reasons would have to be articulated for every strike. And, although there may be some increased litigation over erroneously granted or denied hybrid strikes at the appellate level, I would expect that it would be offset by a reduction in *Batson* litigation.

Nor would the hybrid strike system require any particular voir dire procedure in order to yield improvements over the current system — although I would argue, as others have, that expanded voir dire is preferable if the desired goal is to seek a truly impartial jury.[166] Voir dire proceedings vary dramatically in different states and even in different courtrooms within the same courthouse.[167] Sometimes judges conduct the voir dire questioning and sometimes attorneys are permitted to do so; sometimes there is a mixture of both. Sometimes panels of venire members are questioned together; in other cases each prospective juror is questioned individually and out of the presence of the rest of the venire. Sometimes jurors are asked to fill out lengthy written questionnaires before they are questioned in court. Sometimes the questioning is expansive, with significant latitude for the attorneys over the direction and the depth of questioning; sometimes the permissible scope is carefully curtailed by the judge.

At present, in courtrooms with strictly limited voir dire procedures, peremptory challenges are often exercised with little concrete individualized information about the jurors aside from physically obvious traits such as race, gender, physical appearance, and manner of dress. Thus, attorneys must generally resort to stereotypical assumptions in order to exercise their peremptory strikes. Within this context, implementing the hybrid jury strike system would likely mean significantly reducing the number of strikes exercised, because little information would be available upon which to base either a cause challenge or a hybrid strike. This reduction would be an

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[166] *See* Hans & Jehle, *supra* note 87, at 1198–1201; Page, *supra* note 69, at 254 (citing scholarship).

[167] *See* Hans & Jehle, *supra* note 87, at 1184–86 (describing variations in voir dire practice across different states and jurisdictions).

improvement, because such necessarily stereotypical peremptory strikes have little value worth saving. When peremptory strikes are exercised within an information deficit, the risk increases that attorneys will resort to racial and gender stereotypes in making their choices. The risk also increases that the penumbral function of the peremptory strike is less effective; there will be more "false positives" and a reduced chance that any given peremptory strike will actually eliminate a biased juror. Hybrid strikes would contribute to overall fairness by setting a higher standard for excluding jurors and limiting strikes in this information-poor context.

By contrast, in expanded voir dire procedures today, peremptory strikes may be exercised based on individuated information other than race and gender. In an information-rich context, the peremptory strike is more valuable in promoting fairness and legitimacy because it can be exercised intelligently to eliminate jurors who may truly be biased. Under a hybrid strike regime, one can also predict that the more expansive the voir dire and the more information available to the parties, the more attorneys would be able to establish the factual predicate for a strike, the more frequent the exercise of the strikes would be, and the more accurate the parties' estimation that a risk of bias exists. And in an information-rich environment, the loss of the ability to strike jurors based on hunches and stereotypes seems less significant. The parties would have the opportunity to question jurors more thoroughly and to genuinely further the interest in jury impartiality.

Conclusion

Thirty years of Supreme Court adherence to the *Batson* framework has failed to meaningfully protect against discrimination in the exercise of peremptory strikes, leading many to call for their abolition. Despite the persuasive power of this call, however, there seems to be little movement on the ground in that direction. This Article suggests a less extreme, and therefore more palatable, reform: the replacement of traditional peremptory strikes with hybrid jury strikes, which could only be exercised if the proponent first articulated reasons coming close to, but not found to satisfy, the standard for cause challenges. This reform would have important salutary effects by mandating ex ante rationality, yet preserving in modified form the most important penumbral function of the peremptory strike. The hybrid strike would be a flexible tool: It could be achieved through legislative or judicial action, calibrated to meet different policy objectives, combined with a modified *Batson* test, layered on top of other reform proposals, allocated asymmetrically between prosecutor and defense, and implemented with positive effect in variously-structured voir dire proceedings. It has the potential to perform the critical task of translating *Batson*'s ideal of non-discriminatory jury selection into a more effective and enforceable structural framework.