

2015

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Recommended Citation

Howe, Scott W. (2015) "Deselecting Biased Juries," *Utah Law Review*: Vol. 2015 : No. 2 , Article 1.

Available at: <http://dc.law.utah.edu/ulr/vol2015/iss2/1>

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DESELECTING BIASED JURIES

Scott W. Howe*

Abstract

Critics of peremptory-challenge systems commonly contend that they inevitably inflict “inequality harm” on many excused persons and should be abolished. Ironically, the Supreme Court fueled this argument with its decision in Batson v. Kentucky by raising and endorsing the inequality claim sua sponte and then purporting to solve it with an approach that preserved peremptories. This Article shows, however, that the central problem is something other than inequality harm to excused persons. The central problem is the harm to disadvantaged litigants when their opponents use peremptories to secure a one-sided jury. This problem can arise often—whenever a venire is slanted in favor of one of the parties. The advantaged litigant can use peremptories to seat a large group of favorable jurors regardless of how the disadvantaged litigant exercises its peremptories. The Court in the Batson cases only obliquely confronted that problem, because constitutional rulings cannot appropriately resolve it. However, there is a remedy. Peremptory systems reflect the idea that parties acting in their self-interests can help pursue group neutrality on a jury. Similarly, by conferring on litigants a right to stop peremptories at any time, states can enlist them to determine when opposing parties are using peremptories to promote group bias.

I. INTRODUCTION

The peremptory challenge of potential jurors has ancient roots but a modern chorus of critics.¹ The essence of the peremptory is that it requires no good reason,² unlike with a successful challenge for cause, when the challenger must convince the court that the potential juror is unable to follow the judge’s instructions or is

* © 2015 Scott W. Howe. Frank L. Williams Professor of Criminal Law, Dale E. Fowler School of Law, Chapman University. I thank my colleagues at Chapman, particularly Larry Rosenthal, Associate Dean Dan Bogart, and Dean Tom Campbell. Most importantly, I thank Jetty Maria Howe for assistance at all stages of this project.

¹ See, e.g., Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 *FORDHAM. L. REV.* 1683, 1713 (2006) (“The chorus of judges calling for the elimination of the peremptory, while still small, is nonetheless growing.”).

² See, e.g., *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (“The essential nature of the peremptory challenge is that it is one exercised without a reason stated”); *Lewis v. United States*, 146 U.S. 370, 378 (1892) (“[I]t is, as Blackstone says, an arbitrary and capricious right”).

otherwise unqualified.³ Although abolished in England in 1988⁴ and not required by the U.S. Constitution,⁵ the tradition of allotting parties in a jury trial a number of peremptory challenges⁶ survives in the United States in both criminal and civil cases.⁷ The practice has long been rationalized as allowing parties to excuse venire members whom they fear may be secretly unqualified or biased and to facilitate vigorous voir dire by protecting parties against secret hostility that could develop in a venire member through pointed questioning.⁸ Yet, a variety of commentators, including several past and current members of the Supreme Court, have urged that the use of peremptory challenges leads to injustice.⁹ They assert that the practice is so troublesome that either the legislatures or the courts should abolish it.¹⁰

Protests about peremptory challenges have focused largely on inequality concerns.¹¹ Complaints have long arisen that parties can use peremptory strikes to discriminate against venire members based on factors such as race, ethnicity, and

³ See *Swain*, 380 U.S. at 220.

⁴ See *Miller-El v. Dretke*, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (stating that “England, a common-law jurisdiction[,] . . . has eliminated peremptory challenges”).

⁵ *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988).

⁶ The number allotted varies widely from state to state and between criminal and civil cases. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 228–32 tbl.41 (2006), available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf>, archived at <http://perma.cc/4P3T-HA5S>. For example, different states give criminal defendants in a noncapital felony case anywhere from four to twenty peremptories, not counting extras allowed for the selection of alternate jurors. See *id.* In misdemeanor criminal cases and civil cases, the number tends to be lower. See *id.*

⁷ See Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1471–72 (2012) (noting that “despite criticism of the practice, every jurisdiction in the country continues to employ peremptory strikes” (citing 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, 1085 (2011))).

⁸ See, e.g., Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 554–55 (1975) (“Questioning in order to investigate the appropriateness of a cause challenge may have so alienated a potential juror that, although the lawyer has not established any basis for removal, the process itself has made it necessary to strike the juror peremptorily.”).

⁹ See *Rice v. Collins*, 546 U.S. 333, 342–43 (2006) (Breyer, J., concurring); *Miller-El*, 545 U.S. at 267 (Breyer, J., concurring); *Batson v. Kentucky*, 476 U.S. 79, 102 (1986) (Marshall, J., concurring); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 827 (1997); Marder, *supra* note 1, at 1715; John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907, 907–08 (2003).

¹⁰ See *Collins*, 546 U.S. at 342–43 (Breyer, J., concurring); *Batson*, 476 U.S. at 108 (Marshall, J., concurring); Hoffman, *supra* note 9, at 809; Marder, *supra* note 1, at 1712–15; Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 104 (2009).

¹¹ See *Batson*, 476 U.S. at 102 (Marshall, J., concurring) (“The Court’s opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the *Equal Protection Clause*.” (emphasis added)).

gender.¹² Critics contend that those kinds of strikes harm the excused venire members both by denying them the opportunity to serve as jurors¹³ and by denigrating them for their membership in the protected class.¹⁴ Further, strikes of that sort allegedly harm the opposing party by implying that the trial court will tolerate unfair treatment not only of the excused jurors but also of the party.¹⁵ Likewise, such discriminatory strikes allegedly undermine trial participants and observers' confidence in the fairness of the judicial system, because they will see the treatment of the excused jurors as unjust.¹⁶

Complaints about peremptories continue despite increased measures by the Supreme Court in recent decades to regulate them under the Equal Protection Clause. In *Batson v. Kentucky*,¹⁷ a prosecutor used peremptories against black venire members, and the defendant, who was black, objected.¹⁸ The Court held that the trial judge should have required the prosecutor to give reasons for the strikes and should have assessed whether the prosecutor discriminated on racial grounds.¹⁹ In later cases, the Court extended *Batson* beyond prosecutors,²⁰ beyond criminal cases,²¹ and beyond race,²² and it also declined to require that the party or lawyer objecting to the strikes share the protected characteristic of the challenged venire member.²³ Yet,

¹² See, e.g., *Swain v. Alabama*, 380 U.S. 202, 221 (1965) (rejecting petitioner's claim that a prosecutor's use of peremptory challenges to excuse black persons from the venire "is a denial of equal protection of the laws").

¹³ See, e.g., *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (asserting that a peremptory challenge based on race denies the excused person "a significant opportunity to participate in civic life").

¹⁴ See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) ("It denigrates the dignity of the excluded juror . . .").

¹⁵ See, e.g., *Powers*, 499 U.S. at 411 ("The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury . . . because racial discrimination in the selection of the jurors . . . places the fairness of a criminal proceeding in doubt." (citations omitted)); see also *J.E.B.*, 511 U.S. at 140 ("The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings.").

¹⁶ See, e.g., *Powers*, 499 U.S. at 413 ("The verdict will not be accepted or understood [as fair] . . . if the jury is chosen by unlawful means at the outset.").

¹⁷ 476 U.S. 79 (1986).

¹⁸ *Id.* at 83.

¹⁹ *Id.* at 97.

²⁰ See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (prohibiting criminal defendants from exercising peremptories to excuse black persons based on race).

²¹ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (holding that a private litigant in a civil case could not use peremptories to exclude black persons based on race).

²² See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (holding that a state in a civil action to establish paternity could not use peremptories to excuse male jurors based on gender).

²³ See *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (holding that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same races").

critics contend—and few others seem to disagree—that *Batson* doctrine has mostly enabled a “charade” of neutral reasons and has failed to do much to prevent strikes based on prohibited grounds.²⁴ They also contend that abolition of peremptories is the only effective way to stop the “inequality harm.”²⁵

Despite the criticism and venerated positions of many critics, peremptory challenges remain the norm throughout the country.²⁶ Various study groups appointed by national organizations and state governments have opposed abolition,²⁷ including the American Bar Association.²⁸ No state has gotten rid of peremptory challenges, and the Supreme Court has never had a majority of members who appeared ready to abolish them or to recommend their abolition.²⁹ The prevailing view among interested sectors of the legal profession is that if there is something wrong with the limited effect of *Batson* doctrine in restraining peremptories, there is something right about it, too.³⁰ And, what apparently is deemed right is not that *Batson* doctrine has largely prevented peremptories based on race and gender but that even those strikes can help produce more neutral juries.³¹ The widespread resistance to ending peremptories suggests that claims that they continue to risk inequitable mistreatment based on race and gender have not persuaded lawmakers.

In this Article, I will show that the standoff over peremptories does not mean retentionists are completely right and abolitionists completely wrong. Both positions

²⁴ Judge Constance Baker Motley expressed this view in an opinion rejecting the purported reasons given by a party in a civil case for using peremptories to challenge two black persons and a Latino. *See Minetos v. City Univ. of N.Y.*, 925 F. Supp. 177, 185 (S.D.N.Y. 1996) (“It is time to put an end to this charade. We have now had enough judicial experience with the *Batson* test to know that it does not truly unmask racial discrimination.”); *see also* Marder, *supra* note 1, at 1706 (“*Batson* is so easy to circumvent that it allows a charade in the courtroom.”).

²⁵ *See, e.g., Minetos*, 925 F. Supp. at 185 (declaring that peremptories “per se violate equal protection”); Marder, *supra* note 1, at 1715 (“[E]limination of the peremptory should be the next step.”); Price, *supra* note 10, at 104 (contending that the best way to avoid “equal protection concerns” is to “remove them altogether”).

²⁶ *See, e.g., Bellin & Semitsu*, *supra* note 7, at 1085 (“It continues to be available in all American jurisdictions . . .”).

²⁷ *See* Marder, *supra* note 1, at 1685–86.

²⁸ *See* AM. JURY PROJECT, AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS 14 (2005) (advocating that peremptory challenges be preserved), *available at* <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.auth.checkdam.pdf>, *archived at* <http://perma.cc/KM2T-A8NK>.

²⁹ Justices Breyer and Stevens were together on the Court at a time when both came close to expressing the view that peremptory challenges should be eliminated. *See* Marder, *supra* note 1, at 1714–15.

³⁰ *See id.* at 1685 (“Few trial lawyers want to relinquish the peremptory challenge.”).

³¹ *See id.* at 1686 (“Even though . . . organizations or committees [focused on jury reform efforts], usually consisting of lawyers, judges, and academics, recognize that the peremptory challenge has been difficult to police and has led to juries that are less diverse than they might otherwise be, they have been unwilling to recommend the elimination of the peremptory.”).

miss the mark. Peremptories sometimes produce bad consequences, but the risk of inequality harm to excused persons is not the central problem. Likewise, peremptories do not warrant elimination, but *Batson* doctrine does not adequately regulate them.

What is wrong with peremptories even after *Batson* is that they sometimes promote one-sided juries and thus have negative social consequences. Although some commentators have urged that what is mostly wrong with peremptories is that they reduce jury representativeness,³² this is, like claims about inequality, not the heart of the problem. Peremptories reduce representativeness but in pursuit of maximum jury neutrality, and a trade-off on that score is inherent in any kind of peremptory system. The real problem is that peremptories sometimes not only impair representativeness but also promote the opposite of neutrality—group bias. And *Batson* doctrine does not focus on preventing those outcomes even if it sometimes operates to prevent them. Where peremptories serve mostly negative social ends, there is a societal interest in disallowing them, but *Batson* doctrine is often nonresponsive.³³

Confusion over what social ends remain at stake with peremptories traces back to confusion about the meaning of impartiality at the level of the individual juror.³⁴ Individual impartiality represents not a bland neutrality but a wide array of permissible perspectives.³⁵ The Court has not adequately clarified this point and, in the *Batson* line of cases, has denied it.³⁶ Yet, the reality that individual impartiality constitutes an array of nondisqualifying sympathies helps reveal why, especially in light of *Batson* doctrine, peremptories based on generalized characteristics do not pose serious inequality harm to excused venire persons. Peremptory strikes need not be understood to accuse the excused persons of being unwilling or unable to follow the law or of being inferior citizens. Recognition of impartiality as an array of

³² See, e.g., Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 96–97 (1996) (“[T]his sort of discrimination violates the Sixth Amendment’s guarantee of a jury that represents the community.”); see also Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1128 (1995) (noting that the Sixth Amendment idea of a fair cross section of the community provides “a better approach as a matter of legal theory”).

³³ Although not the basis for a proposal in this Article that *Batson* and its progeny should be overturned, *Batson* doctrine not only sometimes fails to limit peremptory challenges that serve purely negative social ends but also sometimes forecloses peremptory strikes that have social value. See *infra* text accompanying notes 195–203 & 243–245.

³⁴ See William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 125 (noting that the term “impartial” is “ambiguous in the context of jury selection”).

³⁵ See Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173, 1179–90 (1995).

³⁶ See, e.g., *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (denying that a venire person who is “predisposed to favor” a party could be viewed as impartial); *United States v. Wood*, 299 U.S. 123, 145–46 (1936) (describing impartiality as a “mental attitude of appropriate indifference”).

acceptable biases means that, even when secretly based on race or gender, a challenge generally reflects only that one of the parties does not think the excused person would be the most favorable to it among the qualified venire persons in that particular trial.³⁷ This action creates no serious inequality harm and does not warrant abolishing peremptories.³⁸

The idea of an impartiality array also helps clarify why peremptories sometimes, but not always, serve positive social ends. From a societal perspective, the hoped-for result of allowing peremptories is that each party will excuse venire persons who, although individually impartial, fall far on the opposite side of the impartiality array,³⁹ resulting in a jury made up mostly of persons nearer the center. Yet, whether peremptories can help achieve that outcome depends in part on the makeup of the venire. When the venire starts out decidedly one-sided, peremptory challenges may not promote the seating of a neutral jury, but of a biased one. Even after *Batson*, the party aligned with a highly predominant perspective among the legally impartial venire persons can often exclude all or most of those persons who fall on the other side of the array while seating many who favor it. For example, when a prosecutor in a predominantly conservative county uses peremptory strikes to exclude those scarce venire persons who, although legally impartial, seem potentially open to the defense, the resulting jury is not only less representative of the community but also biased for the prosecution regardless of how defense counsel uses peremptory strikes. Such an outcome has negative social value.

The dilemma of how to allow peremptory strikes that promote group neutrality, but not those that promote a one-sided jury, has no perfect solution. Rules or standards cannot effectively describe when peremptories promote group bias. However, in searching for a response to protests about unequal treatment of excused jurors, some scholars have suggested negotiated challenges,⁴⁰ and a form of that approach—one requiring consent of the opposing litigant—can address the real tendency of peremptories to promote group bias.⁴¹ The idea of challenges by consent

³⁷ See Pizzi, *supra* note 34, at 126 (describing peremptory challenges as “comparison shopping” to obtain jurors who a lawyer believes will be more sympathetic to one litigant).

³⁸ See Muller, *supra* note 32, at 149 (“This is not an equal protection harm . . .”).

³⁹ See, e.g., Pizzi, *supra* note 34, at 125 (noting that individuals can be “impartial” and yet still vary “in terms of values, religious beliefs, political leanings, experience, sex, race, background, and all those things that make each of us different”).

⁴⁰ See Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 7 (2014) (endorsing negotiated peremptories as a remedy for the inadequacies of *Batson* doctrine in preventing inequality harm to excused jurors); see also Dru Stevenson, *Jury Selection and the Coase Theorem*, 97 IOWA L. REV. 1645, 1672 (2012) (contending that negotiation between parties about peremptories would “obviate the need for *Batson* challenges” and render *Batson* rulings “unnecessary”).

⁴¹ While endorsing peremptories by consent of the opposing litigant, I urge an exception in capital cases. In that context, the defendant alone should be able to decide whether the parties will go forward with peremptories. The prosecution in a capital case can have the court excuse for cause all potential jurors whose views about the death penalty would “substantially impair” their ability to vote for it. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Research indicates that death-qualified jurors favor the prosecution not only on

does not correlate closely with a claim that attempts to locate the harm from peremptories primarily with the challenged juror.⁴² Yet, it fits well with a claim that locates the harm with the objecting litigant. As a response to the group-bias concern, the approach enlists parties to act not in the interests of venire persons, but in their own interests by stopping peremptories when they see their opponents using them to achieve one-sidedness.

This Article, which does not seek to justify peremptory challenges but to explain why their use should depend on consent from the opposing litigant, proceeds in five parts. The first three parts rebut the case for abolishing peremptories on the notion that they pose inequality harm. Part II shows why the Court attempted to construct *Batson* doctrine on the theory that peremptory challenges cause inequality harm, primarily to excused persons. A history of efforts in some places to use peremptories to exclude all black persons from juries, at least in cases involving any white litigants or complainants, led the Court to demand reform, and equal protection was the best, albeit highly flawed, constitutional theory available to pursue it. Part III demonstrates the effect of the Court's decision to regulate peremptories under the Equal Protection Clause on the discourse over peremptories. The rhetorical case about injustice the Court built up to justify limiting peremptories fueled an argument that the moral problem of inequality was irresolvable except by eliminating peremptories, even if *Batson* doctrine solved the technical, legal problem of unequal protection. Part IV shows why continuing claims of inequality harm to excused jurors deserve rejection as a basis for abolishing peremptories. This discussion demonstrates the reality of individual impartiality as a range of nondisqualifying biases, which helps reveal both why a peremptory challenge, even when secretly based on a disfavored stereotype, is not seriously harmful to the excused person and why it can promote the neutrality of the jury.

The last two parts of this Article focus on the central problem from the continuing use of peremptory challenges and on the solution to that problem. Part V demonstrates that peremptory challenges sometimes exacerbate group bias on juries. This discussion reveals why devising rules or standards to define when peremptory

sentencing but also on guilt or innocence. See RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 343–44 (3d ed. 2006). Despite this problem, the Supreme Court rejected the claim of a capital defendant that the Sixth Amendment right to an impartial jury calls for a separate, non-death-qualified jury on guilt or innocence. See *Lockhart v. McCree*, 476 U.S. 162, 176–77 (1986). The Court concluded that removal of the jurors “serve[d] the State’s entirely proper interest in obtaining a single jury . . . that could impartially decide all of the issues” in the case. *Id.* at 180. Consequently, the capital defendant should have the chance to use peremptory strikes—and twice as many as the prosecution—to try to ameliorate the group bias. Or he should be able to prevent any use of peremptories.

⁴² This approach, as a replacement for *Batson* doctrine, would both over- and underrespond to the perceived problem of inequality harm. Parties would frequently prevent their opponents from using peremptories that were not based on race or gender and would frequently allow their opponents to use peremptories that were based on those factors. For more on this approach, see *infra* Part VI.

challenges promote group bias is infeasible. In response to the problem, Part VI endorses a nonconstitutionally mandated remedy that, while imperfect, would likely achieve better outcomes than we currently obtain from relying on *Batson* doctrine. This remedy centers on allowing peremptory challenges by consent.

II. *BATSON* DOCTRINE AND CONCERN FOR EXCUSED JURORS

In this Part, I show why the Supreme Court has located the constitutional harm from peremptories grounded on race or gender primarily with the excluded juror. The Court's equal protection approach rests on the idea that venire persons who face excusal based on their race or gender feel denigrated and are unjustly denied a valuable opportunity for civic service. There are serious problems with the substance of this theory and with some of the corollary ideas the Court has fostered to make it function to restrain peremptories. Because of these difficulties, various commentators believe the Court should have located the constitutional harm primarily with the litigant against whom a prohibited peremptory operates.⁴³ This alternative approach would rest on a theory of promoting representativeness on juries, an idea that originated from the right of a criminal defendant to an "impartial jury" under the Sixth Amendment.⁴⁴ One of my larger themes in this Article is that neither a theory of unequal treatment of excused jurors nor one asserting denial to litigants of a representative jury appropriately describes the central dilemma posed by peremptories today. Indeed, there is no constitutional theory that works well to get at the real problem. Nonetheless, in this Part, I explain why, as between equal protection and representativeness, the Court would have wanted to use equal protection to support its *Batson* doctrine.

A. *The Pre-Batson Approach to Peremptory Challenges*

Lingering efforts in the Jim Crow South, still operating after *Brown v. Board of Education*,⁴⁵ to generally keep black persons off of juries caused the Court to begin thinking about how to regulate peremptory challenges.⁴⁶ Well after the Civil War and the passage of the Fourteenth Amendment, some states tried to keep black persons off by law.⁴⁷ Yet, the Court ruled, beginning with *Strauder v. West*

⁴³ See *infra* text accompanying notes 96–101.

⁴⁴ See, e.g., *Duren v. Missouri*, 439 U.S. 357, 360 (1979) (striking down Missouri law that allowed women to opt out of jury service by filing written request); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (invalidating Louisiana law that required women to file a written request before they would be summoned for jury service).

⁴⁵ 347 U.S. 483 (1954).

⁴⁶ For the first post-*Brown* case in which the Court confronted the problem, see *Swain v. Alabama*, 380 U.S. 202 (1965).

⁴⁷ For example, in 1873, West Virginia passed a law that provided, "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879).

Virginia,⁴⁸ that the Equal Protection Clause forbids state laws that disallow jury service based on race.⁴⁹ Therefore, jury commissioners in places like Alabama, which had large black populations,⁵⁰ had to make at least some token efforts to integrate jury venires.⁵¹ This requirement turned out not to be so problematic for the commissioners because litigants could retain white homogeneity on juries if they only knocked off the relatively few black persons on the venires with peremptories.⁵² The tactic was not limited to trials involving interracial disputes. Apparently, many white litigants did not want a mixed jury whether or not other participants in the trial were black.⁵³ However, the efforts to use strikes against black persons caused the greatest affront in interracial criminal cases, where black victims or defendants sometimes suffered what seemed the worst injustices.⁵⁴ All-white juries regularly exonerated white defendants of murders of black persons based on self-defense, “even when that finding was wildly implausible.”⁵⁵ Racial bias by all-white juries against black criminal defendants was equally virulent. From 1930 to 1968, “[o]f the 455 men executed for rape, 405, or 89 percent,” were black men, “virtually all of whom were accused of raping white women,” while apparently not a single white man was ever executed “for raping a black victim.”⁵⁶

There was some uncertainty over how to describe the constitutional claim against what was going on.⁵⁷ Was the problem that litigants were being harmed by the excusals because black jurors would sometimes provide views and decisions that

⁴⁸ 100 U.S. 303 (1879).

⁴⁹ *Id.* at 310; *see also* *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (finding a violation of the Fourteenth Amendment where the government used facially neutral jury selection laws to systematically exclude persons of Mexican descent); *Norris v. Alabama*, 294 U.S. 587, 599 (1935) (same, but where black persons were systematically excluded).

⁵⁰ *See, e.g., Swain*, 380 U.S. at 232 (Goldberg, J., dissenting) (noting that the black population of Talladega County, Alabama, comprised 26% of the total population).

⁵¹ *See id.* at 205 (majority opinion) (noting that jury commissioners included an average of six to seven black persons on jury venires in criminal cases).

⁵² *See, e.g., Whitus v. Georgia*, 385 U.S. 545, 550 (1967) (noting that the seven black persons included on the venire of ninety persons were all eliminated at the jury selection stage).

⁵³ *See Swain*, 380 U.S. at 234–35 (Goldberg, J., dissenting).

⁵⁴ *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, 156 (1989) (describing the use of peremptories in black-defendant cases as “especially offensive and especially visible”).

⁵⁵ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 118 (2011).

⁵⁶ Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, in *DEATH PENALTY STORIES* 171, 192–93 (John H. Blume & Jordan M. Steiker eds., 2009) (citations omitted).

⁵⁷ *See, e.g.,* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 725 (1992) (questioning whether prohibiting race-based jury selection stems from a desire to protect litigants from biased juries, or from a desire to protect excluded jurors and the class they represent).

were different from white jurors?⁵⁸ Or was the problem that black venire persons were being treated unequally based on assumptions that their skin color mattered when it actually had little to do with how they would deliberate and decide cases?⁵⁹ If it was litigants who were harmed, was it only black litigants, or any litigant who preferred the excluded black venire persons?⁶⁰ Also, if there was harm to someone, was it outweighed by the benefits of peremptories in sometimes eliminating the more extreme venire persons who had not been excused for cause? After all, peremptories were part of an old common law tradition, which suggested that they generally served good ends.⁶¹

The inability of even the Warren Court, at the height of its equal protection activism,⁶² to agree that trial litigants had a cognizable constitutional claim underscored the difficulty of explaining it. In 1965, in *Swain v. Alabama*,⁶³ by a six-to-three margin, the Warren Court rejected a criminal defendant's equal protection challenge to a prosecutor's use of peremptories to exclude all black persons from his jury.⁶⁴ A nineteen-year-old black man, Robert Swain, had been convicted and sentenced to death for the rape of a seventeen-year-old white woman in Talladega County, Alabama.⁶⁵ The case was especially troubling because, although 26% of the persons eligible for jury service in Talladega County were black and grand juries there regularly included black persons,⁶⁶ not a single black person had served on a Talladega County petit jury since about 1950.⁶⁷ Those who made it onto venires were excluded either for cause or through peremptories, although the state had not been solely responsible for challenging all of them.⁶⁸

Justice White, writing for the Court, conceded that a prima facie case could be made where the party brought proof showing that, in case after case, regardless of the circumstances, the prosecutor in a county always used peremptories to ensure that no black persons served on juries.⁶⁹ In those circumstances, there was a

⁵⁸ See Muller, *supra* note 32, at 101 (“The Court’s pre-*Batson* cases on grand and petit jury discrimination reflected a commitment to the view that one might rationally glean some hint of a person’s perspective from his or her race or gender.”).

⁵⁹ See *id.* (noting that, at one point, the Court adopted the view that race and gender were “flatly irrational predictors of juror perspective”).

⁶⁰ The Court eventually confronted this question in *Powers v. Ohio*, 499 U.S. 400 (1991), and answered that the complaining litigant did not have to be of the same race as the excluded juror. See *id.* at 402.

⁶¹ See *supra* text accompanying note 1.

⁶² For a summary of the Court’s efforts from the mid-1950s through the early 1970s to expand equal protection safeguards in the sphere of criminal procedure, see Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 379–85 (2001).

⁶³ 380 U.S. 202 (1965).

⁶⁴ See *id.* at 209.

⁶⁵ See *id.* at 203.

⁶⁶ See *id.* at 232 (Goldberg, J., dissenting).

⁶⁷ See *id.* at 205 (majority opinion).

⁶⁸ See *id.* at 224–26.

⁶⁹ See *id.* at 223–24.

reasonable inference that the exclusions were “for reasons wholly unrelated to the outcome of the particular case” and, instead, were to deny black persons “the same right and opportunity to participate in the administration of justice enjoyed by” white persons.⁷⁰ However, all nine Justices concluded that Swain was required to prove the prosecution had “systematically” used peremptories to exclude black persons, not just in his case but “over a period of time.”⁷¹ And the majority ruled that, despite the historical evidence that for more than a decade no black person had served on any trial jury in Talladega County, Swain needed more evidence about the prosecutor’s role in the excusals to meet this burden.⁷²

B. *Batson and the Equal Protection Theory Advanced*

Coming at the tail end of Chief Justice Burger’s tenure and mostly during the subsequent era of the Rehnquist Court,⁷³ *Batson* and its progeny were extraordinary for overruling a Warren Court decision denying relief to a criminal defendant on an equal protection claim. Yet, even Justice White rather remarkably embraced the rejection in his concurring opinion in *Batson* that opened by noting, “The Court overturns the principal holding” in the *Swain* opinion (which Justice White had written for the Court).⁷⁴ The equal protection issue likely would not have gone before the Court in *Batson* had the petitioner not presented the case as one focused only on a Sixth Amendment claim for representativeness, which avoided any need to reconsider the equal protection ruling in *Swain*.⁷⁵ The Court had granted certiorari on only the Sixth Amendment question, and the case was fought on those grounds alone.⁷⁶ Nonetheless, some of the Justices apparently changed their minds after oral

⁷⁰ *Id.* at 224.

⁷¹ *Id.* at 227; *see also id.* at 232–35 (Goldberg, J., dissenting) (agreeing with the standard but contending that Swain had made a prima facie case).

⁷² *See id.* at 227 (majority opinion).

⁷³ The majority of *Batson* doctrine was articulated in cases decided after 1986, during the era of the Rehnquist Court. For a discussion of those cases, see *supra* notes 17–23 and accompanying text. *Batson* itself was decided only a few weeks before Chief Justice Warren Burger announced his retirement and President Ronald Reagan named Justice Rehnquist as his choice to become Chief Justice. *See Batson v. Kentucky*, 476 U.S. 79, 79 (1986) (“Decided April 30, 1986”); President Ronald Reagan, Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nominations of William H. Rehnquist to be Chief Justice and Antonin Scalia to be an Associate Justice (June 17, 1986), available at <http://www.reagan.utexas.edu/archives/speeches/1986/61786e.htm>, archived at <http://perma.cc/7AE6-G8XJ>.

⁷⁴ *Batson*, 476 U.S. at 100 (White, J., concurring).

⁷⁵ The dissent emphasized the “truly extraordinary” nature of the Court’s decision in light of the petitioner’s express determination not to raise the equal protection argument in the Supreme Court of Kentucky or in the Supreme Court of the United States. *See id.* at 112–18 (Burger, C.J., dissenting).

⁷⁶ *See, e.g.,* Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1152 (1993) (“The grant of certiorari had not mentioned equal protection nor had *Batson*’s counsel urged any such ground.”).

arguments. The *Batson* opinion brought a “major surprise” when it not only limited peremptories but also when it did so on equal protection grounds, thus contravening *Swain*.⁷⁷

The key to viewing *Batson* doctrine as semisensible is to understand it as designed to preserve peremptories and to modestly check their use against certain historically excluded groups—particularly black persons and women—by all parties in all cases. Reliance on an equal protection theory enabled the Court to achieve this goal. Because the equal protection theory rested on harm to the excluded juror, it could apply to the use of peremptories by all parties in both criminal and civil cases as long as the Court found state action when a private litigant exercised a peremptory, which it did.⁷⁸ At the same time, because equal protection law required invidious intent by the actor,⁷⁹ even the disproportionate use of peremptories against black persons and women was not automatically prohibited.⁸⁰ The effect was to maintain peremptories and to, at least, prevent situations like the one in *Swain* in which black persons or women were entirely or largely excluded from jury service in a county for several years.⁸¹

Despite the benefits of the equal protection approach, it posed a conundrum. The question was how to overcome the claim that inequality harm to an excused juror involves no harm to the party opposing the strike. Inequality harm to the excused juror derives from the idea that peremptory strikes focused on race or gender assume a relevant difference between jurors that does not exist or, at least, is significantly overestimated. After all, to treat unlike jurors unlike is not unequal treatment.⁸² Yet, if we assume that the race and sex of a juror does not bear on how the juror would deliberate or vote, there is no harm to an opposing litigant from a

⁷⁷ Pizzi, *supra* note 34, at 110.

⁷⁸ See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 50 (1992) (criminal defendant); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620–28 (1991) (private civil litigant).

⁷⁹ See, e.g., *Tarrance v. Florida*, 188 U.S. 519, 520–22 (1903) (rejecting equal protection challenge to the exclusion of black persons from jury venire due to lack of evidence of intent to discriminate); see also *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987) (affirming a death sentence in the face of an equal protection challenge based on statistical evidence of racially disparate application of the death penalty due to lack of evidence that the petitioner’s jury harbored an intent to discriminate on racial grounds).

⁸⁰ See, e.g., *Batson*, 476 U.S. at 97 (holding that, in response to an objection to a challenge to a black venire person, the State need only provide a “neutral explanation” and “emphasiz[ing] that the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause”); *id.* at 101 (White, J., concurring) (“[I]t is not unconstitutional, without more, to strike one or more blacks from the jury.”).

⁸¹ See *Marder*, *supra* note 1, at 1701 (“Lawyers might still exercise discriminatory peremptories, but they might not do it as often and certainly not in as obvious a manner as pre-*Batson*.”).

⁸² See, e.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 414 (William Rehg trans., 1998) (noting that the “principle of substantive legal equality . . . holds that what is equal in all relevant respects should be treated equally, and what is unequal should be treated unequally”).

race- or gender-based peremptory strike.⁸³ On that view, the opposing litigant should have no standing to object to the peremptory,⁸⁴ and an erroneous ruling upholding an impermissible strike should always be harmless error.⁸⁵

The Court offered bold assertions to support its theories of inequality and standing, and it largely sidestepped the conundrum over harmless error.⁸⁶ First, the Court declared that race and gender had nothing to do with the likely views of venire persons so that peremptories based on race and gender treated them unequally.⁸⁷ Second, it declared that opposing litigants, including those not of the excluded venire person's race, had standing based on a fear engendered by witnessing mistreatment

⁸³ See, e.g., Muller, *supra* note 32, at 122–23 (noting that if “[r]ace and gender are . . . false proxies for viewpoint” when there is a peremptory strike based on race or gender, then “nothing is lost”).

⁸⁴ The Court had so held in a prior case involving an alleged denial of equal protection on the basis of sex in which a black male defendant argued, among other things, that the State's method of composing its jury pool had excluded women. See *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972). The Court concluded that, when urged by a male, “there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service.” *Id.*

⁸⁵ An argument could, in theory, thread through the difficulty by acknowledging that race and gender stereotypes are not accurate enough to justify peremptories but are sufficiently accurate to make an impermissible strike potentially outcome determinative in a trial, giving rise to both standing in the opposing litigant and the possibility for reversal on direct appeal. However, the argument would seem to call for extensive evidence about just how well racial and gender stereotypes can predict juror attitudes in various circumstances. Also, even with such information, the argument would likely end up nuanced, cerebral and stunted in rhetorical force.

Regarding the question of reversal on direct appeal, the Court could have said there was error but that it was harmless and did not justify reversal. However, “without the remedy of reversal, the Court's strong words about the egregiousness of race-based peremptories might be dismissed as merely idealistic or hortatory.” *Babcock*, *supra* note 76, at 1158.

⁸⁶ The Court could concede that race and gender can be rational proxies for juror attitudes but simply declare, nonetheless, that, in the view of the law, peremptories based on race and gender excluded jurors unequally. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (“Individuals are not expected to ignore as jurors what they know as men—or women.”). However, because this position also reflects inconsistency, it is not much more satisfying than the Court's conflicting views that qualified jurors are all fungible, but that *Batson* errors are per se reversible on direct appeal.

⁸⁷ See, e.g., *id.* at 139 (majority opinion) (emphasizing lack of support for conclusion that gender can accurately predict juror attitudes); *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (declaring excusal based on race as “arbitrary”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (contending that the only “rational” method for excusing a juror with a peremptory is “without the use of classifications based on ancestry or skin color”); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (asserting that “[a] person's race” has nothing to do with “qualifications and ability impartially to consider evidence presented at trial”); see also Muller, *supra* note 32, at 96 (“[T]he Court has firmly rejected the idea that a juror's race or gender has any bearing on how that juror will view the evidence in a case or vote on the question of guilt or innocence.”).

of the excluded persons that some unfairness could also be inflicted on them.⁸⁸ Third, the Court mandated reversal on appeal for every *Batson* violation without inquiry into whether the violation constituted harmless error.⁸⁹

These conclusions provoked claims of incoherence.⁹⁰ The first conclusion—that juror’s races and genders do not influence their deliberations and decisions—conflicted with the Court’s own prior statements on the importance of maintaining representativeness in jury pools and venires,⁹¹ and few trial lawyers believe that the race and gender of jurors never matter.⁹² The second conclusion—that criminal defendants feel fear from witnessing mistreatment of jurors excused by the prosecution—also lacked the ring of truth. Does the criminal defendant who loses the battle over the prosecution’s peremptory excusal of a black venire person really feel fear because of a perceived denial of the venire person’s constitutional rights? Or does he feel frustration instead because his own racially based attempt to get the person on the jury to gain a hopefully empathetic perspective has failed?⁹³ Moreover, the third conclusion—that *Batson* errors require reversal on appeal—does not square with the first conclusion that all qualified jurors are fungible. If jurors are all the same, *Batson* errors should never have any effect on the outcome of a trial and, thus, should never warrant reversal.⁹⁴ Professor Eric L. Muller has called the juxtaposition

⁸⁸ See, e.g., *Powers*, 499 U.S. at 411 (“The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury . . . because racial discrimination in the selection of jurors . . . places the fairness of a criminal proceeding in doubt.” (citations omitted)); see also *J.E.B.*, 511 U.S. at 140 (“The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings.”).

⁸⁹ See, e.g., *Batson*, 476 U.S. at 100 (holding that “prima facie, purposeful discrimination” without “a neutral explanation” for the exclusion of all “black persons” was sufficient to reverse conviction); see also *Babcock*, *supra* note 76, at 1158 (noting that while the Court has not required automatic reversal for *Batson* errors in habeas corpus, it “does not demand proof of harm to the jury’s decision-making before reversing judgments on the direct appeal of *Batson* cases”).

⁹⁰ See, e.g., *J.E.B.*, 511 U.S. at 157–63 (Scalia, J., dissenting) (stating that the majority opinion contradicts earlier Sixth Amendment jurisprudence regarding gender representation on juries, and has led to the creation of an “illogical” doctrine).

⁹¹ See, e.g., *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972) (plurality opinion) (holding that systematic exclusion of black persons from grand and petit juries violated the Due Process Clause because exclusion of “any large and identifiable segment of the community” forecloses “a perspective on human events that may have unsuspected importance in any case that may be presented”); *Ballard v. United States*, 329 U.S. 187, 193 (1946) (using supervisory powers over federal courts to require inclusion of women in jury venires because “the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both”); see also Muller, *supra* note 32, at 103 (asserting that “the Court has, with increasing firmness and stridency, rejected the very theory of difference that it had embraced for many years in its earlier jury discrimination cases”).

⁹² See *J.E.B.*, 511 U.S. at 148 (O’Connor, J., concurring) (“We know that like race, gender matters.”).

⁹³ See *id.* at 158 (Scalia, J., dissenting).

⁹⁴ See, e.g., Muller, *supra* note 32, at 96 (“Thus the Court has articulated a package of

of the first and third conclusions a “contradiction” so profound as to reveal that “something is amiss in the Court’s response to the discriminatory use of peremptory challenges.”⁹⁵

The “paradox” created by the use of the equality theory has caused some commentators to conclude that the Court should have employed the Sixth Amendment theory of representativeness to support its *Batson* doctrine.⁹⁶ The representativeness theory was grounded in decisions in which the Court held that states could not use methods to construct jury pools or venires that substantially underrepresented certain cognizable groups, including black persons, women, and Mexican Americans.⁹⁷ Those decisions rested on the notion that a venire constructed by methods that would substantially underrepresent important segments of the community would likely reflect a different mix of perspectives than one that was representative.⁹⁸ The Court had never held the same kind of rules about representativeness applied regarding an actual jury that applied to a venire.⁹⁹ Nonetheless, it had prohibited certain state actions that might impair representativeness at the stage of seating a jury, such as laws calling for juries of less than six¹⁰⁰ or improper exclusions of venire persons in capital cases based on their

rights which, in logic, require no appellate remedy.”); *see also id.* at 123 (explaining that the Court’s rejection of the difference theory would mean that a *Batson* error would not be a true “structural error” justifying automatic reversal under *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), because by definition the fungibility of jurors would make every error harmless); Babcock, *supra* note 76, at 1158 (asserting that “we might have expected that the Court would require some showing of prejudice before ordering reversal”).

⁹⁵ *See Muller, supra* note 32, at 126; *cf. Babcock, supra* note 76, at 1158 (describing as “odd” the Court’s view on habeas that “racial bias in the exercise of peremptory challenges does not automatically affect the jury’s truth-finding function” when the Court has not demanded “proof of harm to the jury’s decision-making before reversing judgments on the direct appeal of *Batson* cases”).

⁹⁶ *See, e.g., Muller, supra* note 32, at 131–48 (outlining the Sixth Amendment as a better analysis for *Batson* violations). For a variety of other reasons as well, commentators have contended that the Court might have relied on this representativeness concept. *See Marder, supra* note 32, at 1114–36; Pizzi, *supra* note 34, at 117–19.

⁹⁷ *See Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (noting that the exclusion of black persons, women, or Mexican Americans from jury venires in criminal cases would violate the representativeness requirement).

⁹⁸ *See id.* (asserting that the lack of members of cognizable groups could “deny criminal defendants the benefit of the common-sense judgment of the community”); *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975) (reversing male defendant’s conviction largely on view that “a flavor, a distinct quality” was missing from his jury venire because of the underrepresentation of women (quoting *Ballard v. United States*, 329 U.S. 187, 193–94 (1946))).

⁹⁹ *See, e.g., Taylor*, 419 U.S. at 538 (“[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”).

¹⁰⁰ *See Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (plurality opinion) (Blackmun, J.) (concluding that five-member juries are not “juries” promised by the Sixth Amendment, because having fewer than six members “prevents juries from truly representing their

qualms about the death penalty.¹⁰¹ Those precedents arguably could have given the Court a basis to decide the *Batson* case under the Sixth Amendment and, by acknowledging the differences among different groups of jurors, to avoid the challenge posed by equal protection theory.

The disadvantage of the Sixth Amendment was that it would have required even more labored positions than equal protection in getting the Court to the outcome it achieved with *Batson* doctrine. The Sixth Amendment theory was both too weak and too strong. It was too weak in that it would not easily support the regulation of peremptories, certainly not across all cases. States need not preserve representativeness in the face of other proper concerns¹⁰² (the Court decided a case that made precisely that point only five days after it decided *Batson*).¹⁰³ The very notion that different cognizable groups will have different perspectives suggests that states have a “legitimate interest”¹⁰⁴ in allowing litigants to exercise peremptories based on racial and gender grounds to try to promote maximum neutrality.¹⁰⁵ In any event, the representativeness theory also would not readily limit anyone other than prosecutors.¹⁰⁶ On its face, the Sixth Amendment protects criminal defendants and does not govern criminal defense lawyers or private civil litigants.¹⁰⁷ Assuming those problems could be overcome, the Sixth Amendment approach was also too strong because it would not carry the same limiting principle as equal protection in circumstances where it did apply.¹⁰⁸ Without an invidious intent requirement, which

communities”); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (holding that six-person juries in criminal cases are permissible because they do not prevent the “possibility for obtaining a representative cross-section of the community”). Although some confusion has arisen over whether Justice Blackmun’s opinion in *Ballew* was for the Court, Professor Muller has explained that his Sixth Amendment analysis did attract five votes. *See Muller, supra* note 32, at 138 n.268.

¹⁰¹ *See Adams v. Texas*, 448 U.S. 38, 49–51 (1980); *Witherspoon v. Illinois*, 391 U.S. 510, 518–23 (1968).

¹⁰² *See Howe, supra* note 35, at 1192–97 (noting that states can depart from representativeness goals, for example, by using certain categorical definitions of individual impartiality and competency and by allowing excusals based on hardship).

¹⁰³ In *Lockhart v. McCree*, 476 U.S. 162, 182–84 (1986), the Court rejected a capital defendant’s claim that, in light of the Court’s prior decisions allowing states to “death qualify[]” juries for capital-sentencing decisions, the Sixth Amendment calls for a separate, non-death-qualified jury on guilt or innocence questions. The Court noted that removal of the jurors served the State’s “entirely proper interest” in obtaining a single jury that could impartially decide both the guilt or innocence and sentencing issues in the case. *See id.* at 180. Commentators have suggested that the Court’s simultaneous consideration of *McCree* helps explain why it chose not to use the Sixth Amendment to support its decision in *Batson*. *See Babcock, supra* note 76, at 1153; *Pizzi, supra* note 34, at 121–22.

¹⁰⁴ *McCree*, 476 U.S. at 175.

¹⁰⁵ *See Howe, supra* note 35, at 1215.

¹⁰⁶ *See Pizzi, supra* note 34, at 119.

¹⁰⁷ The Sixth Amendment provides in relevant part, “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .” U.S. CONST. amend. VI.

¹⁰⁸ Four years after *Batson*, the Court rejected the claim of a criminal defendant that the

the prior representativeness cases eschewed,¹⁰⁹ the Sixth Amendment would generally seem to prohibit peremptories that had a disparate impact on the representation of any gender or racial group on the jury.¹¹⁰ The Court undoubtedly could have shoehorned Sixth Amendment precedents into some kind of explanation for *Batson* doctrine. However, if the central problem with *Batson* doctrine was that it did not fit very well with equal protection, it fit even worse with the Sixth Amendment.¹¹¹

Batson doctrine rested on a strained and self-contradictory explanation of constitutional harms to litigants, but it got the Court to the outcome it apparently wanted to achieve. One could argue the Court should not have twisted so hard to make the equal protection approach work out—that it should have simply left things where they stood before 1986.¹¹² But the Court could not live with what *Swain* had allowed through its “crippling” evidentiary demands.¹¹³ The Court apparently wanted to preserve peremptory challenges and to modestly restrain their use to dismiss members of certain historically disfavored groups.¹¹⁴ *Batson* doctrine, based on an equal protection approach, achieved that end.¹¹⁵

Sixth Amendment would support his challenge to the peremptory excusal of black persons from his jury. *See Holland v. Illinois*, 493 U.S. 474, 486–88 (1990). Part of the Court’s rationale was that there seemed not to be a limiting principle that would preserve peremptory systems. *See id.* at 484 (noting that holding the Sixth Amendment representativeness idea to restrain peremptories would likely require their eradication); *id.* at 488 (Kennedy, J., concurring) (“The contention is not supported by our precedents and admits of no limiting principle to make it workable in practice.”).

¹⁰⁹ *See, e.g., Duren v. Missouri*, 439 U.S. 357, 364 (1979) (rejecting Missouri law that allowed women to opt out of jury service on request despite the absence of evidence of discriminatory intent to deter women from serving on juries).

¹¹⁰ Perhaps the litigant would have to provide not simply a neutral, nondiscriminatory reason, but one that was “legitimate.” *See Lockhart v. McCree*, 476 U.S. 162, 175 (1986). However, if reliance on racial or gender characteristics would not be legitimate, although representativeness theory would deem those characteristics helpful for distinguishing the perspectives of venire persons, reliance on other nonracial and nongender stereotypes would also not seem to provide legitimate reasons for challenges that impacted cognizable groups. On this view, peremptories that had disparate impacts on racial or gender groups could not survive.

¹¹¹ *See also Underwood, supra* note 57, at 738 (noting, among other problems, that the Sixth Amendment has “no power to convince us to permit or prohibit discrimination . . . in the use of peremptory challenges”).

¹¹² *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 118–31 (1986) (Burger, C.J., dissenting).

¹¹³ *Id.* at 92 (majority opinion).

¹¹⁴ *See, e.g., Alschuler, supra* note 54, at 156 (describing *Batson* as “the Supreme Court’s effort to tame the peremptory challenge—but not very much”).

¹¹⁵ *See Marder, supra* note 1, at 1701.

III. THE MORAL DILEMMA RAISED BY THE *BATSON* CASES

Despite the Court's efforts and success in eradicating the worst abuses of jury selection that existed in the Jim Crow era, *Batson* and its progeny likely intensified rather than quelled the calls for abolition of peremptories. I contend that two aspects of the Court's work in the *Batson* cases come together to help stir up rather than calm continuing dissatisfactions with peremptory systems. First, the opinions build the case that there are always major harms inflicted on the person excused with a peremptory when racial or gender stereotyping helped motivate the challenger's action. Second, the Court set up an impotent regulatory procedure to prevent many of those precise kinds of challenges. This dichotomy between the serious harms alleged and the weak remedy imposed was probably unavoidable if the Court was to give opposing litigants automatic standing to object for excused venire persons and was to ultimately reach the result embodied by *Batson* doctrine.¹¹⁶ However, a moral dilemma arises for anyone who not only accepts the Court's description of the harms, but who also favors no more regulation than the Court provided.

A. *The Harm Alleged to Excused Venire Persons*

In the *Batson* cases, the Court portrayed the damage to persons excused by peremptories as arising in every instance in which a race or gender stereotype motivates the challenger. The context does not matter. Whether every black venire member in every case for a decade has been peremptorily excused in the county or whether no prior racial pattern of excusals exists, the excusal of a black person (or a member of any race) based on race, according to the Court, harms that person and all who learn of the excusal. *Swain* implied that the "brand" of "inferiority" and concomitant sense of exclusion from all jury service¹¹⁷ arose only where there was evidence that members of one's group were systematically excluded in various cases over a significant period.¹¹⁸ Only then was the peremptory being used to signal something noxious—something more than simply that the challenger thought a person from a different group might be a more helpful juror in the particular case.¹¹⁹ *Batson* and its progeny abandoned that position in favor of the view that any challenge—even a single one—grounded on race harms the excluded juror.¹²⁰ The

¹¹⁶ This difficulty would not have been avoided by using Sixth Amendment representativeness theory rather than equal protection theory to support *Batson* doctrine. To make the case that peremptory strikes based on racial or gender grounds violate primarily the rights of the objecting litigant, the Court still would have had to make a case for injustice involved with all peremptory strikes motivated even partially by racial or gender stereotypes. Also, the inability to largely prevent such strikes under the *Batson* procedure would still imply the continuing acceptance of injustice.

¹¹⁷ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

¹¹⁸ *See Swain v. Alabama*, 380 U.S. 202, 224 (1965).

¹¹⁹ *See id.* at 220–21.

¹²⁰ *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (confirming that even a single racially based challenge that is allowed

Court also declared that this harm exists in an interracial case where the excused juror shares the race of the litigant who opposes the excusal, although the shared characteristic would suggest the peremptory reflected concerns about juror bias and was not an accusation of racial inferiority.¹²¹

Other factors that might seem to counter the inequality harm to the excused person are also irrelevant under the *Batson* cases. According to the Court, harm to the excused person exists even if he suggested during voir dire that he would be happy not to serve on the jury.¹²² Likewise, the harm exists even if the racial basis for the peremptory is sufficiently secret so that only a parsing of the record to compare the treatment of a person of a different race who gave arguably similar answers during voir dire could reveal it.¹²³ Further, the harm exists even if the party objecting to the strike was using peremptories in the same disproportionate way to exclude members of a different race or gender from that of the excused person.¹²⁴ This last conclusion survives even if it is white persons and men whose exclusion is at issue, although black persons and women, not white persons and men, historically suffered exclusion from jury service.¹²⁵ According to the *Batson* opinions, there is never room for doubt or nuance about whether a challenge based on racial or gender grounds damages the excused person.

Harm to the venire person also exists, according to the *Batson* cases, even if the excusal rests only partially on racial or gender grounds.¹²⁶ Where a venire has three black persons and a white civil litigant with three peremptories excuses only two of them and accepts the third on the jury, we can infer the litigant does not rely exclusively on skin color. The litigant may weigh the fact that the venire persons are black, but it is only a partial explanation for the decisions to excuse. Nonetheless, according to the Court, excusal of the two black venire persons can violate *Batson* and harm the excused persons in the same way as if the litigant exercised peremptories based on a hard and fast racial rule.¹²⁷

by a trial court can require reversal on appeal).

¹²¹ See *Batson*, 476 U.S. at 89 (rejecting “the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant”).

¹²² See *Snyder*, 552 U.S. at 480–82; *id.* at 488 (Thomas, J., dissenting).

¹²³ See *id.* at 483–85 (majority opinion).

¹²⁴ See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (ruling that a state in a civil action to establish paternity could not use peremptories to excuse male jurors based on gender although the male defendant used nine of ten peremptories to excuse women).

¹²⁵ See *id.*

¹²⁶ The Court has stated that a peremptory “shown to have been motivated in substantial part by discriminatory intent” is improper but has suggested that the party exercising the challenge could rebut by establishing that the prohibited factor was “not determinative.” See *Snyder*, 552 U.S. at 485.

¹²⁷ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616–17 (1991) (holding that equal protection can be violated in these circumstances although a private litigant in a civil case exercised the peremptories).

Where the harm exists, moreover, the Court has described it as awful. In cases involving a peremptory excusal based on race, the Court has called such discrimination “pernicious.”¹²⁸ The peremptory excusal mars the “dignity” of the venire person.¹²⁹ It imposes on the person a “stigma or dishonor”¹³⁰ that implies incompetence and inferiority. The insult is “open and public”¹³¹—an “overt wrong.”¹³² Indeed, the person “suffers a profound personal humiliation heightened by its public character.”¹³³ Further, the excusal “forecloses a significant opportunity to participate in civic life.”¹³⁴ And “with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”¹³⁵

Where the excusal rests on gender (even if male gender), the harm is no less, according to the Court. Women suffered a long history of categorical exclusion from civic life that, while not “identical” to that imposed on racial minorities, is similar.¹³⁶ A peremptory excusal based on gender “reinvokes” that “history of exclusion from political participation.”¹³⁷ It “denigrates the dignity of the excluded juror[s].”¹³⁸ Such excusals are “practically a brand upon them, affixed by the law, an assertion of their inferiority.”¹³⁹ It tells all who are witnesses that “certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions”¹⁴⁰ We also should not underestimate this harm, because “[e]qual opportunity to participate in the fair administration of justice is fundamental to our democratic system.”¹⁴¹ In sum, according to the Court, no venire person should ever have to endure the terrible damage of being excused with a peremptory challenge that rested on a racial or gender stereotype.

B. The Failure of the Remedy to Eliminate the Harm Alleged

Despite the depiction of severe harm to all jurors who face excusal based on race or gender, the Court provided a remedial procedure that allows those kinds of excusals to persist. *Batson* mandated a three-step process for evaluating equal protection claims.¹⁴² First, the opponent of a peremptory must establish a *prima facie*

¹²⁸ *Batson v. Kentucky*, 476 U.S. 79, 88 (1986).

¹²⁹ *Georgia v. McCollum*, 505 U.S. 42, 48 (1992).

¹³⁰ *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

¹³¹ *McCollum*, 505 U.S. at 49.

¹³² *Powers*, 499 U.S. at 412.

¹³³ *Id.* at 413–14.

¹³⁴ *Id.* at 409.

¹³⁵ *Id.* at 407.

¹³⁶ *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994).

¹³⁷ *Id.* at 142.

¹³⁸ *Id.*

¹³⁹ *Id.* (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 145.

¹⁴² *See Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

case by showing that “the totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹⁴³ Second, the party exercising the peremptory must respond with a “neutral” explanation.¹⁴⁴ Third, the judge must decide whether the objector has established purposeful discrimination.¹⁴⁵ The problem is that this procedure generally does not produce a conclusion of improper discrimination, although many commentators contend, without much disagreement, that racial and gender stereotypes regularly influence peremptory challenges.¹⁴⁶

Some excusals based on race and gender can occur at the first stage of establishing a prima facie case, although most occur later.¹⁴⁷ A litigant can sometimes get away with a few race- or gender-based strikes before the judge will find a prima facie case and begin requiring explanations.¹⁴⁸ A judge could begin requiring explanations after the first objection, which could come with the very first excusal that even arguably rests on racial or gender grounds. However, uncertainty remains over whether that approach is correct,¹⁴⁹ and some courts have not followed it.¹⁵⁰ And, on that view, if there are only a couple of black members of the venire, for example, a litigant might be able to exclude both of them on racial grounds without inquiry. The Supreme Court has never amplified much,¹⁵¹ beyond its direction in *Batson* that facts in the objector’s case alone can suffice and that the standard is “an inference” of purposeful discrimination,¹⁵² over how a trial judge should decide when the use of peremptories creates a prima facie case.¹⁵³

¹⁴³ See *id.* at 93–94.

¹⁴⁴ *Id.* at 97.

¹⁴⁵ *Id.* at 98.

¹⁴⁶ See, e.g., Price, *supra* note 10, at 105 (contending that “*Batson* hearings, originally intended to be a remedial measure against discrimination, are no remedy at all”); Marder, *supra* note 1, at 1707 (asserting that “[l]awyers have simply learned how to mask discriminatory peremptories”).

¹⁴⁷ See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 460 (1996) (presenting empirical evidence suggesting “that it is relatively easy for a *Batson* complainant to establish a prima facie case, but that it is much more difficult ultimately to prevail on a *Batson* challenge”).

¹⁴⁸ See Alschuler, *supra* note 54, at 173.

¹⁴⁹ Arguably, a prima facie case is generally not established on such facts, because *Batson* suggested that something like a “pattern” of strikes against black persons or something said during voir dire or in exercising a challenge would be required. See *Batson*, 476 U.S. at 97. However, a judge might nonetheless follow this procedure in some cases on the view that, if a prima facie case were to be established a few challenges later, the reasons for the earlier challenges would also warrant evaluation.

¹⁵⁰ See Alschuler, *supra* note 54, at 171 n.75 (citing cases).

¹⁵¹ In *Johnson v. California*, 545 U.S. 162 (2005), the Court held that, to establish a prima facie case, an objector need not show that it was “more likely than not” that a peremptory was based on a prohibited ground. See *id.* at 168.

¹⁵² See *Batson*, 476 U.S. at 93–94.

¹⁵³ See *id.* at 97 (“We have confidence that trial judges, experienced in supervising voir dire, will be able to decide . . .”).

At the second stage, evasions of the *Batson* prohibition require the skills of an average eighth grader. The explanation cannot be merely a denial of “discriminatory motive” or an affirmation of “good faith.”¹⁵⁴ But it does not have to be “persuasive, or even plausible.”¹⁵⁵ The Court has emphasized that a “neutral” explanation does not mean one that “makes sense.”¹⁵⁶ Although *Batson* said the explanation at least had to relate to the case at hand,¹⁵⁷ the Court later seemed to abandon even that position.¹⁵⁸ “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”¹⁵⁹ Thus, for example, a statement by a prosecutor that two excused black men had long hair and facial hair were neutral, nondiscriminatory explanations.¹⁶⁰ Likewise, a prosecutor’s assertion that “specific responses and the demeanor” of two Hispanic individuals during voir dire “caused him to doubt their ability to defer to the official translation of Spanish-language testimony” was a neutral reason.¹⁶¹ “As long as [lawyers] give a reason—any reason—that does not involve a juror’s race or gender, then they have satisfied *Batson*’s command.”¹⁶² And even when race or gender motivates them, lawyers “have learned to provide other explanations for the exercise of their peremptories.”¹⁶³

The third stage, involving the judge’s determination, also will leave unexposed a large proportion of the cases in which a party has covertly exercised a peremptory on improper grounds. The Court has clarified that trial judges should scrutinize in light of all the circumstances the explanation given at stage two, and, where they find it implausible, can infer the ultimate fact of purposeful discrimination.¹⁶⁴ In two separate cases the Court overturned capital convictions by finding purposeful discrimination after rejecting as implausible the reasons given by prosecutors for excusing black venire members.¹⁶⁵ Nonetheless, commentators contend that lower courts usually accept the neutral reasons offered by litigants at the second stage.¹⁶⁶

¹⁵⁴ *Id.* at 98 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

¹⁵⁵ *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

¹⁵⁶ *Id.* at 769.

¹⁵⁷ *See Batson*, 476 U.S. at 98.

¹⁵⁸ The apparent abandonment came in *Elem*. *See* Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1593 (2012).

¹⁵⁹ *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion).

¹⁶⁰ *See Elem*, 514 U.S. at 766.

¹⁶¹ *Hernandez*, 500 U.S. at 360.

¹⁶² Marder, *supra* note 1, at 1706.

¹⁶³ *Id.*

¹⁶⁴ *See, e.g., Hernandez*, 500 U.S. at 365 (“In the typical peremptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed.”); *see also Elem*, 514 U.S. at 768 (“At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.”).

¹⁶⁵ *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008); *Miller-El v. Dretke*, 545 U.S. 231, 265–66 (2005).

¹⁶⁶ *See, e.g., Marder, supra* note 158, at 1592 (stating that most trial judges accept the reasons given as permissible).

Trial judges do not like to accuse lawyers, especially prosecutors, of being “racists” or “sexists” and “liars,” but this occurs when judges reject lawyers’ explanations for excusing black persons (or anyone who has a race) or women (or men).¹⁶⁷ And because most *Batson* claims on appeal come from unsympathetic criminal defendants who look guilty, appellate courts tend to reject *Batson* claims and interpret the doctrine narrowly.¹⁶⁸ However, empirical studies in a variety of jurisdictions confirm that pronounced racial disparities continue in the use of peremptories.¹⁶⁹ *Batson* doctrine apparently has only modestly deterred peremptories based on race and gender.

If one accepts the Court’s description of the harms that result from discriminatory peremptories, *Batson* doctrine’s failure to stop them is cause for alarm. Each discriminatory peremptory, according to the Court, does serious damage to the improperly excused person and the observers, and it contributes to a general decline in the public’s confidence about the fairness of jury trials. Moreover, commentators appear to agree that the number of improper excusals is large,¹⁷⁰ and some contend they permeate the jury selection process at rampant levels and are only lightly checked by the *Batson* remedy.¹⁷¹ Perhaps unconscious rather than

¹⁶⁷ See, e.g., Robin Charlow, *Batson “Blame” and Its Implications for Equal Protection Analysis*, 97 IOWA L. REV. 1489, 1493 (2012) (stating that “[c]alling attorneys racists and liars is just not the same as labeling them overstepping cross-examiners or charging them with offering inadmissible evidence”).

¹⁶⁸ In federal habeas cases, federal courts must also defer to state court rulings on *Batson* claims unless the state court “made an unreasonable factual determination.” *Rice v. Collins*, 546 U.S. 333, 339 (2006); see Nancy Leong, *Civilizing Batson*, 97 IOWA L. REV. 1561, 1563 (2012); see also *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam) (reversing a Ninth Circuit decision granting habeas relief on a *Batson* claim).

¹⁶⁹ 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 (2001) (finding that in 317 Philadelphia capital murder trials over a seventeen-year period, prosecutors struck an average of 51% of black persons but only 26% of similar, nonblacks, while defense strikes revealed almost exactly the opposite ratio); 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, 1554 (2012) (finding that “after controlling for several other race-neutral factors, black venire members faced odds of being struck by the state that were 2.48 times those faced by all other venire members”); Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don’t Discriminate, but Analysis Shows They Are More Likely to Reject Black Jurors*, DALL. MORNING NEWS, Aug. 21, 2005, at 1A (focusing on 108 noncapital felony trials in Dallas in 2002 and finding that prosecutors excused eligible black persons “at more than twice the rate” they excused eligible white persons).

¹⁷⁰ See, e.g., WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 1094 (5th ed. 2009) (contending that, given “experience under *Batson*,” it is “understandable why some have viewed the *Batson* procedures as less an obstacle to racial discrimination than a road map to disguised discrimination”).

¹⁷¹ See, e.g., Marder, *supra* note 158, at 1592 (suggesting that the *Batson* check is ineffective because “trial judges are reluctant to find *Batson* violations, and appellate judges are deferential to trial judges’ determinations”).

purposeful discrimination explains many race- or gender-based peremptories so that they actually do not violate the Equal Protection Clause.¹⁷² Yet, even viewing *Batson* doctrine as doing a good job of solving the technical legal problem of unequal protection, it would do a poor job of solving the moral problem of injury imposed through nonpurposeful, unequal treatment. If the story of inequality harm that the Court has constructed is accurate, there is need for an extraordinary remedy, and only the abolition of peremptory challenges seems adequate.

IV. REJECTING THE INEQUALITY ARGUMENT FOR ABOLITION

The abolition movement's failure to gain traction around the country suggests that something does not ring true about the story of inequality harms that the Supreme Court presented in the *Batson* cases. The view that *Batson* doctrine does a wonderful job of eliminating discriminatory peremptories is probably not widespread. There is little credible commentary supporting that position. The shortage of support for abolition probably is not explained by decision makers' unawareness of the claims concerning *Batson*'s inadequacy. The amount of criticism and the esteemed positions occupied by some of the critics making the case for *Batson*'s failure undermine that theory.¹⁷³ One might ask whether lawmakers and their relevant constituents simply deem the value of peremptories to greatly outweigh the harms the Court described in the *Batson* cases. Yet, the Court described the harms as so serious, and implied by its view that qualified venire persons are all fungible and that the benefits of peremptories are so minimal, that, if accepted as accurate, the harms seem to obviously overwhelm the benefits. Thus, what is left as the most plausible explanation for why lawmakers have not abolished peremptories is that they or their relevant constituents simply do not believe the Court's story, at least as it applies to the use of peremptories after *Batson*. In this Part, I explain the grounds for disbelief.

A. *The Value Differences of Impartial Jurors*

The story of great harm and minimal benefits from peremptories that the Court told in the *Batson* cases rests in large part on an idealized portrait of an impartial juror. The Court portrayed the impartial juror as precisely neutral.¹⁷⁴ She will not

¹⁷² See, e.g., *Collins*, 546 U.S. at 343 (Breyer, J., concurring) (asserting that “sometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype”); Morrison, *supra* note 40, at 32 (noting that a lawyer may be “unaware of how a juror’s race has affected her decision to strike”).

¹⁷³ See *supra* notes 9–16 and accompanying text.

¹⁷⁴ See, e.g., *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (contending that a venire person who is “predisposed to favor” a party is not impartial); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (characterizing a gender-based peremptory as one that uses gender as a “proxy for juror competence and impartiality” and, thus, denying that such a peremptory could correctly reflect a view that one impartial juror may be less favorable than another);

lean based on prejudices or sympathies even a little bit one way or the other. She is completely indifferent about the outcome of the case.

If this characterization were accurate, we could easily see why a peremptory against an impartial venire person on any grounds, but especially based on race or gender, would injure her. After all, the portrayal implies that there are only two kinds of venire persons—neutral and unfit to serve. On this view, a peremptory necessarily charges, incorrectly, that the excused venire person is unfit to serve, because there is no good reason to excuse a perfectly neutral person for another perfectly neutral one.¹⁷⁵ It also charges erroneously that the impartial venire person has committed a double wrong in trying to slip through the court’s inspection by concealing her alleged unfitness. When the accusation rests primarily on her nonwhite race or her female gender, it also evokes the country’s history of unjust legal classification of nonwhite persons and women as inferiors.¹⁷⁶ An unfounded accusation of unfitness, sanctioned by a court, is denigrating, humiliating, and deeply scarring, especially if the inference of inadequacy carries the lingering imprimatur of generations of discrimination.

If the Court’s portrayal of the impartial juror were accurate, we could also easily see why peremptories of any sort would have little value. The Court’s portrayal implies that all venire persons who qualify as impartial are exactly neutral. Consequently, they are also interchangeable—not merely black persons as against white persons and women as against men, but anyone against everyone else. On this view, excusing one impartial venire person for another will not change the deliberations or the verdict in a case. Replacing a nonwhite person with a white person or a woman with a man is of no real benefit. All impartial jurors are the same—neutral. Peremptories become, then, of only imaginary or psychological benefit to anyone.

The central problem with the Court’s portrayal is that it bears no connection to the laws and practices on voir dire and excusals for cause and thus to the actual meaning and function of a peremptory. Those laws and practices play out so that jurors can hold an array of sympathies and prejudices that make them lean toward one outcome or another in a case. Venire persons do not become unfit to serve in practical terms except in extreme circumstances. On the nonidealized view of an impartial juror as anyone who makes it past an excusal for cause, impartial jurors are far from fungible.

United States v. Wood, 299 U.S. 123, 145–46 (1936) (characterizing impartiality as a “mental attitude of appropriate indifference”).

¹⁷⁵ See, e.g., *J.E.B.*, 511 U.S. at 142 (describing a gender-based peremptory as conveying that the excused person is “unqualified . . . to decide important questions”); *Powers*, 499 U.S. at 410 (implying that a peremptory based on race challenges “fitness as a juror” (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986))); *Batson*, 476 U.S. at 87 (characterizing the question as whether race bears on “fitness as a juror”).

¹⁷⁶ See, e.g., *Batson*, 476 U.S. at 103–04 (Marshall, J., concurring) (discussing historical exclusion of black persons from juries); *J.E.B.*, 511 U.S. at 131–34 (discussing historical exclusion of women from juries).

Excusals for cause generally only eliminate venire persons with obvious conflicts of interest or those who openly claim such extreme positions that they seem determined to avoid jury service.¹⁷⁷ Statutes commonly govern challenges for cause,¹⁷⁸ and, other than certain disqualifications,¹⁷⁹ the typical grounds provided “include a blood relationship to one of the litigants, a pecuniary interest in the outcome of the case, and previous service on a jury which considered a similar crime or a grand jury which considered the same crime.”¹⁸⁰ In addition, there is usually a general statutory provision,¹⁸¹ or a basis recognized by courts,¹⁸² allowing parties to exclude for cause any venire person who “is unable or unwilling to hear the case at issue fairly and impartially.”¹⁸³ Under this latter basis, a trial judge will excuse, for example, a juror who maintains in the face of the law that the criminal defendant must testify or otherwise prove his innocence to warrant acquittal or that certain testimony, such as that from a police officer, is always credible.¹⁸⁴ However, few venire persons will be so obstinate, unless they are committed to staying off of the jury.

Courts can also find *implied* bias under the general provision, but, especially in the absence of extensive pretrial publicity, they rarely do so in noncapital cases.¹⁸⁵ First, so many venire persons arrive with opinions that will affect their votes on a case that to exclude them all would leave few to serve.¹⁸⁶ Second, voir dire questioning, often posed by the judge to the group, is usually too limited to produce information that would clearly establish implied bias.¹⁸⁷ Except in interracial capital cases,¹⁸⁸ judges generally need not ask or allow probing questions about sympathies

¹⁷⁷ See generally CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 792–94 (5th ed. 2008) (listing examples of for cause challenges, including a potential juror who “is unable or unwilling to hear the case at issue fairly and impartially” (quoting AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 15-2.5(a) (3d ed. 1996) [hereinafter ABA STANDARDS])); LAFAVE ET AL., *supra* note 170, at 1087–88 (stating that challenges for cause are often set by statute and “permit rejection of jurors on narrowly specified, provable and legally cognizable bases of partiality”).

¹⁷⁸ See LAFAVE ET AL., *supra* note 170, at 1087.

¹⁷⁹ See *infra* text accompanying notes 234–240.

¹⁸⁰ WHITEBREAD & SLOBOGIN, *supra* note 177, at 792–93; see also LAFAVE ET AL., *supra* note 170, at 1087 (noting the additional common ground that the venire person will be a witness in the case).

¹⁸¹ See LAFAVE ET AL., *supra* note 170, at 1087–88.

¹⁸² See WHITEBREAD & SLOBOGIN, *supra* note 177, at 793.

¹⁸³ ABA STANDARDS, *supra* note 177, § 15-2.5(a).

¹⁸⁴ See LAFAVE ET AL., *supra* note 170, at 1087–88.

¹⁸⁵ See WHITEBREAD & SLOBOGIN, *supra* note 177, at 793–94.

¹⁸⁶ See *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g) (“[I]t would be extremely desirable to obtain [an opinion-less] jury; but this is perhaps impossible, and therefore will not be required.”).

¹⁸⁷ See *Babcock*, *supra* note 8, at 548–49 (stating that judge-conducted voir dire questioning will not probe very deeply, in the interest of time).

¹⁸⁸ See *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion) (“Because of the

and prejudices even in cases where grounds for concern about bias seem clear.¹⁸⁹ Consistent with these lax requirements, judges often will only ask or permit a limited set of objective or superficial questions, such as whether anyone knows any of the witnesses or, in a criminal case, whether anyone has been a victim of or witness to a similar crime.¹⁹⁰ When a venire member raises her hand, the typical follow up is merely a question about whether the connection or experience “would tend to prejudice her in evaluating the testimony to be given in the case.”¹⁹¹ Those kinds of follow-up questions will produce only a few affirmative responses, because venire members generally do not want to admit that they cannot be fair.¹⁹² Even when the judge permits more questions, jurors will generally maintain that they can be impartial.¹⁹³ In the face of a denial of bias, moreover, “[p]rejudice is seldom implied, on the reasonable ground that individuals who say they can be impartial should be trusted to abide by their oath.”¹⁹⁴ This means that venire persons with all kinds of relevant sympathies and prejudices will pass muster and make it onto the jury if they are not excused with peremptories.¹⁹⁵

Given the rules and practices on voir dire and cause challenges, there is good reason to believe that perspectives associated with venire persons’ race and gender will often matter. The Court’s contention in the *Batson* cases that jurors’ race and gender do not affect their deliberations or decision making is certainly at odds with the views of most trial lawyers.¹⁹⁶ It is also “untrue to decades of judicial efforts to open the jury to excluded groups, to the findings of social science, and to the beliefs of the public.”¹⁹⁷ As we have seen, the Court’s own pre-*Batson* decisions on representativeness at the venire stage make the case that juror race and gender affect verdicts.¹⁹⁸ Social science evidence also strongly suggests that black and white jurors

range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.”).

¹⁸⁹ See, e.g., *Ristaino v. Ross*, 424 U.S. 589, 598 (1976) (upholding failure to question about racial prejudice in case involving allegation of black-on-white crime); *Ham v. South Carolina*, 409 U.S. 524, 528–29 (1973) (upholding failure to voir dire on reactions to facial hair although defendant was a bearded civil rights worker defending against a drug charge in a small town in South Carolina on grounds that police framed him).

¹⁹⁰ See *Babcock*, *supra* note 8, at 548–49.

¹⁹¹ *Id.* at 548.

¹⁹² See Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors’ Views Regarding the Peremptory Challenge*, 78 CHI.-KENT L. REV. 1061, 1096–97 (2003) (indicating it is “psychologically difficult or embarrassing to refer to oneself as biased, [and] also may seem wrong in a moral sense”).

¹⁹³ See *id.*

¹⁹⁴ WHITEBREAD & SLOBOGIN, *supra* note 177, at 793.

¹⁹⁵ Cf. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978) (asserting that all jurors inevitably are prejudiced in one direction or the other).

¹⁹⁶ See *infra* text accompanying notes 244–245.

¹⁹⁷ Muller, *supra* note 32, at 107.

¹⁹⁸ See *supra* notes 97–101 and accompanying text.

on the whole react differently to evidence in many contexts¹⁹⁹ and that differences also arise in how male and female jurors as groups vote in some cases.²⁰⁰ As for public perceptions, several notorious trials in the post-*Batson* era, such as those involving Rodney King, the Menendez brothers, and O.J. Simpson have involved heavy media focus on the racial and gender composition of the juries, leaving little doubt that the public believes the demographic makeup of juries matters.²⁰¹ The heavy media focus on the composition of the jury in the recent George Zimmerman trial only underscores the widespread belief in the significance of juror race and gender.²⁰² Thus, even those who oppose a return to the *Swain* rule would fairly conclude “that race and gender are at least minimally rational predictors of perspective.”²⁰³

B. Reexamining the Harms and Benefits of Peremptories

If impartial jurors are not fungible and juror race and gender matters, the Court’s account of harms and benefits in the *Batson* cases should not drive the policy debate about the abolition of peremptories. The view that individual impartiality represents not neutrality but an array of permissible perspectives helps explain why peremptories in a post-*Batson* world, even when covertly based on race or gender, do not inflict inequality harms on excused persons and can promote something positive—jury neutrality. This nonidealized view of juror impartiality as a range of acceptable sympathies raises questions about the sensibility of *Batson* doctrine itself.²⁰⁴ Nonetheless, I do not argue that the Court should overrule or amend that

¹⁹⁹ See, e.g., Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1046 (2012) (finding that all-white juries in Florida are much more likely to convict black than white defendants and that gap disappears if there is one black juror); Sheri Lyn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625–43 (1985) (evaluating social science studies regarding race and guilt attribution; race and sentencing; and race, attractiveness, and blameworthiness); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 66–67 (1993) (reviewing social science studies and concluding that “the influence of jury discrimination on jury decisions is real and can be measured”).

²⁰⁰ See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* 140–42 (1983) (“Some differences as a function of juror gender have been observed in sentencing recommendations and other judgments related to the verdict rendering process.”).

²⁰¹ See Muller, *supra* note 32, at 106.

²⁰² See, e.g., Earl Ofari Hutchinson, *Zimmerman Trial Juror b37 Reconfirms Glaring Juror Racial Bias*, HUFFINGTON POST (July 17, 2013, 2:18 PM), http://www.huffingtonpost.com/earl-ofari-hutchinson/zimmerman-trial-juror-b37_b_3611614.html, archived at <http://perma.cc/W3CX-PDYP> (contending that the absence of black persons on the Zimmerman jury affected the outcome); *The Trayvon Martin Case: Race and Juries*, ECONOMIST (July 16, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/07/trayvon-martin-case>, archived at <http://perma.cc/WKZ7-FTYZ> (“Are juries racially biased? Of course they are.”).

²⁰³ Muller, *supra* note 32, at 150.

²⁰⁴ We have already seen that *Batson* doctrine is only quasi sensible, at best. See *supra*

doctrine or that lower courts should not enforce it.²⁰⁵ I contend only that the implausibility of the story the Court presented in the *Batson* opinions undermines the inequality argument for eliminating peremptory systems today. I begin by rejecting the alleged harms of peremptories and then discuss their social benefits.

1. *The Missing Inequality Harm from Peremptories*

There are two central problems with claims that significant inequality harms result from discriminatory peremptories in a post-*Batson* world. First, the harm to the excused person is not appropriately presumed because jury service is not usually understood as a benefit, and a peremptory is not reasonably understood as denigrating. Second, assuming there were some minor harms in a few cases, there is still no apparent *inequality* harm because juror race and gender does matter (making venire persons different) and because persons of all races and genders face peremptories based on their race or gender.

(a) *The Absence of Harm*

At the outset, we should disbelieve the notion that jury service is predominantly a benefit rather than a burden to the average venire person. By declaring that jury service is a benefit,²⁰⁶ the Court in the *Batson* cases made every race- or gender-based peremptory damaging to the excused person by definition. The Court needed to portray every such excusal as harmful because *Batson* doctrine eliminates any requirement that the excused venire person object and gives third-party standing to the opposing litigant.²⁰⁷ Yet, if jury service is not viewed as a benefit, which it is not by average persons, a peremptory excusal is only reasonably presumed as injurious if it is denigrating.²⁰⁸

text accompanying notes 82–95.

²⁰⁵ One could plausibly argue, for example, that *Batson* rules should only limit government litigants, not criminal defendants or private civil parties, on the view that only then is there state action implicating equal protection law. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 150–51 (1994) (O'Connor, J., concurring) (reinforcing that the Equal Protection Clause “prohibits only discrimination by state actors” and stating the “decision should be limited to a prohibition on the government’s use of gender-based peremptory challenges”).

²⁰⁶ *See supra* Part III.A.

²⁰⁷ *See* Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1814–15 (1993) (“A criminal defendant is permitted to raise *Batson* challenges . . . on the theory that he or she is being afforded standing to raise the rights of a third party—the prospective juror.”).

²⁰⁸ *See, e.g.,* Rose, *supra* note 192, at 1097 (discussing how persons view jury service—as a duty). If a peremptory covertly based on race or gender were denigrating, the denigration alone would render the challenge harmful. *Cf. Underwood, supra* note 57, at 745–46 (discussing situations where exclusion on racial grounds from an activity that many people might “happily choose to avoid” would deeply injure those same people).

Indeed, if anyone involved in a *Batson* dispute was harming another, the litigant objecting to the excusal seems more plausible as the culprit than the litigant exercising the strike. We should suspect the objector acts based on a racial or gender stereotype that implies the venire person will favor the objector's position. Otherwise, the objector probably would not complain. Litigants object in *Batson* disputes for their own ends, not because they care about the rights of the challenged venire person. Also, the objector rather than the challenger inflicts the harm, because jury duty is more plausibly understood as a burden than a benefit to the average venire person.²⁰⁹ People who show up for jury duty have not volunteered as they would if they applied for a job, sought to rent an apartment, or arrived at a poll to vote; the law has coerced them to appear and serve.²¹⁰ To say that jury duty is purely a wonderful opportunity to participate in democratic government²¹¹ sounds like proselytism.²¹² It ignores the hardships that the requirement places on most of those ordered to be there.²¹³ For a few, jury service may be purely an empowering, educational, and inspiring experience.²¹⁴ Yet, the likely reaction typical among those summoned is that jury service is undesirable,²¹⁵ and there is no logical (as opposed to instrumental) reason to view it as a benefit instead of a burden.²¹⁶ Moreover,

²⁰⁹ See, e.g., Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1719 (2012) (asserting that “jury service is an onerous burden for most”).

²¹⁰ We also should not forget that some excused persons will already have served on a jury and others will have to serve in another trial in the future.

²¹¹ See *supra* text accompanying note 135.

²¹² A disproportionate number of minorities apparently also would find such proselytism unpersuasive, as studies, at least in some areas, have shown that they respond to jury notices they have received at substantially lower rates than white persons respond. See Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 714 (1993).

²¹³ See, e.g., Sheri Lynn Johnson, *The Language and Culture (Not To Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 77 (1993) (asserting that venire persons of all races are happy not to have to serve, because of the burden).

²¹⁴ In 2011, in Alabama, black citizens, on behalf of a class, sued the District Attorney of Henry and Houston counties, and prosecutors working under him, alleging that prosecutors in those counties had systematically excluded black persons from jury service through peremptory challenges, particularly in capital cases. See *Hall v. Valeska*, 849 F. Supp. 2d 1332, 1333–34 (M.D. Ala. 2012). Although the federal District Court granted summary judgment for the defendants, *see id.* at 1333, the suit suggests that some persons view their excusals through peremptories as inflicting inequality harm on them. At the same time, the suit may better reflect the view of the plaintiffs' lawyers that juries in capital cases in those counties had been slanted against capital defendants through the use of peremptories. See *infra* Part V.A.

²¹⁵ See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 718 (1995) (stating that “most prospective jurors attempt to avoid service”); STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 14 (1994) (noting that most persons who are sent a jury summons never appear, in part because they ask to be excused).

²¹⁶ Empirical evidence, while meager, supports the view that persons summoned to jury service usually view it as a “duty” for which they would not have volunteered and, further, that those who are excused by peremptories do not feel mistreated. A study of two hundred

“because jurors are selected mostly on the basis of chance, even prospective jurors who would prefer to serve have little personal expectation or claim to be chosen.”²¹⁷ In these circumstances, we cannot accurately presume the challenging party is harming venire persons by merely excusing them in a single case any more clearly or significantly than the party objecting harms them by trying to include them on the jury.

Peremptories based on generalized characteristics also do not denigrate the excused venire person once we accept that individual impartiality represents a broad range of nondisqualifying perspectives. Neither the excused person nor the observers can reasonably view a peremptory in the post-*Batson* world as an accusation of wrongdoing or unfitness to serve.²¹⁸ If venires include an array of legally qualified but very different people, the use of peremptories is merely an exercise in “comparison shopping” in which each litigant is hoping to seat the venire persons who will be the most helpful to its cause.²¹⁹ The law requires so many relatively subjective judgments that juror perspectives will matter although all jurors are following the law.²²⁰ The reasonable interpretation of a peremptory is that the excusing party believes there are others who will be more ready to see the situation from that party’s perspective.

There is also no special insult involved with a peremptory secretly based on race or gender because there remains no reasonably inferred insult at all. There is still no good basis to see an accusation that the excused person is a failed human, a

former venire persons by Professor Mary Rose found that persons typically viewed jury service as “not an activity most would have chosen to undertake on their own,” and that they accepted peremptory challenges as a legitimate part of an adversarial system. Rose, *supra* note 192, at 1097. While there were a few outliers, who Rose suggests may have arrived with preexisting negative views, *see id.* at 1095 & n.121, the vast majority distinguished between “the wisdom of the attorneys’ decisions” on peremptories and the fairness of jury selection. *Id.* at 1097. Regardless of the suspected basis for their excusal, they held similarly positive views about being “treated fairly.” *Id.* at 1067. They generally agreed that their duty was to appear and be prepared to serve, but that if their service was not needed, there was no serious insult or injury to them. *See id.* at 1097. To the extent that they saw unfairness, their concern largely focused not on excusals, but on the judge’s unduly harsh responses to people who sought to avoid service based on hardship but were forced to serve. *See id.* at 1092.

²¹⁷ Alschuler, *supra* note 215, at 718.

²¹⁸ *Batson* doctrine will prevent the kind of situation that the Court confronted in *Swain* and will go much farther by deterring any obvious race- or gender-based peremptories although they are not part of a pattern across multiple cases. In this context, excused jurors and observers will not know that a particular peremptory rests on a racial or gender stereotype. The judge also can take steps to try to prevent venire persons and observers from inferring racial or gender motives by not publicizing, for example, which party has exercised particular strikes or the basis for any objections. *See, e.g., Babcock, supra* note 76, at 1179 (advocating that challenges and explanations be made out of jurors’ presence).

²¹⁹ Pizzi, *supra* note 34, at 126.

²²⁰ *See, e.g., Heather K. Gerken, Second-Order Diversity*, 118 HARV. L. REV. 1099, 1165 (2005) (discussing the variation in jury verdicts due to jurors’ discretionary judgments); *infra* text accompanying note 221.

second-class citizen or anything else that is negative. The judge can legitimately clarify in advance that litigants exercise peremptories not based on unfitness but to seat those they see as the best match with their interests from among the qualified venire persons. Beyond that bland conclusion, the meaning of a peremptory, even when suspected to rest on race or gender, is far too ambiguous to be reasonably taken as denigrating.

A suspected racial or gender stereotype could easily reflect a compliment rather than an affront. Perhaps a prosecutor in a black-on-black murder case does not want jurors who are merciful and secretly operates with a stereotype that black persons will tend to be more merciful than white persons. She may anticipate defenses of self-defense and provocation, which involve subjective judgments by jurors about how a “reasonable” person in the defendant’s shoes would have acted.²²¹ She might believe that merciful jurors would be more likely than less compassionate ones to see the defendant’s conduct as reasonable, although all would be following the law. Assuming suspicion that her excusal of a black venire person was partially or wholly race based, if the stereotype was about mercifulness, there would be no accusation of incompetence or unfitness. Indeed, religious texts suggest that mercifulness is praiseworthy.²²²

The failure to apply a stereotype also offers no safeguard against offense. Suppose a black litigant excuses a white venire person who later finds out that the lawyer voluntarily explained at the bench, “he appears from his answers to be as dumb as a rock.” Although not based on a stereotype, this rationale would be thoroughly demeaning, but perfectly proper, whether or not accurate. Thus, there is no logic in the view that a racial or gender stereotype will denigrate the excused venire person while a statement regarding one of the person’s specific qualities will not.

(b) *The Absence of Inequality*

Assuming that some venire persons experience significant deprivation when excused with a peremptory, there is still no clear *inequality* harm—even when the litigant covertly excuses based on a racial or gender stereotype. The equality idea—that equals should be treated alike and nonequals differently—is malleable in that its meaning depends on an external rule that defines who is equal.²²³ In the constitutional-law context, the Supreme Court can infuse the equality mandate with categorical, external rules that are nonfactual, such as that race and gender do not

²²¹ See, e.g., *State v. Simon*, 646 P.2d 1119, 1122 (Kan. 1982) (self-defense); *Commonwealth v. Carr*, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990) (provocation reducing murder to voluntary manslaughter).

²²² See, e.g., *Luke* 6:36 (King James) (“Be ye therefore merciful, as your Father also is merciful.”).

²²³ See generally Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997) (critiquing the idea of prescriptive equality); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that in order for equality to have meaning, it must incorporate external values and ideas).

constitute relevant differences among venire persons.²²⁴ However, if we accept that juror race and gender can matter, then the inequality claim falters. An observer would lack adequate information to conclude accurately that a litigant who has been allowed to excuse a truly aggrieved venire person (assuming we could identify her) based secretly on race or gender (assuming we could know this) weighs race or gender too heavily.²²⁵

There is a second reason why excusal by a peremptory—even when secretly based on a racial or gender stereotype—is not easily understood to impose *inequality* harm. All persons summoned to a jury venire face the real possibility of excusal (or acceptance) by a litigant based partially on a covert stereotype that the litigant applies to their race or gender. Men are sometimes secretly excluded in part because of their gender, just like women. White persons are sometimes secretly excluded in part because of race, just like nonwhite persons. In the very same case, one party may excuse predominantly white persons or men while the other party excuses predominantly nonwhite persons or women. Members of all races and genders are subject to the same kind of treatment in the process. We should doubt whether there is inequality harm in the actions of one litigant secretly using a stereotype to challenge a venire person when the opposing litigant is likely using the same stereotype to object and to exercise and refrain from exercising its own peremptories.²²⁶ Although the Court has defined away any doubts on this score by focusing narrowly on the actions of the party exercising the strike,²²⁷ the moral claim of inequality does not comfortably attach to a view of jury selection that takes a few steps back.

2. *The Value of Peremptories*

When we accept that venire persons are not interchangeable, we can also see how peremptories can serve valuable ends. They can promote neutrality on juries. The efforts of each party to excuse those deemed least likely to vote for it can lead to a jury made up mostly of jurors near the center of the impartiality array.²²⁸ While

²²⁴ See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (“But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.”).

²²⁵ Two additional points warrant reiteration. First, in the face of a peremptory, an objection by the opposing litigant on *Batson* grounds confirms the opponent’s belief that the racial or gender stereotype allegedly influencing the excusing litigant is essentially accurate. See *supra* text accompanying note 93. Second, there is good reason to think that, especially in a post-*Batson* world, litigants who exercise peremptories covertly based on race and gender often do not rely on racial or gender rules alone but on multiple considerations. See, e.g., *supra* note 126–127 and accompanying text; *infra* notes 276 and accompanying text.

²²⁶ See *J.E.B.*, 511 U.S. at 159–60 (Scalia, J., dissenting).

²²⁷ See *id.* at 129, 146 (majority opinion).

²²⁸ Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 413 (2010); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J.

I have urged that there generally is no reasonable basis in a post-*Batson* world for a sense of inequality injury by those excused with peremptories, the benefits of pursuing group neutrality counter any minor irritations actually felt. After all, jury selection “[does] not revolve entirely around jurors’ particular interests.”²²⁹ Peremptories can promote a sense of fairness in the selection process for the parties and a broader societal sense that juries are impartial.

Whether a jury made up mostly of centrists is superior to a jury that includes a representative collection of outliers is not beyond debate, but the overall direction of our jury-selection practices suggests that we are conflicted between these two goals. If we actually favored maximum representativeness, we would require courts to select each jury randomly from a list of every adult legal resident in the jurisdiction.²³⁰ However, states need not permit noncitizens to serve, and it need not scour the population to identify every adult citizen.²³¹ We don’t require states to work hard to find those who stay off of voter registration lists or most other governmental radar screens, or to keep close track of those who move often.²³² This laxness disproportionately reduces the number of minority persons who receive jury summonses, because citizen minority groups decline registering to vote and move their residences more frequently than their white counterparts.²³³ States can also disqualify many identifiable adult citizens,²³⁴ including those who suffer from mental illness and those with prior felony convictions,²³⁵ although the latter exclusion has a substantially disproportionate impact on black men.²³⁶ States can also excuse those whose service would impose on them financial or other hardship, which disproportionately excuses minorities,²³⁷ although states could usually

945, 983 (1998).

²²⁹ Rose, *supra* note 192, at 1096; *see also* Tetlow, *supra* note 209, at 1718 (noting that “their interests should not trump the rights of the defendant, victims, or even of the public to a fair trial”).

²³⁰ For a summary of the source lists that states use to find persons for jury service, *see* BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 218–22.

²³¹ *See, e.g.*, LAFAVE ET AL., *supra* note 170, at 1078 (noting, for example, the federal approach of “selecting jurors randomly from voter lists”); WHITEBREAD & SLOBOGIN, *supra* note 177, at 777 (regarding “aliens”).

²³² *See* HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 18–23 (1993).

²³³ King, *supra* note 212, at 714; FUKURAI ET AL., *supra* note 232, at 48–51.

²³⁴ In addition to other categories of persons, states can excuse those engaged in a “critical occupation,” often defined by statute and including military, government, and professional jobs. *See* LAFAVE ET AL., *supra* note 170, at 1079.

²³⁵ *See, e.g.*, Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (“Thirty-one states and the federal government subscribe to the practice of lifetime felon exclusion”); *id.* at 69 (arguing against a lifetime exclusion on policy grounds, while still asserting that such an exclusion is constitutional); WHITEBREAD & SLOBOGIN, *supra* note 177, at 777 (discussing exemptions for mental illness).

²³⁶ Kalt, *supra* note 235, at 114.

²³⁷ Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 356 (1999); *see also* LAFAVE ET AL.,

eliminate the financial hardship by paying jurors well and covering all of their expenses. As we have seen, states can also exclude those who meet statutory definitions of partiality.²³⁸ Even statutory definitions that are overinclusive of actual partiality can pass muster.²³⁹ States can also exclude in death-penalty cases those whose qualms about capital punishment would “substantially impair” their ability to vote for it.²⁴⁰ The message that these aspects of jury selection send is a willingness to sacrifice jury representativeness to achieve some other “legitimate end.”²⁴¹ Compared to the ends sought with those practices, the goal of maximizing neutrality on juries through peremptories seems equally legitimate. We should not forget that the Supreme Court has acknowledged that peremptories serve a valuable purpose, even when based on stereotypes, unless the stereotypes are about race and gender.²⁴²

Despite the Court’s disparagement of race- and gender-based peremptories as irrational,²⁴³ they can help promote group impartiality as much as many other kinds of peremptories that the law permits.²⁴⁴ To limit the use of peremptories, the Court asserted juror interchangeability in *Batson* and its progeny. However, when the question is whether we should abolish peremptories altogether, we should not take the Court’s claims of “no difference” too seriously. As Justice O’Connor has asserted: “[E]xperienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic,” and, in this process, “we know that . . . race [and] gender matter[.]”²⁴⁵ Perhaps *Batson*’s lax remedy reveals that the Court majority did not believe its own account of juror fungibility.²⁴⁶ In any event, from the vantage point that race and gender often matter, *Batson*’s failure to stop all or even most peremptories covertly grounded on those characteristics is not so obviously negative.

Efficiency and juror-privacy concerns also favor allowing peremptories, including those covertly based on race and gender. We could try to replace peremptories with greatly expanded voir dire and excusals for cause. If lawyers had more opportunity to ferret out extreme biases in voir dire and judges were more willing to excuse for cause, peremptories might become less important. However,

supra note 170, at 1079 (listing economic hardship as a reason for excusing jurors).

²³⁸ See *supra* text accompanying notes 178–183.

²³⁹ See Howe, *supra* note 35, at 1194 (noting that these categorical definitions can serve the interest in efficiency).

²⁴⁰ *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

²⁴¹ See *Lockhart v. McCree*, 476 U.S. 162, 180 (1986).

²⁴² See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (noting that “we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures”); see also *Holland v. Illinois*, 493 U.S. 474, 484 (1990) (emphasizing the value of peremptories in “enabling each side to exclude those jurors it believes will be most partial toward the other side”).

²⁴³ See *supra* note 87 and accompanying text.

²⁴⁴ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148–49 (1994) (O’Connor, J., concurring).

²⁴⁵ *Id.* at 148.

²⁴⁶ See *supra* Part III.B.

assuming those changes would actually work to expose and eliminate persons with strong sympathies,²⁴⁷ jury selection would become a more extensive ordeal, as it already is in capital cases because of the need to “death-qualify” juries.²⁴⁸ The process would also involve greater invasions of venire persons’ psyches and personal lives, which they likely would not appreciate.²⁴⁹ Extensive questioning, particularly through questionnaires, enables parties to use peremptories intelligently, but lawyers would need to probe even more vigorously to secure the kind of explicit confessions of bias needed to support more excusals for cause.²⁵⁰ Peremptories enable courts to move through jury selection much more quickly and with less offense to venire persons by allowing litigants to act on their educated intuitions.

In the end, claims of inequality harm to excused persons fail as a ground to abolish peremptories.²⁵¹ In the post-*Batson* world, inequality harms from excusal seem minimal, and whatever sense of irritation or deprivation arises for excused persons does not outweigh the value of peremptories in pursuing group impartiality. These conclusions apply not only to peremptories that classify as clearly nondiscriminatory but also to those secretly based on race and gender.

²⁴⁷ *But see, e.g.,* Babcock, *supra* note 76, at 1175–76 (contending that this approach would be ineffective).

²⁴⁸ *See supra* note 41.

²⁴⁹ *See* Rose, *supra* note 192, at 1093 (finding through an empirical study that former jurors viewed protection of their privacy during voir dire as important).

²⁵⁰ *See* Stephanie Clifford, *TV Habits? Medical History? Tests for Jury Duty Get Personal*, N.Y. TIMES, Aug. 21, 2014, at A1 (noting that lawyers use the information to exercise peremptories in accordance with perceived “patterns” that “might make jurors more likely to find for one side or another”); *supra* text accompanying notes 187–195.

²⁵¹ I also reject arguments that we should abolish peremptories because lawyers do not exercise them effectively. Some commentators have contended that evidence that lawyers’ nonracial and nongender explanations seem to make no sense indicates that they often fail to distinguish favorable from unfavorable venire persons. *See, e.g.,* Melilli, *supra* note 158, at 497–99 (suggesting that some peremptory removals are “silly, if not offensive”). Sometimes, opponents of peremptory systems have also pointed to empirical studies that show excused venire persons often, although not always, would have voted the same way as actual jurors. *See, e.g.,* Marder, *supra* note 158, at 1597 (finding that prosecutors and defense attorneys were unable to use peremptories to any advantage (citing Zeisel & Diamond, *supra* note 195, at 517)). My response is that few defenders of peremptory systems claim that lawyers can always or even usually change the outcome of a trial with one or more peremptory strikes, but this point does not make peremptories a waste of time. In many cases, the evidence probably turns out to favor one party enough so that peremptories do not matter. Also, lawyers in jury selection often don’t know who will replace the excused venire person, so a peremptory does not always produce a more favorable juror. In exercising peremptories or objecting to them, lawyers are merely playing the odds as they perceive them at the moment. Nonetheless, the empirical evidence does not show that peremptories never or almost never change outcomes. *See* Zeisel and Diamond, *supra* note 195, at 519 (“We are . . . tentatively persuaded that cases in which peremptory challenges have an important effect on the verdict occur with some frequency.”).

V. PEREMPTORIES WITH NEGATIVE SOCIAL VALUE

The use of peremptories is not trouble free. This Part demonstrates that peremptories sometimes produce mostly negative social consequences, although inequality harm to excused jurors is not the central problem. My claim is not merely that peremptories reduce jury representativeness,²⁵² because representativeness must give way if peremptories are to promote jury neutrality. The real problem is that peremptories sometimes both reduce representativeness and ensure the opposite of jury neutrality—group bias. In those circumstances, peremptories have negative social value, and there is a societal interest in disallowing them. The challenge lies in defining through rules or standards the group of cases in which peremptories serve those negative ends.

A. *When Peremptories Promote Group Bias*

The idea that individual impartiality encompasses an array of permissible sympathies helps clarify not only why peremptories can promote maximum group neutrality but also why they sometimes will promote group bias. From a policy perspective, the function of peremptories is to help produce a jury made up mostly of persons near the center of the impartiality array.²⁵³ Whether peremptories can promote that outcome depends in part on the makeup of the venire. When the venire starts out slanted, peremptory challenges can assure that the jury is one-sided. Despite *Batson*, the party aligned with a highly predominant perspective on the venire can frequently excuse all or most of those persons who fall on the other side of the array while seating many who favor it. The peremptories of the other party will not prevent this outcome.

The *Swain* case, in which the Warren Court articulated the pre-*Batson* rule for regulating peremptories, demonstrates the problem.²⁵⁴ At Robert Swain's trial, the jury venire included about one hundred persons.²⁵⁵ Black males at the time constituted about 26% of all adult men in the county.²⁵⁶ However, Swain's venire included only eight black persons, and the court excused two for cause.²⁵⁷ The prosecutor excused the remaining six with peremptories, producing an all-white jury.²⁵⁸

²⁵² See, e.g., Muller, *supra* note 32, at 97 (“[T]his sort of discrimination violates the Sixth Amendment’s guarantee of a jury that represents the community.”); see also Marder, *supra* note 32, at 1128 (noting that the Sixth Amendment idea of a fair cross section of the community provides “a better approach as a matter of legal theory”).

²⁵³ See, e.g., Leipold, *supra* note 228, at 983 (noting that “[i]n theory, all that remain[s] [after peremptories] are the ‘most neutral’ jurors in the middle”).

²⁵⁴ For more on *Swain v. Alabama*, 380 U.S. 202 (1965), see *supra* text accompanying notes 62–72.

²⁵⁵ *Swain*, 380 U.S. at 210.

²⁵⁶ *Id.* at 205.

²⁵⁷ *Id.*

²⁵⁸ See *id.*

If we could ask Swain why this process was unfair, he would surely say that the prosecutor had used peremptories to seat a jury that was stacked against him. Precisely because we think that black persons might well have viewed the case differently than white persons (not that everyone was fungible), we view the prosecutor's strikes of all black persons as unfair to Swain. We could probably also say today, under *Batson*, that the six black persons whom the prosecutor excused suffered inequality injuries, because they were probably excused in part based on their race. But we would also have to concede, under *Batson*, that Swain probably covertly inflicted even more inequality harm on white persons. The trial judge permitted him to excuse two venire persons for every person excused by the state, and he used all of his strikes to excuse white persons,²⁵⁹ although he probably would have accepted them if they were black persons. Of course, the notion that Swain inflicted more unconstitutional injuries than the prosecutor should make us realize that *Batson* doctrine fails to hone in on the most important concern. When the venire is imbalanced, the favored litigant can use peremptories to secure group bias regardless of how the other party exercises its strikes.

One of the Court's *Batson* cases, *J.E.B. v. Alabama ex rel. T.B.*,²⁶⁰ exemplifies the problem in stark fashion. On behalf of T.B., the mother of a minor child, Alabama sued J.E.B. for paternity.²⁶¹ At trial, the court assembled a venire of thirty-six people, twenty-four women, and twelve men.²⁶² The court excused three people for cause, leaving twenty-three women and ten men.²⁶³ Each side had ten peremptories.²⁶⁴ The state excused nine men, and J.E.B. excused nine women. The resulting jury was all women, and they found J.E.B. to be the father, after which the court ordered him to pay child support.²⁶⁵ J.E.B. objected to the excusals of the men as a violation of equal protection, but the trial court concluded that *Batson* did not apply, and the state appellate court agreed.²⁶⁶ On the limited question of whether *Batson* governed gender strikes, the Supreme Court reversed.²⁶⁷

What troubles us about the factual scenario in *J.E.B.*? To say that the men, whom the state excused, suffered inequality harm seems contrived.²⁶⁸ Would we plausibly assume the men suffered significant denigration and deprivation? Were they treated differently by each side without a good reason? Did the larger selection process treat the excused men differently than the excused women? The answers to all of these questions are obvious. What is troubling is not that peremptories were used to mistreat the men but that they were used to secure a one-sided jury. For the very reason that we believe men and women, on average, could react differently to

²⁵⁹ *See id.* at 210.

²⁶⁰ 511 U.S. 127 (1994).

²⁶¹ *Id.* at 129.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 130–31.

²⁶⁸ *See supra* Part IV.B.

the evidence in the case (rather than they are fungible), we view the state's peremptories as unfair to J.E.B. This view persists although, from a *Batson* perspective, J.E.B.'s conduct in jury selection seemed as improper as that of the state. Our sense that J.E.B.'s conduct does not bear on the unfairness of the process to him underscores that *Batson* does not focus on the right problem. Because the venire started out decidedly one-sided, the state could use peremptories to secure a jury that was skewed no matter how J.E.B. responded with his own strikes.

The potential for litigants to use peremptories to promote one-sided juries persists today. *Batson* doctrine will sometimes deter those outcomes, but only partially and haphazardly. The doctrine does not purport to prevent litigants from using rationales other than race and gender to exercise peremptories. As critics of *Batson* have noted, the doctrine will also only modestly deter race- and gender-based strikes.²⁶⁹ Where a venire is already slanted in one direction, a litigant can still often use peremptories to exclude everyone, or almost everyone, on the opposite side of the impartiality array.

We can see *Batson*'s impotence to stop such an outcome by imagining a criminal prosecution in a prosperous county near Los Angeles in which an overwhelming majority of the population usually votes Republican. The defendants are white police officers charged with crimes involving their alleged use of excessive force against a black citizen visiting from Los Angeles. The county has a large segment of noncitizen Hispanics, but the proportion of black and Hispanic persons eligible for jury service is less than 10%. On the venire, there are only five black persons or Hispanics and a large proportion of older and retired white persons. During jury selection, the defense lawyers use peremptory strikes to excuse all of the black and Hispanic persons, plus a young white woman with a forearm tattoo, and three young white or Asian American males, one with long hair, another with a shaggy goatee who was overheard to say "rad" in the hallway, and a third with disc earrings. Although the prosecution objects to the minority strikes based on *Batson*, the trial court declines to find racial discrimination by the defense lawyers. The prosecutors use all of their peremptories to excuse older white persons, but the jury ends up comprised largely of older white persons. Nobody on the jury is individually biased, but the use of peremptories has promoted a jury with group bias. In the face of a prosecution case that would likely have persuaded a jury in Los Angeles, the conservative, old, nondiverse jury in the nearby county votes to acquit the officers.

B. Why Laws Cannot Describe Group-Bias Outcomes

The quandary over how to permit peremptory strikes that help secure group neutrality, but not those that promote a one-sided jury, has no ideal remedy. As in *Swain* and *J.E.B.*, we can sometimes surmise that peremptories have probably produced group bias. Those cases involved the disproportionate excusal of the few venire persons with particular racial or gender characteristics in cases where those characteristics would seem to matter. Yet, the difficulty lies in articulating a doctrine

²⁶⁹ See *supra* note 24 and accompanying text.

to identify all of the cases in which peremptories promote group bias without also including many in which peremptories may promote group neutrality. We should not simply give the trial judge discretion to disallow peremptories where they seem to slant the jury. That approach would confer far too much power on the judge to act subjectively. At the same time, there is no workable rule or standard that describes when peremptories achieve a bad end as opposed to the outcome that good public policy would envision for them.

A central difficulty lies in defining in practical terms when a jury is neutral and, thus, when a jury becomes more one-sided. Peremptories inherently tend to muddle whatever community representativeness appears on a venire. Thus, a departure from community representativeness cannot alone define one-sidedness. We could try to imagine the average or median view of a case in a local community as representing neutrality toward that case and then imagine a group of jurors who all, or mostly all, depart in one direction from that center point as reflecting group bias. However, when we think of the situation in *Swain*, we should realize that the average or median view of a case in a local community might itself strike us as one-sided. Perhaps we are referring by neutrality to the likely mean or median perspective in a broader community of citizens—the larger society. We might say that peremptories promote group bias if they help produce a jury that moves decidedly in one direction away from this probable societal center. Yet, this “societal” standard, even if better than a “community” standard, would fail to give the trial judge real guidance in most circumstances. We know the neutral baseline should not be the white, middle-class male Christian who speaks English as his first language.²⁷⁰ But everyone has a skin color, an economic circumstance, a religious or nonreligious orientation, a gender, and a native tongue. If “no one is free from perspective,”²⁷¹ the notion of the mean or median perspective regarding a particular dispute and set of parties is hard to pin down in the form of actual jurors.

The elusive nature of neutrality may also stem from our ambivalence over whether it embodies sufficient “closeness” to empathize rather than merely sufficient “distance” to evaluate.²⁷² Perhaps even the societal median does not represent the ideal neutrality in many cases, including *Swain*.²⁷³ We may want to avoid jurors who are either too invested in or too removed from the issue or the litigants. We may desire those who are both objective and empathetic. A person with dispassion, but a good understanding of the problem and the parties, “is more likely to bring to bear knowledge critical to evaluating evidence, credibility, and justice in

²⁷⁰ Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1207 (1992).

²⁷¹ Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987).

²⁷² See Minow, *supra* note 270, at 1203 (emphasizing that we “want them to have the ability to empathize with others, to evaluate credibility, to know what is fair in this world” (emphasis omitted)).

²⁷³ See, e.g., Ford, *supra* note 228, at 409 (concluding that peremptories can make juries more representative of the “median juror,” which would also make them more likely to convict in criminal cases).

a given case.”²⁷⁴ The commonly held but ambiguous notion that a criminal defendant should have a jury of “peers”²⁷⁵ may embody this idea of empathy as part of neutrality. Yet, acknowledging this additional complexity only compounds the difficulty of reaching a practical rule or standard for resolving particular cases, where the issues and demographics of the participants vary widely. How should the trial judge decide what would be this kind of “neutral” perspective on a case alleging, for example, insider trading of securities, or date rape, or an interracial capital murder? The answers are not clear.

The judge also would have little guidance over how to remedy the problem with peremptories in a case where she sensed that a venire was not balanced. She could call for a new venire, but the new group could easily appear as imbalanced as the first. Demographics matter, and minorities tend to be substantially underrepresented on jury venires for a host of reasons.²⁷⁶ Proceeding with an imbalanced venire, the judge also would lack meaningful standards about how to regulate the use of peremptories to achieve a compromise. She could disallow either party from using peremptories. However, the party disadvantaged by the venire might still want to excuse a few persons that it deemed too extreme; and why not let that party have those strikes? Alternatively, the judge could permit the disadvantaged party its full allotment of peremptories but reduce or exert veto power over those allowed the other side. But this approach would again call for the judge to act with unguided subjectivity in engineering the seating of the jury.

Also problematic, the trial judge in jury selection often will not fully understand how a case will play out in front of the jury. A judge can sometimes discern that racial- or gender-based sympathies will likely become important. However, often the judge at the time of jury selection will not know much about what the evidence will reveal or how it might bear on juror selection. For example, in a shaken-baby murder case against the mother’s boyfriend, the judge may not know whether the defense will present substantial evidence that the mother was the abuser, a gay teenage brother of the victim was the killer, a grandmother was the culprit, or the child died of injuries suffered from an accidental fall down a stairway. Depending on the probable defense, the litigants might focus in jury selection on race, gender, age, sexual orientation, or the ability to understand scientific or technical information, among other juror characteristics. Understanding what the parties are accomplishing with their peremptory strikes will often elude the trial judge when she does not know much about the evidence.

A judge also cannot simply assume that a series of peremptories that disproportionately affect a certain racial or gender group equates with achieving one-sidedness. Where a venire contains a fulsome demographic mix, peremptories may

²⁷⁴ Minow, *supra* note 270, at 1213.

²⁷⁵ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (“The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”).

²⁷⁶ See *supra* notes 212–13, 230–240 and accompanying text.

not further one-sidedness, although the lawyers on both sides act on race and gender stereotypes. As a trial lawyer for the Public Defender Service in Washington, D.C., in the years before *Batson*, I exercised peremptories disproportionately against white persons, and prosecutors in my cases exercised them disproportionately against black persons. Race was only part of the equation, but it was usually an influence.²⁷⁷ However, the juries in my cases typically ended up racially mixed, and my sense was that disproportionate race excusals often did not exacerbate group bias. The issue remains important after *Batson*, because litigants can still disproportionately excuse particular racial or gender groups unconsciously or covertly, or legitimately on nonracial or nongender grounds. A judge who would conclude that such disproportional strikes by a particular litigant always lead to a one-sided jury would surely err.

We can see that the inability to describe in a pithy and pragmatic way the peremptories that promote group bias makes impossible a rule or standard that prohibits them. The Supreme Court or a legislature could not plausibly order trial courts to disallow what it cannot define. We may be sure that peremptories sometimes make juries more partisan instead of more neutral. However, efforts to address the problem with laws that specify when a jury becomes more one-sided are bound to fail.

VI. A REMEDY FOCUSED ON CONSENT BY OPPOSING PARTIES

While courts and legislatures cannot effectively identify and prohibit peremptories that promote group bias, they can rely on litigants to help resolve the problem. Because parties desire both to use peremptories to their advantage and to prevent jury bias that injures them, courts should give litigants substantial power over when to restrict peremptories. This is not a perfect solution, given that litigants are not omniscient. Yet, they are best positioned to judge when they suffer harm from jury bias sufficient to forego their own peremptories. In these circumstances, giving parties a veto power in jury selection would likely promote restraint and cooperation that would preserve peremptories but reduce their use to promote one-sidedness.

²⁷⁷ Depending on the nature of the case and the characteristics of other participants, I was surely influenced to varying degrees by stereotypes about factors such as age, gender, home neighborhood in the city, occupation, dress, and appearance. Additional information when available was also relevant, such as any hints of attitudes revealed by facial expressions or body language along with any statements made by the venire person during voir dire.

Although today Washington's population is 50.1% black, in the decade before *Batson*, its population was 70% black. Andrew Siddons, *Barry, Once Washington's 'Mayor For Life,' Tries to Shape Legacy with Autobiography*, N.Y. TIMES (July 1, 2014), <http://www.nytimes.com/2014/07/02/us/barry-once-washingtons-mayor-for-life-tries-to-shape-legacy-with-autobiography.html>, archived at <http://perma.cc/88NN-KAD6>.

A. *The Proposed System for Jury Selection*

The essence of my proposal is that, except in capital cases,²⁷⁸ courts generally allow opposing parties to exercise their allotment of peremptories, one per side, in alternating sequence, and that each litigant have the power to end the process at any time.²⁷⁹ Parties could continue to object on *Batson* grounds to strikes by their opponents and should receive a ruling before deciding whether to proceed or stop. In a jurisdiction that allows a criminal defendant more peremptories than the prosecution,²⁸⁰ I propose that the defendant have the option to exercise her extra strikes at the beginning, using two for every one used by the prosecution, until she uses up the extras. Where there are multiple litigants on one side, I suggest that a choice to exercise a peremptory by any of them counts as the decision by that side. Under the proposal, one side could altogether decline to use peremptories and thereby prevent the other side from using them. Alternatively, one side could go forward with its strikes, allowing the opponent to go forward as well. When either side declined to cooperate further, the use of peremptories would end with the prior round, although the judge could continue to grant excusals for cause.

The plan could work with either the “jury box” or “struck juror” systems of exercising peremptories.²⁸¹ Under the jury-box system, a group of persons equaling the size of a jury takes its place in the jury box usually, and preferably, after a random draw from the venire. Some voir dire of the entire venire will previously have occurred with some excusals for cause, and voir dire of the panel will continue as well.²⁸² Parties exercise peremptories and additional challenges for cause from the panel, and replacements come from the venire. By contrast, under the struck-juror system, after a voir dire of the entire venire and all excusals for cause, the court creates a panel of persons equal to the size of a jury plus the number of peremptories permitted to all litigants.²⁸³ The parties then use all of their peremptories until the number of persons equaling the size of the jury remains.²⁸⁴ The plan that I propose

²⁷⁸ For the exception I propose in capital cases and the reasoning behind it, see *supra* note 41.

²⁷⁹ Under the approach proposed here, the parties would not need to announce their strikes or their reasons in the presence of the venire persons. Discretion is preferable. See Babcock, *supra* note 76, at 1179 (emphasizing that “courts should insist . . . that the explanations for strikes are offered out of the potential juror’s presence”).

For alternative approaches that one scholar has suggested to enable parties to negotiate over peremptories, see Morrison, *supra* note 40, at 42–45.

²⁸⁰ In a federal prosecution for a noncapital felony crime, for example, the defendant has ten peremptories and the prosecution has six. FED. R. CRIM. P. 24(b). States that give the criminal defendant more peremptories than the prosecution include Arkansas, Georgia, Maryland, Minnesota, New Jersey, New Mexico, South Carolina, and West Virginia. See BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 228–32 tbl.41.

²⁸¹ For another description of the differences between these systems, see LAFAVE ET AL., *supra* note 170, at 1091.

²⁸² See Zeisel & Diamond, *supra* note 195, at 495–96.

²⁸³ See LAFAVE ET AL., *supra* note 170, at 1091.

²⁸⁴ For an example of the use of this kind of system, see *Swain v. Alabama*, 380 U.S.

would work easily with a jury-box system. It could also work with the struck-jury system if, when a party stopped short of exercising all of its strikes, the court randomly selected the jury from among those remaining on the panel.

The decision about which party should go first is not crucial to the functioning of the system. In criminal cases, the court could allow the defense to decide whether to propose the first strike, simply on grounds that the criminal defendant should not bear any disadvantage from the procedure. In civil cases, the court could employ the same approach, although the reasons for such a rule are not as strong. Of course, lawmakers could plausibly conclude that the particular interests at stake in different categories of cases warrant different rules about which party should go first.

B. The Effects of the Proposal

The value of the plan from a policy perspective would depend on the degree to which parties under- and overused their power to impose a peremptory stoppage. Litigants have only “limited knowledge as to the desirability of the members of the jury venire,”²⁸⁵ which means that they cannot accurately identify every situation in which their opponent could use jury selection to promote group bias against them.²⁸⁶ If parties greatly underused the right to stop peremptories in cases in which a peremptory stoppage would help reduce group bias, the benefits of the plan could be modest. At the same time, if parties greatly overused the right to stop peremptories in cases in which their opponent was unlikely to use peremptories to advance one-sidedness, there could be lost benefits from thwarting the pursuit of neutral juries. In theory, then, the plan could have either a net positive or a net negative value.

As a practical matter, however, the proposal does not seem likely to produce a seriously negative outcome and could well produce a substantially positive one. First, we can safely conclude that the plan would reduce the use of peremptories to secure one-sided juries. Litigants sometimes surely would decide not to go forward with peremptories or to quit using them early, primarily to stop their opponent from using them to advance group bias. In *Swain* and *J.E.B.*, for example,²⁸⁷ an early peremptory stoppage forced by *Swain* and *J.E.B.* would have prevented their opponents from using strikes to obtain such one-sided juries.

We can also conclude that the plan would not end the use of peremptories altogether. Most trial lawyers believe in their own ability to exercise peremptories effectively,²⁸⁸ which suggests that they would generally not stop using them absent

202, 210 (1965).

²⁸⁵ Hans Zeisel, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165, 1166 (1987).

²⁸⁶ If replacement jurors are selected randomly, litigants also will often know even less about whether a peremptory will help them.

²⁸⁷ See *supra* text accompanying notes 254–267.

²⁸⁸ See, e.g., Marder, *supra* note 1, at 1685 (emphasizing that “the peremptory challenge allows lawyers and their clients to feel that they have some control in selecting the jury and to feel comfortable with the jury that will hear their case”).

confidence that the opposition could use them to an even greater benefit. Also, parties would likely realize that stopping peremptories very early in jury selection could make the judge more receptive to motions by the opponent to excuse some jurors for cause based on implied bias. In addition, in most jurisdictions, a party probably could not appeal a judge's refusal to excuse a venire person for cause whom the party did not excuse with a peremptory,²⁸⁹ which would sometimes further discourage parties from altogether abstaining from using peremptories. Further, in criminal cases where the defendant had a greater allotment of peremptories than the prosecution, the defendant would often have a strong incentive to go forward with a few rounds of peremptories to gain the two-for-one advantage that would accrue until her extra strikes ran out.²⁹⁰

Under the proposal, even when a litigant might be inclined to stop peremptories, communication with the opponent could spark bargaining that would allow peremptories to continue. Currently, jury selection differs from the rest of the litigation process "in its complete absence of negotiation between the parties."²⁹¹ As part of the proposal, I argue that parties should have the opportunity to converse outside the presence of the venire persons during juror selection. The power of each party to stop peremptories at any time could precipitate bartering between them to the extent that their interests coincide.

The interests of opposing parties will frequently overlap during jury selection. First, the lawyers' competing assessments of panelists and the weight they assign to those assessments may often differ, and, to the extent that they do, negotiations should ensue.²⁹² If defense counsel apprises a particular juror as a four for the defense on its ten-point scale and the opponent apprises her as a three for the prosecution on its own ten-point scale, defense counsel may have no serious objection to a peremptory from the prosecutor against that juror. However, the defense may condition an agreement to allow the peremptory on the prosecutor's agreement not to oppose a defense peremptory to another juror that the defense rates as a three on its scale and the prosecution rates as a five on its scale. The likelihood that the competing lawyers will assess various venire persons differently leaves room for parties to continue with peremptories although one party may see advantages in keeping its most favored jurors on the panel at the expense of stopping peremptories, if necessary.

Even when competing lawyers identically assess the more outlying panelists on both sides of the impartiality array, they will often have a common interest in excusing them, assuming a relatively balanced venire and panel. Litigants generally prefer to try to win a trial rather than to try to hang the jury. Even where

²⁸⁹ See, e.g., *Ross v. Oklahoma*, 487 U.S. 81, 88–89 (1988) (rejecting a constitutional claim against Oklahoma's requirement that a party exercise a peremptory to cure a trial court's error on a for-cause challenge); see also *LAFAVE ET AL.*, *supra* note 170, at 1090 (noting that "in most jurisdictions" a party must try to cure such an error with a peremptory).

²⁹⁰ See *supra* note 280 and accompanying text.

²⁹¹ *Stevenson*, *supra* note 40, at 1646.

²⁹² *Id.* at 1660.

nonunanimous verdicts are allowed,²⁹³ competing sides can rationally conclude that their best chances of winning will involve excluding as many panelists as possible on the opposite side of the impartiality array. When both sides operate with this perspective, they will both be willing to allow the exclusion of some of their favorable panelists as the price of excusing those unfavorable to them. If the lawyers can converse during jury selection, they can also make these decisions explicit. Defense counsel can propose to excuse a panelist whom the opponent wants to keep. The opponent can make explicit that she will agree only if defense counsel does not object to the excusal of another panelist whom defense counsel would like to keep. And if they cannot agree on one trade-off, they may still agree on several others. Parties would frequently conclude that preventing all, or almost all, peremptories would not serve their interests.

In criminal cases, one might question whether the plan would encourage defendants to regularly seek jury deadlocks, but the concern seems dubious. The vast majority of states require criminal juries to find guilt unanimously.²⁹⁴ In theory, criminal defendants operating under a unanimity mandate could often decide to forestall all peremptories not to avoid one-sidedness but simply to keep the one or two outliers on the panel who might strongly favor the defense and cause deadlock.²⁹⁵ One might wonder whether an indigent criminal defendant, not bearing the full financial costs of retrials, has a greater tolerance for mistrial than many other litigants. Indeed, England, which abandoned peremptories in 1988,²⁹⁶ had already begun permitting nonunanimous guilty verdicts in criminal cases,²⁹⁷ ameliorating

²⁹³ Nonunanimous verdicts, typically by at least a 75% majority, are generally allowed in civil cases in the following states: Alaska, Arizona, Arkansas, California, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, and Wisconsin. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 233–37 tbl.42. As for the decision rules in criminal cases, see *infra* note 294 and accompanying text.

²⁹⁴ *See* BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 233–37 tbl.42 (noting that only Louisiana, Oregon, and Puerto Rico allow nonunanimous verdicts in some cases, and the margins required are high: Louisiana—at least 10/12 and unanimity in capital cases and others carrying mandatory penalty of confinement at hard labor; Oregon—at least 10/12 and 11/12 in murder cases; Puerto Rico—at least 9/12).

²⁹⁵ *See* Morrison, *supra* note 40, at 55 (noting this possible objection but explaining why it is not a major concern). Contrary to this approach, empirical research suggests that the presence of one or two extreme jurors rarely explains why a jury deadlocks. Mistrials involving one or two holdouts usually involve deliberations that begin with a wide division, reflecting serious dispute over the weight of the evidence. HASTIE ET AL., *supra* note 200, at 166–67; HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 462–63 (1966); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 41 (1997).

²⁹⁶ *See supra* text accompanying note 4.

²⁹⁷ In 1967, with little prior study, England began allowing 11–1 or 10–2 verdicts in criminal cases in response to evidence that some jurors had been bribed or intimidated to vote for acquittals in particular cases involving professional criminals. *See* VALERIE P. HANS

any such problem.²⁹⁸ The counterargument to this objection centers on the point that the unanimity rule applies against both parties. When criminal defendants see persons on the panel who look like strong outliers for the prosecution, they could also rationally conclude (like other litigants) that, assuming a balanced venire and panel, their best chance for acquittal is to give up their own outliers to get rid of those who would strongly favor the government. For these litigants, as for others, an acquittal is almost always better than a hung jury. Thus, criminal defendants present a challenge for the proposal only on the doubtful proposition that they will, much more than other litigants, shoot for mistrials rather than acquittals.²⁹⁹

The proposal will not prevent all group bias on juries. A jury could still end up severely one-sided although the disadvantaged party forecloses the use of peremptories altogether. A venire and panel of jurors from the venire could be so one-sided that the failure to exercise peremptories would make little difference. There may be zero, or only one or two, favorable venire persons on the panel for the disadvantaged party to protect. One or two jurors may not matter under nonunanimous decision rules, and they may not hold out where unanimity applies. Some scholars have suggested approaches that would help address this larger problem, such as using racial quotas to constitute juries.³⁰⁰ However, there is no constitutional guarantee of a certain mix of views on a jury,³⁰¹ and any effort to

& NEIL VIDMAR, *JUDGING THE JURY* 172 (1986).

²⁹⁸ “[N]onunanimous decisionmaking rules can operate to eliminate the voice of difference on the jury.” Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 *HARV. L. REV.* 1261, 1264 (2000). However, the Supreme Court has held that the Constitution does not require jury unanimity in state criminal trials. *See Apodaca v. Oregon*, 406 U.S. 404, 405–06, 411 (1972) (plurality opinion) (upholding 10–2 guilty verdicts on charges of assault with a deadly weapon, burglary, and grand larceny); *Johnson v. Louisiana*, 406 U.S. 356, 362–63, 365 (1972) (upholding 9–3 guilty verdict in robbery case allowed under Louisiana law at the time).

²⁹⁹ Some percentage of litigants in both criminal and civil cases would see a hung jury as their best possible option and, on that view, might prevent peremptories to keep their most favored persons on the jury not to prevent one-sidedness but in hopes of securing a mistrial. However, this appears generally to be an ineffective strategy for pursuing deadlock. *See supra* note 215 and accompanying text. I suggest that the percentage of litigants who employ it will be small, especially where nonunanimity rules prevail. Nonetheless, to the extent that this issue raises concern in criminal cases, a response would be to amend the proposal to guarantee both sides in a criminal trial two peremptories without the consent of the opponent.

³⁰⁰ *See, e.g., Alschuler, supra* note 215, at 708–09 (supporting application to petit-jury context of a racial quota system used to select grand juries in Hennepin County, Minnesota); Johnson, *supra* note 199, at 1698–99 (proposing that each African American, Native American, or Hispanic American criminal defendant have the right to include three “racially similar” jurors); King, *supra* note 212, at 711 (advocating racially conscious selection at early stages when “reasonably necessary” to promote public confidence in fairness of proceedings).

³⁰¹ *See, e.g., Ross v. Oklahoma*, 487 U.S. 81, 86 (1988) (emphasizing the holding in *Lockhart v. McCree* that the Constitution assumes when the jury is selected from a cross section of the community it can be defined impartial).

ensure that every jury were thoroughly neutral at the group level would bring major complications, starting with the inability to define group neutrality.³⁰² The proposal does not aim to solve the larger problem of group bias on juries but only to reduce the potential that parties can use peremptories to exacerbate it.

The proposal also would allow the party benefitted by an imbalanced panel to stop peremptories merely to preserve its advantage. However, this power usually would not matter much if, as I urge, the court chooses panel members randomly from the venire. If the panel starts out one-sided, the venire was likely equally one-sided and, thus, even under current approaches to juror selection, the jury would likely have ended up at least as one-sided as it would with a peremptory stoppage. This is why the advantaged party would rationally want to go forward with peremptories and why the disadvantaged party is more likely to decide to stop them.³⁰³ Likewise, during the process of exercising peremptories, if the panel starts to favor a party who then stops peremptories, the outcome should be relatively close to the most neutral jury that could have been selected from that venire under the current approach to jury selection. This outcome will probably not represent perfect neutrality, assuming we could define it. But again, the plan aims to ensure not that juries are neutral but simply that peremptories will not skew them.

A plan focused on consent is not a flawless answer to the problem of one-sided juries that peremptories can promote, but I contend that it is the best one. Abolition is not a good choice if we hope to preserve some of the benefits that peremptories provide. Simply reducing the number of allotted peremptories to one or two per party in all cases is also a poor choice because it would respond in categorical form to a nuanced problem—largely curtailing the benefits of peremptories while also contributing to the problem of one-sidedness. Relying only on *Batson* doctrine is also unwise because those rules only address the problem obliquely. The best choice is to enlist parties themselves to determine when their opponents are using peremptories to achieve not neutrality but group bias.³⁰⁴

VII. CONCLUSION

This Article began by asking why peremptory challenges continue to evoke strong and widespread protest. The standard answer is that, despite *Batson* doctrine, peremptories impose inequality harm on many excused venire persons. I have provided an alternative criticism, while also endeavoring to expose the weakness of the inequality argument. I have urged that the inequality story collapses in a post-*Batson* world because the unconscious or covert excusal of venire persons on race

³⁰² See *supra* text accompanying notes 270–275.

³⁰³ The proposal could exacerbate group bias in rare circumstances. If the panel is freakishly one-sided compared to the venire, the advantaged party could force a peremptory stoppage to prevent the opponent from trying to balance the panel with replacements from the venire. However, this situation should rarely arise if the court chooses the panel members randomly.

³⁰⁴ Cf. Morrison, *supra* note 40, at 42 (urging negotiated peremptories as a solution to the problem of “the discriminatory use of peremptory challenges”).

or gender grounds neither justifies a presumption that those persons suffer harm nor plausibly classifies as unequal treatment of them. I have also argued that any minor irritation to excused jurors is offset by the value of peremptories in promoting jury neutrality, including those based unintentionally or secretly on racial or gender stereotypes. Yet, I have urged that peremptories should sometimes still disturb us because they can, when the venire is imbalanced, aid the advantaged litigant in securing a one-sided jury. The harm is not to the excused jurors but to the disadvantaged litigant.

While my arguments might suggest the view that *Batson* was wrongly decided, I disavow that position. I contend merely that we should not take seriously as a reason to abolish peremptories the story of inequality harm that the Court presented in the *Batson* cases. Whether based on the right to equal protection of venire persons or on the Sixth Amendment right of a criminal defendant to an impartial jury, existing constitutional theory does not adequately address the real problem with peremptories. The Court aimed in the *Batson* cases both to preserve peremptories and to modestly restrain their use to excuse members of certain disfavored groups. The effort produced some positive effects. But the central problem with peremptories in a post-*Batson* world is the harm they pose to disadvantaged litigants by promoting group bias. While *Batson* doctrine has helped stem this persistent harm, the benefits have been limited and haphazard.

Because of difficulties with identifying peremptories that promote group bias, I have endorsed a plan that enlists litigants to decide when to disallow them. Peremptory systems reflect the idea that parties acting in their competing self-interests can help pursue group neutrality on juries. In the same vein, allowing peremptories only with the consent of the opposing litigant can help prevent their use to achieve group bias. As a side effect, the plan would also restrain, substantially more than *Batson* doctrine, the use of peremptories generally and, thus, those based on racial, ethnic, and gender stereotypes. Yet, the goal of peremptory systems is to pursue jury neutrality, and the ultimate measure of the proposal is its ability to serve that end.