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# Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection

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# Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection†

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Ethical: 2. Professionally right or befitting; conforming to professional standards of conduct.<sup>1</sup>

Tragedy: a word of uncertain derivation, applied, broadly, to dramatic (or, by extension, other) works in which events move to a fatal or disastrous conclusion.<sup>2</sup>

## I. INTRODUCTION

Since the Supreme Court's opinion in *Batson v. Kentucky*,<sup>3</sup> the rules and tools available to lawyers for selecting juries have changed dramatically from what they had been for decades in American courtrooms.<sup>4</sup> The Court's well intentioned effort in *Batson* to attempt to eliminate racial discrimination from the process of jury selection set in motion a series of modifications in lawyer decision making which have changed how lawyers fill the jury box. Prior to *Batson*, the sacrosanct tool known as the peremptory challenge had been virtually unassailable as a jury selection weapon.<sup>5</sup> Abuses by prosecutors, particularly in the

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years of litigation in state courts and in the Supreme Court in which we were frequent adversaries.

1. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 877 (2d ed. 1957).

2. THE OXFORD COMPANION TO ENGLISH LITERATURE 992 (Margaret Drabble ed., 5th ed. 1985).

3. 476 U.S. 79 (1986). *Batson* held for the first time that a criminal defendant could object to the prosecutor's use of peremptory challenges and provided a procedural mechanism for questioning such a decision by the prosecutor during the jury selection process. See *id.* at 86; see also *infra* Part II.

4. Generally, lawyers in a trial select a jury by choosing twelve individuals from a larger panel of citizens that come before the court and answer questions about themselves. Voir dire is the process where information is obtained from jurors in order to determine whether they should be disqualified because of some bias that makes them unable to serve. Often jurors are simply rejected after voir dire by one of the parties as unsuitable by the use of a peremptory challenge which, prior to *Batson*, could not be questioned.

"[T]he critical importance of voir dire is illustrated by research demonstrating that approximately eighty percent of jurors make up their minds by the conclusion of opening statements. Other research, conducted in trial simulations . . . suggests that jurors' decisions are made even earlier." V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS § 8.0, at 223-24 (1985) (footnotes omitted).

5. See *Batson*, 476 U.S. at 118-19 (Burger, C.J., dissenting). "Long ago it was recognized that '[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial.' The peremptory challenge has been in

southern United States,<sup>6</sup> had prompted concerns that some improper uses of the challenge should be easier to prove.<sup>7</sup> *Batson* provided more flexibility by lowering the "crippling burden of proof" that had existed for many years.<sup>8</sup> In doing so, however, the Court has raised serious questions about the proper role of juries and the responsibilities of lawyers as both attempt to do their job making important decisions in the justice process.

In the decade that followed the *Batson* decision, the Court spawned a number of opinions<sup>9</sup> that have made the rules of jury selection so difficult to understand that even a lawyer who ethically seeks to follow the law may have considerable problems deciding what the law will permit. This circumstance has been further complicated by how the *Batson* rules affect a lawyer's obligation to attempt to select the best possible jury to hear the case on behalf of his client.<sup>10</sup> The lawyer's ethical obligation to be a zealous advocate will often place him in direct conflict with the current jury selection law.

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use without scrutiny into its basis for nearly as long as juries have existed." *Id.* (quoting WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 145 (1878)).

6. See LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860, at 94 (1961). Indeed no African American served on any trial jury in the United States, North or South, until 1860. See *id.*

"The problem of the effect of racial composition on a jury and its verdict is most noticeable when the trial involves a blatantly racial issue." HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 5 (1993). An example of such a racially charged issue was the trial of Byron D. La Beckwith for the murder of the Mississippi civil rights leader Medgar Evers in 1963. It was not until a racially mixed jury heard the case in 1994 that a conviction was obtained. See Ronald Smothers, *White Supremacist is Convicted of Slaying Rights Leader in '63*, N.Y. TIMES, Feb. 6, 1994, at A1, A30.

In the first trial "[i]t took four days to select a jury for the trial. In the end, none of the six Negroes on the panel of 106 jurors was selected, and, when it was over, there were twelve white men in the jury box." MYRLIE B. EVERS & WILLIAM PETERS, FOR US, THE LIVING 354 (1967).

7. Prior to *Batson*, blacks were challenged from juries in some jurisdictions at an alarmingly high rate. See, e.g., *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975) (discussing that in 15 criminal trials, 81% of black jurors were struck in cases involving black defendants).

8. *Batson*, 476 U.S. at 92.

9. See *infra* Part III.

10. A lawyer representing a criminal defendant has an obligation to make his client's best interest a primary concern. Even the Supreme Court has recognized "[u]ndivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer." *Von Moltke v. Gillies*, 332 U.S. 708, 725-26 (1948) (footnote omitted).

Indeed, *Batson* and its progeny have developed into a system of rules that not only encourage, but often require, lawyers attempting to select juries to lie to judges, clients, other lawyers, and even to themselves as they navigate the conflicting goals presented on the roily waters of jury selection.

This Article is an attempt to address the ethical tragedies that have been created by a system that encourages lawyers to manufacture better race-neutral reasons for why they have excluded a particular juror. A lawyer may engage in this enterprise whether he is trying to intentionally disguise illegal conduct or merely attempting to assure that he is not perceived as engaging in improper jury selection practices. Either way, the legal profession can ill afford to further erode the public's confidence in its integrity and honesty. In my view, a system that creates this kind of dishonesty is at least as costly as the system of racial or gender discrimination that the rules seek to avoid;<sup>11</sup> especially when there are better alternatives to resolve the problems.

For decades, race, gender, and a host of other demographic factors have played a substantial role in jury selection.<sup>12</sup> Litigants have used these factors to predict which jurors might be favorably disposed to their case. The concern is not simply the gamesmanship of advocacy, but contemplates important policy questions as well. Permitting litigants to have a substantial role in selecting the decision maker or shaping the decision making body bolsters respect for, and legitimacy of, the outcome of a trial.<sup>13</sup> This is particularly true in criminal cases where the

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11. It is clear that lawyers do not have the best reputation for honesty and integrity among members of the general public. See Kenneth Lasson, *Lawyerling Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 725 (1994). "[T]he public seems to see lawyers as inherently less ethical than doctors, plumbers, or bureaucrats—and attributes to them a failure of compassion and morality that is probably more a trait of their profession than of their individual character or upbringing." *Id.*

12. There is a notion that jury selection techniques assisted by social sciences research presents a somewhat cynical view of jury independence. One observer has noted that "[j]ury research assumes that stereotypes are valid and that jury deliberation is merely an exercise in small-group dynamics. It tends to recommend that a lawyer match the presentation of his case—its style, its volume, its color—to the preconceived psychological variables of a specific type of juror." PAULA DiPERNA, *JURIES ON TRIAL: FACES OF AMERICAN JUSTICE* 148 (1984).

13. It is important that lawyers never lose sight that their relationship with the client is one of agent and counselor, but not as a parent, who makes all the important decisions for the child:

The client's preferences should always be taken into account. At the end of the day, it is the client, and not the client's lawyer, who must live

jury is charged with the awesome responsibility over a person's liberty, or even life or death.<sup>14</sup>

I propose that the jury selection process be changed to permit the criminal defendant, at his option, to actually select from a pool of qualified jurors, people he believes are favorable to his case. I would permit the prosecutor to respond to that choice by making a choice of his own, limited by the number that the defendant has directly selected. In this way I believe we can remove much of the cat and mouse game of lawyers offering contrived reasons for challenging jurors.

This process will also clarify the host of questions raised by the use of jury selection professionals which, I believe, under the current law may well be illegal, since the advice they provide often relies on demographic data that includes assumptions and stereotypes about race and gender.<sup>15</sup>

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with the jury's verdict. The lawyer will proceed to a new case. The client does not enjoy this luxury; the jury's verdict is likely to end the matter. The client will not only appreciate being consulted, but is more likely to be accepting of whatever verdict comes from a jury regarding whose makeup he or she was consulted.

JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* 484 (2d ed. 1990) (footnote omitted).

14. This Article is limited to jury selection in the criminal context. Although I believe that many, if not all, of my proposals would be suitable for civil trials, my emphasis on the criminal trial is the result of my belief that the *Batson* problem is more prevalent in criminal cases. See REPORT ON THE USE OF PEREMPTORY CHALLENGES IN CRIMINAL CASES IN THE WAKE OF *BATSON V. KENTUCKY*, MARYLAND STATE BAR ASSOCIATION SECTION OF CRIMINAL LAW AND PRACTICE 9 (1996) (discussing that a judge's survey confirmed "that *Batson* appears most frequently in the criminal context"). This is not to suggest that the ethical issues it raises in civil trials are not important. As the Supreme Court has said, the civil trial has "so firm a place in our history," *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), and thus is "so fundamental and sacred to the citizen," that it must "be jealously guarded by the courts." *Jacob v. New York City*, 315 U.S. 752, 752-53 (1942).

"[I]n the latter half of the twentieth century, as civil lawsuits become longer and more complex, service on a civil jury has become an increasingly hair-raising prospect." ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION* 275 (1991).

15. In Part III, I will discuss whether use of jury selection professionals is a violation of civil rights, and perhaps even criminal law. See *infra* Part III. It must be acknowledged that jury selection professionals often intentionally use race and gender assumptions in their analysis. Indeed, the social sciences have had a profound effect on jury selection. Many studies have revealed that "background characteristics of jurors such as race, sex, and age, among others, have been associated with certain verdict preferences." JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* § 2-102, at 15 (1987). However, determining what those verdict preferences will be is

I will also propose several reforms that focus on the education of the jury and the information lawyers receive about the jurors through the *voir dire* process.<sup>16</sup> I will also present reforms designed to stimulate greater community education and inclusiveness in jury pools by requiring teenagers seeking their driver's license to complete mandatory juror citizenship training in order to instill the importance of the jury system in our country to the next generation of decision makers.

My hope is to place the concern over discrimination in jury selection in its proper context with the need for legitimate advocacy. Justice will be better served by replacing the current system which invites and tolerates dishonesty. Through these reforms, it is my hope to strengthen the greatest jury system in the history of civilization.<sup>17</sup>

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quite another matter. Reaching a conclusion about what a particular jury will do is quite "complex and often very subtle." *Id.*

Of course, stereotypes are at the root of the social sciences research. One scholar has observed that:

Each stereotype, whether group or personal, represents all things or persons of a given class and is the basis for reaching decisions affecting conduct toward others in that class. . . .

This might seem strange and somewhat foolish, but we must recognize that it makes for simplicity and efficiency when it is necessary to make rapid and frequent adjustments to many people in a wide variety of situations where there is little opportunity for careful, judicious study and the weighing of a multiplicity of observations.

PAUL A.F. WALTER, JR., RACE AND CULTURE RELATIONS 34 (1952).

Since selection of a jury involves "rapid" decisions, "frequent" judgements and "little opportunity" to "careful[ly]" study individual jurors, it is highly and perhaps hopelessly susceptible to stereotyping of all kinds. *Id.*

16. In *Morgan v. Illinois*, 504 U.S. 719 (1992), the United States Supreme Court stated that "part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Id.* at 729. Without *voir dire*, the trial judge's ability to exercise his duty to remove jurors who cannot impartially evaluate the evidence would be impossible. See *Rosales-Lopez v. United States*, 451 U.S. 182, 191 (1981) (White, J., plurality opinion).

17. The right to a jury trial, considered so sacrosanct at the founding of the United States, that when compared to other rights among the Bill of Rights James Madison is reported to have said that it was "the most valuable [sic] on [sic] the whole list." ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 208 (1955) (quoting 1 ANNALS OF CONG. 755 (Joseph Gales ed., 1789)).

"Ever since the seventeenth century when juries began to express sentiments against the government, there has been a tendency for the jury to become, at least in popular thought, a safeguard of political liberty." THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 107 (5th ed. 1956).

Chief Justice William Howard Taft once observed that "[t]he great bulwark and protection of the individual . . . against the power of the government and the

## II. ACT I: THE TRAGEDY OF HISTORY

The well intentioned rule in *Batson* has become a confusing maze, thus failing to adequately accomplish any of the purposes of either those who supported unbridled peremptory challenges, or those who oppose such challenges entirely.

### A. Addressing Original Sin: The Birth of *Batson* and Beyond

There is a cruel irony in the jury system that the very element of public consensus that gives it its democratic character may, in the same breath, lead to controversial and unjust verdicts that many of us abhor. Such has been the experience with racial discrimination in the jury system in American criminal justice. On the one hand, we applaud our jury system as inclusive and democratic.<sup>18</sup> On the other, it had become

king . . . was [the] trial by jury." William H. Taft, *The Administration of Criminal Law*, 15 YALE L.J. 1, 4 (1905).

William O. Douglas reminds us that although a jury "is sometimes the victim of passion[,] . . . it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do." WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 112 (1954).

18. The notion of ordinary citizens exercising power over important decisions is one of the unique features of the jury system.

The Supreme Court has observed that "[o]n many occasions, fully known to the Founders of this country, jurors—plain people—have . . . stood up in defense of liberty . . . despite prevailing hysteria and prejudices." United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18-19 (1955) (footnote omitted). The right to a jury trial has been praised throughout history despite its flaws. In rejecting alternatives to the jury trial, Sir William Blackstone said, "however *convenient* these [alternatives] may appear at first, . . . yet let it be again remembered, that delays, and little inconveniences in the form of justice, are the price that all free nations must pay for their liberty in more substantial matters." 4 WILLIAM BLACKSTONE, COMMENTARIES \*350.

Noted historian Lawrence M. Friedman has explained that:

In American legal theory, jury power was enormous, and subject to few controls. There was a maxim of law that the jury was judge both of law and fact in criminal cases. This [maxim of law] was particularly strong in the first, Revolutionary generation, when memories of royal justice were fresh.

LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 284 (2d ed. 1985).

However, its democratic features have historically had their own limitations. Noted trial lawyer Gerry Spence has commented that the jury system, as developed by the Founding Fathers, was "never intended to give . . . the right to vote or the power of the jury to the poor, to blacks, or to women. Because juries were made up only of trusted members of the ruling class." GERRY SPENCE, WITH JUSTICE FOR NONE: DESTROYING AN AMERICAN MYTH 88 (1989).

The contradictions between the democratic values of the jury and the historical limitations imposed on the people who could serve has become the touchstone for



hopelessly entangled in the same pervasive racial discrimination<sup>19</sup> which paralyzed every political institution in our Nation during the dubious period in our history known as "Jim Crow."<sup>20</sup> Racial discrimination in criminal justice was certainly not surprising considering it was born out of the harsh slave codes<sup>21</sup> of colonial and post-revolutionary America, which, for the most part, even forbade the testimony of a negro in court.<sup>22</sup>

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many of the criticisms of the jury that exist today.

19. Racial discrimination in the criminal justice system has long been inextricably linked to the right to vote since most jury panels are drawn from voting lists. There has been an unfortunate history of bias that had resulted in relatively few African Americans being registered to vote prior to the middle 1960s.

Intimidation tactics by governmental officials designed to discourage voter registration were not uncommon. For example, during the height of the civil rights movement, Sheriff's deputies of Terrell County, Georgia, barged into a local black church, "scowled and rubbed their guns" as Sheriff Z. T. Mathews of Terrell County "lectured from the pulpit on why no more than the current 51 Negroes, out of the county's 8,209, need be registered to vote." TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 619 (1988).

20. "Jim Crow" laws, which enforced legal separation among the races, characterized the period of American history at the turn of the twentieth century up to the middle 1950s and 1960s. "Jim Crow" laws were able to thrive because of the erosion of the right to vote which occurred after Reconstruction. As noted historian John Hope Franklin observed, "[o]nce the Negro was disfranchised, everything else necessary for White Supremacy could be done." JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 342 (3d ed. 1967).

21. As early as 1680, states enacted slave codes which laid out more severe punishment for blacks committing the same offenses as whites. See DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS 31 (1978).

For instance, conviction of raping a white woman, which meant a prison sentence of two to twenty years for a white offender, carried a mandatory death penalty for Negro offenders. Even attempted rape of a white woman by a black man could be punished by death, at the discretion of the court. On the other hand, rape of a slave or a free Negro by a white man was punishable "by fine and imprisonment, at the discretion of the court."

*Id.*

22. In some states, like Virginia, negroes were not even permitted to testify in a murder case when the defendant was white. See A. Leon Higginbotham, Jr. & F. Michael Higginbotham, "Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. REV. 1213, 1239-40 n.142 (1993). "Although most northern blacks gained access to the regular court system by the middle of the nineteenth century, their testimony, when permitted against a white person, was rendered virtually meaningless by all-white juries." Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 7 (1990).

Although several constitutional amendments<sup>23</sup> and reforms during Reconstruction<sup>24</sup> attempted to equalize the status of the newly freed slaves, once Reconstruction collapsed, the injustices of the slavery era returned with the vengeance of a fast spreading communicable disease.<sup>25</sup> It was not until well into the first half of the twentieth century that the criminal justice reforms of the Warren Court<sup>26</sup> addressed racial discrimination in any meaningful way.<sup>27</sup>

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23. In 1865, the Thirteenth Amendment abolished slavery; in 1868, the Fourteenth Amendment provided for equal protection of the laws; and the Fifteenth Amendment, ratified in 1870, provided the right to vote to the newly freed slaves.

24. Reconstruction was the period of American history after the Civil War until around 1877, where the federal government attempted to carry out the adjustment of the recently freed slaves into their new role in America. *See generally* ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988) (providing an insightful and detailed discussion of the Reconstruction period).

It was not long after the Civil War that the question of whether blacks would have the right to vote was addressed by the federal government. *See* JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 707 (1988). In Louisiana, for example, an 1864 legislative debate over a petition of several free blacks to vote was presented to President Lincoln. *See id.* The measure only received his lukewarm support. *See id.* When the Constitutional Convention took up the question of blacks voting, the President said, "I barely suggest for your private consideration, whether some of the colored people may not be let in [to vote]—as, for instance, the very intelligent, and especially those who have fought gallantly in our ranks." *Id.* It was not until six years later that black men were given the right to vote. *See supra* note 23.

During some portion of the Reconstruction period, "juries invariably consisted of white and black Republicans, with blacks sometimes outnumbering whites. Southern Democrats interpreted the racial and political composition of federal juries as incontrovertible evidence of political persecution through judicial injustice." Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 *FORDHAM URB. L.J.* 155, 172 (1995) (footnote omitted).

25. Reconstruction collapsed after a complex series of political events and episodes of corruption by federal Reconstruction officials. *See* JOHN D. HICKS, *A SHORT HISTORY OF AMERICAN DEMOCRACY* 437-38 (1949). These circumstances led to a change in the attitude of northerners toward the South:

the pressure of northern opinion for greater leniency toward the South forced Congress to pass an Amnesty Act, in May, 1872, that reduced the number of ex-Confederates excluded from the suffrage. . . . Gradually, in state after state, Democratic majorities took over the administration of government, carpet-baggers were expelled, and great numbers of Negroes ceased to vote.

*Id.* at 438.

26. The Warren Court revolutionized the criminal justice process by obligating the states to recognize many rights contained in the federal Constitution. For a discussion of the Warren Court's jurisprudence in this area, see ROBERT G. MCCLOSKEY, *THE MODERN SUPREME COURT* (1972).

27. Occasionally, the Supreme Court would decide a case in favor of a black de-

One provocative account of the criminal justice system in existence in the early twentieth century involved the community of Phillips County, Arkansas, in the "Black Belt" of the South around 1919. Although more than seventy-five percent of the county's population was black and 18,000 of its residents were of voting age, "[n]o Negro had served on either a grand jury or a trial jury in 30 years."<sup>28</sup> Such circumstances had become normal in the South. "Southern jurors knew full well that they were selected on a racially discriminatory basis; it would have been more than a miracle if their verdicts had not reflected the discrimination exercised in their own selection."<sup>29</sup> It was not until the 1930s and the famous "Scottsboro Boys" cases that the issues of racial bias in jury selection and the need for effective legal counsel gained the attention of the entire nation.<sup>30</sup>

Theoretically, it has long been a violation of law to systematically exclude potential jurors on racial grounds. In *Strauder v. West Virgin-*

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fendant and against the racist climate. An example of one such case was *Moore v. Dempsey*, 261 U.S. 86 (1923). In that case, the Court overturned a district court's refusal to review the allegations in a black defendant's habeas corpus petition. *See id.* at 87. The basis of the defendant's claim was that his trial was dominated by a riotous mob. *See id.* at 87-89. Justice Oliver Wendell Holmes, Jr., writing for the 7-2 Court, said:

if in fact a trial is dominated by a mob so . . . there is a departure from due process of law; . . . "if the State [sic], supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State [sic] deprives the accused of his life or liberty without due process of law."

*Id.* at 90-91 (quoting *Frank v. Manquam*, 237 U.S. 309, 335 (1915)).

Although Justice Holmes was willing to rule in favor of the black defendant in *Moore*, he still expressed his belief that the desires of the community play a large part in the justice system. *See id.* at 88-91. Many years earlier he had observed that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." OLIVER WENDELL HOLMES, *THE COMMON LAW* 36 (Mark DeWolfe Howe ed., 1963).

28. LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 232 (1966).

29. *Id.* at 240.

30. The series of trials that came to be known as the "Scottsboro Boys" cases focused the attention of the country on discrimination in the criminal justice system, primarily in the South. *See Powell v. Alabama*, 287 U.S. 45, 49-53 (1932). The incident involved charges of rape against black youths accused by a white woman under prejudicial circumstances. *See id.* at 49. At the center of the controversy was the racial discrimination in jury selection in the case. *See id.* at 50. Under questioning at a hearing, prior to jury selection at a retrial of one of the defendants, a Morgan County, Alabama jury commissioner said "he had never met a Negro fit for jury duty." JAMES GOODMAN, *STORIES OF SCOTTSBORO* 123 (1994) (footnote omitted).

ia,<sup>31</sup> the Supreme Court held racial discrimination in jury selection was prohibited.<sup>32</sup> Clearly, the letter of the law had consistently been ignored through a series of clever devices that kept blacks from even getting near the courthouse doors.<sup>33</sup> Furthermore, the Supreme Court, though recognizing the right to a jury where there was no discrimination,<sup>34</sup> permitted discrimination through the unassailable use of the peremptory challenge. If a black citizen managed to navigate the voter registration hurdle and the selection for the jury pool hurdle, the prosecutor in most instances could simply dismiss the few survivors with one of its several peremptory challenges.<sup>35</sup>

When the Supreme Court ultimately changed the ease with which black jurors could be removed from jury service in its landmark decision in *Batson v. Kentucky*,<sup>36</sup> it was as if a great earthquake had shaken a mighty stone wall. That wall was the case of *Swain v. Alabama*<sup>37</sup> decided in the mid-1960s, but reflecting the sentiment about peremptory challenges that had been in existence long before. *Batson* expressly "reexamine[d] that portion of *Swain v. Alabama* concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory

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31. 100 U.S. 303 (1879).

32. *See id.* at 306-09.

33. "Polling places were frequently set up far from Negro communities, and the more diligent Negroes failed to reach them upon finding roads blocked and ferries conveniently 'out of repair' at election time." FRANKLIN, *supra* note 20, at 333.

In the 1890s, Mississippi employed a poll tax, among other requirements, which limited negroes from the vote. *See* BENJAMIN QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* 172 (1996). "[S]ome southern states hastened to pass 'grandfather clauses,' bestowing the [right to vote] upon those whose grandfathers had voted." *Id.*

Some states would give blacks difficult "voter registration literacy test[s]." DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 378 (1986). These tests would often involve a requirement that the "applicant[] for voter registration be able to read, write, and interpret the Constitution." FRED D. GRAY, *BUS RIDE TO JUSTICE* 111 (1995). Some voting registrars even engaged in the rather pathetic practice of registering all white applicants and then hiding. *See id.* Others "would resign before registering African Americans in any significant numbers." *Id.*

All of these techniques had a corresponding detrimental effect on the number of blacks available to make up jury pools even though many of these practices were ultimately ruled unconstitutional or rendered illegal by federal voter's rights legislation.

34. *See Strauder*, 100 U.S. at 306-09.

35. *See supra* note 6.

36. 476 U.S. 79 (1986).

37. 380 U.S. 202 (1965).

challenges to exclude members of his race from the petit jury."<sup>38</sup>

In *Batson*, a black defendant, charged with burglary and receiving stolen goods, complained that his all white jury was selected largely by the prosecutor's removal of the black venireman by the use of peremptory challenges.<sup>39</sup> All four potential black jurors were struck by the prosecutor.<sup>40</sup> *Batson's* counsel raised an objection to the prosecutor's conduct at the trial level under the Sixth and Fourteenth Amendments of the United States Constitution.<sup>41</sup> *Batson's* attorney also requested a hearing.<sup>42</sup> "Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to 'strike anybody they want to.'"<sup>43</sup>

On appeal, petitioner conceded that *Swain* foreclosed his equal protection claim.<sup>44</sup> Instead, *Batson* pressed a Sixth Amendment fair cross-section claim and an independent state ground; section 11 of the Kentucky Constitution.<sup>45</sup> The Kentucky State Supreme Court did not adopt the petitioner's fair cross-section rationale, citing its reliance on *Swain*.<sup>46</sup> *Batson* successfully petitioned the Supreme Court on the Sixth Amendment fair cross-section claim.<sup>47</sup> In a surprising holding that defies coherent interpretation, the Supreme Court reversed.<sup>48</sup>

In an opinion by Justice Lewis Powell, the Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."<sup>49</sup> Justice Powell explained that the very idea of the jury body is that it be composed of "neighbors, fellows, associates, persons having the same legal status in society as that which he [the person having the right to select the jury] holds."<sup>50</sup> He further noted that "[t]he petit jury has occupied a central

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38. *Batson*, 476 U.S. at 82 (footnote omitted) (citation omitted).

39. *See id.* at 82-83.

40. *See id.* at 83.

41. *See id.*

42. *See id.*

43. *Id.*

44. *See Batson*, 476 U.S. at 83.

45. *See id.*

46. *See id.* at 84.

47. *See id.*

48. *See id.* The problem of lack of clarity created by *Batson* occurred because the Court mixed several constitutional principles throughout the opinion. Thus, the decision became a curious hybrid, part Sixth Amendment fair cross-section, part equal protection, and part substantive due process.

49. *Id.* at 86.

50. *Batson*, 476 U.S. at 86 (quoting *Strauder v. West Virginia*, 100 U.S. 303,

position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."<sup>51</sup>

The Court's emphasis in *Batson* is a crucial point because the protection created by that case appears to have special significance for criminal defendants. The Court would later depart from this exclusive focus on criminal cases to expand *Batson*'s prohibitions to other participants in the justice system.<sup>52</sup>

The reason that *Batson* was later expanded so broadly can probably be explained by reference to a curious turn in Justice Powell's opinion. After initially stressing the defendant's right to select a jury from "peers or equals," the Court changed direction and began to discuss the notion that the harm from discriminatory jury selection extended "to touch the entire community."<sup>53</sup> While this may have been a somewhat accurate and even a well intended observation, it ultimately led to problems determining the true basis of the *Batson* holding.

Most of Justice Powell's discussion was directed to the problem of black defendants being denied black jurors.<sup>54</sup> The Court noted that "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'"<sup>55</sup> In analyzing the Court's earlier opinion in *Swain*, he explained that although the opinion did not sanction racial discrimination in jury selection, it nonetheless acknowledged that "[t]he Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control."<sup>56</sup>

This accommodation was practiced regularly before *Swain* and there-

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308 (1879)).

51. *Id.* The jury trial is a vital hedge against the virtually limitless discretion of the local prosecutors who may have more than justice on their mind as criminal cases are pursued. As one observer has explained:

There are almost no legislative rules for prosecutors to follow, and the courts have been reluctant to set down any norms or to overrule prosecutors' decisions. The absence of effective limits on prosecutorial discretion creates the potential for corruption, as well as for abuse of power for personal or partisan political ends. The latter potential is exacerbated by the fact that the post of prosecutor always has been a stepping stone to the judiciary or to higher elective office.

CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 283 (1978).

52. See *infra* notes 107-94 and accompanying text.

53. *Batson*, 476 U.S. at 86-87.

54. See *id.* at 88-90.

55. *Id.* at 87-88 (quoting *Strauder*, 160 U.S. at 308).

56. *Id.* at 91.

in resulted in a criminal defendant having the sole remedy to establish racial discrimination in jury selection only if he could demonstrate that the prosecutor engaged in racial discrimination in a series of cases. In the language of Justice White's opinion in *Swain*, an equal protection claim could only be made if the prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause."<sup>57</sup> Only after meeting such a burden could a defendant establish a case for purposeful discrimination.

Simply stated, the defendant was required to show a pattern of exclusion in a number of different cases rather than a pattern of excluding black jurors in a single case. Justice Powell properly characterized this method of challenging racial discrimination as placing upon the "defendant[] a crippling burden of proof."<sup>58</sup> It was this procedural cerberus<sup>59</sup> that prompted the Supreme Court to strike down the portion of the *Swain* opinion that made the prosecutor's use of peremptory challenges "largely immune from constitutional scrutiny."<sup>60</sup>

While acknowledging that in an equal protection case the burden of proof to show purposeful discrimination in jury selection is clearly on the defendant,<sup>61</sup> when deciding whether the burden has been met, the Court said it must engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."<sup>62</sup> That is, cir-

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57. *Swain v. Alabama*, 380 U.S. 202, 223 (1965).

58. *Batson*, 476 U.S. at 92 (footnote omitted).

59. In Greek Mythology, Cerberus was a three-headed dog that guarded the entrance to Hades. See *ENCYCLOPAEDIA BRITANNICA II READY REFERENCE* 691 (1976). The Cerberus, a vigilant guardian according to ancient lore, had to be subdued by Hercules as the last of his twelve mythical heroic labors. See *WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE* 1167 (2d ed. 1957). Overcoming *Swain* was indeed a Herculean task inasmuch as "[i]n the 21 year period that *Swain* was good law, only two defendants managed to meet *Swain's* requirements." Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 *UCLA L. REV.* 517, 530 n.63 (1992) (citing *State v. Washington*, 375 So. 2d 1162, 1163-65 (La. 1979) (holding that the first twelve blacks challenged established a prima facie case); *State v. Brown*, 371 So. 2d 751, 753-54 (La. 1979) (discussing that the peremptory challenge of all blacks on venire and history of challenges against blacks was sufficient to meet the *Swain* test)).

60. *Batson*, 476 U.S. at 92-93. *Swain* had received a good deal of scholarly criticism prior to *Batson*. See, e.g., Robert L. Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 *OKLA. L. REV.* 385 (1985).

61. See *Batson*, 476 U.S. at 93.

62. *Id.* (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S.

cumstantial proof of apparent racially motivated conduct can be taken into account in establishing whether improper racially motivated conduct in jury selection has occurred.

The Court cited an example of what might indicate racial bias in jury selection as the “total or seriously disproportionate exclusion of Negroes from the jury venires.”<sup>63</sup> Once the defendant claimed improper racial exclusion had occurred in the selection of his jury, the trial court would be required to follow a procedure and conduct a hearing to determine whether the prosecutor could justify his reasons.<sup>64</sup>

In developing this new procedural tool, Justice Powell rejected the State’s concern that such a procedure would “create serious administrative difficulties.”<sup>65</sup> As it turned out, his conclusion may have been one of the most shortsighted legal projections of all-time.<sup>66</sup> The Court not only brushed aside the administrative obstacles in implementing the new system, but it also “decline[d] . . . to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.”<sup>67</sup> The Court balked at formulating any procedural guidance because of what it described as “the variety of jury selection practices followed in our state and federal trial courts.”<sup>68</sup>

The *Batson* Court spawned three concurring opinions which are

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252, 266 (1977)).

63. *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

64. *See id.* at 96-97. The Court explained how the *Batson* procedure would be used:

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a “pattern” of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. . . .

Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant’s *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.

*Id.* (citations omitted).

65. *Id.* at 99.

66. Justice Powell noted that “those States applying a version of the evidentiary standard we recognize today . . . have not experienced serious administrative burdens.” *Id.* (footnote omitted).

67. *Batson*, 476 U.S. at 99 (footnote omitted).

68. *Id.* at 99 n.24.



important in understanding the development of the doctrine that emerged over the decade which followed. The first, written by Justice Thurgood Marshall, applauded what he called an "eloquent opinion [of] the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries."<sup>69</sup> He explained that "[t]he Court's opinion . . . ably demonstrates the inadequacy of any burden of proof for racially discriminatory . . . peremptories."<sup>70</sup>

Although Justice Marshall offered high praise for Powell's conclusion, he was clearly not pleased with the procedural mechanism it had created.<sup>71</sup> Justice Marshall bluntly remarked that "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."<sup>72</sup> In support of his position, Justice Marshall cited several statistical studies that indicated the misuse of peremptories against black jurors.<sup>73</sup> He concluded that the use of peremptories against blacks had been "both common and flagrant."<sup>74</sup>

Foreshadowing the pervasive problem of how one was to evaluate the truthfulness of reasons a prosecutor might offer to justify a challenge on a non-racial basis, Justice Marshall quipped that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."<sup>75</sup> Justice Marshall was troubled that explanations justifying strikes against black jurors could be easily generated and would likely make the protection established by the Court in *Batson* merely "illusory."<sup>76</sup> He not only feared outright dishonesty, but also "unconscious racism,"<sup>77</sup> which

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69. *Id.* at 102 (Marshall, J., concurring).

70. *Id.* (Marshall, J., concurring).

71. *See id.* at 102-03 (Marshall, J., concurring).

72. *Id.* (Marshall, J., concurring). Some scholars have embraced Justice Marshall's view. *See, e.g.,* Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 422 (1992) ("We must make reasonably certain that our juries represent the conscience of the community and that no citizen, on the basis of invidious discrimination, will ever be excluded from participating in this most important responsibility of citizenship . . .").

73. *See Batson*, 476 U.S. at 103 (Marshall, J., concurring).

74. *Id.* (Marshall, J., concurring).

75. *Id.* at 106 (Marshall, J., concurring).

76. *Id.* (Marshall, J., concurring).

77. *Id.* (Marshall, J., concurring). Some scholars have examined the subject of unconscious prejudice and what role it may play in jury selection. *See, e.g.,* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

might lead a prosecutor to easily conclude "that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."<sup>78</sup>

Justice Marshall speculated that "[e]ven if all parties approach[ed] the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet."<sup>79</sup> Justice Marshall also found unacceptable the notion that peremptories should be eliminated for the prosecution, but not the defense attorney.<sup>80</sup> He wrote that "[i]f the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay."<sup>81</sup>

It appears that Marshall's assessment of the appropriate jury selection procedure would be that any twelve jurors from the community, not excusable for cause,<sup>82</sup> would be preferred over a system that risks the racial discrimination practiced in the use of peremptory challenges. His concurring opinion endorses random juries, not because he believed a defendant cannot benefit from peremptory challenges, but rather because of his fear that the continued use of peremptories would hurt blacks more in the long run.<sup>83</sup>

The two remaining concurring opinions focused on procedural matters related to peremptories. Those matters would become key to the legal developments in subsequent *Batson* progeny. Justices Brennan and

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78. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

79. *Id.* (Marshall, J., concurring).

80. *Id.* at 108 (Marshall, J., concurring).

81. *Id.* (Marshall, J., concurring). Marshall's view that there is no way to avoid eliminating the peremptory challenge is perhaps the most controversial issue that has emerged from the *Batson* opinion. See *id.* (Marshall, J., concurring). However, even those who do not support the unbridled use of peremptories recognize that there are costs involved if they are eliminated. One scholar has written:

The elimination of the peremptory involves trade-offs. . . . Without peremptories, parties will no longer exercise any oversight about who can be excused, thus making the correction of judicial error more difficult. And finally, the elimination of peremptories would mark a departure from tradition, and some would argue that the tradition should not be discarded because it has served us well.

Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1137 (1995).

82. A challenge for cause indicates that a juror would be disqualified by reason of being biased by any number of circumstances, for example, being unable to fairly judge the evidence because of a business relationship with a party or a witness.

83. See *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

Stevens joined in an opinion which cautioned against the Court requesting issues be addressed that were not briefed by the parties or decided in the lower courts.<sup>84</sup> Justice O'Connor was concerned that the decision in *Batson* not be applied retroactively,<sup>85</sup> a view shared by Chief Justice Burger and Justice White.<sup>86</sup>

In a lengthy dissent, Chief Justice Burger complained vigorously that the majority had decided the case on a question not properly before the Court.<sup>87</sup> He emphasized that certiorari had only been granted on the Sixth Amendment fair cross-section ground.<sup>88</sup> He wrote that the majority's decision was "truly extraordinary [because] it is based on a constitutional argument that the petitioner ha[d] expressly declined to raise."<sup>89</sup> Thus, he felt it was improper to decide the case on an equal protection basis.<sup>90</sup>

The Chief Justice was not merely disturbed by the procedural posture of the case, but he also lamented the demise of the ancient right to peremptory challenge, commenting that "[t]oday the Court sets aside the peremptory challenge, a procedure which h[ad] been part of the common law . . . for nearly 200 years."<sup>91</sup> His opinion doubted the wisdom and clarity of the strange equal protection rule adopted by the majority.<sup>92</sup> In attacking the majority, he said, "[r]ather than applying [a] straightforward equal protection analysis, the Court substitutes for the holding in *Swain* a curious hybrid."<sup>93</sup> The Chief Justice was referring to the portions of the majority opinion that relied in part on the fair cross-section argument<sup>94</sup> and the substantive due process rationale,<sup>95</sup>

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84. See *id.* at 108-11 (Stevens, J., concurring).

85. See *id.* at 111 (O'Connor, J., concurring).

86. See *id.* (O'Connor, J., concurring).

87. See *id.* at 112 (Burger, C.J., dissenting).

88. See *id.* (Burger, C.J., dissenting).

89. *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting).

90. See *id.* at 112-13 (Burger, C.J., dissenting).

91. *Id.* at 112 (Burger, C.J., dissenting).

92. See *id.* (Burger, C.J., dissenting).

93. *Id.* at 126 (Burger, C.J., dissenting).

94. Prior to the Supreme Court deciding *Batson*, a number of lower courts had reached similar results on Sixth Amendment grounds. See, e.g., *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985) (imposing limitations on prosecution peremptories on Sixth Amendment grounds), *vacated sub nom.* *Michigan v. Booker*, 478 U.S. 1001 (1986).

95. In an earlier holding, the Supreme Court had explained that "[w]hen any large and identifiable segment of the [population] is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience." *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

but ultimately placing the decision under the equal protection banner.<sup>96</sup>

So concerned was Chief Justice Burger about the consequences of the majority's opinion, he urged that "[a]t the very least, this important case reversing centuries of history and experience ought to be set for reargument next term."<sup>97</sup> Justice Rehnquist, in his dissent, said that *Swain* should have been left undisturbed.<sup>98</sup> He did "not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding . . . of *Swain*."<sup>99</sup>

After the decision in *Batson*, some lower courts demonstrated a willingness to occasionally decide that a prosecutor's alleged race-neutral reason was inadequate.<sup>100</sup> Various courts rejected explanations such as "teachers . . . are too liberal,"<sup>101</sup> that a juror "shucked and jived,"<sup>102</sup> the religious affiliation of the juror,<sup>103</sup> a juror having the same last name as the defendant,<sup>104</sup> a juror that was the same age as

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96. See *Batson*, 476 U.S. at 97. Justice Powell explained:

Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.

*Id.* (citation omitted).

97. *Id.* at 134 (Burger, C.J., dissenting).

98. See *id.* at 139 (Rehnquist, J., dissenting).

99. *Id.* (Rehnquist, J., dissenting).

100. The substance of almost all *Batson* hearings has become a contest of honesty and candor before the trial court attempting to weigh the validity of the reasons offered by counsel. The fear of lawyers fabricating reasons for peremptory challenges have lead some commentators to suggest that courts should disallow "intuitive" explanations altogether. Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Jury Selection and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 362-65 (1993) (arguing that the only answers accepted should be those with a substantial nexus with the facts of the case).

101. *Powell v. State*, 548 So. 2d 590, 594 (Ala. Crim. App. 1988) (stating that the explanation was inadequate since it was not shown to apply to the particular juror).

102. *State v. Tomlin*, 384 S.E.2d 707, 710 (S.C. 1989) (stating that the prosecutor's explanation evidenced discriminatory motive and voided the impact of the race-neutral reason).

103. See *State v. Collier*, 553 So. 2d 815, 822-23 (La. 1989) (holding that the prosecutor failed to rebut prima facie showing of discrimination in the use of challenges against black jurors when he gave as reasons their religious affiliations, but did not strike white jurors that were the same religion as the challenged black jurors).

104. See *State v. Aragon*, 784 P.2d 16, 17, 20 (N.M. 1989) (reasoning was inadequate because prosecutor asked no question in voir dire to support his conclusions).

the defendant,<sup>105</sup> and the vague explanation that the prosecutor "just got a feeling about him."<sup>106</sup>

The confusing majority opinion, combined with the dissent's substantive and procedural objections to the majority's equal protection approach, began a ten year odyssey of decisions from the Supreme Court that would change the way lawyers and judges would conduct jury selection into the next century.

#### B. *The Children of Batson: Fruit of the Curious Tree*

It was certainly remarkable that, notwithstanding the substantive shortcomings of the *Batson* opinion, the Supreme Court overruled the *Swain* decision at a time when most observers believed that the Court was engaged in a rather conservative turn.<sup>107</sup> The apparent victory for expanded civil rights in *Batson* was somewhat unexpected. However, the patchwork quilt decision it produced left unanswered far more questions than it solved. The Court wasted no time in adjusting the scope of its precedent. The Court first ruled on whether the *Batson* rule would apply to cases that had been tried before it was decided.<sup>108</sup>

Soon after, in its 1989 Term, the Court heard arguments in *Holland v. Illinois*,<sup>109</sup> which raised the question of whether a white defendant could make a Sixth Amendment fair cross-section challenge to blacks

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105. See *Carrick v. State*, 580 So. 2d 31, 31-32 (Ala. Crim. App. 1990) (holding that the state engaged in unconstitutional disparate treatment of black jurors when it challenged black jurors who were the same age as the defendant, while leaving white jurors the defendant's age on the panel).

106. *United States v. Horsley*, 864 F.2d 1543, 1544, 1546 (11th Cir. 1989) (stating that the prosecutor's explanation was legally insufficient to refute a prima facie case of racial discrimination).

107. See *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986). The Burger Court was considered to be more conservative than the Warren Court which preceded it. See DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 4 (1992). "In 1969, President Richard Nixon had chosen [Warren Burger] to lead a conservative counterrevolution at the Court." *Id.* A year after *Batson* when Chief Justice Rehnquist was appointed, the Court's jurisprudence was expected to become more right wing. See *id.* at 8. During Chief Justice Rehnquist's confirmation process, the NAACP Legal Defense Fund reviewed 83 civil rights cases in which the Court had ruled. See *id.* at 21. "It found Rehnquist had voted against these plaintiffs 82 times." *Id.*

108. See *Griffith v. Kentucky*, 479 U.S. 314, 316 (1987). The Court held that *Batson* applied retroactively to all federal criminal cases pending on direct review or not yet finally decided when *Batson* became law. See *id.* at 328.

109. 493 U.S. 474 (1990).

being struck from his petit jury.<sup>110</sup> In yet another opinion from a deeply divided Court, the Sixth Amendment claim was rejected.<sup>111</sup> Justice Scalia, writing for the majority, "reject[ed] petitioner's fundamental thesis that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the 'fair possibility' of a representative jury."<sup>112</sup> The rejection of the Sixth Amendment claim effectively destroyed, for constitutional purposes, what had been a successful attack on peremptory challenges in many lower courts.

This, however, was only a partial victory for those Justices who did not want to see *Swain* disturbed. A concurring opinion, written by Justice Anthony Kennedy,<sup>113</sup> agreed that fair cross-section analysis did not apply to petitioner's challenge.<sup>114</sup> Nonetheless, in unwavering dicta, he embraced the view "that if the claim here were based on the Fourteenth Amendment Equal Protection Clause, it would have merit."<sup>115</sup> Justice Kennedy could "see no obvious reason to conclude that a defendant's race should deprive him of standing in his own trial to vindicate his own jurors' right to sit."<sup>116</sup>

The tone of Justice Kennedy's short, but incisive, concurring opinion was intended to make it clear that, although he did not accept Holland's Sixth Amendment argument, he clearly did not reject the core value of non-discrimination in jury selection.<sup>117</sup> Thus, anyone who could count would realize that Justice Kennedy, along with the four dissenters in *Holland*, constituted a majority that was willing to extend the *Batson* equal protection rationale to white defendants. For Justice Kennedy, the equal protection claim was vested in "[a]n important bond [between] the accused and an excluded juror."<sup>118</sup>

In supporting his equal protection dicta, Justice Kennedy made the assertion that a juror subjected to a peremptory challenge "will leave the courtroom with a lasting sense of exclusion from the experience of jury participation, but possessing little incentive or resources to set in

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110. See *id.* at 475-76.

111. See *id.* at 478.

112. *Id.*

113. See *id.* at 488 (Kennedy, J., concurring). Justice Kennedy was appointed to the Court after Chief Justice Burger's retirement and Justice Rehnquist's elevation to Chief Justice.

114. See *id.* (Kennedy, J., concurring).

115. *Holland*, 493 U.S. at 488 (Kennedy, J., concurring).

116. *Id.* at 489 (Kennedy, J., concurring).

117. See *id.* at 488-90 (Kennedy, J., concurring).

118. *Id.* at 489 (Kennedy, J., concurring).

motion the arduous process needed to vindicate his own rights."<sup>119</sup>

In dissent, Justice Thurgood Marshall again pressed for more constitutional protection against peremptory challenges.<sup>120</sup> He explained why he regarded Holland's Sixth Amendment claim as valid.<sup>121</sup> He accused the majority of "selective amnesia"<sup>122</sup> regarding the Court's Sixth Amendment precedents and in the majority's suggestion that upholding the claim "would cripple the device of peremptory challenge."<sup>123</sup> Justice Marshall referred to this complaint by the majority as "staggering."<sup>124</sup>

In a separate dissent, Justice Stevens stated that he believed the Court should have reached the equal protection claim even though it had not been raised.<sup>125</sup> He also endorsed the petitioner's Sixth Amendment claim.<sup>126</sup> He explained that "[a]fter our recognition [in *Batson*] that a defendant could bring an equal protection challenge to the removal of black jurors in a single case, it is difficult to see why recognition of a Sixth Amendment right would impose any additional burden."<sup>127</sup>

This conflict in *Holland* established the basis for the Court's decision in the very next Term in *Powers v. Ohio*.<sup>128</sup> In *Powers*, the Court finally recognized, as its majority rule, the rationale of Justice Kennedy that a white defendant had an Equal Protection Clause right to complain about the exclusion of blacks from his jury.<sup>129</sup> This anticipated expansion of *Batson* seemed a welcomed victory for those Justices who embraced the original *Batson* rule.<sup>130</sup>

The momentum for expanding *Batson* continued in the very next Term with the Court's decision in *Edmonson v. Leesville Concrete Co.*<sup>131</sup> In a dramatic extension of its equal protection jurisprudence, the Court held that private litigants in a civil case may not use peremp-

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119. *Id.* (Kennedy, J., concurring).

120. *See id.* at 490 (Marshall, J., dissenting).

121. *See Holland*, 493 U.S. at 490-504 (Marshall, J., dissenting).

122. *Id.* at 500 (Marshall, J., dissenting).

123. *Id.* (Marshall, J., dissenting) (quoting *Id.* at 484).

124. *Id.* at 501 (Marshall, J., dissenting).

125. *See id.* at 506-07 (Stevens, J., dissenting).

126. *See id.* at 506, 519-20 (Stevens, J., dissenting).

127. *Holland*, 493 U.S. at 519-20 (Stevens, J., dissenting).

128. 499 U.S. 400 (1991).

129. *See id.* at 416.

130. *See infra* note 142 and accompanying text.

131. 500 U.S. 614 (1991).

tory challenges to strike jurors on account of race.<sup>132</sup> Building on his earlier concurring opinion in *Holland*<sup>133</sup> and his opinion for the majority in *Powers*,<sup>134</sup> Justice Kennedy reasoned that, because of the impropriety of racial bias in the courtroom, such "race-based exclusion violates the equal protection rights of the challenged jurors."<sup>135</sup> Donald Edmonson, the plaintiff, was a black construction worker who was injured in a work related accident at Fort Polk, Louisiana.<sup>136</sup> He invoked his right to a trial by jury and "[d]uring *voir dire*, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury."<sup>137</sup> The trial court denied Edmonson's request to have Leesville Concrete articulate race-neutral reasons.<sup>138</sup>

In a series of analogies intending to explain the public nexus to the private act of a lawsuit, the Court reasoned that "[w]hen a lawyer exercises a peremptory challenge, the judge advises the juror [that] he or she has been excused. . . . [A] private party could not exercise its peremptory challenges absent the overt, significant assistance of the court."<sup>139</sup> Accordingly, the Court concluded that the jury selection process "constitutes state action."<sup>140</sup>

In eloquent language, Justice Kennedy rendered a surprisingly comprehensive rejection of race-based justification in jury selection.<sup>141</sup> He wrote:

It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the

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132. *See id.* at 616.

133. *See supra* notes 113-19 and accompanying text.

134. *See supra* notes 128-30 and accompanying text.

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

136. *See id.* at 616-17.

137. *Id.* at 616.

138. *See id.* at 616-17.

139. *Id.* at 623-24.

140. *Id.* at 626.

141. *See Edmonson*, 500 U.S. at 630-31.



courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of [racial] stereotypes. Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror.<sup>142</sup>

The only conclusion that can be reasonably drawn from this language is that including racial considerations in striking jurors is not only undesirable, but it is a violation of the excused juror's constitutional rights. Thus, race-based jury selection may be actionable under federal civil, as well as criminal, law.<sup>143</sup>

Justice O'Connor was joined by Chief Justice Rehnquist and Justice Scalia in a dissenting opinion that severely criticized the reasoning of the Kennedy majority.<sup>144</sup> She explained that simply because:

The government erects the platform; it does not thereby become responsible for all [the work] that occurs upon it. As much as we would like to eliminate completely from the courtroom the specter of racial discrimination, the Constitution does not sweep that broadly. . . . [A] peremptory strike by a private litigant is fundamentally a matter of private choice and not state action.<sup>145</sup>

She described the peremptory challenge as a tool that "by design, [created] an enclave of private action in a government-managed proceeding."<sup>146</sup>

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142. *Id.* Some scholars embraced Justice Kennedy's view. One such commentator passionately wrote that the:

exclusion of jurors is like exclusion of voters: the exclusion of voters by reason of race does violence to constitutional ideals, whether or not the exclusion affects the outcome of any particular election. . . . [I]t stigmatizes the entire excluded group, impairs public confidence in the judicial system, and may affect some verdicts. Derivative harms of this kind flow from discrimination in many contexts and reinforce our shared commitment to eradicate such discrimination. But it is important to remember that the primary victim of discrimination is the person actually excluded by reason of race.

Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 727 (1992).

143. Justice Kennedy noted that all jury selection plans "must implement statutory policies of random jury selection from a fair cross section of the community and nonexclusion on account of race, color, religion, sex, national origin, or economic status." *Edmonson*, 500 U.S. at 622 (citations omitted); see also *infra* notes 251-52 and accompanying text (suggesting that any practice inconsistent with race or gender-neutral goals is unlawful).

144. See *Edmonson*, 500 U.S. at 631 (O'Connor, J., dissenting).

145. *Id.* at 632 (O'Connor, J., dissenting).

146. *Id.* at 633-34 (O'Connor, J., dissenting). Some scholars have disagreed with

In a separate dissenting opinion, Justice Scalia commented that the majority's opinion was not only an inaccurate statement of the law of state action, but was simply a gesture demonstrating the Court's "uncompromising hostility to race-based judgments, even by private actors."<sup>147</sup> Justice Scalia explained, that in his view, the Court's expansion of *Batson* to civil cases would come at a high price, and he suggested that "much of it will be paid by the minority litigants who use our courts."<sup>148</sup>

Even though protection appeared to be expanding for minorities under the *Batson* doctrine, criminal defense counsel were about to receive a jolt that would remove what had been a monopoly of protection under the *Batson* rule. In the next Term of the Supreme Court, criminal defense counsel discovered what Justice Scalia was hinting about in his dissent in *Edmonson*. In *Georgia v. McCollum*,<sup>149</sup> the Supreme Court extended the *Batson* prohibitions to criminal defense attorneys exercising peremptory challenges.<sup>150</sup>

Relying on the perceived injury to the challenged juror, Justice Blackmun wrote, "[r]egardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State."<sup>151</sup> Building on the reasoning of Justice Kennedy in *Edmonson*,<sup>152</sup> Justice Blackmun suggested that defense counsel's participation in race-based peremptory challenges would be unlawful.<sup>153</sup> He said that "[d]efense counsel is limited to 'legitimate, lawful conduct.' It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race."<sup>154</sup>

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the position that peremptory challenges constitute state action. See Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 808 (1989) (arguing that *Batson* should not be extended to criminal defendants because it does not constitute state action and denies criminal defendants the widest possible latitude in jury selection).

147. *Edmonson*, 500 U.S. at 645 (Scalia, J., dissenting).

148. *Id.* (Scalia, J., dissenting).

149. 505 U.S. 42 (1992).

150. *See id.* at 50-55.

151. *Id.* at 53 (footnote omitted).

152. *See supra* notes 132-43 and accompanying text.

153. *See McCollum*, 505 U.S. at 57.

154. *Id.* (quoting *Nix v. Whiteside*, 475 U.S. 157, 166 (1986)). One commentator has suggested that "the decision in *McCollum* may well have been influenced by the consequences of prohibiting only one side in a criminal case from using . . . peremptory challenges." Kenneth J. Melilli, *Batson in Practice: What We Have Learned*

In a concurring opinion, Justice Clarence Thomas prophesied "that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes."<sup>155</sup>

In 1993, the Court heard argument in a case that potentially would expand the *Batson* doctrine to all jury trial cases. In *J.E.B. v. Alabama ex rel. T.B.*,<sup>156</sup> the Supreme Court held that intentional discrimination on the basis of gender by lawyers in exercising peremptory challenges in a civil case violated the Equal Protection Clause.<sup>157</sup> The decision in *J.E.B.* finally closed the fences around the scope of the *Batson* doctrine. By collecting within the *Batson* rule the category of gender, any case would be ripe for a potential jury selection controversy. Because women encompass about one half of the nation's population,<sup>158</sup> they are likely to be present in every jury panel from which petit juries are selected. In short, all cases may not have a black/white controversy lurking in jury selection, but all jurors belong to one gender or the other.

In *J.E.B.*, yet another opinion by Justice Blackmun, the Court concluded that "[a]ll persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."<sup>159</sup>

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*About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 454 n.57 (1996).

155. *McCollum*, 505 U.S. at 60 (Thomas, J., concurring in the judgment).

156. 511 U.S. 127 (1994).

157. *See id.* at 129.

158. *See id.* at 142 n.13. The Supreme Court has in recent years recognized the need for protection of women's rights despite the fact that they are not a numerical minority. *See id.*; *see also* *Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973). The Court has said that "the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of [the] high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination." *Id.* (footnote omitted).

159. *J.E.B.*, 511 U.S. at 141 (footnote omitted). It is an unassailable fact that women suffered considerable difficulty securing the right to vote, obtaining it 50 years after emancipated black males. *See generally* Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 261-66 (1996) (discussing women obtaining the right to vote and to serve on juries).

In 1873, Susan B. Anthony and 50 other women were tried in Rochester, New York, for trying to exercise their right to vote. *See* MIRIAM SCHNEIR, *FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS* 133 (1972).

In this Alabama paternity case brought by the mother of a minor child, a jury trial was requested.<sup>160</sup> "The trial court assembled a panel of 36 potential jurors, 12 males and 24 females. After the court excused three jurors for cause, only 10 of the remaining 33 jurors were male."<sup>161</sup> Of the remaining male jurors, the State struck ninety percent of them, or nine out of ten.<sup>162</sup> The petitioner objected to the all female jury that was to try his case.<sup>163</sup>

Justice Blackmun pointed out that "supporters of the exclusion of women from juries tended to couch their objections in terms of the ostensible need to protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere."<sup>164</sup>

In dissent, Chief Justice Rehnquist expressed the view that race was different than gender.<sup>165</sup> He wrote that "[r]acial groups comprise numerical minorities in our society, warranting in some situations a great-

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Anthony's defense was that the Fourteenth Amendment defined "citizen" as all *persons* born or naturalized in the United States, which made women eligible to vote. The judge would not allow Anthony to testify on her own behalf. Her attorney and district attorney presented five hours of argument, after which—without leaving the bench—the judge drew a previously prepared written opinion from his pocket and read it. He ruled that the Fourteenth Amendment was inapplicable and directed the all-male jury to bring in a guilty verdict.

*Id.*

160. See *J.E.B.*, 511 U.S. at 129.

161. *Id.*

162. See *id.*

163. See *id.* Prior to *J.E.B.*, some courts refused to extend the *Batson* doctrine to gender-based challenges. See, e.g., *United States v. Broussard*, 987 F.2d 215, 217 (5th Cir. 1993) (refusing to extend *Batson* to gender-based challenges). Other courts have extended the equal protection rationale to gender-based peremptories. See, e.g., *United States v. De Gross*, 913 F.2d 1417, 1423 (9th Cir. 1990) (extending *Batson* to gender-based challenges); *State v. Levinson*, 795 P.2d 845, 849 (Haw. 1990) (extending *Batson* to prohibit gender-based challenges); *Tyler v. State*, 623 A.2d 648, 649 (Md. 1993) (extending *Batson* to gender-based challenges).

164. *J.E.B.*, 511 U.S. at 132. We should be reminded that stereotyped assumptions about women have even influenced our popular culture. The dialogue presented in Harper Lee's classic work, *To Kill a Mockingbird*, is an example. Lee's main character, the ethical and well regarded lawyer, Atticus Finch, shared some of those notions. When asked by his son Jem, why women did not sit on juries, he said, "'I guess it's to protect our frail ladies from sordid cases like Tom's [a rape trial of a black man]. Besides,' Atticus grinned, 'I doubt if we'd ever get a complete case tried—the ladies'd be interrupting to ask questions.'" HARPER LEE, *TO KILL A MOCKINGBIRD* 202 (1960).

165. See *J.E.B.*, 511 U.S. at 154 (Rehnquist, C.J., dissenting).

er need for protection, whereas the population is divided almost equally between men and women."<sup>166</sup>

In a stinging dissenting opinion, Justice Scalia accused the majority of an effort "to pay conspicuous obeisance to the equality of the sexes."<sup>167</sup> He warned that by doing so, "the Court imperils a practice that has been considered an essential part of . . . the common law."<sup>168</sup> He accused the majority of "vandalizing . . . our people's traditions."<sup>169</sup> Justice Scalia's angry retort to the extension of *Batson* to gender-based challenges was not surprising considering his disagreement with the Court's earlier efforts to change the way peremptory challenges could be used by creating new constitutional rules.

Justice Blackmun's blanket condemnation of race or gender-based decisions by lawyers, compared with the fervor of Justice Scalia's "hands off" approach,<sup>170</sup> reached a bizarre climax the very next Term. The Court was poised to decide a case that would threaten to destroy the integrity of the work done by the Justices who had supported the *Batson* non-discrimination doctrine.

In the case of *Purkett v. Elem*,<sup>171</sup> the Court removed the need for lawyers to give plausible non-racial reasons for why they exercised their peremptory challenges.<sup>172</sup> The case came to the Supreme Court from a federal habeas corpus proceeding.<sup>173</sup> The respondent was convicted of robbery in a Missouri trial court.<sup>174</sup> During jury selection, Elem lodged an objection to two blacks being struck from his jury.<sup>175</sup> The

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166. *Id.* at 154-55 (Rehnquist, C.J., dissenting). One critic of the *J.E.B.* opinion believes that it "is confusing because it supported the peremptory challenge yet provided reasons [to] justify its abolishment. . . . However, in refusing to do so, the Court seems to have invalidated the peremptory challenge in practice." Christopher M. Ferdico, Note, *The Death of the Peremptory Challenge: J.E.B. v. Alabama*, 28 CREIGHTON L. REV. 1177, 1207 (1995) (footnotes omitted).

167. *J.E.B.*, 511 U.S. at 163 (Scalia, J., dissenting).

168. *Id.* (Scalia, J., dissenting). Some images of women and their behavior are based on the notion that nature made men and women unalterably different. See, e.g., RUSH H. LIMBAUGH III, *THE WAY THINGS OUGHT TO BE* 194 (1992) ("[N]ature has defined behavioral roles for men and women. These roles are ordained in large part and not easily altered.").

169. *J.E.B.*, 511 U.S. at 163 (Scalia, J., dissenting).

170. See *supra* notes 147-48 and accompanying text.

171. 514 U.S. 765 (1985) (per curiam).

172. See *id.* at 768-70.

173. See *id.* at 766-67. The Petitioner proceeded in the district court under 28 U.S.C. § 2254. See *id.* at 766.

174. See *id.* at 766.

175. See *id.*

prosecutor explained his strike by stating that:

"I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair. . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and beards look suspicious to me."<sup>176</sup>

The trial court overruled Elem's objection, and the Missouri Court of Appeals affirmed, "finding that the 'state's explanation constituted a legitimate "hunch""<sup>177</sup> and that "[t]he circumstances fail[ed] to raise the necessary inference of racial discrimination."<sup>178</sup>

The federal district court adopted the magistrate judge's report and recommendations concluding that the Missouri court's determination that "no purposeful discrimination was a factual finding entitled to a presumption of correctness."<sup>179</sup> On appeal, the Eighth Circuit Court of Appeals reversed and remanded, holding that "the prosecution must at least articulate some plausible race-neutral reason for believing that [sic] those factors will somehow affect the person's ability to perform his or her duties as a juror."<sup>180</sup> The court "concluded that the 'prosecution's explanation for striking juror 22 . . . was pretextual."<sup>181</sup> Thus, it concluded that the district court erred in not finding intentional discrimination.<sup>182</sup>

In rejecting this conclusion of the Eighth Circuit, the Supreme Court reasoned that the explanation a prosecutor gives does not have to "be 'related to the particular case to be tried'"<sup>183</sup> or be "clear and reasonably specific."<sup>184</sup> The Court explained "[w]hat it mean[t] by a

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176. *Id.*

177. *Elem*, 514 U.S. at 766 (quoting *State v. Elem*, 747 S.W.2d 772, 775 (Mo. Ct. App. 1988)). In other contexts the Supreme Court has rejected the use of hunches as a basis of constitutionally valid official conduct. See generally *Terry v. Ohio*, 392 U.S. 1 (1968) (recognizing that an inarticulate hunch is insufficient to justify a stop on the street by a police officer).

178. *Elem*, 514 U.S. at 766 (quoting *Elem*, 747 S.W.2d at 775).

179. *Id.* at 766-67.

180. *Id.* at 767 (quoting *Elem v. Purkett*, 25 F.3d 679, 683 (8th Cir. 1994)).

181. *Id.* (quoting *Elem*, 25 F.3d at 684).

182. See *id.*

183. *Id.* at 768-69 (quoting *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (footnote omitted)).

184. *Elem*, 514 U.S. at 768 (quoting *Batson*, 476 U.S. at 98 n.20 (quoting *Texas*

'legitimate reason' [a]s not a reason that makes sense, but a reason that does not deny equal protection."<sup>185</sup> In effect, any non-racial reason, or presumably non-gender, would suffice.

Two curious procedural aspects of *Elem* were the basis of controversy. First, the Court's opinion was issued per curiam for what was a seven Justice majority.<sup>186</sup> This anonymous authorship was in stark contrast to the fervent partisan nature of earlier opinions in the *Batson* line of cases.<sup>187</sup> Secondly, the Court decided the case without the benefit of full briefing and oral argument, a point that frustrated dissenting Justices Stevens and Breyer.<sup>188</sup>

Justice Stevens wrote "[i]n my opinion it is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits of the case. The Court does this today when it overrules a portion of our opinion in *Batson v. Kentucky*."<sup>189</sup> Justice Stevens characterized this action as the Court having "misused its summary reversal authority."<sup>190</sup>

He decried what he believed was the majority's "unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that 'I had a hunch about this juror based on his appearance,' and [the assertion that] 'I challenged this juror because he had a mustache.'"<sup>191</sup> He was concerned that such distinctions "de-mean[] the importance of the values vindicated by our decision in *Batson*."<sup>192</sup>

Thus, the practical effect feared by the dissent is that whatever *Batson* stood for in terms of eliminating discrimination, it could now be easily ignored by prosecutors by offering any reason that was facially race or gender-neutral. As long as the reason is believed by the trial court judge, it would pass constitutional muster on appeal as a matter of law. *Elem* makes the reasons found valid at the trial level virtually

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Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981))).

185. *Id.* at 769 (quoting *Batson*, 476 U.S. at 98 n.20).

186. *Id.* at 766. "Per curiam" is "[a] phrase used to distinguish an opinion of the whole court from an opinion written by any one judge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

187. The strongly held views by each of the Justices in the *Batson* series of cases makes the summary opinion in *Elem* particularly noteworthy.

188. See *Elem*, 514 U.S. at 770 (Stevens, J., dissenting).

189. *Id.* (Stevens, J., dissenting) (footnote omitted) (citation omitted).

190. *Id.* at 770 n.1 (Stevens, J., dissenting).

191. *Id.* at 777-78 (Stevens, J., dissenting).

192. *Id.* at 778 (Stevens, J., dissenting).

unreviewable.<sup>193</sup>

The *Elem* opinion in many ways renders useless the ten years of *Batson* jury selection jurisprudence. For those who favored *Batson*, its prohibitions can be easily avoided by coming up with even implausible race-neutral reasons.<sup>194</sup> For those who feared the demise of peremptory challenges, *Elem* resurrects their power by reducing the scrutiny under which they would be examined for all lawyers desiring to use them.

### III. ACT II: THE TRAGEDY OF HONESTY

*Batson* and its progeny promote dishonesty and encourage dishonesty to remain concealed, which undermines the ethical foundation of the legal profession.

Much has been written about the low regard with which many members of the public have for lawyers. Although this fact has been the touchstone for much humor,<sup>195</sup> the lack of public confidence in the integrity of lawyers is no laughing matter.

This is not a recent phenomenon. A public opinion poll taken in the early 1950s ranked lawyers behind teachers, clergy, politicians, and merchants in importance to the community.<sup>196</sup> Certainly, the fact that lawyers spend a great deal of their time making representations on behalf of others and involving themselves in matters where people are required to trust them, may lead to a temptation to occasionally misrepresent. However, whatever the source of dishonesty, the fact remains that the harm to the reputation of the profession from the conduct of even one unscrupulous lawyer is substantial.

In the context of the *Batson* problem, lawyer honesty is implicated

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193. See *id.* at 767-69.

194. One public defender recently commented that the *Purkett* case "raises a burden that is relatively impossible to meet . . . . If the Court won't look at the plausibility of a race-neutral strike, then it sounds to me like I have to prove purposeful discrimination—what's in the prosecutor's mind. Unless you have a prosecutor who messes up badly, you're never going to get that kind of proof."

Richard C. Reuben, *Excuses, Excuses: Any Old Facially Neutral Reason May Be Enough to Defeat an Attack on a Peremptory Challenge*, A.B.A. J., Feb. 1996, at 20, 20 (quoting Gary Guichard, State Public Defender in Atlanta).

195. See Lasson, *supra* note 11, at 723-25 (collecting a number of popular lawyer jokes, many of which suggest the notion that they lack honesty and integrity).

196. See Albert P. Blaustein, *What Do Laymen Think of Lawyers? Polls Show the Need for Better Public Relations*, 38 A.B.A. J. 39, 39 (1952).



because the rule of *Batson* requires a lawyer to give his reason, which compels a disclosure to the judicial tribunal.<sup>197</sup> Such an obligation is no casual event because the duty of disclosure requires "that a lawyer be absolutely honest with the court. Thus, a lawyer shall not knowingly: make a false statement of material fact or law to a tribunal."<sup>198</sup>

In the midst of a *Batson* hearing, it must be remembered that several events that may reflect upon the honesty of a lawyer have already occurred. First, jurors have been challenged who belong to a protected group and a member of the Bar has objected, suggesting his opponent has behaved illegally.<sup>199</sup> Second, the number of those jurors challenged has been deemed by the judge sufficient to require the lawyer to respond directly to the court about whether they have done something that violates the law.<sup>200</sup> When questioned, only two answers are available: I had an improper motivation in challenging the juror, or I did not.

The rule of *Batson* creates a triggering mechanism that requires the judge to ask an officer of the court whether he has violated his obligation to be candid with the court. The ethical tragedy this creates is that being asked whether one has violated *Batson* is tantamount to an accusation of dishonesty.

It may be suggested that *Batson* held no such conclusion, rather, that it merely requires the judge to inquire into why a pattern of apparent racial challenges has occurred.<sup>201</sup> The problem with this conclusion, however, is that if the lawyer offers no reason, he loses the hearing because he is presumed to have acted improperly by failing to renounce that suggestion of his dishonesty.<sup>202</sup> Thus, any answer, short

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197. See *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

198. JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 9.5, at 253 (1987) (footnotes omitted).

199. In theory, even a single juror improperly challenged would be enough to violate *Batson*.

200. See *Batson*, 476 U.S. at 96-97.

201. See *id.*

202. In a letter written in response to a confidential Maryland State Bar Association survey, one jurist described the dilemma the *Batson* rule places on the judge presiding over a hearing:

It seems every lawyer and judge can create the procedure they deem appropriate, and confusion and disorder lurk at the threshold of each case. For instance, do you first find out from the prospective juror what his/her pedigree is? (Obviously, this puts the judge in the position of appearing to be biased by asking). Do you then ask the attorney why he or she exercised a peremptory against this particular juror? And then, by some unknown standard, decide whether or not you believe the attorney's stated reason is bona

of admitting that you tried to make an illegal challenge, is better than no answer at all.<sup>203</sup>

A by-product of such a rule is the problem it creates for a lawyer who fears that his answer, based on intuition or a hunch, may not be believed by the judge. No lawyer wants a judge to disbelieve him; thus, creation of a more plausible answer becomes the convenient solution. Some lawyers may justify such a reaction by hiding behind their obligation to represent their client "zealously."<sup>204</sup> Others may simply convince themselves that the better *Batson* answer is the actual reason that they challenged the juror. Such a rationale raises even more challenging ethical questions:

A lawyer has a duty to be honest with himself or herself. . . .

This duty, however, goes beyond the law. Any lawyer who can lie to himself that what he is doing for a client is right and just when it really is not will devalue his worth to himself and become a mere prostitute for the client. Ultimately, this course has to pervert or devalue the lawyer's own sense of values.<sup>205</sup>

The more that the lawyer believes that he can avoid being labeled a racist, sexist, or liar by a quickly formulated neutral reason, the more he is likely to repeat the process should the matter come up again.

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fide? If one decides it isn't, does the judge then infer that some other motivation exists, and in effect accuse the attorney of lying? This is an inauspicious way to start a trial and sows the seeds for mistrial and recusal motions before the trial even starts.

Letter from an anonymous jurist, to the Maryland State Bar Association (June 30, 1995) (on file with author, Maryland State Bar Association Section on Criminal Law and Practice, and the *New England Law Review*).

203. Some jurists believe that *Batson* does have a deterrent affect on prosecutors who might attempt to strike minority jurors. In response to a judicial survey, another trial judge commented "that prosecutors have bent over backwards not to place themselves in a *Batson*-risky situation, and thus will exercise a challenge to an African-American juror only if they have a well-thought-out reason for doing so." Letter from an anonymous jurist, to the Maryland State Bar Association (June 9, 1995) (on file with author, the Maryland State Bar Association Section on Criminal Law and Practice, and the *New England Law Review*).

204. Gerald F. Uelman, *Lord Brougham's Bromide: Good Lawyers as Bad Citizens*, 30 LOY. L.A. L. REV. 119, 122 (1996) ("The premise of the adversary system is that the goal of fair adjudication is more likely to be served if lawyers function as zealous advocates for their clients and leave judgments about what is good for the 'system' for another time and place."); see also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066-67 (1976) (arguing that lawyers have a special relationship and obligation to protect individual autonomy within the law).

205. HALL, *supra* note 198, § 9.7, at 256 (footnote omitted).

A judge may also become a participant in the charade that encourages lawyers to offer better neutral reasons for excluding jurors. A judge certainly does not take comfort in having his courtroom become a battleground for accusations between lawyers alleging illegal conduct; thus, there is likely a temptation to identify a lawyer as having violated *Batson* only as a last resort.<sup>206</sup> Thus, the reluctance on the part of judges to find a *Batson* violation fuels the practice of offering fabricated reasons that relieves the judge of the need to implicitly call an officer of the court a liar by ruling to reject his reason.

In my view, this creates a system that, through the structure of its accusatory process,<sup>207</sup> encourages lawyers to lie. They are rewarded for effective fabrication by the judge who would rather believe that the lawyer in question is obeying his oath. Such a system is morally unjustifiable, but easily understood. It is supported by law that makes it more convenient to ignore these moral questions than to police them. Professor William Simon recently discussed why laws go unenforced. He said:

Many laws are unenforced or underenforced because people disobey them and officials are unable or unwilling to sanction them. With some laws, this fact is a tragedy that reflects the inadequate socialization of the actors and practical difficulties of enforcement. With others, however, it seems a largely desirable mode of accommodating formal law to practical circumstances. In these situations, citizens often violate the laws without any sense of wrongdoing, and their actions are ratified by officials who decline to sanction them even when they have the ability to do so.<sup>208</sup>

Professor Simon's observations are a persuasive description of what I believe takes place in the post-*Batson* courtroom during jury selection. Since a judge can no better search the heart of a lawyer for truth than a witness in a case, his ability to enforce *Batson* is limited by his de-

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206. At least one detailed statistical analysis has demonstrated that neutral explanations are accepted by trial courts in "almost four out of five situations." Melilli, *supra* note 154, at 465. This high frequency of acceptable explanations could indicate that judges are likely to find most any reason acceptable rather than to rule, in effect, that a lawyer has attempted to mislead them.

207. One might ponder if a lawyer caught red handed attempting to exercise peremptory challenges against black or women jurors, could even invoke the Fifth Amendment right to remain silent, rather than fabricate an alternative reason for the challenge. See U.S. CONST. amend. V; see also *California v. Byers*, 402 U.S. 424, 427-34 (1971) (Burger, C.J., plurality opinion) (suggesting that some statements taken for administrative purposes may not be subject to Fifth Amendment privilege).

208. William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 233 (1996).

sire to avoid stigmatizing a lawyer as untruthful.

This problem may be particularly difficult to solve if the challenge is made between lawyers who must practice against each other on a regular basis. The accusatory procedure of *Batson* is likely to lead to hard feelings and an uncomfortable courtroom working environment.<sup>209</sup> For the lawyer who does not regularly practice before a given court, the risk of making a *Batson* challenge may be to anger the judge by challenging the integrity of a local lawyer with whom the judge has become familiar and who he may believe to be honest. Developing such a negative relationship with a judge at the beginning of a case may certainly be detrimental to one's client. Thus, making a *Batson* challenge may bring extreme disfavor because, beneath it all, everyone involved knows that it is a pointless exercise if the judge is not inclined to bring a lawyer's personal integrity into question.

What is particularly disturbing is that the *Elem* case,<sup>210</sup> the most recent of the Supreme Court's *Batson* progeny, may have made it impossible to solve this ethical tragedy. By permitting virtually any race or gender-neutral reason to satisfy the explanation requirement,<sup>211</sup> the Supreme Court has placed unreviewable power in the hands of trial judges, who have little incentive to use it against lawyers who regularly practice before them. Thus, the ethics of both lawyers and judges are called into question because the law makes it easier for lawyers to lie and makes it easier for judges to ignore it when they do.

Honesty is an important value in a lawyer's professional responsibility and for society in general.<sup>212</sup>

To be honest is to be real, genuine, authentic, and bona fide. To be dishonest is to be partly feigned, forged, fake, or fictitious. Honesty expresses both self-respect and respect for others. . . . Honesty imbues lives with openness, reliability, and candor; it expresses a disposition to live in the light. Dishonesty seeks shade, cover, or concealment. It is a disposition to live partly in the dark. . . . Lying is an "easy" tool of concealment, and when often employed, all too easily hardens into a malignant vice.<sup>213</sup>

When dishonesty becomes too convenient, it becomes like a game of

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209. See *supra* note 202.

210. See *supra* notes 171-94 and accompanying text.

211. See *Purkett v. Elem*, 514 U.S. 765, 768-69 (1995) (per curiam).

212. Honesty is a primary value that a lawyer should possess. Without it all other matters in the lawyer's world are likely to fall below professional standards.

213. WILLIAM J. BENNETT, *THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES* 599 (1993).

“[c]atch me if you can!”<sup>214</sup> Thus, there is a danger that the untruthful behavior will become institutionalized.

The legal profession is already confronting problems of institutional dishonesty that are shaped even from the beginning of legal training. A recent article in the *National Jurist Magazine* serves as an instructive example of how dishonesty in the profession becomes entrenched in routine conduct.<sup>215</sup> The article, which was based on a law student survey, noted that “[f]ifty-four percent of respondents [to the survey] said they have cheated in some way while in law school, including plagiarizing, copying other students’ homework, using forbidden materials during exams, and inflating their achievements on their résumés.”<sup>216</sup>

Not unpredictably, the reasons that law school cheating goes undetected and unreported are similar to why *Batson* violations are so difficult to police. “For starters, lots of cheating may go unreported, even though many law schools have honor codes that require students to report any offenses they know about.”<sup>217</sup> This failure to report cheating is often attributed to peer pressure and the “fear of being labeled a snitch.”<sup>218</sup> Lawyers and judges in a community do not want to believe that there are liars in the ranks, therefore, peer pressure may encourage even diligent lawyers to abandon legitimate *Batson* objections.

Secondly, students who accuse others of cheating have the “responsibility to substantiate the charge.”<sup>219</sup> This is extremely difficult unless the student is “caught red-handed.”<sup>220</sup> Similarly, in a *Batson* hearing, the objecting party has the burden of establishing that the pattern of strikes indicates discrimination. Thus, for a lawyer to realistically succeed in a *Batson* hearing, the number of black or women jurors challenged would have to be unusually high. In either circumstance, the ease and frequency with which cheating occurs tarnishes the profession. As one lawyer has observed, “[c]heating, like all scandals, blackens the eye of the profession, and our profession has enough black eyes.”<sup>221</sup>

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214. *Id.* at 600.

215. See Soozhana Choi, *How Many of Your Classmates Cheat?*, THE NAT’L JURIST, Nov./Dec. 1996, at 14.

216. *Id.*

217. *Id.* at 18.

218. *Id.* (quoting Dana Gottlieb, Third Year Law Student, St. Thomas University School of Law).

219. *Id.* (quoting Frank Real, Assistant Dean for Student Services, Santa Clara University School of Law).

220. *Id.* (quoting Frank Real, Assistant Dean for Student Services, Santa Clara University School of Law).

221. Choi, *supra* note 215, at 20 (quoting John Held, Recruiting Partner,

When dishonesty becomes so pervasive that it is considered normal, something needs to change. If deception becomes the manner in which the law encourages efficiency, the profession fails.

#### IV. ACT III: THE TRAGEDY OF COMPETENCE

Modern jury selection approaches may well be illegal under *Batson*, since lawyers still openly rely on instinct, experience, and science which all depend, in some degree, on assumptions about race and gender.

In order to understand how lawyers are affected by the changes in the law brought about by the *Batson* line of cases, one must first look at what lawyers actually believed about jury selection and peremptory challenges before the rules were altered. During the 1960s, the noted trial lawyer Louis Nizer described the lawyer's job of selecting a jury to be a composite of hunch, instinct, and experience.<sup>222</sup> He wrote that "[w]hen a lawyer selects jurors, he scans their faces, evaluates their voices, appraises their diction, observes their clothes, senses their empathy, weighs their mannerisms, all to determine whether they will be favorably inclined to his client and cause. He does not seek mere objectivity."<sup>223</sup>

In this context, he describes the lawyer's role as an advocate, attempting to maximize the jury selection process in favor of his client as much as possible.<sup>224</sup> Nizer explains that the selection process itself carried certain protections at the time before *Batson*, when he practiced.<sup>225</sup> "Since each side selects those who have most favorable predilection to it, an average impartiality is thereby approximated. This is the law's device to avoid prejudice."<sup>226</sup>

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McAndrews, Held & Malloy in Chicago).

222. See LOUIS NIZER, *THE JURY RETURNS* 295 (1966).

223. *Id.*

224. See *id.*

225. See *id.*

226. *Id.* Other lawyers concur with Nizer's assessment. For example, the flamboyant William Kunstler once wrote:

an impartial jury is a myth. Each side in a [jury] trial wants jurors it believes will be sympathetic to it, so lawyers deliberately set out to select specific jurors. I base my choices largely on intuition and instinct, always hoping the ones I select have fewer basic antagonisms and will therefore be more likely to vote for acquittal.

WILLIAM M. KUNSTLER WITH SHEILA ISENBERG, *MY LIFE AS A RADICAL LAWYER* 287 (1994).

At the core of the *Batson* dispute is the use of racial stereotyping in making jury selection decisions. Most of the controversy over whether the inquiry rule of *Batson* was needed, was the action of prosecutors striking blacks from juries,<sup>227</sup> believing that they were either unfit to serve because of their race or too likely to favor acquittal of a black defendant.<sup>228</sup>

At the outset, it should be recognized that whatever value racial stereotyping has in jury selection, it is no panacea for success. One danger of racial stereotyping is that those who engage in it may place too much confidence in its accuracy. All blacks and all whites do not necessarily think alike. As noted Harvard scholar Cornel West has observed, "[e]very claim to racial authenticity presupposes elaborate conceptions of political and ethical relations of interests, individuals, and communities. Racial reasoning conceals these presuppositions behind a deceptive cloak of racial consensus."<sup>229</sup> Professor West cautions that any attempt to confine blacks, for example, within a single ideology should be viewed with "suspicion."<sup>230</sup>

227. See *supra* note 7.

228. Former Philadelphia Chief Prosecutor, Jack McMahon, in a highly publicized training tape on jury challenges, stated:

"The blacks from the low-income areas are less likely to convict. . . . In selecting blacks, you don't want the real educated ones. . . . [And], young black women are very bad. There's an antagonism. I guess maybe because they're downtrodden in two respects. They are women and they're black . . . so they somehow want to take it out on somebody and you don't want it to be you."

L. Stuart Ditzen et al., *Avoid Poor Black Jurors, McMahon Said*, PHILA. INQUIRER, Apr. 1, 1997, at A1.

McMahon justified his suggested actions by saying "it may appear as if you're being racist, but again, you're just being realistic. You're just trying to win the case. The other side is doing the same thing." *Id.* Obviously, his assumptions about good jurors are replete with racial conclusions and stereotypes, improper under *Batson*, but at least in his opinion, constitutes effective advocacy to obtain a conviction or avoid an acquittal.

229. CORNEL WEST, *RACE MATTERS* 26 (1993).

230. *Id.* Despite the lack of definitive proof that racial assumptions are the best predictor of jury behavior, conscious racial choices are still made at trials. In the celebrated Mayor Marion Barry drug and conspiracy trial, race played out as an important factor in jury selection for both sides. See JONATHAN I.Z. AGRONSKY, *MARION BARRY: THE POLITICS OF RACE* 230-31 (1991). The government, with its available challenges, used "seven of their nine permitted strikes to dismiss blacks they thought would be sympathetic to the mayor [a black man]. . . . [B]y contrast, [Barry's lawyers] used all but two of their 12 strikes to exclude white [jurors] they thought might vote to convict their client." *Id.*

Despite the Supreme Court's attempts to remove consideration of race from jury selection, there has been a long tradition of using physical characteristics as a proxy for behavior. Professor Paula Johnson reminds us that:

For centuries, theorists have propounded genetic determinism as the justification for ranking people on the basis of class, race, ethnicity, and gender, and for providing differential access to societal resources. . . . Eighteenth and nineteenth century biological definitions of race subdivided people into three basic classifications: Negroid (Black), Caucasian (White), and Mongoloid (Yellow). . . . The postulate of biological determinism equated racial differences with innate inferiority. Consequently, the biological system of ranking the races institutionalized the bases upon which societal benefits and burdens were to be distributed.<sup>231</sup>

The debate still rages as to whether these assumptions based on physical characteristics have any validity.<sup>232</sup> The focus on race and behavior has been joined with the controversial concept of racial jury nullification.<sup>233</sup> This concept has gained a great deal of attention in

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Such behavior on the part of lawyers would seem to support former prosecutor McMahon's notion that each side is trying to challenge jurors based on racial assumptions. See *supra* note 228.

The Bernhard Goetz subway shooting case in New York involved a shooting by a white man of several black men who Goetz maintained approached him in a threatening manner on the subway. See *People v. Goetz*, 497 N.E.2d 41, 43-44 (N.Y. 1986). In this case, race was considered a significant factor in the jury selection strategy. See GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 88 (1988). The prosecutor needed jurors sympathetic to the black victims who may have been approaching Goetz for questionable reasons. See *id.* "[H]e would prefer, as he put it, left-leaning 'Greenwich village types,' people who would appreciate the public danger generated by armed gunmen stalking the subways. *Id.*

231. Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 355-56 (1996) (footnotes omitted).

232. Compare James Shreeve, *Terms of Estrangement*, DISCOVER, Nov. 1994, at 56, 56-63 (discussing how the question of race persists in scientific research) with Juan Williams, *Violence, Genes, and Prejudice*, DISCOVER, Nov. 1994, at 92, 92-102 (discussing the consequences of the debate suggesting that an inclination towards violence can be linked to race).

233. Racial jury nullification refers to the notion that juries will be less likely to convict someone of their own race in some cases, even if the evidence strongly suggests that they are guilty. Although racially motivated jury nullification has received a great deal of attention recently, the phenomenon is not limited to that circumstance. See generally Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165 (1991) (advocating instructions



several high publicity jury trials like the Mayor Marion Barry trial,<sup>234</sup> the Rodney King police beating trial,<sup>235</sup> and, of course, the infamous O.J. Simpson case.<sup>236</sup> These cases focused new attention on how race plays a role in jury behavior, resulted in skepticism about the jury system,<sup>237</sup> and led to calls for reform.<sup>238</sup>

The controversial scholarship of Professor Paul Butler,<sup>239</sup> who has called for juries in black communities to acquit black defendants in some non-violent drug crimes,<sup>240</sup> brought a great deal of criticism to him.<sup>241</sup> However, it also focused the national debate on the reality of

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to a jury on its power to nullify a verdict).

234. See generally Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377 (1994) (discussing the acquittal of District of Columbia Mayor Marion Barry of drug charges, on evidence many believed was overwhelming, indicating that jury nullification may have taken place).

235. See Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1, D22 (reporting the acquittal and subsequent rioting after the controversial verdict rendered by an all white jury). See generally STACY C. KOON & ROBERT DEITZ, *PRESUMED GUILTY: THE TRAGEDY OF THE RODNEY KING AFFAIR* (1992) (discussing the King case from the point of view of one of the officers involved).

236. See George Anastaplo, *On Crime, Criminal Lawyers, and O.J. Simpson: Plato's Gorgias Revisited*, 26 LOY. U. CHI. L.J. 455, 466 n.26 (1995) (discussing the Simpson case and "deep-seated reservations that African-Americans have about the criminal justice system").

237. Recent polls reveal that whites and blacks have different attitudes about the fairness of the jury system, particularly after the O.J. Simpson criminal verdict. See Joe Urschel, *Poll: A Nation More Divided*, USA TODAY, Oct. 9, 1995, at 5A.

238. Some advocates of reform have suggested major renovation of the jury system because of the "benign neglect[,] . . . malignant hostility[,] . . . cynical manipulation and strategic perversion" that the jury system has suffered. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995) (discussing several proposed major reforms to the jury system).

239. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678 (1995) (arguing that it is sometimes legally and morally appropriate for black jurors to refuse to convict certain black defendants).

240. See *id.* at 679. Professor Butler suggests that "the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison." *Id.*

241. In passionate rejection of Professor Butler's endorsement of intentional jury nullification for some crimes, Professor Randall Kennedy observes that "although [Professor Butler's views are] animated by a desire to challenge racial injustice [his proposal] would demolish the moral framework upon which an effective, attractive, and compelling alternative can and must be built." RANDALL KENNEDY, *RACE, CRIME, AND LAW* 310 (1997). Professor Kennedy makes a detailed argument critical of Professor Butler's suggestions. See *id.* at 295-310.

race conscious jury behavior. The principle of jury nullification is not a new concept,<sup>242</sup> but *Batson* has presented new challenges in considering the role nullification should play in the criminal justice system. The seemingly irreconcilable contradiction that race should not be a factor in selecting juries, while at the same time lawyers and psychologists utilizing race as a primary decision making factor, has caused criticism of the jury system to become severe.<sup>243</sup> Thus, differences among the races in the perception of "jury justice" has been further exposed.<sup>244</sup>

In *J.E.B.*, Justice Blackmun, writing for the Court, made it unmistakably clear that race or gender-based exclusion of jurors was illegal.<sup>245</sup> If this is true, why is it not illegal to hire a jury consultant who will take into account the race and gender of the jurors?<sup>246</sup> Why

242. The concept of jury nullification is not new. Indeed, the practice pre-dates the Declaration of Independence. See *Bushell's Case*, 124 Eng. Rep. 1006, 1006-07 (C.P. 1670) (discussing that at the trial of Quaker activists William Penn and William Mead, who were charged with unlawful assembly, the jurors refused to convict, despite strong evidence and the fact that the jurors were refused food and drink).

243. One critic of the suggestion of race conscious jury behavior has called "Professor Butler's proposal . . . foolish and dangerous." Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 111 (1996).

244. See *supra* note 237.

245. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); see also *supra* text accompanying note 170.

246. Jury consultants often use surveys which directly seek information that will assist parties in excluding jurors based on racial or gender issues and attitudes. A good example of such a survey is the massive jury consultant questionnaire used by the O.J. Simpson defense team. Among the questions asked in the 294 item survey related to gender; "164. Have you or has someone you know had any contact with a family violence program, a battered women's shelter, or attended any programs concerning family or domestic violence? Yes? No? If yes, who was involved. Please explain the circumstances." Survey from O.J. Simpson's Defense Team to Jurors (Oct. 3, 1994) (on file with author and the *New England Law Review*).

On the matter of race, the survey questions were even more direct. For example:

182. How big a problem do you think racial discrimination against African-Americans is in Southern California? A very serious problem? A somewhat serious problem? Not too serious? Not at all serious? Not a problem?

188. "Some races and-or ethnic groups tend to be more violent than others." Strongly agree? Agree? Disagree? Strongly disagree? No opinion? If you wish to do so, please explain your answer:

191. When you were growing up, what was the racial and ethnic make-up of your neighborhood?

is it not illegal to ask voir dire questions about racial attitudes or women's issues?<sup>247</sup> Considering race and gender in excluding jurors seems to be established by both tradition<sup>248</sup> and science<sup>249</sup> and is a matter of serious consideration for a trial practitioner seeking to be competent.<sup>250</sup>

I would submit that under the *Batson* doctrine, hiring a jury consultant and discussing the racial and gender composition of a jury in a particular case might well constitute the crime of conspiracy to violate the equal protection rights of potential prospective jurors.<sup>251</sup> The ac-

192. Is there any racial or ethnic group you do not feel comfortable being around? Yes? No? If yes, please explain.

*Id.*

Such direct references to gender and race leaves little doubt that the focus of the Simpson jury selection took into account these allegedly impermissible factors.

247. See *supra* note 246.

248. The use of jury consultants and their demographic and psychological tools have been developed to assist lawyers in selecting better juries. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 397 n.\* (1993) ("The object is not to ensure fairness, but to replace the lawyers' hunches and rules of thumb about good jurors and bad jurors . . . with something more solidly grounded. The process is extremely expensive; consequently, it is used only in very special cases. Whether it works or not has never satisfactorily been proven."). Prior to the scientific approach, lawyers used experience, tradition, or folklore to decide who should be on a jury in any given case. See *id.* at 243-44.

249. Scientific jury selection techniques have become a fixture in American courtrooms in high profile cases. Some observers believe, however, that it has not been good for the perception of fairness in the justice system held by the public. See JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 176 (1994) ("Scientific jury selection grew out of, and in turn pushed further, the prevailing skepticism about juries as impartial institutions of justice.").

250. The Sixth Amendment provides the right of an accused "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The Court has determined that such assistance must be reasonably effective. See *Strickland v. Washington*, 466 U.S. 668, 687-97 (1984). Accordingly, the need to be competent logically extends to a lawyer's role in jury selection. See, e.g., *Commonwealth v. Stitzel*, 454 A.2d 1072, 1075-76 (Pa. 1982) (holding that the failure to exercise a peremptory challenge to remove a potentially prejudicial juror can constitute ineffective assistance of counsel).

Even the American Bar Association has recognized that seeking a jury consultant may be required if a lawyer is to provide competent representation. In the context of a death penalty case, one ABA report has advised that such consultants can help determine what "invisible but lethal [amounts] of prejudice may exist in the jury pool." AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 117 (1989). The report concluded consideration of "sociological data, psychological expertise," and "intuition" may be useful. *Id.* Ironically, these are the very factors which *Batson* and its progeny have called into question.

251. Conspiracy, which is a crime in all jurisdictions, has been defined as:

tions of the legal defense team would also seem to violate various civil rights laws that have long been in place to protect against attempts to violate a citizen's constitutional rights.<sup>252</sup>

It may be suggested that in the representation of the client such discussions might be protected by various privileges attached to lawyer confidentiality.<sup>253</sup> However, since consideration of race has been deemed illegal by the Supreme Court, how could it be shielded by a mere evidentiary privilege? It is well settled that such protections do not operate when illegal conduct is taking place.<sup>254</sup>

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A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful.

BLACK'S LAW DICTIONARY 309 (6th ed. 1990).

Although planning for jury selection is not illegal, discussing how to challenge jurors based on race or gender, while at the same time developing neutral reasons to mask those intentions, would seem to be using unlawful means to accomplish an act (jury selection) which is not "in itself unlawful." *Id.*

252. An attorney may well be in violation of 18 U.S.C. § 242, a criminal statute, which provides in pertinent part that:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 242 (1994).

It would also appear that the defense team advising the defendant may be in violation of 42 U.S.C. § 1983, a civil statute, which provides that deprivation of a constitutional right under color of law, shall make a person "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1994).

Thus, an attorney attempting to remove blacks or women from a jury and seeking a jury consultant's advice on how to remove them, would be depriving them of the right to serve on a jury. Since the Supreme Court has deemed the jury selection process a public matter, *see* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-28 (1991); *see also supra* notes 139-40 and accompanying text, the defense team would be acting under "color of law" as the statutes prohibit. 18 U.S.C. § 242 (1994); 42 U.S.C. § 1983 (1994).

253. Attorney client privilege will not shield a lawyer who attempts to conspire to commit perjury. *See, e.g., United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

254. There has long been an exception to the confidentiality rules for lawyers who plan or engage in future crimes and frauds. *See* JOHN WESLEY HALL, *PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER* 882 (2d ed. 1996).

The current state of the law would appear to make consulting such professionals a serious ethical problem.<sup>255</sup> There has been little attention focused on this concern as far as I have been able to determine.<sup>256</sup> Is this because no bar disciplinary counsel will seriously consider an inquiry against an attorney who diligently seeks to prepare his case by empaneling the best jury possible, racial and gender considerations notwithstanding? Is it because government prosecutors do not believe that discrimination of lawyers against "challenged jurors" is not a major civil rights priority?<sup>257</sup> Perhaps it is because no one, including the Supreme Court, contemplated that the *Batson* rules were intended to operate to keep lawyers from trying to prepare their jury selection as they had always prepared.

The problem is that the rules have changed, but the conduct of lawyers has not; yet another ethical tragedy. No one appears to believe that preparing for trial with a jury consultant is the same as illegally conspiring to select jurors based on race or gender. Until someone sanctions the lawyers, they will not and indeed might believe that they cannot stop using the tools that their professional judgment suggests might actually help their clients.<sup>258</sup> Even those lawyers who are not

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255. One scholar has even suggested that the ethical problem is equally unavoidable for the jury consultant. See FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* 139 (1994).

An ethical issue for social scientists retained by trial counsel persists. Social scientists who participate in the adversarial attempt to obtain favorable jurors tarnish the image of their profession. Serving in this capacity, the paid expert should have no false illusions; no one wants to hire an "ivory tower" consultant to assist in selecting a "fair and impartial" jury. . . . The goal is to maximize the number of favorably biased jurors. Consultants who facilitate this must appreciate that their efforts contribute to an end of questionable propriety.

*Id.* (footnotes omitted).

256. There has been little scholarship on the subject of the ethics of lawyers using jury selection professionals to help select juries in racially or gender laden cases. In other contexts, however, lawyers have been subject to criminal "prosecution for conduct that exceeds the proper bounds of zealous representation and violates the criminal law, such as counseling clients to destroy evidence or jury tampering." Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 676 (1997) (footnotes omitted) (discussing judicial and disciplinary remedies against overzealous advocates).

257. One would wonder what type of jury a federal civil rights prosecutor would attempt to impanel to try such a case. Would he take race or gender into account? Let us hope he would at least resist the urge to hire a jury consultant for this particular trial.

258. The modern criminal trial features jury consultants in increasing numbers. In

able to use consultants often ask voir dire questions that contemplate racial or gender consideration. It is also obvious that lawyers will use their eyes to identify the race or gender of jurors and their instinct and experience to select those believed to be best suited to the case. If race or gender has been used during this process, often, it is known only to the lawyer.<sup>259</sup>

It is clear that we must establish jury selection rules that will not create a situation where a lawyer, using jury consultants, is either breaking the law or, by failing to use one, is committing malpractice.<sup>260</sup> Accordingly, the *Batson* doctrine again creates a problem which has all the charm of the riddle of "Rumpelstiltskin."<sup>261</sup>

## V. ACT IV: THE TRAGEDY OF THE ACCUSED

A criminal defendant, who has the greatest stake in the outcome of his trial, may have not only lost the unfettered right to peremptory challenges, but also the ability to meaningfully consult his lawyer about his personal preferences in shaping his jury.

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the O.J. Simpson case, both the prosecution and defense had jury consultants available. See Mark Miller, *The Road to Panama City: How a Jury Consultant Got O.J. Back on the First Tee*, NEWSWEEK, Oct. 30, 1995, at 84. Because of the success of Simpson's defense, which resulted in an acquittal of all charges, the demand for his consultant's services has increased. See *id.* But even Ms. Jo-Ellan Dimitrius, jury consultant for O.J. Simpson's defense team, recognized that her role in the case was not necessarily well thought of by the public. "Unfortunately, . . . what we do is viewed as suspect by people—always has been, always will be." *Id.*

259. Some lawyers have suggested that not only should a competent attorney consider playing to the perceived racial prejudice of a jury, but that sound advocacy often requires such efforts. One lawyer training manual suggests that during opening argument "in addition to all else, [the lawyer] must have a clear perception of the convictions, the sentiments and firmly rooted prejudices of the twelve men in the box." LLOYD PAUL STRYKER, *THE ART OF ADVOCACY: A PLEA FOR THE RENAISSANCE OF THE TRIAL LAWYER* 58 (1954).

260. See *supra* note 250. There is reason to believe that the use of jury consultants will continue. In 1991, for example, lawyers paid \$200 million for consulting services. See Debra Sahler, Comment, *Scientifically Selecting Jurors While Maintaining Professional Responsibility: A Proposed Model Rule*, 6 ALB. L.J. SCI. & TECH. 383, 402 (1996). Sahler suggests that the profession's use of consultants supports the notion that many lawyers believe scientific jury selection is superior to the use of traditional theories and stereotypes. See *id.* at 402-03.

261. THE COMPLETE GRIMM'S FAIRY TALES 264 (Joseph Campbell ed., 1944). In this Brother's Grimm fairy tale, the obligation of a young woman to the mystical elf Rumpelstiltskin, to surrender her first born child, could not be satisfied until she could answer a nearly impossible riddle, to guess his name. See *id.* at 266. She ultimately solved the riddle, but only by accidentally overhearing the answer. See *id.* at 267-68.

The problem of whether it is appropriate to take into account race and gender as part of a jury selection strategy is further complicated if a defendant may wish to play in the selection of his own jury. Consider the following hypothetical scenario that might occur:

A white criminal defendant is charged with a racial hate crime against a black woman who was assaulted as she attempted to enter her vehicle leaving a shopping mall. The victim was beaten badly and her vehicle was spray painted with racial slurs. You represent the defendant who is accused of the crime. He states that he was not even near the scene. He is, however, fearful that women or blacks on the jury will lead to his conviction. He asks you to remove as many of them as possible during the jury selection.

What is an appropriate ethical response to his request under *Batson*? It appears that you must tell him that you cannot take race and gender into account when you use your peremptory challenges.<sup>262</sup> If you hire a jury consultant and your consultant suggests that your client's fears are well taken, do you ignore her advice? When you actually begin to strike jurors, do you put your client's wishes out of your mind? How do you avoid being placed in this uncomfortable position? Perhaps the only alternative a lawyer may have in a case that he knows has racially or gender charged facts, is to explain to the client the rules of *Batson* and that in order for the lawyer to select the best jury possible, the client simply cannot offer his opinions on the composition of the jury.

How should a lawyer respond to the client's wishes in such a situation? Obviously, the law contemplates that the defendant participate with his lawyer in the jury selection process.<sup>263</sup> A defendant, in most circumstances, cannot even abandon his right to a jury trial without taking affirmative steps to do so.<sup>264</sup> Furthermore, the failure of a lawyer to discuss the selection of the jury with his client may lead to a claim of ineffective assistance of counsel.<sup>265</sup>

It is realistic to conclude that most defendants will ultimately base their opinion of their lawyer on the result rendered by the jury.<sup>266</sup> Thus, if the client's input is not considered, confidence in the quality of the legal representation will also be diminished.<sup>267</sup> Even in a world

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262. See *supra* text accompanying note 170.

263. See *Crosby v. United States*, 506 U.S. 255, 258-59 (1993).

264. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

265. See *supra* note 250.

266. See *supra* note 13.

267. The confidence a client has in his lawyer is closely linked to the perception that the lawyer will, in some measure, advance the client's own interests. See Michael

where scientific jury selection is available, the client's opinion about which jurors should sit and which should not, will affect the client's attitude about the fairness of the proceedings against him.

Obviously, clients do not always agree with their attorneys on the jury selection decisions that should be made. An interesting example of such disagreement can be found in the chronicle of the case of *United States v. MacDonald*,<sup>268</sup> the so called "fatal vision" case.<sup>269</sup> The prosecution centered around the actions of a military physician, Doctor Jeffrey MacDonald, who was accused of killing his wife and children in a series of brutal stabbings in the family home.<sup>270</sup>

The defense hired a jury consultant to create a profile of the jury most favorably disposed to MacDonald's case.<sup>271</sup> A demographic analysis revealed "that the ideal jury would be composed mainly of conservative whites over the age of thirty-five—in most cases, just the kind of jury sought by the prosecution."<sup>272</sup> MacDonald was uncomfortable

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J. Lightfoot, *On a Level Playing Field*, 30 LOY. L.A. L. REV. 69, 73 (1996).

The accused's lawyer is the one person who stands between him and the cold reality, the full force and weight, of the system. The overriding responsibility of the criminal defense attorney is to fight off the advances of those who would take advantage and to boldly assert and vigorously pursue the client's defenses.

*Id.*

268. 456 U.S. 1 (1982). See generally JOE MCGINNISS, *FATAL VISION* (1983).

269. See generally MCGINNISS, *supra* note 268.

270. See *MacDonald*, 456 U.S. at 3-5; see also MCGINNISS, *supra* note 268, at 4-6.

271. MCGINNISS, *supra* note 268, at 484. "Although the term 'scientific jury selection' is used to describe the practices of jury consultants, the actual methods used vary considerably. There seem to be four types of jury consultants based on the prevailing scientific approach used: the Typologists, the Clinicians, the Empiricists, and the Theoreticians." Robert D. Minick, *Using Jury Consultants to Assist Voir Dire*, in LITIGATION 1994, at 289, 293-94 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5185, 1994).

The Typologists argue that people can be categorized into various personality types that are meaningfully related to verdict preferences. . . .

The Clinicians also rely on psychological principles and systems to rate individual jurors on their likely verdict preferences. . . .

The Empiricists rely on statistical assumptions and methods to determine which kinds of people will hold a particular verdict preference. . . .

The Theoreticians use psychological principles and empirical research methods to study each case.

*Id.* at 294-96.

272. MCGINNISS, *supra* note 268, at 485. The book describes the survey process as involving "a series of demographic questions pertaining to age, race, marital status, length of residence in the county, educational background, political affiliation, and



with the selection system from the beginning, explaining to his lawyer that "everything you're saying goes against my gut feeling."<sup>273</sup>

In the midst of jury selection during the case, MacDonald felt that as each of the jurors were being selected, "another nail [was] being hammered into [his] coffin."<sup>274</sup> His lawyers and jury consultant were, however, "delighted with the makeup of the jury."<sup>275</sup> The jury found MacDonald guilty on all counts, despite the attorney's confidence in his jury selection strategy.<sup>276</sup>

regularity of church attendance. . . . The professor had then weighted each of the factors, much as a horse player will do when analyzing a field of thoroughbreds." *Id.* at 484-85.

273. *Id.* at 485 (quoting Jeffrey MacDonald).

274. *Id.* at 496 (quoting Jeffrey MacDonald).

275. *Id.* The promise of accurate scientific jury selection is in many ways the very opposite of the traditional jury selection strategy based on the instinct of lawyers and clients selecting jurors on often intangible feelings. Part of the validation of the traditional jury selection approach is that it fuses the attorney and client together with their jury selection choices. The jury's verdict, which is the result of their mutual judgment, is left squarely in the hands of the defendant and his lawyer. That is why giving due regard to the client's personal reactions to particular jurors is so important. If the selection decisions are based on science, then science can be credited with the result rather than the emphasis being placed on the client who, after selecting the jury based on his own input, can truly be said to have had his day in court, even if hindsight reveals his decisions were wise or unwise.

I would caution that the need for personal participation and validation should not be so easily substituted by science. The defendant's input is part of the intangible quality of freedom of choice which plays an important role in our system. It is that freedom to choose which novelist Aldous Huxley described as "the right to live in constant apprehension of what may happen tomorrow." ALDOUS HUXLEY, *BRAVE NEW WORLD* 163 (1946). Huxley's classic work "is a fable about a world . . . where social stability is based on a scientific caste system. Human beings, graded from highest intellectuals to lowest manual workers." *THE OXFORD COMPANION TO ENGLISH LITERATURE* 127 (Margaret Drabble ed., 5th ed. 1985). Jury selection limited by the unproven promise of scientific accuracy has a potential dehumanizing effect on the criminal justice process, particularly for a criminal defendant who will be bound by the jury selection decisions in his case.

276. See MCGINNISS, *supra* note 268, at 585. Indeed, it has been noted that: many commentators—both lawyers and social scientists—have expressed skepticism regarding the ability of psychologist consultants to be of any real assistance in winning cases. Those skeptics from the legal community typically argue that trial preparation, including jury selection, is an art not a science, and that the instincts of a seasoned trial lawyer are superior to any social scientific approach.

Dennis P. Stolle et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 *LAW & PSYCHOL. REV.* 139, 143 (1996) (footnotes omitted).

It is obviously easy to criticize the attorney's jury selection decision in hindsight. But the point to be made here is not so much the correctness of the jury selection strategy, but the importance of the client's input into the process. MacDonald had strong opinions about jury selection. That process is difficult enough without the added complications presented by *Batson*.

The law as it currently stands blurs the lines between client and lawyer. Although the client may wish to express preferences for jurors based on race or gender, the law appears to prohibit the lawyer from acting on those preferences. Thus, the client, who has the most to lose from a poor result in the trial, places his lawyer in an awkward ethical position merely by expressing his own private racial or gender opinions.

The client has no ethical obligation to refuse to consider such preferences. The lawyer, however, is apparently forbidden to advance the client's biases. This may lead to the lawyer discouraging the client from giving his opinions on jury selection for fear of placing himself in an ethical dilemma.<sup>277</sup> Discouraging the client's input may result in straining the client's confidence in the relationship with his attorney. The jurors may even notice the client's lack of involvement in the jury selection process, leaving them the impression that the client is not taking the matter seriously.<sup>278</sup> The ethical tragedy is that the *Batson* doctrine may require that the lawyer's ethical obligation causes him to diminish the client's input into the part of the trial process that he is most concerned about and for which he holds the strongest opinions.

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277. Lawyers have always been required to walk a fine line regarding the ethics of representing criminal defendants. On the one hand, it is clear that their loyalty remains with the client. On the other, there always lurks the danger that the public perceives the attorney's role as shielding a guilty client from conviction. "No issue is more central to the American legal system and more controversial among the American public than the criminal defense lawyer's obligations in defending the guilty." DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 653 (1994). The tension between these obligations effects how the attorney makes decisions during a criminal trial.

278. Jurors recognize the defendant's participation at trial during jury selection. One juror from the Bernhard Goetz trial observed:

I had many opportunities to observe the man. . . . His face was expressionless, betraying no emotion, and he displayed little if any reaction to anything that went on around him. . . . I got the feeling that his opinions about the prospective jurors were being put to use by his counsel. He wasn't just their pawn, along for the ride.

MARK LESLY WITH CHARLES SHUTTLEWORTH, *SUBWAY GUNMAN: A JUROR'S ACCOUNT OF THE BERNHARD GOETZ TRIAL* 15 (1988).

## VI. ACT V: RESOLVING THE ETHICAL TRAGEDIES

The challenge of resolving a problem as complicated as the one that the *Batson* doctrine has created involves a realistic appraisal of which circumstances can be corrected and which cannot. It should be remembered that although *Batson* recognized a constitutional rule against discrimination, its mechanisms are primarily procedural.<sup>279</sup> Thus, it may be that a procedural solution is the best place to solve some of the ethical tragedies this case has created.<sup>280</sup>

The primary evil sought to be remedied by *Batson* was racial exclusion of all black jurors from the trials of black defendants.<sup>281</sup> I would propose a jury selection procedure that would permit a defendant more flexibility to actually choose jurors that he would desire to serve on his jury. I call this procedure "affirmative selection."<sup>282</sup> This would be accomplished by permitting the defendant to trade some of his peremptory challenges to place qualified jurors,<sup>283</sup> that he believes are favorable, to judge his case. The number of challenges traded to actually select jurors should never exceed one half of the total number of the jury panel.<sup>284</sup> Once the defendant has made a decision to select a juror, the prosecutor will not be able to remove that juror with a peremptory challenge. Accordingly, it will be necessary for the defendant to make his affirmative selections from the jury panel at the beginning of jury selection.<sup>285</sup>

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279. See *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986).

280. See *id.* at 97-99. The Court noted that the states are free to implement a "variety of jury selection practices." *Id.* at 99 n.24.

281. See *id.* at 87-90; see also *supra* notes 54-55 and accompanying text.

282. This phrase is not to be confused with affirmative action. It does not suggest an advantage for any particular party in the criminal case, rather, it contemplates that jurors be selected by preferred traits as opposed to being rejected for less preferred characteristics. By changing the focus and the jury selection tool, I believe we will be able to avoid a host of procedural problems that plague the peremptory challenge system.

283. Since the jurors who will be available for selection will have already been established as eligible to serve because they will not have been excluded for "cause," there is little reason to be concerned that the jury selected from this process would not be as capable of deciding the case as one selected under the current peremptory challenge system.

284. By providing that the defendant could not select more than one half the panel in this manner, it would assure that he would not dominate the jury selection process.

285. I recognize that the selection process I propose would be greatly affected by the size of the prospective jury panel, the size of the community, or the nature or notoriety the case may have received. For example, a high profile capital case may require a larger panel of jurors to select from than a somewhat minor theft charge. I

The prosecution's recourse against the defendant's affirmative selection will be that it may select a juror from the panel that is to its liking. Although such a procedure might at first blush appear to simply permit all parties to impose their offensive and discriminatory stereotypes, it offers several advantages over the system currently in place.

First, since the defendant triggers the process of actual affirmative selection of jurors, there would be no point for the prosecutor to attempt to defeat the selection of jurors that might be of similar background to the defendant.<sup>286</sup> For a black defendant who may desire to include blacks on his jury, this process offers the option to prevent the prosecutor from excluding black jurors.<sup>287</sup> The same advantage would extend to defendants in communities with substantial minority populations other than African American.<sup>288</sup> Once it is clear that total exclusion will not be possible, a prosecutor would have little incentive to engage in such a practice. This adjustment to the jury selection process will have the advantage of resolving the primary evil *Batson* sought to address—total exclusion of blacks from a jury.<sup>289</sup>

It does not make sense to create a doctrine that does not solve the primary concern for which it was created, while creating greater problems in its place. The awkward hearing into why jurors have been challenged offers little hope of actually increasing minority participation on criminal juries.<sup>290</sup> Affirmative selection does offer the realistic possibility of increased minority participation in actual jury decision making.

Second, there is an advantage to permitting litigants to include jurors that they believe are favorable, rather than rejecting those they find unacceptable. It is no facial equal protection violation for one juror to be selected by a lawyer who favors that juror's background or characteristics over others.<sup>291</sup> If a prosecutor or defense lawyer engages in blatant exclusion of blacks or women with their peremptory challenges, the *Batson* mechanism, for what its worth, would still be available.<sup>292</sup>

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think these problems can be managed much more easily than the *Batson* problem that they will eliminate.

286. See *supra* note 7.

287. See *id.*

288. See *Hernandez v. New York*, 500 U.S. 352, 363-72 (1991).

289. See *Batson v. Kentucky*, 476 U.S. 79, 87-90 (1986).

290. See *supra* notes 193-94 and accompanying text.

291. A preference in selecting a juror is different from an exclusion or rejection of a juror because, among other reasons, a juror has no right to serve on any particular jury.

292. See *supra* note 206. Affirmative jury selection proposals have been advanced

However, affirmative selection eliminates the need for juror rejection to be the primary tool for empaneling favorable jurors by both the prosecution and defense. The defendant would be able to select who he believes to be his peers,<sup>293</sup> while at the same time be able to eliminate jurors he believes to be highly undesirable.<sup>294</sup>

This kind of flexibility protects the highly valued ability of the defendant to participate in jury selection,<sup>295</sup> while at the same time permits the prosecutor to respond to the defense's advocacy by an "affirmative selection" of his own. This give and take will achieve the balance that has been traditionally considered the advantage of the pre-Batson system of unbridled peremptory challenges.<sup>296</sup>

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by other writers. One insightful proposal, by Professor Deborah A. Ramirez, suggests that under an ancient common law doctrine, litigants can be given a greater role in jury selection by a system that provides "each litigant with a certain number of affirmative peremptory choices, which litigants could use to include their 'peers' within the petit jury." Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and A Proposal for Change*, 74 B.U. L. Rev. 777, 806 (1994).

My proposal, while embracing several of the approaches and some of the reasoning of Professor Ramirez, differs in at least two substantial respects. First, the suggestion that my affirmative selection process be triggered only by the defendant and limited by his number of choices. Thus, if a defendant wishes to affirmatively select only one juror, he may do so being fully aware that the prosecution may only balance his selection with one selection of his own. This returns to the lawyer and client the coveted advocacy and control characteristic of the pre-Batson jury selection model. Second, Professor Ramirez would permit some of her affirmatively selected jurors to be struck from the petit jury by the prosecutor or the defense. *See id.* at 806-07. My proposal would not permit either party to remove an affirmatively selected juror. Such a procedure would highlight the importance of direct jury selection participation because each side would be linked to the consequences of their own strategic choices if the defendant chooses to trigger in the affirmative selection process.

293. *See supra* note 95.

294. Several defense attorneys I interviewed for this Article were concerned that a system that afforded them the option to select one half of the jury and the prosecutor the right to select the other half would result in more hung juries if they could not exclude some of the highly undesirable jurors. In short, many believed that it was easier to determine what jurors they did not like, than it was to select jurors who were favorably predisposed to their client's case.

295. *See supra* note 13 and accompanying text.

296. In support of the value of peremptory challenges, Professor Barbara Babcock has written:

Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predisposition that would make them inappropriate jurors for

Third, the affirmative selection process removes many of the ethical dilemmas that are legion under the current system. It removes the potential criminality of the use of jury consultants and the demographic information on which they routinely rely.<sup>297</sup> A lawyer operating in a preference based system would be free to consider information he believes would assist him in shaping a favorable jury. There would be no need to ignore race or gender as part of the equation for exercising jury preference.

Affirmative selection would reduce the need for lawyers to create adequate neutral reasons for rejecting a particular juror in order to reach one believed to be more favorable. This advantage assumes that a lawyer will generally avoid dishonesty to the court if he has given an alternative. Certainly, a lawyer with a mind to discriminate may attempt to do so no matter what system is in place. But since it is nearly impossible for a judge to know whether a lawyer is being dishonest in a *Batson* hearing, removing the incentive to fabricate is a better way to ensure candor in the courtroom.<sup>298</sup>

Fourth, for those defense lawyers who trigger the option of affirmative selection, I would deem that any appeal on the basis of *Batson* would be waived.<sup>299</sup> If the defendant believed that there was an underrepresentation of minorities in the jury pool itself, he could pre-

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particular kinds of cases. . . . The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes.

Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 553 (1975) (footnote omitted).

297. See FREDERICK, *supra* note 15, §§ 3-202 to -203, at 47-65.

298. This is not to say that one should never take action against prosecutors or defense lawyers who act in a blatantly racist manner against jurors. The jurors may still take legal action for their exclusion from the jury. See *supra* note 143 and accompanying text. The lawyer is also bound by his oath of office to operate in accord with his ethical responsibility not to discriminate in excluding jurors, and prosecutors have a special responsibility to the community at large to perform their duties in light of special ethical standards as a representative of the people. See, e.g., *Berger v. New York*, 388 U.S. 41 (1967). Thus, the prosecutor should be very careful to avoid discriminatory conduct.

299. This proposal would reduce the clutter in the appellate court resolving such issues. Again, the defendant would have to decide, with the help of his lawyer, which weapons he would choose to pursue his case.

Almost immediately after *Batson* was decided, appeals under the case flourished. See Stephanie B. Goldberg, *Batson and the Straight-Faced Test*, A.B.A. J., Aug. 1992, at 82, 82. By 1990, there had been more than 700 state and federal cases reported on the subject. See *id.* My proposal would eliminate a large number of these cases.

serve that objection on appeal,<sup>300</sup> but if he elected to affirmatively select a portion of his jury, this would be presumed to be an unappealable strategic choice.<sup>301</sup> If the defense lawyer wishes to take his chances with a *Batson* hearing and appeal that issue, he would simply refuse to trigger affirmative selection.

Affirmative selection would be a better method than to abolish peremptory challenges, as has been suggested by many scholars.<sup>302</sup> Proponents of abolition argue that discrimination against blacks and women should not be tolerated in jury selection.<sup>303</sup> Abolition of the challenge will not necessarily result in a more inclusive jury.<sup>304</sup>

Reform of the jury selection system alone will not be enough to address the concerns that have been recently generated by the jury reform debate.<sup>305</sup> Adjustments to the system that will inform lawyers about the jurors, make jury pools more inclusive, and educate jurors about their job will also supplement the effectiveness of my proposed jury selection system.

During the voir dire process, the lawyers should be permitted to ask jurors more questions about their backgrounds and experiences so that jurors may be selected based on information beyond the lawyer's observations of their physical characteristics.<sup>306</sup> Heavy reliance on physical observation of jurors without an opportunity to gather more relevant information encourages lawyers to engage in unfair stereotyping for

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300. See *Turner v. Fouche*, 396 U.S. 346, 359-60 (1970) (invalidating a jury list based on the "substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list").

301. Appellate courts already do this when lawyers fail to use all their strikes when at trial appealing challenges for cause.

302. See *supra* note 72 and accompanying text.

303. See *supra* note 142 and accompanying text.

304. Eliminating peremptory challenges will not necessarily mean that more minorities will serve on juries. It is still required that steps be taken to increase the number of minorities in the jury pool.

305. The jury reform debate is not a new idea in the United States. Efforts to improve the jury system have existed even in the early 1940s. Complaints about the system's shortcomings like the length of time for jury service, the qualifications of citizen jurors, and the effects of press coverage were all concerns of reformers before the onset of the electronic age. See LESTER BERNHARDT ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 412 (1947).

306. The Supreme Court has held that the scope of voir dire is governed by the discretion of the trial court subject to violation of the Fourteenth Amendment of the United States Constitution. See *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973). It has also been recognized that voir dire examination also assists counsel in exercising peremptory challenges. See *Mu'min v. Virginia*, 500 U.S. 415, 431 (1991).

want of an alternative.<sup>307</sup>

I also believe that jurors should receive more education about their role in the process.<sup>308</sup> To advance this goal, I would propose a system where jurors would receive one day of mandatory juror education prior to their being selected to serve. The particulars of the content of such juror training could be determined by panels composed of prosecutors, judges, and defense lawyers working together with local bar associations.<sup>309</sup>

This training would create better informed decision makers and reduce the possibility that a jury trial verdict would merely be the result of jury selection science,<sup>310</sup> clever advocacy,<sup>311</sup> or racial jury nullification.<sup>312</sup> This training component would provide the needed balance so that everyone in the system could do their job as they see fit. Lawyers could retain their role as advocates, judges could remain moderators, and jurors, fully informed of their role, could thoughtfully decide the cases. Educating the jury about its proper role and, indeed, the role of all participants in the process, will remove much of the mystery from the jury trial for the jurors and reduce the risk that they will decide the case based on assumptions that they have formed from information they may have received about the workings of a jury from the popular media.<sup>313</sup>

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307. See *supra* note 15 and accompanying text.

308. Today, most jurors receive only a brief orientation prior to serving on a jury. The primary guidance that will be given is generally withheld until they are given instructions by the judge at the end of a case.

309. The attorneys and judges could receive credit toward any state continuing legal education requirement they may be obligated to satisfy.

310. See *supra* notes 231-32 and accompanying text.

311. See *supra* note 248.

312. See *supra* notes 233, 239-42 and accompanying text.

313. Any jury training program should include a discussion of the role of the defense lawyer and prosecutor; a discussion of the judge's role and the events that take place routinely during a trial, like bench conferences and information on why they cannot talk to outsiders or each other prior to their deliberations. There is no reason jurors should not know what role these frequent events play in a trial. The risk that they will speculate on such matters or attach improper significance to them is far too great, particularly in light of the fact that most courtroom rules and procedures have some basis in logic.

As one commentator has noted:

Our legal system's single-minded devotion to a somewhat mechanistic notion of "fairness" has led us to keep from the jury important information that we fear might have an improper effect on the verdict. This practice reflects the condescension with which courts often treat jurors: we make them wait while the lawyers and judge wrangle; we keep them in the dark about



This concept of juror education could easily fit into the "one day/one trial" system currently in place in many jurisdictions.<sup>314</sup> Such systems could be modified into "two days/one trial" in order to accommodate the proposed training component. Before we consider radical reforms like abandoning the jury system for a different method of trying cases,<sup>315</sup> we should at least attempt to educate jurors better to determine if that improvement will resolve our lack of confidence in the process.

Finally, I believe that we should take serious steps to make jury pools more inclusive of all groups of citizens.<sup>316</sup> Expanding the pool of available jurors is a desirable goal in our society and well worth the effort it may require.<sup>317</sup> Some reformers have embraced policies to ex-

much of the proceedings.

William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 586 (1991) (footnote omitted).

314. G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 217 (Mar./Apr. 1996) (footnote omitted). The so called "one day/one trial" system is currently in place in about one-third of the United States. *Id.* (footnote omitted). One Michigan county experiment with "one day/one trial" juries showed that they include more executives, professionals and others of an increased educational level. See *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1455-56 (1997). "Combined with the elimination of professional exemptions, one day/one trial could greatly increase courts' chances of obtaining more inclusive jury pools." *Id.* at 1456.

315. In Germany, for example, juries have been abandoned altogether. See Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227, 228 (1995). They have been replaced by a mixed system where "lay participants . . . sit on panels with professional judges." *Id.* See generally John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195 (discussing strengths and weaknesses of a mixed jury system).

316. Inclusiveness of all groups of citizens in the jury system has been a problem. Aggressive efforts should be made to improve minority participation. "Getting minorities involved in the jury process has been a struggle . . . . The reasons are that voter rolls don't always reflect minority participation and some minority communities tend to be more transient." Mark Curriden, *Jury Reform: No One Agrees on Whether the System is Broken, But Everyone is Trying to Change It*, A.B.A. J., Nov. 1995, at 72, 73. Expanding minority participation will do as much for the integrity of the jury process as any strategy for assuring minorities are not improperly struck from a jury panel.

317. At common law, the respect afforded to jurors was far greater than they receive today. An early criminal law treatise has noted "if anyone strike a juryman in the presence of the courts at Westminster, or the justices of assize, or of oyer and terminer, he will lose his hand, forfeit his goods, and the profits of his land during his life." 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 526

pand from the practice of using the voting rolls to using motor vehicle registration to draw eligible jurors.<sup>318</sup> I agree with such an approach, but I believe more is required. I propose that every person seeking a driver's license be required to attend mandatory citizenship training on the role and function of the jury before being issued the privilege of a driver's license.<sup>319</sup> Such training should also be required during driver's license renewal so that more citizens may be reminded of their important obligation to serve on a jury.<sup>320</sup>

This process will particularly instill the value of the jury in the nation's youth. There are few items more prized among young people than a driver's license.<sup>321</sup> By combining the privilege to drive with the privilege and responsibility to serve on a jury, we will do more than simply pay lip service to this important civic obligation. Less tolerance for avoiding jury service<sup>322</sup> and more respect for the role of the jury should be welcome by-products of such reforms.<sup>323</sup>

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(1832).

318. By 1991, only Maine, Michigan, Minnesota, and Oklahoma used motor vehicle registration lists as the primary source for obtaining jurors. *See* Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1057 n.173 (1991) (collecting the various sources of selecting jurors among the several states).

319. It may be that a few exceptions to this requirement may be necessary, but such exceptions should be deemed highly necessary.

320. Once the driver has received the training, they could be certified for such completion and need not receive it again until they would actually be called to serve under the "two day/one trial" system I have already discussed. *See supra* notes 307-16 and accompanying text.

321. Perhaps the use of the privilege to drive as an opportunity to educate citizens about the responsibility to serve on a jury will promote greater respect for the courts in general. Most citizens come into contact with the court system for the first time on traffic matters. It makes sense to link jury service and driving privilege for this reason alone.

322. I agree with the assessment of Stephen Adler that "[b]uilding a better jury means treating jury duty like military service in wartime; the requirement of service should be, for the most part, nonnegotiable." STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 220 (1994). He notes that only "[a]bout 45 percent of Americans who are sent jury notices actually appear at the courthouse." *Id.* at 243 n.1.

323. Many people do not take their jury service obligation seriously. Noted trial attorney F. Lee Bailey once remarked that many people do not respect the obligation to serve on a jury. *See* F. LEE BAILEY WITH HARVEY ARONSON, *THE DEFENSE NEVER RESTS* 257 (1971). "Most people put jury duty in a class with measles and root canal work. Quite often, intelligent, successful people who would make good jurors are the ones who get out of serving." *Id.*

## VII. CONCLUSION

The jury has received severe criticism in recent years,<sup>324</sup> particularly regarding how its members are chosen.<sup>325</sup> The Supreme Court, attempting to solve the problem of blatant racial discrimination,<sup>326</sup> created a set of rules it believed would solve some of the problems, but has created others in its place. By rethinking the way juries are selected, much of the dishonesty and confusion that ten years of well intentioned, but unworkable rules have created, can be avoided.<sup>327</sup>

By combining the technique of "affirmative selection,"<sup>328</sup> with reforms in jury voir dire,<sup>329</sup> jury education,<sup>330</sup> and by the expansion of the jury pool, we can achieve the goals of a more effective and ethical jury system.<sup>331</sup> The integrity of the profession requires that we replace the "catch me if you can"<sup>332</sup> system that has resulted from *Batson* and its progeny.<sup>333</sup>

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324. One trial court judge expressed his concerns that "[j]uries may be getting dumber." HAROLD J. ROTHWAX, *GUILTY, THE COLLAPSE OF CRIMINAL JUSTICE* 201 (1996).

325. *See supra* note 255.

326. *See supra* notes 3-8 and accompanying text.

327. *See supra* Parts II-V.

328. *See supra* Part VI.

329. *See id.*

330. *See id.*

331. *See supra* note 17.

332. *See supra* Part III.

333. *See supra* notes 213-14 and accompanying text.