

Reports of Batson's Death Have Been Greatly Exaggerated:¹ How the *Batson* Doctrine Enforces a Normative Framework Of Legal Ethics

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I. Introduction: Preserving *Batson* and the Peremptory Challenge

Despite the peremptory challenge's venerable common-law³ antecedents, there has lately been a movement in the criminal justice system to abolish this ancient workhorse. Jurists,⁴ practitioners and

¹ The phrase "Reports of my death have been greatly exaggerated," attributable to Samuel Langhorne Clemens (Mark Twain), is a famous misquote. Clemens actually wrote "... the report of my death was an exaggeration," in a May 1897 note to the *New York Journal*. The *Journal*, which had conflated news of the illness of Clemens's cousin, James Ross Clemens, into that of Clemens's death, printed Clemens's correction on June 2, 1897. See [http://www.the-right-stuff.com/References/index.html#\[NY%20Jnl%201897%20Twain%20Quotes](http://www.the-right-stuff.com/References/index.html#[NY%20Jnl%201897%20Twain%20Quotes) [last visited 2/23/05]

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³ There is no constitutional right to the peremptory challenge. Instead, it is "in the nature of a statutory privilege, which may be withheld altogether without impairing the constitutional guaranties of an 'impartial jury' and a fair trial." Frazier v. United States, 335 U.S. 497, 505 n.11 (1948). States may grant the right to challenge jurors peremptorily at will, and take it away just as quickly. See Stilson v. United States, 250 U.S. 583, 586 (19__) ("there is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges"). This is why the threats from various state courts and legislatures to eliminate the peremptory challenge must be taken seriously.

⁴ See, e.g., Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 836 (1997); People v. Tarkisha Brown, __ N.Y.2d __ (2002)(Kaye, J., concurring) (calling for elimination of peremptories); Batson v. Kentucky, 476 U.S. 79 (1986) (Marshall, J, concurring) (raising concern that Batson procedure may not eliminate discrimination and arguing for peremptory challenge abolishment); Edmondson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting) (objecting to extension of *Batson* to civil cases); Miller-El v. Cockrel, 537 U.S. 322 (2003) (Thomas, J., dissenting). But see Christopher E. Smith & Roxanne Ochoa, *The Peremptory Challenge in the Eyes of the Trial Judge*, 79 JUDICATURE 185, 186 (January-February 1996) (in survey of federal district court judges, majority viewed peremptory challenges as beneficial mechanism for attorney to remove potential jurors biased in favor of opposition).

legal scholars⁵ have begun to clamor for the outright prohibition of this jury selection tool, a movement that essentially began with the introduction of the *Batson* procedure a little over twenty years ago.⁶ *Batson*'s critics argue that the doctrine is in a state of disarray, and for many, their solution is to simply dispense with the entire exercise.

The reasons for eliminating the peremptory challenge are varied. The combination of the *Batson* procedure and the peremptory challenge have been accused of causing multiple problems, including confusing standards; injecting bias into the proceedings; permitting defense counsel's unclean hands; inculcation of bias and unconscious racism into jury selection; waste of judicial time and money; and the negative public perception of jury selection.

⁵ For a representative sampling of academic takes on the problems inherent in the *Batson* procedure and the peremptory challenge, see Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153 (1989); Cheryl L. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror's Speech and Association Rights*, 24 Hofstra L. Rev. 567, 583-86 (1996); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 554-564 (1992); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501 (1999); Comment, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. Chi. L. Rev. 1311 (1997); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 Geo. L.J. 945 (1998); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex. L. Rev. 1041, 114-36 (1995); Kenneth J. Melilli, *Batson in Practice: What we have Learned about Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 502-03 (1996); Vivien T. Montz and Craig L. Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. Miami L. Rev. 451 (2000); William T. Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 Sup. Ct. Rev. 97 (1987); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 760-64 (1992). But see Cheryl Brown, Comment, *Challenging the Challenge: Twelve Years after Batson, Courts are Still Struggling to Fill in the Gaps Left by The Supreme Court*, 28 U. BALT. L. REV. 379 (1999) (concluding that *Batson* challenge necessary tool to eliminate discrimination in jury selection despite "lack of direction"); Barbara L. Horowitz, *The Extinction of the Peremptory Challenge: What Will the Jury System Lose by its Demise*, 61 U. CIN. L. REV. 1391 (1993) (arguing that elimination of peremptory challenges will take away one of most important right guaranteed to litigant); A.C. Johnstone, Comment, 1998 U. Chi. Legal F. 441 (1998) (explaining pragmatic value of peremptory challenge while arguing that *Batson* should not be extended); Jean Montoya, *What's So Magical About Black Women? Peremptory Challenges at the Intersection of Race and Gender*, 3 MICH. J. GENDER & L. 369 (1996) (arguing that *Batson* hearings on peremptory challenges do not consume considerable amount of court time, and providing critique of *Batson* standards).

⁶ See *Batson v. Kentucky*, 476 U.S. 79 (1986).

What the *Batson* critics overlook, however, is the positive power of the *Batson* doctrine. Using legal ethics as a lens through which to interpret *Batson* sheds new light on the doctrine. Properly understood, the *Batson* procedure enforces a normative framework of legal ethics, providing an aspirational standard for the legal profession. By fostering a non-discrimination norm as part of the norm of professionalization, *Batson* both improves the actions of lawyer and judges during jury selection while at the same time constructing and compelling an aspirational code of ethics. *Batson*'s ethical imperative affects the norms of the legal profession itself.

Batson has a largely unarticulated ethical component, one that invokes a lawyer's professional responsibility. By and through the *Batson* procedure, prosecutors, defense counsel and judges are compelled to act ethically in shaping the criminal jury. For trial counsel, this means trying to eliminate overtly illegal considerations of race and gender from jury selections and pointing out their opponents' unconstitutional choices, as well as being ethical and honest when defending against a *Batson* claim. For the bench, this means scrutinizing peremptory challenges carefully, occasionally bringing a sua sponte *Batson* challenge of their own, as well as applying considered and reasoned analysis in the three-step *Batson* process. *Batson*'s ethical component not only complicates our understanding of the professional behavior of the criminal bar, but also provides an aspirational standard for criminal lawyers and judges.

The *Batson* procedure also gives us a concrete example of how the norms of the legal profession itself can be affected by laws. Traditionally, we think of laws being shaped by norms.⁷ With *Batson*, however, the law itself is affecting the legal profession's non-discrimination norms. With the constant requirement to abide by the rules of *Batson* (that is, no challenges based on race or gender⁸), lawyers are compelled to focus on the norm of professionalism during jury selection, an important social norm. The desire to eliminate the

⁷ See, e.g., Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in MICHAEL HECTER & KARL DIETER-OPPS, EDS, *Social Norms* (Russell Sage Foundation, 2001); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). For example, while it was once common to perform public floggings in the town square to punish blasphemy and adultery, we no longer do this because our norms of crime have changed. Hence, our changing norms forced a change in the laws. See generally JURGEN HABERMAAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1996) (attempting to bridge internal and external perspectives through discourse theory). I discuss the effect of law and norms within the *Batson* procedure in greater detail *infra* Part I.

⁸ See *JEB v. Alabama*, 511 U.S. 127, 143 (1994) (forbidding peremptory challenges based solely on gender).

peremptory challenge and the *Batson* procedure disregards the power of the law to affect the social norms of lawyers. *Batson* doctrine creates a space where law—here, the *Batson* procedure—is expressively influencing lawyers’ ethical behavior by the message it embodies.

Finally, a legal ethics approach to *Batson* provides the best means of understanding why the courts have adopted this specific doctrine to enforce the two critical rights of criminal jury selection: the right of the defendant to a bias-free jury and the right of the potential juror to serve. Instead of requiring that a wrongly excluded juror seek remedy in an extra-legal proceeding outside of the criminal trial, the Supreme Court demanded that criminal courts themselves actively participate in ensuring that jury selection is free from bias. This decision makes most sense when legal ethics is viewed as a basis for a normative framework for establishing a means of enforcement for lawyers’ ethical obligations.

Viewing the *Batson* doctrine through a legal ethics lens also helps clarify why the Supreme Court chose to enforce the norm of non-discrimination through the trial court. Given the tradition within legal ethics of imposing procedures and prophylactic rules to ensure that the legal profession meets its obligations, the Court decided that the best way to enforce ethical obligations was to remind lawyers of the profession’s ethical aspirations. Accordingly, *Batson* functions as both a reminder of lawyers’ aspirational goals as well as a means of enforcement and attorney discipline.

This Article has several aims. First, I will propose a legal ethics theory of *Batson*, as the *Batson* doctrine is a vehicle through which the legal system achieves a major aspiration of professionally responsible behavior. Second, I will provide a measured look at the anxiety surrounding the *Batson* procedure and the peremptory challenge, starting with its most recent history, and explain how my theory of legal ethics can resolve many of the *Batson* grievances. Finally, I will examine why *Batson* is so important and look at some of the additional implications of my legal ethics approach.

II. A Legal Ethics Theory of *Batson*

The ethical deliberations compelled and enforced by *Batson* are critical in understanding *Batson*’s value. *Batson* has an unarticulated ethical component, one that invokes a lawyer’s professional responsibility and fosters a nondiscrimination norm as part of the norm of professionalism. This is an area mostly unexplored by the professional responsibility literature,⁹ and one I will explore in greater detail.

⁹ One of the few treatments of ethics in *Batson* can be found in Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Judges*, 73 CHICAGO-KENT LAW REVIEW,

The field of legal ethics provides a useful lens for thinking about *Batson*. One aspect of *Batson* which is unique is that it protects the right of the potential jurors to serve on the jury, yet it is enforced in criminal justice proceedings by defense lawyers, prosecutors and judges. A focus on legal ethics makes this aspect less anomalous, however, because *Batson*'s ethical imperative compels responsible behavior by attorneys and jurists on behalf of not only the defendant, but also the potential jurors. The result is what one scholar has propounded as a moral theory of ethical lawyering; the lawyer or judge engaging with the *Batson* doctrine—which occurs in each and every jury selection—takes "personal moral responsibility for the consequences of their professional acts."¹⁰

The system of legal ethics is generally designed to protect the public and, in doing so, protect the integrity and reputation of the profession. Traditionally, the standard enforcement mechanism for legal ethic complaints is the client-initiated attorney disciplinary proceedings. Other types of enforcement mechanisms, however, often create a situation where the threat of the disciplinary proceeding is unlikely to provide a means of policing wrongdoing. For example, we frequently rely on prosecutors and other lawyers to initiate charges against attorneys who assist their clients' criminal activities.¹¹ Traditional enforcement mechanisms, however, frequently fail to police attorney misconduct, as the punishment is so far attenuated

SYMPOSIUM ON RACE AND CRIMINAL LAW 475 (1998) (articulating a broader vision of the *Batson* obligation and providing a concrete ethical standard for assessing when a strike violates that obligation). Johnson, however, excludes defense counsel from her vision, and although she has recognized that *Batson* imposes ethical obligations on lawyers, she disagrees that legal ethics actually helps explain *Batson* doctrine. Robin Charlow's exploration of the ethicality of *Batson* focuses primarily on possible sanctions to be visited on attorneys who make discriminatory strikes. See Charlow, *supra* note ___, at ___.

¹⁰ DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 17 (2000). See also ANTHONY T. KRONMAN, *THE LOST LAWYER : FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (discussing the ideal of the lawyer-statesman, which Kronman maintains is dying a slow death in the American legal profession). Although I agree with Kronman that the lawyer-statesman ideal is in decline, I do not agree with his proposition that the ideals that have risen to replace it are "anemic." Id. at 3. On the contrary, I contend that *Batson* is one example that illustrates the sense of honor and duty that most attorneys and judges possess, particularly in the arena of criminal justice, that most maligned of practice areas. As I discuss below, *Batson* doctrine, although imperfect, gives lawyers an aspirational ideal that is achievable in the realities of daily practice. Although not so weighty a concept as the lawyer-statesman ideal, *Batson* promotes legal ethics in one of the most fraught areas of justice, the criminal trial.

¹¹ A recent example of this is the prosecution and conviction of New York defense attorney Lynne Stewart for facilitating the expression of terrorist messages from her client, Omar Abdel Rahman.

from the actual misdeed that there is little reinforcement of positive behavior.

The *Batson* procedure is a special type of enforcement mechanism, one which differs from the rest by accurately and immediately policing wrongdoing. *Batson* should thus be seen as one way in which the legal system achieves one of its aspirations, because the ethical behavior of participants in the criminal trial is ensured by the rules of the doctrine. As one scholar notes, “the likelihood that the traits of character on which ethical lawyering depends will be fostered or undermined among individual lawyers will be determined to a great extent by the shape of the institutional framework of legal practice.”¹² The framework of *Batson* fosters ethical lawyering by its immediate and vigorous enforcement mechanisms.

By and through the *Batson* procedure, prosecutors, defense counsel¹³ and judges are compelled to act ethically in shaping the criminal jury.¹⁴ For counsel, this means trying to eliminate overtly illegal considerations of race and gender from their jury selections and pointing out their opponents’ unconstitutional choices, as well as being ethical and honest when undergoing a *Batson* challenge to their peremptory challenge of a potential juror. For the bench, this means scrutinizing peremptory challenges carefully, occasionally bringing a sua sponte *Batson* challenge of their own, as well as considered and reasoned analysis in the three-step *Batson* process.¹⁵

¹² Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1630 (2002).

¹³ For a variety of reasons, criminal defense lawyers have been scrutinized more vigorously than other attorneys in regards to legal ethics. For more extensive arguments regarding the special position of criminal defense lawyers, see David Luban, *Are Criminal Defense Lawyers Different?*, 91 MICH. L. REV. 1729 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767 (1993).

¹⁴ As will become evident, I disagree with such legal scholars who argue that lawyers are becoming more dishonest as time goes on. For a representative sample of this view, see W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527 (2002)(suggesting that decline in lawyer honesty is main reason for decline in the public's perception of lawyers).

¹⁵ The state action invoked by the *Batson* procedure brings up the issue of “the appearance of impropriety and the expressive component of state action,” as explored recently by Deborah Hellman in *Judging By Appearances: Professional Ethics, Expressive Government and the Morality of How Things Seem*, 60 MD. L. REV. 653, __ (2001) (arguing that the appearance of impropriety can inform the discussion on the expressive dimension of state action). As discussed above, *Batson* is so important—and so scrutinized—because it involves the public’s right

Batson's ethical component not only complicates our understanding of the professional behavior of criminal lawyers, but also provides an aspirational standard¹⁶ for criminal lawyers and judges. By asserting that defense counsel have unclean hands, or that both prosecutors and defense wish to misuse peremptories to manipulate voir dire, as some of the *Batson* critics do, is to underestimate the professional behavior of not only criminal lawyers and their adversaries, but also the criminal bench. *Batson's* role in uncovering pretext, in the beginning of the criminal jury trial, creates a level of ethicality which sets the tone for the rest of the judicial proceeding.

The idea that lawyers play a role as public guardian is definitely one in retreat.¹⁷ Some scholars, however, have suggested that lawyers' commitment to the public good is an aspiration worth reviving.¹⁸ This is where *Batson* may provide a useful example. By providing an open forum in which all three actors in the criminal justice system are not only required but also encouraged to watch for bias and prejudice, their own¹⁹ and others', *Batson* can play a small

to serve on a jury, and all peremptory challenges are enacted by the state. Impermissibly striking potential jurors on the basis of race or gender causes two potential harms to merge: in expressive state action, the mimetic (appearing to do wrong) and non-mimetic (actually doing wrong) combine, as "appearance and reality coalesce." Hellman, *Judging Appearances*, at ___. In Hellman's phrasing, how the action of impermissibly striking jurors due to race or gender appears (biased) and how it actually is (biased) are the same.

¹⁶ By promoting this aspiration standard, I do not mean to contradict Fred Zacharias's keen observation about "the fiction that lawyers somehow are, or can be regulated into being, more upstanding than laypersons." Fred Zacharias, *The Humanization of Lawyers*, Public Law and Legal Theory Research Paper Series 5 (2003). Instead, I look to a more realistic aspirational standard, one that promotes not so much a "higher standard of citizenship" as a standard of basic ethical behavior that I would hope all people would strive for, not just lawyers.

¹⁷ See Russell Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 417-19 (2001).

¹⁸ See Russell Pearce, *Retreat of the Elite*, Am. Law, July 2001, at 79. Pearce observes, however, that efforts at promoting this kind of commitment have failed so far, because law is still a business. *Id.* For a view of how aspirational legal ethics can function in the business law world, see Howard M. Erichson, *Doing Well by Doing Good*, 57 VAND. L. REV. __ (2004).

¹⁹ Of course, one specific concern defense counsel has which the prosecutor and the judge do not is the question of client loyalty. As Erichson observes, while the theme of commitment to the public good pervades discussions of lawyer professionalism, views differ substantially on the extent to which lawyers should focus on the public good versus loyal and zealous representation of their clients. See Erichson, *supra* note __, at 23 n.117. For example, compare Monroe Freedman, *UNDERSTANDING LAWYERS' ETHICS* (1990) (arguing for an advocacy

role in reviving the conception of lawyers as public guardians.²⁰ By judicious use of *Batson*, the original sense of “pro bono publico”—the broad concept of what was within the public interest—could be restored as well, instead of limiting it to the definition it currently has of undercompensated legal representation.²¹ In the spirit of Roscoe Pound, *Batson* could link professional conduct with serving the public interest—“it is of the essence of a profession that it is practiced in a spirit of public interest.”²² As well, careful and proper use of *Batson* could provide the moral accountability that professional responsibility scholars desire to instill into the profession at large.²³

Batson, too, relies on a shared trust between the prosecutor, defense counsel and judge. Although each and any one of these players may start the *Batson* ritual by raising the challenge, in the end the others can only rely on the challenged attorney’s word whether he has a genuine race-neutral reason for striking the potential juror. Once the *Batson* challenge has been raised, if the race-neutral reasoning is found suspect, then the other two actors in the criminal trial are bound to be more suspicious of the challenged attorney, since the trust has been broken. Maintaining this level of trust provides another way in

perspective); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (same) with David Luban, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (arguing for a perspective of moral activism); William Simon, *THE PRACTICE OF JUSTICE* (1998) (arguing for a competing vision focusing on legal merit and justice as opposed to subjective morality).

²⁰ One area in which it can be argued that the role of the lawyer as public guardian still remains is in “cause lawyering.” Menkel-Meadows defines cause lawyering as “an activity that seeks to use law-related means or seeks to change laws or regulations to achieve greater social justice,” for both particular individuals and disadvantaged groups. *See* Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in Austin Sarat & Stuart Scheingold, eds., *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 38 (1998). Many, if not all, criminal defense attorneys, particularly those who represent the indigent, see their role as counsel as a means of cause lawyering.

²¹ *See* Erichson, *supra* note ___, at 18. As Erichson points out, “the profession’s modern usage of the phrase ‘pro bono publico’ includes representation without fee as well as some instances of representation for a substantially reduced fee.” *See id.*, *supra* note ___, at 18 n.87. Erichson argues, correctly in my view, that the “prevailing conception of public interest work is based on considered to be public interest work is based on an implicit determination of market undervaluation,” but this does not have to be the case. *See id.* *See also* Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to State Expectations*, 77 TUL. L. REV. 91, 113 (2002).

²² Roscoe Pound, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 9 (1953).

²³ *See, e.g.*, Deborah Rhode, *IN THE INTERESTS OF JUSTICE, REFORMING THE LEGAL PROFESSION* (2000).

which *Batson* positively influences legal ethics. Moreover, it helps illustrate how the norms of professional responsibility are affected by legal sources.

But *Batson*'s ethical component is even broader. As one legal ethics scholar has observed:

How lawyers reconcile the tension between moral aspirations and pragmatic constraints is important not just for the profession but also for the nation. Lawyers play a crucial role in the structure of our private affairs and public institutions. . . . A central challenge of legal practice is how to live a life of integrity in the tension between these competing demands.²⁴

Batson's requirement that lawyers and judges behave ethically has spillover effects onto the larger world of criminal justice.²⁵ The criminal defendant, knowing her lawyer cannot illegally strike potential jurors based on race, ethnicity or gender, is touched by the egalitarian principles embedded in the procedure. The prosecutor representing the state or the nation knows his actions, if illegal or underhanded, will reflect negatively on the polity. The judge has her own responsibility to independently scrutinize each side's peremptory challenges and isolate any that even smack of improper reasoning. The *Batson* ritual, enacted over and over again in the criminal courtroom, promotes ethical behavior not just in the selection of the criminal jury but also the larger world because the integrity and fairness practiced there promotes social justice.²⁶ Social justice begets more social justice.

Additionally, *Batson* provides a respite from the common problems of adversarial justice. The "corruption of judgment"²⁷ that

²⁴ Deborah Rhode, Introduction, *ETHICS IN PRACTICE* __ (Oxford Univ. Press 2000).

²⁵ The *Batson* procedure also provides a corrective for some of the critique of professional responsibility as it is currently taught to lawyers and law students--the legalistic model. As Baron and Greenstein note, "law students learn to think of law generally, and Professional Responsibility specifically, as disengaged from moral considerations." *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME JOURNAL OF LAW, ETHICS AND PUBLIC POLICY __ (2001). *Batson* is a counterpoint to this problem because it is a legal problem directly engaged with the moral considerations of ethical behavior, racial equality and honest practice.

²⁶ As Rhode argues, "The public deserves reasonable access to legal assistance and legal processes that satisfy minimum standards of fairness, effectiveness and integrity. And the profession deserves conditions of practice that reinforce such standards in the service of social justice." Rhode, *supra* note __, at __.

²⁷ David Luban, *Wrongful Obedience: Bad Judgments and Warranted Excuses*, *ETHICS IN PRACTICE* _ (OUP 2000).

often results from the adversarial system²⁸ is less likely to occur in criminal jury selection due to *Batson*; because there is a ritualized, easily invoked correction to the manipulation of voir dire for unethical or illegal reasons by three separate actors (judge, prosecutor and defense counsel), professionally responsible behavior is that much more likely to occur. *Batson* is a tool of self-regulation²⁹ that works, because the attempts to strike potential jurors for illegal motives is more often than not caught and punished. Unlike many areas of the law, which have little to no disciplinary proceedings except for the most egregious of cases, justice for the *Batson* violation is swift, reliable and fitting the crime.

The “evolving ideal”³⁰ of professional responsibility should expand to absorb the role of *Batson* procedure in criminal law. Although admittedly imperfect, *Batson* provides both a path and a floor to the lawyers involved in the arena of criminal justice. *Batson*’s built-in self regulation permits each party involved in the criminal case—defense counsel, defendant, prosecutor and judge—to act as ethically as possible as well as to examine their own conscience if called to account for their jury strikes.³¹ In sum, *Batson* narrows the divide between “ethical aspirations and daily practices”³² which should always be the goal of the ethical lawyer.

Examined closely, the *Batson* doctrine espouses a theory of legal ethics that urges counsel to behave in a professionally

²⁸ As Robert Gordon has documented, the legal system is a common good that cannot function effectively in the face of unrestrained partnership. See Robert Gordon, *Why Lawyers Can’t Just Be Hired Guns*, ETHICS IN PRACTICE (Oxford U. P. 2000)

²⁹ Of course, as Zacharias, among others, has observed, “professional regulation has followed a trend of becoming ‘legalized’—more specific and designed for enforcement.” Zacharias, *Humanization*, *supra* note __, at 15. See also Frank O. Bowman, *A Bludgeon By Any Other Name: The Misuse of ‘Ethical Rules’ Against Prosecutors To Control The Law of The State*, 9 GEO J. LEGAL ETHICS 665, 762 (1996) (describing “an increasing ‘legalization’ of attorney discipline”); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241 (1991) (nothing that traditional professional “norms have become ‘legalized’”).

³⁰ Rhode, *supra* note __, at __.

³¹ Unlike many other ethics rules, *Batson*’s enforcement mechanisms ensure prompt following of its ethical dictates. Cf. Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 Fordham L. Rev. 1599 (2002) (arguing that rules of ethics are so minimal and ambiguous that they do not promote justice, concluding that legislatures and courts should create standards that clearly define prohibited conduct, including punishments of civil liability and sanctions).

³² Rhode, *supra* note __, at __.

responsible way and elucidates ethical means of behavior for both attorneys and judges. The text of *Batson* itself indicates that the Supreme Court has seen *Batson* as representing an ethical imperative, emphasizing the unique role and responsibility of lawyers.

A. *The Ethical Imperative of Batson v. Kentucky*

A close reading of *Batson v. Kentucky* illustrates the ethical imperative propounded by the Supreme Court in its creation of *Batson* doctrine. *Batson* can be summarized as a three-part process to examine whether the disputed peremptory challenge was rooted in bias or discriminatory thinking. Step one requires defense counsel to make a prima facie case that the challenges in the case at hand were racially motivated and that the juror is a member of a “cognizable racial group.”³³ In step two, the burden shifts to the prosecutor to articulate a race-neutral reason for the challenges.³⁴ Finally, if a race-neutral reason is provided, in step three the trial court determines whether the challenger has met her burden of proving that the potential jurors had been struck due to racial prejudice.³⁵ The Court has recognized that each state remained free to develop its own practices regarding the manner in which its trial courts should handle *Batson* claims.³⁶

The *Batson* opinion begins by reaffirming that a state’s purposeful or deliberate denial of participation to blacks as jurors in the administration of justice violates the Equal Protection Clause,³⁷ thus reminding all readers that the ethical practice of lawyering was at stake. Expounding on this principle, the Court goes on to specify that a defendant has a right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria,³⁸ explicitly noting that the “Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account

³³ *Batson*, id. at 82. The challenger must show that (1) the group is definable and limited by some clearly identifiable factor; (2) a common thread of attitudes, ideas or experiences runs through the group; and (2) a community of interest exists among the group’s members, such that the group’s interest cannot be adequately represented if the group is excluded from the jury selection process. See United States v. Svrigo, 815 F.2d 30,33 (1st Cir. 1987).

³⁴ See Batson at 97. Although the prosecutor’s explanation need not rise to the same level of justification as a for-cause challenge, it cannot be pretextual. See id.

³⁵ See id.

³⁶ See id. at 99.

³⁷ *Batson*, 476 U.S. at 84.

³⁸ *Batson*, id. at 85-86.

of race, or on the false assumption that members of his race as a group are no qualified to serve as jurors.”³⁹ Such strong language at the beginning of the opinion serves to set up the prosecutor’s ethical requirement to act honorably and honestly in her use of peremptory challenges to create a fair jury.

The Court goes on to explain how the harm from discriminatory jury selection extends from harm to the defendant to the excluded juror and, ultimately, to the entire community.⁴⁰ By expanding the realm of injury caused by biased peremptory challenges, the Court makes clear that the duty of the prosecutor, to behave ethically in jury selection, is essential not only to ensure a fair trial for one person, but also to sustain the underlying ethos of responsible legal behavior. To fail to do so is to injure three separate parties: the defendant, the excluded juror, and, most importantly for our purposes, the community at large. The Court thus provides a basis for why the non-discrimination norm fostered by *Batson* helps create a pervading sense of ethical behavior for everyone involved.

The *Batson* Court also discusses why it chose to have the requirement for ethical behavior in criminal jury selection enforced by judges. By stating that the “Constitution requires . . . we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford ‘protection against action of the State through its administrative officers in effecting the prohibited discrimination,’”⁴¹ the Court directly addresses why judges are the most effective way to enforce *Batson*’s ethical requirements. Because judges, in accepting counsel’s peremptory challenges, implement any bias through the hands of the State, it only makes sense to have this very same hand of the State reject impermissible challenges.

Unlike so many instances of attorney misconduct, *Batson* allows the State a direct role in enforcing ethical conduct (through the role of the judge in evaluating a *Batson* challenge) and in disciplining the erring attorney (by refusing her peremptory challenge due to a finding of bias). Hence the Court’s decision to give trial courts the disciplinary tools for correcting ethical violations in jury selection makes sense. As the *Batson* court argues, “[w]e have confidence that trial judges, experience in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.”⁴²

³⁹ *Batson*, *id.* at 86.

⁴⁰ *Batson*, *id.* at 87.

⁴¹ *Batson*, *id.* at 88.

⁴² *Batson*, *id.* at 97.

In setting out the three-step procedure of *Batson* doctrine, the Court specifies its ethical requirements for trial courts and prosecutors. First, in determining if the defendant carried her burden of persuasion, the trial court must undertake “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”⁴³ That is to say, the trial court must ethically use its knowledge of motivation to sift through the prosecutor’s intent, to see if the prosecutor has behaved ethically in the first instance.

Next, the burden shifts to the prosecutor to ethically explain the exclusion of the potential juror. The Court pointedly remarks, in its discussion of step two, that the “State cannot meet its burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties.”⁴⁴ This warning to prosecutors also functions as a sign of the heightened ethical standards that the Court has chosen to impose in overruling prior law and implementing *Batson*. By stating the requirement that the prosecutor must give “a clear and reasonably specific explanation of his legitimate reasons”⁴⁵ so starkly and repeatedly, the Court signals that the ethical behavior of the prosecutor is paramount to the proper functioning of the *Batson* doctrine.

Interestingly, the Court is most explicit in addressing its ethical requirements for judges and prosecutors in a footnote directed to Justice Marshall⁴⁶ at the end of the opinion.⁴⁷ Noting that it does not share Marshall’s concerns regarding prosecutorial and judicial enforcement, the Court rejects the notion that prosecutors will not fulfill their duty to exercise only legitimate challenges.⁴⁸ Instead, it assumes and compels their responsible behavior, along with that of the bench, by articulating a specific ethical responsibility: “Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.”⁴⁹ By singling out the conscientious duties of the bar and the bench, the

⁴³ *Batson*, id. at 93.

⁴⁴ *Batson*, id. at 94.

⁴⁵ *Batson*, id. at 98 (quotations and citations omitted).

⁴⁶ I discuss Justice Marshall’s *Batson* concurrence *supra* Part II.

⁴⁷ *Batson*, id. at 99 n.22.

⁴⁸ *Batson*, id. at 99 n.22.

⁴⁹ *Batson*, id. at 99 n.22.

Court made clear the unique role and responsibility of lawyers to behave appropriately in criminal jury selection.

Ultimately, by so explicitly articulating the behavioral standards for both the judge and the prosecutor, the *Batson* Court lays down both an ethical imperative and an aspirational goal for the profession. As the Court states in its conclusion, “[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and *the rule of law* will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”⁵⁰

The Court makes clear that the *Batson* apparatus is designed to protect the defendant, the potential juror and the public, the same constituency with which legal ethics is deeply concerned. The ethical imperative expressed by the *Batson* Court is one way the law achieves one of its aspirations, reinforcing the public trust that is inherent in the model of legal ethics.

B. Batson’s positive effect on the norms of the legal profession

Unlike neoclassical law and economics, legal ethics is based on the view that the legal profession has norms and that lawyers will generally seek to comply with these norms. Legal ethics does not naively avoid enforcing the obligations that it imposes, but rather than seeking some type of optimal penalty structure, it works by reminding lawyers of the profession’s ethical aspirations, and, in extreme cases, disciplining lawyers who have flouted the rules. In short, legal ethics provides an alternative framework to neoclassical law and economics in providing a means of enforcing obligations.

Batson influences behavior expressively through the message it embodies, positively influencing the norms of the legal profession. Admittedly, fostering good social norms among the population at large cannot be a sufficient justification for *Batson*. *Batson* is too low salience of an issue to have very much of an effect of social norm writ large, because the actual procedure is not utilized that frequently within criminal trials.⁵¹ *Batson*’s power to foster a non-discrimination norm as part of the norms of professionalism, however, provides a sound justification. The movement to eliminate the peremptory

⁵⁰ *Batson*, *id.* at 99 (emphasis mine).

⁵¹ Anecdotally, I have been told that many criminal practitioners refer to *Batson* as “the A-bomb” and are hesitant to invoke it, in part because opposing counsel view it as an accusation of racism.

challenge and the *Batson* procedure disregards its power to affect the norms⁵² of the legal profession.

Batson gives us a fascinating, concrete example of how ethical norms can be affected by laws. Traditionally, we think of norms shaping laws,⁵³ as legal regulation often functions to particularize the broader behavioral standards embodied in social norms.⁵⁴ Norms impact the actual rules of operation in society in at least two distinct ways.⁵⁵ First, people's conduct and behavior are influenced by established norms in a society.⁵⁶ Second, "norms can motivate law and have a substantial influence on what gets codified as law."⁵⁷

⁵² As Lynn Stout observes, there is some disagreement among legal scholars who write upon the topic of social norms as to an exact definition of what social norms are. However, "there seems to be a general consensus . . . that norms are rules of behavior that are enforced primarily not by courts, but by other forces." Lynn A. Stout, *Other-Regarding Preferences and Social Norms*, Georgetown Law and Economics Research Paper No. 265902 (March 2001) (arguing that the human tendency to act in an other-regarding fashion (to sacrifice in order to help or harm others) is far more pervasive, powerful, and important than generally recognized).

⁵³ See, e.g., Amartya Sen, *Normative Evaluations and Legal Analogues*, keynote lecture at conference on Norms and the Law, Wash. U. School of Law, March 2001) (transcript on file with author) ("norms and laws are intimately connected and influence each other. The influences work in both directions.") See generally Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in SOCIAL NORMS (Michael Hechter & Karl-Dieter Opp, eds., March 2001); (reviewing literature); Richard H. McAdams, *The Origin, Development, and Regulation of Social Norms*, 96 MICH. L. REV. 338, 343-46 (1997) (same); Symposium, *Law, Economics, and Norms*, 144 U. PA. L. REV. 1643 (1996); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2002); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998). See also ERIC POSNER, *LAW AND SOCIAL NORMS* (2000) (discussing laws, norms and economic methodology).

⁵⁴ See McAdams, *supra* note ___, at 340-50.

⁵⁵ See Sen, *supra* note ___, at 1.

⁵⁶ See Sen, *supra* note ___, at 1. Sen goes on to explain:

Norms can impose obligations and constraints which work like law, and this is perhaps the most direct manifestation of norms as "unwritten law" to which Charles Davenant referred. At the very least, norms can supplement legal rules (the "written law," as it were) that are in force. . . . Norms and their operation cannot altogether supplant legal rules and their enforcement, but they can certainly supplement the latter effectively, which is the point at issue here.

See id.

⁵⁷ Sen, *supra* note ___, at 1. Sen points out that this can either work directly through legislation or more indirectly through judicial interpretation. See *id.*

Frameworks of law and legal thinking have also influenced the discussion and formulation of norms, however.⁵⁸ The laws embodied in *Batson* and progeny themselves affects norms.⁵⁹ The influence goes both ways—not only do norms influence laws, but law and legal thinking also shape norms and normative thinking. Specifically, law and legal thinking have a great influence on ethical norms, as legal concepts “can thus help to clarify what is to be morally sought as well as to communicate the results of ethical deliberations.”⁶⁰

Batson is such an example. From the time of the Civil Rights movement and the codifications of those rights into the Civil Rights Act, society slowly had begun to move towards a more expansive theory of rights for minorities and women. There was a significant lag in the actualization of such rights, however. This was true in both general society and in the criminal justice system. By the mid-1980’s, the laws that had created the expanding norms of equality in everyday life had not, for various reasons,⁶¹ reached the criminal courtroom. Thus, the creation of the *Batson* procedure⁶² in 1986 responded to these ethical deliberations, and the doctrine has grown as our understanding of what is to be “morally sought” has expanded accordingly.

Approximately 20 years later, the legal concept crystallized by *Batson*—that blacks, and later women and other minorities, cannot be stricken from the jury due to their immutable characteristics—has helped clarify what is to be “morally sought:”⁶³ the fair selection of a

⁵⁸ See Sen, *supra* note __, at 2. As Sen notes, since these connections from law to norms have received less attention than the connections of norms to law, they need “more explicit examination.” *Id.*

⁵⁹ See Sen, *supra* note __, at 3 (discussing “the way frameworks of law and legal thinking influence the discussion and formulation of norms.”)

⁶⁰ Sen, *supra* note __, at 4.

⁶¹ Such as Jim Crow laws, the slowness of society to change, etc.

⁶² The fact that these racial and gender norms have evolved so rapidly in the past thirty years, in part via their inculcation in the law, can be attributed to their status as *other-regarding* norms. As Stout argues, “other-regarding behaviors are especially likely to be socially ‘codified’ into norms, and especially likely to prove sticky, because human beings are predisposed to adopt other-regarding preference functions.” Stout, *supra* note __, at __. Requiring egalitarian treatment for blacks, women and ethnic minorities encapsulate the more general norm of “treating others as you would like to be treated.” The fact these *Batson* norms have arisen also argue for their efficiency. As Ellickson has documented, norms tend to support efficient behaviors because people have an innate preference for utilitarian, or welfare-improving, norms. See Ellickson, *supra* note __, at 29; Stout, *supra* note __, at __.

criminal jury, untainted by bias, heuristics, or contemporary anxieties over race and gender. The difficulty of this goal was indeed made easier by establishing its “legal analogue.” In short, without *Batson*, it is reasonable to assume that biased juries might still have been empanelled for at least another decade, if not, with more subtlety, through today.⁶⁴

Moreover, a legal enactment like *Batson* can also help publicize a new consensus about desirable behavior.⁶⁵ Although by 1986 there was, in the broadest sense, a general consensus that discrimination on the basis of race was unconstitutional and improper, the holding of this theoretical norm had not quite percolated down to the specific reality of criminal jury selection. Similarly, in 1992, although the gender norm of egalitarian, non-discriminatory treatment had begun to take hold in general society, it had not permeated the strongholds of the criminal courtroom. The principles of *Batson* as a legal norm have helped confirm, inculcate and publicize the requirements of the most modern racial and gender norms for lawyers.

This process continues today. The discussion, in the courts and in the legal academy, about the permissibility of challenging jurors on basis of national origin and religion illustrates the questionable status both of these classifications have achieved in the national discourse. The lack of a legal norm crystallizing these classifications as either permissible or impermissible not only shows the confusion and lack of clarity that these labels currently evoke in society, it also demonstrates the need for law to help create the social norms themselves. *Batson* and progeny are a fine example of the two-way street of influence from legal norms to social norms and back again.

Recent law and economic work also appreciates the significance of norms, as the economics literature now uses norms to explain an incredible variety of positive and normative issues.⁶⁶ As

⁶³ In this sense, I am endorsing a “naturalist” theory of the law, as opposed to either a positivist or historicist theory. See, e.g., Harold J. Berman, *The Historical Foundations of Law*, Emory University School of Law Public Law and Legal Theory Research Paper Series, No. 05-3, at 3 (defining naturalist theory of law as one focused on law as a moral instrument, in contrast to positivist or historicist theories).

⁶⁴ For a view arguing that criminal law in general should track social norms to be effective, see PAUL ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (Westview 1995) (suggesting that there is a tension between the legal code in America and folk intuitions concerning criminal culpability and the proportionality of punishment).

⁶⁵ Richard McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338, 350-51 (1997).

⁶⁶ See McAdams, *Regulation of Norms*, *supra* note __, at 340. For a representative discussion of norms in the field of law and economics, see, for example, Robert Cooter, *Expressive Law and Economics*, 27 J. LEG. STUDIES 585 (1998); ROBERT

one scholar notes, “many legal rules are best understood as efforts to harness the independent regulatory power of social norms.”⁶⁷

When, as here, law influences an equilibrium, there are both behavioral and hermeneutic effects.⁶⁸ Behaviorally, the *Batson* doctrine has encouraged lawyers to act in an ethical manner during jury selection, and decreased their use of bias, consciously and subconsciously, in using peremptory challenge. Hermeneutically, *Batson* has helped change beliefs that lawyers possess by imposing such immediate and shaming consequences to improper and unconstitutional peremptory challenges. Accordingly, law influences behavior by changing the norms that determine the meaning ascribed to behavior.⁶⁹

Moreover, *Batson* has influenced and reinforced ethical norms through its expressive function.⁷⁰ According to the expressive theory of law, “the expression of social values is an important function of the courts, or possibly the most important function of the courts.”⁷¹ Norms can explain the expressive function of law: by “making a statement,” law can strengthen the norms it embodies and weaken those it condemns.⁷² *Batson* doctrine provides an instrument for changing social norms by extrinsically expressing commitments to ethical behavior and non-discriminatory actions.⁷³

Finally, *Batson* both compels and helps communicate ethical deliberations over what it means to empanel a “proper” criminal jury. “Law can speak loud and clear, and moral reasoning may have use for that legal voice.”⁷⁴ Here, the moral reasoning that required equal

ELICKSON, ORDER WITHOUT LAW (1991); Richard H. McAdams, *Signaling Discount Rates: Law, Norms, And Economic Methodology*, 110 YALE L.J. 625 (2001); ERIC A. POSNER, LAW AND SOCIAL NORMS 1-7 (2000). As McAdam notes, “More recently, the subject of social norms has come to the sustained attention of rational choice scholars, including economists, philosophers, political scientists, and legal theorists.” McAdams, *Signaling Discount Rates*, at 625-26.

⁶⁷ Posner, *supra* note ___, at 7.

⁶⁸ Posner, *supra* note ___, at 33.

⁶⁹ See Larry Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968-72, 1019-25 (1995).

⁷⁰ For a general exploration how law influences norms through its expressive function, see Cooter, *Expressive Law and Economics*, at 585-6 (equating creation of norms by court to expression of social values);

⁷¹ Cooter, *supra* note ___, at 585.

⁷² See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2034-35 (1996).

⁷³ See Cooter, *supra* note ___, at 611.

rights for all citizens was articulated by *Batson* and its progeny, and the criminal justice system quite obviously needed its legal and moral directive.⁷⁵ *Batson*'s requirement to protect the criminal defendant, the prospective juror and the public's participation in the jury and foster anti-discriminatory actions helps preserve the moral rights so necessary for a proper functioning of legal ethics.

C. Enforcing *Batson* Norms through Jury Selection

Batson norms are primarily enforced through jury selection. One way that *Batson* differs, in terms of legal ethics, from most other constitutional rules is how it is enforced in the proceedings of the actual trial; even when a *Batson* decision is overturned on the appellate level, the remedy is invariably sent back to the trial court for scrutinization of the challenged strike. That is to say, unlike most attorney violations of legal ethics, the *Batson* doctrine requires the process of jury selection to be the locus for the enforcement of the *Batson* norm instead of attorney disciplinary proceedings.

Though the Constitution provides the source of the right to have a jury free from discrimination and bias, legal ethics provides the best means of understanding the approach to enforcing the right that the courts have adopted. As most recently elucidated by Mitchell Berman, there is an important distinction between constitutional meaning and the means by which that meaning is enforced.⁷⁶ The conflict between constitutional meaning vs. constitutional doctrine is too great a subject to discuss here, and I limit my discussion to the specifics of *Batson*.

When it comes to implementing the constitutional meaning of *Batson*, viewing the procedure through the lens of legal ethics gets us

⁷⁴ Sen, *supra* note ___, at 4.

⁷⁵ Sen goes on to point out, however, that "it is not in general cogent even to presume that if a normative right is important, then it must necessarily be appropriate to try to legislate and institutionalize it as a legal right." Sen, *supra* note ___, at 7. In the case of *Batson*, one can presume that the impetus of the Civil Rights and feminist movement spurred the creation of the law and its progeny. I do not mean to suggest, however, that moral rights will always find their champion in legal ones; quite the opposite. "In many cases the influence of legal analogy and legal thinking has been to narrow the breadth and range of ethical and political reasoning." *Id.* at 16.

⁷⁶ See generally Mitchell Berman, *Constitutional Decision Rules*, 90 VIRGINIA LAW REVIEW 1, 35-50 (2004). As Berman observes, "American constitutional theorists and judges have struggled with problems of constitutional interpretation, exploring how meaning is properly derived from the Constitution and, insofar as the answer may be different, how courts ought to derive such meaning." *Id.* at 3.

closest to properly-crafted constitutional doctrine.⁷⁷ The constitutional meaning of *Batson*—that attorneys must use non-discriminatory bases to strike jurors peremptorily—is translated almost immediately to a workable constitutional *Batson* doctrine through the constant and regular enforcement mechanisms of the trial court and scrutiny of opposing counsel.

With *Batson*, there is little room for slippage between constitutional meaning and doctrine, because the meaning is enforced in the very same space that the doctrine is practiced. On a less theoretical level, this means that the directions given by the *Batson* Court and progeny—that the equal protection clause prohibits discriminatory striking of potential jurors on the basis of race or gender—are easily translated into understandable doctrine by the court and counsel because the lapse between violation and cure is minimal. Legal ethics helps foster the connection between *Batson*'s constitutional meaning and doctrine, because legal ethics contains the tradition of imposing procedures and prophylactic rules to ensure that the legal profession meets its obligations. The court-made rules that govern the implementation of *Batson* in the trial courts make the most sense when viewed through the legal ethics lens because *Batson*'s elaborate procedures parallel and reinforce those normally found in legal ethics. Legal ethics, then, can be seen as the link between meaning and doctrine within *Batson*.

More generally, the *Batson* doctrine's means of enforcing professional norms make more sense than the traditional means of attorney discipline. For one thing, the difficulty of proving racial and gender discrimination to a sufficient degree of confidence makes it dangerous to formally discipline attorneys for violating *Batson*.⁷⁸ The milder sanctions of *Batson*—reseating of a stricken potential juror, retrial or appellate court rebuke on appeal—are more appropriate than any kind of formal punishment.

One reason for preserving the milder sanctions of *Batson* to more severe disciplinary penalties is because racial discrimination is often unwitting and unconscious. The study of cognitive psychology⁷⁹ has

⁷⁷ See Berman, *supra* note ___, at 5 (discussing Fallon's *Implementing the Constitution*).

⁷⁸ In the District of Columbia, however, judges are required to report a finding of a *Batson* violation against a particular lawyer to the professional responsibility officer of the D.C. Bar, who can then consider taking formal action.

⁷⁹ Cognitive psychology is a school of psychology that examines internal mental processes such as problem solving, memory, and language. Cognitive theory contends that solutions to problems take the form of algorithms—rules that are not necessarily understood but promise a solution, or heuristics—rules that are understood but that do not always guarantee solutions. See A. J. SANFORD, COGNITION AND COGNITIVE PSYCHOLOGY (1986); H. L. PICK, P. VAN DEN BROEK,

shown how people use mental shortcuts in reasoning when making assumptions.⁸⁰ These mental shortcuts in reasoning, or heuristics, are present in every aspect of life, including the functioning of criminal justice system. By shining the spotlight on pretext and bias, *Batson* requires lawyers to acknowledge how they impute certain kinds of assumptions by bringing their mental shortcuts to bear on the categories of race and gender.

Batson requires the legal profession to recognize the imputations of race and gender, to confront its attitudes about not just the specific categories themselves but also about poverty, class subjugation, immigration, etc. By and through the *Batson* procedure, the criminal justice system is forced to recognize the meaning behind these supposedly neutral categorizations. Through its ethical imperative, *Batson* compels lawyers to question those assumptions; to examine how they came to these mental shortcuts; and to acknowledge how heuristics based on outdated stereotyping and bias can infect the criminal jury, even among the most careful and aware.

In short, the *Batson* procedure forces us to move beyond the heuristics of race and gender, and into the hard, painful work of confronting our most basic assumptions. If American society as a whole is still struggling with the difficult legacies left by slavery, subjugation and misogyny, then it is unrealistic to expect that these legacies have not made their way into the courtroom. The *Batson* procedure plays its part in this troubling task by focusing lawyers' vision on the signaling done by race and gender, drawing out the dialogue to include ethnicity and national origin as we start to think about these heuristics as well.

This possibility of unconscious discrimination, rooted in heuristics, provides another reason that violation of the *Batson* doctrine should not lead to disbarment, but instead should be enforced in the courtroom during jury selection. *Batson* provides a forum in which to establish a norm that discourages unconscious discrimination, promoting attorneys' effort to overcome it.

AND D. C. KNILL, ed., COGNITION: CONCEPTUAL AND METHODOLOGICAL ISSUES (1992).

⁸⁰ See, e.g., GERD GIGERENZER, PETER M. TODD, & ABC RESEARCH GROUP, SIMPLE HEURISTICS THAT MAKE US SMART (Evolution and Cognition Series) (19__) (arguing as central thesis of book that people cope in real, complex world of confusing , overwhelming information and rapidly approaching deadlines by using simple heuristics; Bruce Bower, *Simple Minds, Smart Choices*, SCIENCE NEWS (May 29, 1999, pp. 348-349) (same). The use of simple heuristics as a way of making decisions is part of the theory of bounded rationality. For a comprehensive study of heuristics in cognitive psychology, see THOMAS GILOVICH, DALE GRIFFIN & DANIEL KAHNEMAN, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Cambridge Univ. 2002).

Finally, enforcing *Batson* norms through the criminal trial also provides one of the only feasible ways of inculcating the norm not only for attorneys, but also for judges. Though discipline of the bench is possible, it happens only rarely, and usually only when there has been an extreme violation of legal ethics.⁸¹

One scholar has argued that judges “bear substantial responsibility for the wrongful striking of minority-race jurors in their jurisdictions, for they have acquiesced to it.”⁸² Calling for a greater bravery among judges so they will ask the hard questions of prosecutors, and pointing out that it “takes courage to take racial issues seriously, and more courage to do so openly,”⁸³ this scholar contends that the legislature should make the task of the good prosecutor and trial judge easier by requiring ethical rules commanding the asking and answering of such hard questions.⁸⁴

This sort of legislative activity, however, is unnecessary. *Batson*’s ethical imperative, properly understood, is enough to compel ethical behavior from prosecutors, judges and defense counsel. The very public nature of the *Batson* remedy—the invoking of the *Batson* challenge—is, in itself, a incentive for professionally responsible behavior. Because the *Batson* challenge is taken so seriously by all parties involved, the ever-present threat of the doctrine serves to regulate appropriate behavior during jury selection. Additionally, the judge’s ability to raise a *Batson* claim *sua sponte* also creates another strong incentive for counsel to examine their peremptory challenges for remnants of bias or unconscious discrimination. No counsel wishes to start off the trial in a negative light cast by her discriminatory challenges. Thus, there is no need for legislatures to require any more rules about *Batson* than the doctrine already contains, for *Batson*, by its very existence, reminds lawyers of the profession’s ethical aspirations.

⁸¹ A recent example of criminal jurist prosecution is the indictment of Brooklyn trial judge Gerald P. Garson, along with six other justices of the Brooklyn Supreme Court, for official misconduct, which included accepting bribes and fixing cases. See Daniel Wise, *NY Lawyer Turns State’s Evidence*, New York Law Journal (May 23, 2003), at <http://www.nylawyer.com/news/03/05/052303a.html> [last visited 3/17/05].

⁸² Johnson, *supra* note ___, at 477.

⁸³ Johnson, *supra* note ___, at 506.

⁸⁴ See Johnson, *supra* note ___, at 506.

D. A Positive Theory of Developing *Batson* Doctrine

Approaching *Batson* through the lens of legal ethics provides a positive theory for the development of the doctrine. Because the Constitution is the source of *Batson*'s ethical imperative, it creates natural limits to its expansion. For example, it is unlikely that *Batson* will be extended to include class as a protected category, because there is no constitutional right to be free from discrimination on the basis of class, like there is race or gender. Unless new constitutional doctrine or statutory obligation intercedes, *Batson* will remain limited to its current categories of race, gender and ethnicity—as the past ten years have proven.

At the same time, however, the fact that legal ethics functions as a model for the *Batson* doctrine does explain the ways in which *Batson* has been extended. Under a theory of legal ethics, it was only natural that *Batson* was expanded to include strikes by defense counsel, since defense counsel, as attorneys, should also be subject to *Batson*'s ethical requirements. Likewise, it makes sense that the *Batson* doctrine was extended to civil proceedings as well, because naturally the Court would want to include civil practitioners into this aspirational theory of legal ethics. *Batson*'s ethical imperative is a broad one, inclusive of all attorneys and judges who participate in jury selection, since ethical behavior obviously includes the civil bar and bench. Thus, the expansion of *Batson* to defense counsel and civil cases was a natural progression of legal ethics—a system focused on protecting the integrity and reputation of the profession—but one that has clear boundaries.

Batson's evolution from its original expression by the Supreme Court has caused much anxiety and concern among legal scholars, jurists and practitioners. These anxieties run the gamut from *Batson*'s confusing standards, the injection of bias into criminal jury selection, defense counsel's unclean hands, the inculcation of bias and unconscious racism into jury selection, waste of judicial time and money; and negative public perception of jury selection. As I explain below, however, many of these anxieties over *Batson* vanish with a proper understanding of the doctrine's aspirational legal imperative.

III. The Evolution of the Peremptory Challenge: How *Batson* Changed the Landscape

What can explain all the anxiety about the *Batson* procedure and the peremptory challenge? To answer this question, it is helpful to look at *Batson* and its most recent progeny. The history of the peremptory challenge, on these shores and others, has been

exhaustively documented,⁸⁵ and need not be rehashed here. A brief tour through the Supreme Court jurisprudence of *Batson*, however, will better ground our discussion of the *Batson* critiques.

In 1986, the Supreme Court abandoned their previous requirement, as promulgated in *Swain v. Alabama*,⁸⁶ that to prove juror discrimination, there must be broad historical evidence of racial discrimination in the exercise of peremptory challenges. *Batson v. Kentucky* held that a defendant could overcome the presumption that peremptory challenges were made legitimately through a three step process.⁸⁷

The prohibited discrimination elucidated in *Batson*, denying prosecutors the ability to peremptorily-strike members of the same race as the defendant for racially motivated reasons, was subsequently extended to protect against peremptory challenges against members of a racial group different from the defendant.⁸⁸ In *Powers v. Ohio*,⁸⁹ the Supreme Court eliminated the requirement that the excluded juror be of the same cognizable racial group as the complaining criminal defendant.⁹⁰

That same year, in *Edmundson v. Leesville Concrete Co.*,⁹¹ the Court extended *Batson* to include the discriminatory exercise of peremptory challenges in civil actions between private litigants. A year later, in *Georgia v. McCollum*,⁹² third-party standing to raise improper exclusion of potential jurors based on race was extended to

⁸⁵ See, e.g., Hoffman, *supra* note __, at 813 – 829 (discussing pre-English history of peremptory challenge, the challenge’s English history, and the challenge in the U.S. up until *Batson*); Carlson, *supra* note __, at 951-956 (same).

⁸⁶ 380 U.S. 202 (1965).

⁸⁷ See 476 U.S. at 96-97.

⁸⁸ See Carlson, *supra* note __, at 958-59.

⁸⁹ 499 U.S. 400 (1991).

⁹⁰ *Powers*, 499 U.S. at 404. A defendant may make a *Batson* complaint for the discriminatory striking of members of any cognizable racial group, including whites. See *id.* at 411. The *Powers* court held that the criminal defendant has third party standing to raise an equal protection claim chiefly on behalf of an excluded juror. See *id.* at 411.

⁹¹ 500 U.S. 614 (1991). The Court found state action by the private litigant’s discriminatory use of peremptory challenges, since these challenges are executed by a judge, a state actor. See *id.* at 619-20.

⁹² 112 S. Ct 2348 (1992) (get correct cite!).

the prosecution.⁹³ Finally, the Court held in *J.E.B. v. Alabama*⁹⁴ that equal protection bars discrimination in jury selection on the basis of gender.

Although various lower courts have held that *Batson* principles extend to such categories as religion⁹⁵ or national origin,⁹⁶ the Supreme Court has not recently broadened *Batson* any further. In fact, the Court declined to extend *Batson* to Latino and Hispanic jurors in *Hernandez v. New York*.⁹⁷ Despite many predictions of expansion, the Court has so far resisted the growth of *Batson* since *J.E.B.*, and the *Batson* universe has remained stable for over the past ten years.

IV. Fear and Loathing about *Batson*: The Prudential Attacks

The first critique against the post-*Batson* peremptory challenge came, ironically enough, in one of the *Batson* concurrences. Although joining the majority opinion of the Court, Justice Thurgood Marshall took time to write a separate concurrence which pointed out that “[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.”⁹⁸

Justice Marshall’s concern that *Batson* would not eliminate discrimination was the pre-cursor to many current day worries that *Batson*, instead of helping eradicate racial/gender discrimination, actually helps hide prejudice in socially acceptable forms. Marshall argued that *Batson* failed to solve the peremptory problem due to three

⁹³ The Court concluded that state action exists where a criminal defendant exercises peremptory challenges. *See id.* Although peremptory challenges are not constitutionally protected fundamental rights, they still involve the state because the judge is the moderator and implicator of jury selection, dismissing the stricken potential jurors.

⁹⁴ 511 U.S. 127, 143 (1994).

⁹⁵ *See United States v. Somerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997) (applying *Batson* to Jewish religion).

⁹⁶ *See, e.g., Rodriguez v. Schriver*, ___ F. Supp. ___ (S.D.N.Y. 2003) (Maas, J.) (holding that national origin is an impermissible reason for striking a potential juror); *Rico v. Leftridge-Byrd*, 340 F.3d 178, 184 (3d Cir. 2003) (applying *Batson* to Italian-American potential jurors); *United States v. Bin Laden*, 91 F. Supp. 2d 600, 625 (S.D.N.Y. 2000) (Sand, J.) (“[I]t is well settled that equal protection principles forbid discriminatory exclusions from jury service on the basis of factors such as race and national origin; *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989) (applying *Batson* to potential jurors of American Indian ancestry).

⁹⁷ 500 U.S. 352, 361 (1991) (holding that Latino or Hispanic potential jurors could be excluded from the jury based upon the race-neutral explanation of their inability to accept a translator’s rendition of Spanish-language testimony).

⁹⁸ *Batson*, 476 U.S. at 102 (Marshall, J. concurring).

major reasons: (1) “trial courts fac[ing] the difficult burden of assessing prosecutor’s motives;”⁹⁹ (2) “outright prevarication by prosecutors”¹⁰⁰ and, potentially, defense counsel;¹⁰¹ and (3) coded racial prejudice, unarticulated—sometimes even subconscious—but difficult to detect. “[S]eat of the pants instincts’ may often be just another term for racial prejudice.”¹⁰²

These concerns led Justice Marshall to conclude that the Court should ideally ban peremptories from the criminal justice system,¹⁰³ as the right to peremptory challenges had no “constitutional magnitude”¹⁰⁴ and could be “withheld altogether;”¹⁰⁵ only by “banning peremptories entirely can such discrimination be ended.”¹⁰⁶

Justice Marshall’s concurrence presciently anticipated many of the current concerns about *Batson* and the peremptory challenge. What Justice Marshall did not anticipate, however, was how highly evolved the *Batson* procedure has become, creating a more carefully crafted tool than what was Supreme Court initially drafted almost 20 years ago. With Justice Marshall as our Virgil,¹⁰⁷ we will walk

⁹⁹ *Batson*, id. at 106.

¹⁰⁰ *Batson*, id. at 106.

¹⁰¹ *Batson*, id. at 108. Although of course at that time there was no “reverse-*Batson*,” Marshall anticipated that procedure, and the Court’s ruling accompanying it, with his comment that “The potential for racial prejudice, further, inhere in the defendant’s challenge as well.”

¹⁰² *Batson*, id. at 106. Marshall goes on to explain, “Even if all parties approach the Court’s mandate with the best of conscious intention, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.” Id.

¹⁰³ *Batson*, id. at 107 (“The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”)

¹⁰⁴ Id.

¹⁰⁵ *Batson*, id. at 108.

¹⁰⁶ Id. at 108.

¹⁰⁷ See DANTE ALEGHIERI, *THE DIVINE COMEDY: INFERNO, Canto I, Argument* (The Harvard Classics, 1909–14):

The writer, having lost his way in a gloomy forest, and being hindered by certain wild beasts from ascending a mountain, is met by Virgil, who promises to show him the punishments of Hell, and afterward of Purgatory; and that he shall then be conducted by Beatrice into Paradise. He follows the Roman poet.

through the long list of grievances documented against the *Batson* procedure to better understand why the *Batson* procedure and the peremptory challenge have managed to stir up such fear, confusion and concern. Moreover, our tour through the *Batson* grievance list will provide another opportunity to better explicate the doctrine's theory of legal ethics.

A. *Batson* has confusing standards

1. "Muddled" procedures cause judicial uncertainty

One complaint that Justice Marshall did not foresee was the growing concern about how to interpret and apply *Batson*. This anti-*Batson* complaint theorizes that judicial understanding of *Batson* is in a state of disarray.¹⁰⁸ Therefore, the argument goes, if jurists cannot understand how to apply and use *Batson* properly, it is unlikely prosecutors and defense counsel could do so.

Putting aside the perhaps unintended slight to practitioners' capabilities, this concern has been raised primarily by jurists and legal scholars. The gravamen of this complaint is that *Batson* and peremptory challenges should be abolished because standards are a muddle, and it is impossible to apply *Batson* correctly and fairly. For example, one jurist¹⁰⁹ in *Wamget v. Texas* argued that peremptory challenges "do not further [the] goal" of ensuring that venirepersons can be "fair and impartial,"¹¹⁰ pinning the blame directly on *Batson*'s tail:

Moreover, *Batson* and its progeny, have made a further muck of things by transforming *voir dire* into a lengthy ordeal involving inquiries into inappropriate questions of race and ethnicity that not only have nothing to do with impartiality, but will also become increasingly muddled in the face of our changing society.¹¹¹

Likewise, I hope to use Justice Marshall's concurrence as a guide to the variety of complaints against *Batson* and the peremptory challenge.

¹⁰⁸ Thanks to Kevin Stack for suggesting this phrasing.

¹⁰⁹ Justice Meyers of the Houston Court of Criminal Appeals.

¹¹⁰ *Wamget v. Texas*, 67 S.W.3d 851, 860 (Tex. 2001) (Meyers, J., concurring opinion) ("By nearly all accounts, the inquiry that ought to be the central concern during *voir dire* is whether the questioned venirepersons can be fair and impartial. Judicial rhetoric to the contrary, peremptory challenges do not further this goal.")

¹¹¹ *Wamget*, *id.* at 860.

It is this fear of “muddle” which has seemingly touched off a firestorm of dislike for *Batson* and peremptory challenges.

Wamget raises a variety of reasons about why the peremptory challenge should be abolished,¹¹² but most interesting is the concern about confusing standards. The concurrence argues that the problem of “defining a cognizable racial/ethnic group”¹¹³ is so great that it becomes “either absurd or nearly impossible.”¹¹⁴ Using the Hispanic classification as example, *Wamget* notes how difficult it can be to determine Latino ancestry from definable physical characteristics, surname or language.¹¹⁵

Having identified this potential problem of *definition*, *Wamget* then moves on to another potential problem, *distastefulness*, observing how it, and other courts, has “viewed the prospect of making ethnic assessments particularly distasteful and inappropriate.”¹¹⁶ *Wamget* then morphs back into its original concern that a logical extension of *Batson* will eventually cover every identifiable group, rolling down the slippery slope into confusion and chaos.¹¹⁷

By conflating these two issues of definition and distastefulness, however, *Wamget* muddies—or muddles—the waters itself. The “slippery slope” concern over expanding group classifications is distinct from the dislike the courts have for entering into any cogitation about race, ethnicity or gender,¹¹⁸ and it is unfair for the court to mix the two together into one. Although a potential concern over growing elaborations of classifications is valid enough, simply

¹¹² See *infra* for further articulation of the *Wamget* court’s concerns.

¹¹³ *Wamget*, *id.* at 863.

¹¹⁴ *Wamget*, *id.* at 863.

¹¹⁵ *Wamget*, *id.* at 864-66.

¹¹⁶ *Wamget*, *id.* at 866.

¹¹⁷ *Wamget*, *id.* at 866.

¹¹⁸ The intersection of race and gender, or what has come to be called “intersectionality,” creates a sum total greater than its parts. African-American women, for example, have multiple identities as result of the oppression that they face from being both women and African Americans. I use the meaning of the term “intersectional” here following that used by Professor Kimberle Crenshaw, which refers to a person’s multiple, oppressed identities. Crenshaw argues that this multiple discrimination is both heavier than and distinct from the sum of its parts. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). I discuss intersectionality in greater detail below.

because the judiciary dislikes grappling with one of the singular issues of our time is not a good enough reason to eliminate the peremptory challenge.

Wamget returns to the problem of confusing standards in the final point of the concurrence, when the procedure is criticized for creating a situation where “courts’ attempts at applying *Batson*, and in particular, at assessing the existence of pretext, are ‘all over the map.’”¹¹⁹ It is this very specter of chaos which has galvanized the judiciary into fearful prophecy and action; not only do they fear their own inability to consistently apply *Batson* over time, but they also fear the *idea* of failed uniformity among all courts.¹²⁰ Despite grudgingly recognizing that they are dealing with categories—race and gender—which may defy easy and uniform black-line rules, the judiciary’s discomfort with a lack of “legality”¹²¹ had led them to proselytize a complete abolition of the peremptory challenge.

Other jurists have similarly used the rallying cry of “confusing standards” as reason to eliminate the peremptory challenge. In *Minetos v. CUNY*,¹²² the court¹²³ spent much of its opinion discussing its concern over judicial misunderstanding of the *Batson* procedure, which, it concluded, invokes no less of a danger than “invit[ing] corruption of the judicial process.”¹²⁴ After citing Justice Marshall’s warning about the dangers of the peremptory challenge, the court jumps straight to its own heart of darkness:¹²⁵ the uncertainty and confusion it locates squarely in *Batson* and progeny.

Arguing that “[a] brief review of the case law shows that judicial interpretations of *Batson* are all over the map,”¹²⁶ the *Minetos* court goes through a representative sample of federal *Batson* cases, with minimal case details, in an attempt to show how courts are very bad at “guess[ing]” which are the pretextual reasons and which are

¹¹⁹ *Wamget*, id at 867 (quoting and citing *Minetos*).

¹²⁰ For another example of what this type of fear has wrought, see, for example, the (overturned) Federal Sentencing Guidelines.

¹²¹ I borrow the phrase from Kyron Huigens, in his most recent work about Blakely & sentencing. See Kyron Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. (forthcoming May 2005).

¹²² 925 F. Supp. 177 (S.D.N.Y. 1996). Thanks to Kevin Stack for bringing this case to my attention.

¹²³ The Honorable Constance Baker Motley of the Southern District of New York.

¹²⁴ *Minetos*, id. at 183.

¹²⁵ See JOSEPH CONRAD, HEART OF DARKNESS (1902).

¹²⁶ *Minetos*, id. at 183.

not.¹²⁷ *Minetos*'s laundry-list of supposedly wildly varying standards can be seen as pretext for an attempt to reduce race and gender, and the social constructs underlying them, to an almost childlike simplicity.

The *Minetos* court also raises some concern over New York state courts' attempt to hammer out some guidelines to applying *Batson*'s second step of separating pretext from reasonable.¹²⁸ The court's concern over New York's promulgated guidelines contrasts to its previous concern over the marked lack of standards for distinguishing pretextual from race-neutral reasons in *Batson*. So although the *Minetos* court claimed to want clear, bright-line rules for the application of the *Batson* challenge, when given some, its critical reaction illustrates some discomfort with the race and gender aspects of *Batson*.

State court jurists have also recently called for the abolition of the peremptory challenge due to this concern over muddled standards as well. In a recent case,¹²⁹ the chief judge of the New York Court of Appeals, in an impassioned concurrence, denounced peremptory challenges and the *Batson* procedure as distorting the fundamental fairness of the jury process.¹³⁰ Highlighting an agreement with Justice Marshall, the chief judge states, somewhat reluctantly, that "[t]he intense focus on factors such as skin color, accent and surname in jury selection is wholly at odds with our societal goal of dealing with people as individuals, on their personal qualities."¹³¹ The chief judge's concern over the "opportunity for mischief"¹³² with *Batson* and peremptories can be interpreted, among other things, as a concern over the standards regulating peremptory challenges under the *Batson* procedure. The chief judge concludes the only solution is that peremptory challenges should be either severely reduced or eliminated entirely.¹³³

New York jurists have often found fault with *Batson* over muddled standards. In 1990, another member of the New York Court

¹²⁷ *Minetos*, *id.* at 183-84.

¹²⁸ *Minetos*, *id.* at 184-85.

¹²⁹ *People v. Tarkisha Brown*, 97 N.Y.2d 500 (2002) (Chief Judge Kaye, concurring).

¹³⁰ *Brown*, *id.* at 509.

¹³¹ *Brown*, *id.* at 509.

¹³² *Brown*, *id.* at 509.

¹³³ *Brown*, *id.* at 509.

of Appeals¹³⁴ suggested in a concurrence that the number of peremptories in New York should be dramatically reduced, if not eliminated entirely.¹³⁵ Citing the complexity of the *Batson* procedure and “the very profound difficulties”¹³⁶ involved in “reconciling a juror challenge system that is theoretically based on the attorney’s inexplicable personal hunch with a constitutional rule that requires attorneys to offer satisfactory “neutral” explanations for their choices,”¹³⁷ this jurist criticized the current procedure as confusing and then argues that despite all its complexity, it does not do its job in unmasking racial discrimination.¹³⁸ This solution spurns the idea of working with the *Batson* procedure as too hard, messy and confusing for attorneys and jurists; instead of “developing a complex set of judicially imposed limitations and standards,”¹³⁹ the strong pruning of the right to peremptory challenge or the wholesale elimination of the tool were offered.

Similarly, two years later, yet another jurist of the New York Court of Appeals¹⁴⁰ argued that *Batson* had failed to wipe discrimination from the jury selection process.¹⁴¹ Writing a separate concurrence to “express a broader concern and perspective,”¹⁴² this jurist criticizes the *Batson* procedure for failing to eliminate discrimination, claiming that the procedure actually assists in disguising impermissible racial motives instead of helping reduce them.¹⁴³ By arguing that “[t]he process that requires courts to sift through counsel’s words for patterns or pretexts of discrimination has not served the goal of cutting the discriminatory weeds out of the jury selection process,”¹⁴⁴ the so-called failure of the *Batson* procedure is

¹³⁴ Judge Vito Titone, New York Court of Appeals.

¹³⁵ *People v. Hernandez*, 75 N.Y.2d 350, 358-60 (1990) (Tito, J., concurring).

¹³⁶ *Hernandez*, *id.* at 358-59.

¹³⁷ *Hernandez*, *id.* at 358-59.

¹³⁸ *Hernandez*, *id.* at 359. This case was decided before *J.E.B.* (1994), however, so it was still permissible to strike on the basis of gender.

¹³⁹ *Hernandez*, *id.* at 359.

¹⁴⁰ Judge Joseph Bellacosa, New York Court of Appeals.

¹⁴¹ *People v. Bolling*, 79 N.Y.2d 317, 325-27 (1992) (concurrence). Again, this was pre-*J.E.B.*, so the court was only dealing with racial discrimination.

¹⁴² *Bolling*, *id.* at 325.

¹⁴³ *Bolling*, *id.* at 328.

¹⁴⁴ *Bolling*, *id.* at 328.

blamed on the allegedly confusing standards and complexity of the process.

Although discussing some other reasons for his dislike of *Batson*,¹⁴⁵ this New York jurist returned to a “seemingly endless variety of issues and permutations, manifesting the intractable struggle of the lower courts to implement the unmanageable and self-contradictory *Batson* remedy,”¹⁴⁶ as one of the primary concerns and reasons to remove the peremptory challenge entirely. Likening the ever-evolving *Batson* procedure to a Sisyphean effort to “push the stone up the mountain,”¹⁴⁷ the procedure is lambasted as an “unworkable remedy,”¹⁴⁸ “impractical”¹⁴⁹ and consisting of standards of “woeful unevenness”¹⁵⁰—a procedure too complicated for either state or federal trial judges.¹⁵¹

Legal scholars have complained about confusing standards as well. They have argued that trial courts have had difficulty distinguishing neutral from pretextual explanations in the *Batson* procedure.¹⁵² One pair of scholars argues that the peremptory challenge has resulted in confusion among state and federal court in determining which groups are protected from its nondiscriminatory application.¹⁵³ As one commentator puts it, “*Batson* is an uncontrollable beast that eventually, but lamentably, will destroy the peremptory challenge.”¹⁵⁴

These reactions illustrate how the fear of *Batson* and the peremptory challenge outmatches the reality of any actual problems *Batson* might create. In all of the above cases, such radical solutions

¹⁴⁵ See *Bolling*, id. at 329 (discussing, among other things, its time-wasting aspects and its failure to eliminate bias). For more discussion of these complaints against *Batson*, see below.

¹⁴⁶ *Bolling*, id. at 328-29.

¹⁴⁷ *Bolling*, id. at 329.

¹⁴⁸ *Bolling*, id. at 329.

¹⁴⁹ *Bolling*, id. at 329.

¹⁵⁰ *Bolling*, id. at 329.

¹⁵¹ *Bolling*, id. at 329.

¹⁵² See Note, *Eliminating a Safe Haven for Discrimination: Why New York Must Ban Peremptory Challenges from Jury Selection*, 3 J.L. & POL’Y 605, 621 (1995).

¹⁵³ Vivien and Craig Montz, *supra* note ___, at 451.

¹⁵⁴ Hoffman, *supra* note ___, at 871 n.5.

to the *Batson* “problem” exemplifies the discomfort caused by the emergence of race or gender in the courtroom. For these critics, it seems, it is easier to eliminate these procedures entirely than to confront, head on, the realities of discrimination in the criminal justice system. Instead, the call for the abolition of the peremptory challenge based on the straw men of “confusing standards,” messiness or complexity belies a discomfort with confronting the realities of race, ethnicity and gender as manifested in the courtroom and within the criminal jury.

This is where the legal ethics approach proves its usefulness. Most of these “judicial uncertainty” critics argue that bias is irretrievably intertwined into the use of peremptory challenge, and no possible procedure or doctrine could eliminate it. The legal ethics approach, however, recognizes that the ethical imperative and aspirational standard provided by *Batson* is enough to overcome most of these potential uses of bias in jury selection. The bias critics shortchange both judges and attorneys by assuming that the normative framework imposed by *Batson* has no power to compel and encourage appropriate, non-discriminatory behavior.

It is true that courts and counsel may occasionally have difficulty in distinguishing neutral from pretextual strikes. The legal ethics approach recognizes, however, that this is not a reason either to abandon the attempt to safeguard a non-discriminatory jury selection process or to jettison a legal procedure—the peremptory challenge—that is generally credited with improving jury selection and, later on, jury deliberations. The simple creation of an ethical standard and a procedure for considering whether that standard has been followed may substantially increase compliance, even if there will inevitably be false positives and negatives in particular cases.

2. *Who is a “protected group:” concern over expanding group classifications*

The second piece of the concern over “confusing standards” is focused on what some jurists and academics see as a never-ending expansion of group classifications which are protected by *Batson*. This is a classic manifestation of the slippery slope argument alluded to above, where opponents of *Batson* and the peremptory challenge argue that because the *Batson* procedure has slowly expanded to include gender and ethnicity, it will soon grow to include all possible difference,¹⁵⁵ thus becoming completely unworkable.

¹⁵⁵ Any discussion of race or gender difference is incomplete without mentioning *difference* feminism. Though too complex a topic to explore in this article, difference theory posits that women have deep-rooted and partly biological gender differences separating them from men. See DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (1990); CAROL GILLIGAN, *IN A DIFFERENT*

Another prominent jurist,¹⁵⁶ a recent convert (in his own words) to abolishing the preemptory challenge, sees this as a major concern, arguing that the *Batson* procedure and preemptory challenge should be banished from the criminal justice system. Gloomily predicting that the “mutations to *Batson* are probably far from over,”¹⁵⁷ this judge predicts that *Batson* will soon be extended beyond race and sex to include, among other things, religion and national origin, since the latter are two classifications traditionally deemed “suspect” under the Equal Protection Clause.¹⁵⁸

Interestingly, some judges are somewhat more comfortable with the idea of national origin becoming one of *Batson*’s protected classes.¹⁵⁹ One jurist points out that often national origin is used as a de facto suspect class, since courts regularly treat “Hispanic” as a race for *Batson* purposes,¹⁶⁰ without distinguishing between different national origins within the category.¹⁶¹ Although noting that extending *Batson* to national origin¹⁶² would “unleash an unseemly and uncontrollable parade of horrors,”¹⁶³ this judge seems to accept that most courts want to avoid this problem by disguising national origin as race and ethnicity.¹⁶⁴

Despite acknowledging that logic would probably compel *Batson*’s extension to national origin,¹⁶⁵ however, this same jurist

VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE (1985); CHRIS WEEDON, FEMINISM, THEORY, AND THE POLITICS OF DIFFERENCE (1999).

¹⁵⁶ Judge Morris B. Hoffman currently serves as a District Court Judge for the Second Judicial District of Denver, Colorado.

¹⁵⁷ Hoffman, *supra* note __, at 836.

¹⁵⁸ Hoffman, *supra* note __, at 837.

¹⁵⁹ Hoffman, *supra* note __, at 837-38.

¹⁶⁰ But see *Hernandez v. New York*, 500 U.S. 352 (1991) (holding that Latino jurors could be excluded from jury based on admitted inability to accept translator’s rendition of Spanish-language testimony).

¹⁶¹ Hoffman, *supra* note __, at 837-38.

¹⁶² So far, *Batson* protection has been extended to Native Americans, see *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989), whites, see *Virgin Islands v. Forte*, 865 F.2d 59 (3d Cir. 1989), and Asians.

¹⁶³ Hoffman, *supra* note __, at 837.

¹⁶⁴ Hoffman, *supra* note __, at 837-38.

¹⁶⁵ Hoffman, *supra* note __, at 837.

refuses to recognize the indeterminacy of race and ethnicity in the first place.¹⁶⁶ By desiring a bright-line rule distinguishing race, on the one hand, and national origin, on the other, this judge falls into the same old trap that the majority of peremptory challenge abolitionists fall: that is, a disinclination to deal with the realities of race and ethnicity, which cannot be separated from the contours of national origin. Something as slippery as the concept of racial and ethnic identity simply cannot be categorized by legalistic, bright-line rules. So although the judge is correct that national origin, itself an amorphous category, should be considered a suspect class for *Batson*, his dislike of a possible *Batson* expansion simply belies a common misunderstanding of the complicated ramifications of racial/ethnic categorization in modern American life.

The expansion of the *Batson* challenge to religion is sometimes deemed “most problematic of all.”¹⁶⁷ Despite current judicial disinclination, on both the state and federal level, to extend *Batson* to religious belief,¹⁶⁸ some worry that if religion, a First Amendment right, becomes a protected class under *Batson*, then there will be no stopping the tide, forcing courts to protect other “particular philosophical or political belief[s].”¹⁶⁹ There is a particular terror about the enmeshing of First Amendment law with the jury trial, which claims that “[o]nce a prospective juror’s general beliefs are declared out of bounds for peremptories, only the tiniest informational platforms will be left from which counsel will be able to take their insupportable and illogical leaps into folk wisdom.”¹⁷⁰

Other critics argue that a “further logical extension” of *Batson* would include applying its protections to other jurors’ First Amendment rights.¹⁷¹ They contend that “once the door is open to

¹⁶⁶ Another way to think about the indeterminacy of race and ethnicity is to discuss it in terms of fluidity of identity. Some scholars believe that race (and to a lesser extent, gender) is a fluid state, not easily confined to simple definitions. “Race may be America’s single most confounding problem, but the confounding problem of race is that few people seem to know what race is.” Ian F.H. Lopez, *The Social Construction of Race* HARVARD C.R.-C.L. L. REV 1, 6-7 (1994) (arguing that “[r]ace is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.”)

¹⁶⁷ Hoffman, *supra* note ___, at 839.

¹⁶⁸ See, e.g., *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) (permissible to strike juror due to religion), *cert. denied*, 511 U.S. 127 (1994).

¹⁶⁹ Hoffman, *supra* note ___, at 839.

¹⁷⁰ Hoffman, *supra* note ___, at 840.

¹⁷¹ V. & C. Montz, *supra* note ___, at 465.

protecting jurors' religious freedoms, then their speech and association freedoms should similarly be protected."¹⁷²

The fear of an expanding *Batson* is shared by many legal scholars. One critic, who also wants to abolish the peremptory challenge, identifies disability, age, wealth, religious affiliation and sexual orientation as possible future protected groups.¹⁷³ This critic argues that the Supreme Court's focus "has shifted from the guarantee of a party to a fair trial by an impartial jury to the protection of equal protection rights of excluded jurors to be free from improper discrimination,"¹⁷⁴ since she foresees any classification requiring strict or heightened scrutiny as soon to require *Batson* protection as well.¹⁷⁵

Similarly, another critic argues that the Supreme Court's interpretation of the *Batson* line of case cannot logically be limited to peremptory exclusions based on race and gender.¹⁷⁶ Citing standard constitutional jurisprudence, this scholar posits that the *Batson* rationale should prevent the peremptory removal of jurors because of their political views, group memberships, prior involvement with the justice system, to take a few examples.¹⁷⁷ In attempting to reconcile the fair cross-section of the jury doctrine with *Batson* jurisprudence,¹⁷⁸

¹⁷² V. & C. Montz, *supra* note ___, at 465.

¹⁷³ Carlson, *supra* note ___, at 949.

¹⁷⁴ Carlson, *supra* note ___, at 967.

¹⁷⁵ Carlson, *supra* note ___, at 967-68. Carlson seems particularly concerned about this because of the then-recent decision of the Court in *J.E.B.*, which held that gender-based strikes are impermissible. Since gender, under Title VII classification, only merits heightened scrutiny, Carlson sees this as an opening for all sorts of new *Batson* protection—a prophecy that has not borne out fruit so far in the 11 years since the piece was published.

¹⁷⁶ Leipold, *supra* note ___, at 949.

¹⁷⁷ Leipold, *supra* note ___, at 949.

¹⁷⁸ As Leipold explains:

A defendant is . . . placed in a strange position: he is entitled to a jury drawn from a fair cross section specifically because it increases the odds that different groups and perspectives will be represented in the jury pool, which in turn helps ensure that the panel is impartial; when actually seating a jury, however, he may not take these same characteristics into account. He may not base his peremptory strikes on the very same proxy for viewpoints that the Court has already used to justify the cross-section requirement, even if his efforts are designed to bring about the exact benefit that the cross-section requirement provides. An attempt to support the cross-section requirement on impartiality grounds thus runs headlong into the rule that race

which would result in a more robust Sixth Amendment and *Batson* doctrine, he sees part of the cost of this reconciliation as the death of the peremptory challenge.¹⁷⁹ This critic does not mourn the peremptory challenge's death, because he sees the value added by peremptory strikes as, at best, taking an already fair jury and making it fairer.¹⁸⁰

Much of this criticism can be seen as an outgrowth of the anxiety *Batson* creates. There is no sign that any court in any jurisdiction is planning to substitute the protected groups of *Batson* with either the protected groups of the First Amendment or of Title VII. The tactics of these *Batson* opponents do cause some concern. By conflating two different theories into one—specifically, the theories underlying the protected groups of the First Amendment with the theories underlying the suspect classification of *Batson* and, more broadly, Title VII—these anti-*Batson* activists are trying to prompt the banning of peremptories.

Critical race theory is a useful analytical structure to understand the slippery slope argument.¹⁸¹ Critical race theory posits that racial and gender identity is fluid, resisting easy categorization. The slippery slope concern with expanding *Batson* categorizations is really a concern about the fluidity of identity, particularly the fluidity of racial identity. The current categories of *Batson*—race, gender, and sometimes ethnicity—are problematic to these critics because of their lack of defined boundaries.¹⁸² This, however, is less a problem with

or gender may not be used as a substitute for inclinations, biases, or possible votes.

Leipold, *supra* note __, at 965.

¹⁷⁹ Leipold, *supra* note __, at 949.

¹⁸⁰ Leipold, *supra* note __, at 982.

¹⁸¹ For a survey of critical race theory, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

¹⁸² For example, often blacks, Hispanics, and Asians can “pass” for white. Moreover, when a potential juror has mixed-race ancestry, it is sometimes difficult to determine, without asking, to which racial or ethnic group the potential venireperson belongs. This should not be seen as a reason to eliminate the peremptory challenge, however. *Batson* forces us to recognize race and gender in jury selection—specifically, the fluidity of racial and gender roles in our society. As much as we would like to easily place people—let alone venirepersons—into simple, definable categories, racial and gender identity resist this categorization. For more on the fluidity of racial identity, see generally IAN F.H. LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF WHITENESS* (1996).

Batson than with our systems of social categorization.¹⁸³ As one theorist notes, we “need to account for multiple grounds of identity when considering how the social world is constructed.”¹⁸⁴

As one commentator has observed, “Because race exists as an integral, structural component of social reality and human relations, racial remediation is impossible except in the company of wide-ranging social reform and human advancement.”¹⁸⁵ *Batson* requires this sort of racial and gender remediation every time the doctrine is invoked because it forces an examination of the fluidity of race and gender, which themselves are socially constructed terms.¹⁸⁶ It is important to openly discuss race and gender—and the intersection of race and gender¹⁸⁷--during criminal jury selection as part of the

¹⁸³ Of course, as Lopez argues, the law itself plays a large role in reifying racial identities:

Race suffuses all bodies of law, not only obvious ones like civil rights, immigration law, and federal Indian law, but also property law, contracts law, criminal law, federal courts, family law, and even “the purest of corporate law questions within the most unquestionably Anglo scholarly paradigm.” I assert that no body of law exists untainted by the powerful astringent of race in our society.

Lopez, *The Social Construction of Race*, *supra* note __, at 3.

¹⁸⁴ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity and Violence Against Women of Color* __ STANFORD L. REV. 1242, 1244 (1991). As Crenshaw argues, “The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite--that it frequently conflates or ignores intragroup differences.” *Id.* at 1242.

¹⁸⁵ Lopez, *Social Construction of Race*, *supra* note __, at 8.

¹⁸⁶ Most critical race theorists do not subscribe to a vision of biologically determined races, but instead implicitly view race as a social product. John Calmore suggests that “[c]ritical race theory begins with a recognition that ‘race’ is not a fixed term. Instead, ‘race’ is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle.” John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992).

¹⁸⁷ Both critical race and feminist theorists have noted the problem of intersectionality when discussing identity. As Serena Mayeri observes, “Kimberle Crenshaw, Angela Harris, Regina Austin and other intersectionality theorists have exposed the tendency of antiracist and feminist discourses to ignore and erase women of color by imagining men as the quintessential targets of race discrimination, and white women as the classic sex discrimination victims.” Serena Mayeri, Note, *Race-Gender Analogies*, 110 YALE L. J. 1045, 1049-50 (2001). Since courts tend to recognize targets of discrimination solely on the basis of belonging to a specific protected class, intersectionality seeks to broaden antidiscrimination law’s response to groups as who fall in both protected classes. Intersectionality affects *Batson* because of *Batson*’s focus on race and gender; when a *Batson* challenge is

attempt to eradicate racism and sexism within the criminal justice system.¹⁸⁸

Though there is a genuine issue regarding where to draw the line in extending the *Batson* challenge, these types of slippery slope arguments which either obfuscate the complexity of racial and ethnic categories or deliberately confuse suspect classification with protected groups are a bit disingenuous. What these critics of *Batson* fail to realize is that like everything else in the criminal justice system, the *Batson* procedure and peremptory challenge as they currently stand provide counsel the freedom to select a fair, impartial jury within a more rigid set of rules and procedures. Defense counsel do not have total freedom to strike any juror they want, nor are they totally rule-bound as to who they might discard. Criminal procedure, like many other things in our rule of law, is a living, flexible institution, providing much more stability—and, paradoxically—freedom than these critics will admit.

Moreover, as I discuss *infra* Part I(d), because the Constitution is the source of *Batson*'s ethical imperative, this limits the categories to which the doctrine can be expanded. For example, despite fears of the slippery slope critics, class is unlikely to be added to the *Batson* pantheon of protected classifications, because class is not protected by the Equal Protection Doctrine. The same argument can be extended to religion; although religion is protected by the First Amendment, it is not covered by the Fourteenth. Since *Batson* doctrine is rooted firmly in the 14th Amendment (indeed, the Court rejected using Sixth Amendment jurisprudence to bolster the doctrine),¹⁸⁹ it is highly

raised, lawyers are forced to examine their belief systems not only about the separate categories of race or gender separately, but also how race and sex discrimination are often intertwined. For a comprehensive bibliography of intersectionality compiled by Jean Ait Amber Belkhir, see <http://www.asanet.org/sections/rgcbiblio.html> [last visited 3/7/05]. See also Regina Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

¹⁸⁸ In this way, I follow the path of Lopez and Mari Matsuda in “attempting to develop a jurisprudence that accounts for the role of racism in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination.” Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991).

¹⁸⁹ See *Batson*, 476 U.S. at 84 n. 4 (“We agree with the state that resolution of petitioner’s claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner’s Sixth Amendment arguments”).

unlikely that the Court will forbid striking jurors on religious grounds, because there is no constitutional basis for doing so.

Finally, as one prominent scholar has noted, “Lincoln, Holmes, and Frankfurter have recognized [that] slippery slope arguments are of limited utility.”¹⁹⁰ Although the metaphor of the slippery slope suggests that there’s only one way through which the slippage happens, there are actually many different ways that decision A (here, *Batson* forbidding strikes based on race and gender) can make decision B (*Batson* forbidding strikes based on class) more likely.¹⁹¹ However, many of these ways have little to do with the mechanisms that people often think about when confronted with the “slippery slope.”¹⁹²

This scholar discusses “judicial-judicial slippery slopes,” the mechanism of slippery slope that is operating here.¹⁹³ *Batson* critics use a “legal effect slippery slope” mechanism by arguing that because decision B follows from decision A, court will feel bound to follow decision B simply as an application of an existing legal rule (the obligation to follow precedent).¹⁹⁴ As this scholar points out, however, “this legal effect slippery slope doesn’t by itself provide much of an argument against result A, because advocates of A could simply urge that courts decide A based on a narrower justification that avoids the excessive breadth or the added authority.”¹⁹⁵

This is precisely the case with the *Batson* slippery slope argument. The slippery slope critics argue that *Batson* will soon be broadened to include, say, religion because the Constitution, through the First Amendment, forbids prejudice on the basis of religion. *Batson*, however, is based on a different constitutional justification—the Equal Protection Clause—which avoids the potential excessive breadth of the doctrine about which the critics are so concerned.¹⁹⁶

¹⁹⁰ Eugene Volokh, *Beyond the Slippery Slope*, 116 HARV. L. REV. __ (2003).

¹⁹¹ Volokh, *supra* note __, at __ n.16.

¹⁹² Volokh, *supra* note __, *id.*

¹⁹³ Volokh, *supra* note __, at section 4a.

¹⁹⁴ Volokh, *supra* note __, at section 4a.

¹⁹⁵ Volokh, *supra* note __, at section 4a.

¹⁹⁶ Of course, as Volokh argues, “a judge deciding whether to adopt proposed principle A may worry that future judges, who have their own understandings of equality or administrability that the original judge does not share, might deliberately broaden B. And there’s little that the original judge can do when adopting A to prevent this broadening.” *Id.* at 4b. This issue is not likely to affect *Batson* doctrine, however, since not only is it unclear whether the *Batson* Court considered slippery slopes when initially fashioning the doctrine, it also is unlikely that any current Courts would not follow the line of *Batson* jurisprudence already promulgated, none of which falls down the slippery slope.

B. Batson wastes time and money

Another common complaint against the peremptory challenge and the *Batson* procedure is that both waste valuable court time by slowing down the jury selection process. Jurists argued this point from the beginning, claiming that the “already unduly lengthened jury selection process”¹⁹⁷ will be further fragmented and interrupted by *Batson*.¹⁹⁸ This vision of never-ending jury selection is also echoed by Texas jurists,¹⁹⁹ one of whom argued that “*Batson* claims will inevitably grow in number, compelling hour upon hour of inquiry into venirepersons’ ethnic backgrounds and heritage and further inquiry into the supposed thoughts and impulses of the proponent of the strike, issues that are irrelevant to juror impartiality.”²⁰⁰ New York jurists²⁰¹ have raised concerns about the “huge, expensive waste of juror time,”²⁰² and conceptualized it as a public problem. And no less a figure than Justice Scalia has expressed worry that expanding the *Batson* doctrine would add “another complexity to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less to the merits of the case.”²⁰³

Fewer legal scholars are worried about the aspect of time-wasting. Those who have raised the concern have focused on “the procedural morass”²⁰⁴ *Batson* has allegedly created in the trial courts as well as “the clogged dockets”²⁰⁵ of the appellate courts when

¹⁹⁷ *Bolling*, 79 N.Y.2d at 329.

¹⁹⁸ *Bolling*, 79 N.Y.2d at 329.

¹⁹⁹ Justice Meyers.

²⁰⁰ *Wanget*, 67 S.W.3d at 867 (concurrency). See also *Minetos*, 925 F. Supp. at 183 (“All peremptory challenges should now be banned as an unnecessary waste of time and an obvious corruption of the judicial process.”)

²⁰¹ Chief Judge Judith Kaye of the New York Court of Appeals.

²⁰² *Brown*, 97 N.Y.2d at 509.

²⁰³ *Edmondson*, 500 U.S. at 645 (1991) (Scalia, J., dissenting) (objecting to extension of *Batson* to civil cases, since “amount of judges’ and lawyers’ time devoted to implementing today’s newly discovered Law of the Land will be enormous.”)

²⁰⁴ Cavise, *supra* note __, at 541.

²⁰⁵ Cavise, *supra* note __, at 541.

contested *Batson* issues are appealed. As the one pair of critics argues, the current form of the peremptory challenge results in mini-hearings and potential appeals on each strike, and the efficacy of the procedure is highly questionable.²⁰⁶ Underlining the administrative costs²⁰⁷ of *Batson* disputes, these concerns value expediency over due process, costs over defendants' rights.

What these complaints all share is a refusal to recognize the importance of criminal jury selection as not only a constitutional due process right of the defendant but an important way for the public to participate in the process of criminal justice. Although further safeguards and procedures may indeed lengthen the average time of a criminal jury trial, thus costing the states and federal government money, this is not all bad. By forcing the criminal justice system to spend time, effort and money on choosing an impartial jury, *Batson* helps signal to everyone that fairness and procedural due process is an intrinsic part of the criminal justice system, one that cannot be shunted off by hasty or careless selection of venirepersons.

The spectacle of criminal justice, as enacted in the criminal jury room, is sometimes just as important as the implementation of such justice. The careful procedures of *Batson* and the laws surrounding the use of peremptory challenges ensure that criminal jury selection is always first and foremost in the collective societal mind. The importance of illustrating the primacy of jury selection, no matter what the costs, ties into the theory of moral lawyering referenced above. A lawyer with integrity and moral character understands that sometimes judicial resources must be spent to ensure not only the actuality of fairness and justice, but the display of it as well. Because the right to participate in the jury is a right not only of the defendant but also the potential juror and the community at large, it is worth occasionally halting the adversarial process that marks the rest of the jury trial for an exercise in ethics, fairness and non-discriminatory norms. If lawyers have "tremendous responsibility for the administration of justice,"²⁰⁸ then the *Batson* procedure, despite its use of judicial time and money, is one way to ensure lawyers have greater moral accountability for non-discriminatory behavior in jury selection.

C. Peremptory challenges inject bias into judicial proceedings

²⁰⁶ V. and C. Montz, *supra* note ___, at 453.

²⁰⁷ Leipold, *supra* note ___, at 1002. Leipold observes that "*Batson* disputes are already a time-consuming and expensive feature of the pretrial process; expanding the forbidden grounds for strikes would compound the problem." *Id.*

²⁰⁸ Russell A. Pearce, *Model Rule 1.0: Lawyers Are Morally Accountable*, 70 *FORDHAM L. REV.* 1805, 1805 (2002).

The “*Batson* causes bias” concern is also prominent among both jurists and legal scholars. The “bias” concern seeks to pin all the bias potentially inherent in criminal jury selection on the *Batson* procedure itself. Bias is a particularly great concern within jury selection because of the right to an impartial jury; an indispensable component of the defendant’s right to an impartial jury is the elimination of biased jurors.²⁰⁹ Thus, there is a tension between *Batson*’s antidiscrimination principle (permitting striking of potential jurors only for constitutionally-permitted reasons) and the general principle of peremptory challenges (encouraging striking of potential jurors due to their bias or favoritism).²¹⁰

The bias concern is prevalent among legal scholars and jurists. Among jurists, a common worry is a fear of hidden motives among both defense counsel and prosecutors. To put it another way, there is fear that criminal lawyers will mask their true intentions with believable, if false, race-neutral reasoning. As one jurist put it, “*Batson* brings to the surface and appears to ratify crude and unbecoming ways of classifying human beings and to disapprove some invidious discrimination while apparently validating much more.”²¹¹ This judge argues that the *Batson* procedure’s three-step process has become less an obstacle to racial discrimination than a “road map” to disguised discrimination.²¹² Many members of the judiciary believe peremptories to be “probably the single most significant means by which such prejudice and bias are injected into the jury selection system,”²¹³ and therefore should be eliminated.

²⁰⁹ See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (noting that due process violated when accused is denied fair trial).

²¹⁰ The second possibility, that of jurors themselves having biased or stereotypical opinions, is outside the scope of this article, as this scenario involves not peremptory challenges but challenges for cause. For a detailed exploration of the issues involved with for-cause challenges, see Abraham Abramovsky and Jonathan I. Edelstein, *Challenges for Cause in New York Criminal Cases*, 64 ALBANY L. REV. 583 (2000). Abramovsky and Edelstein’s article is primarily relevant here in that it spends much of its time attempting to unearth “hidden bias” in for-cause challenge, exemplifying the way in which legal scholars, among others, have a constant preoccupation with rooting out bias in jury selection.

²¹¹ *Bolling*, 79 N.Y.2d at 326 (Bellacosa, J., concurring) (quoting and citing Alshuler, *supra* note __, at 201).

²¹² *Bolling*, 79 N.Y.2d at 330 (Bellacosa, J., concurring) (citing to Serr and Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. LAW & CRIMINOLOGY 1, 59 (1988).

²¹³ *Bolling*, 79 N.Y.2d at 331 (Bellacosa, J., concurring).

The Supreme Court's decision in *Purkett v. Elem*²¹⁴ has been criticized by many as furthering hidden discrimination in jury selection.²¹⁵ *Purkett* relaxed the second stage of *Batson*'s burden-shifting analysis, holding that a litigant's explanation for a peremptory challenge did not have to be "persuasive, or even plausible" for it to be legitimate.²¹⁶ *Purkett* clarified that a legitimate reason does not have to make sense, but only has to be one that "does not deny equal protection."²¹⁷ Scholars claim that this clarification of the *Batson* doctrine has created confusion among the lower courts, as theoretically, any reason would now satisfy *Batson*'s second step.²¹⁸

Among scholars, there has been some exploration into what "pretext" really means. In her examination of the meaning of "pretext" and "discriminatory intent," one scholar argues that there will always be some amount of deception and discrimination in jury selection.²¹⁹ Although a finding of pretext may serve as very strong evidence of unconstitutional discriminatory intent, the two do not necessarily correlate—either there can be pretext without discrimination or discrimination without pretextual findings.²²⁰

The nuances of discriminatory behavior in jury selection, whether overt or unconscious or some combination of the two, are also of much interest.²²¹ Critics fear that though courts can occasionally "smoke out" instances of self-deception or "unconscious racism," the trial court is ultimately unable to find and recognize bias, arguing that self-deception on the part of attorneys is so difficult to identify that a court

²¹⁴ 514 U.S. 765 (1995) (per curiam).

²¹⁵ See Montzes, *supra* note __, at 467-68.

²¹⁶ *Purkett*, 514 U.S. at 765.

²¹⁷ *Purkett*, 514 U.S. at 765.

²¹⁸ Montzes, *supra* note __, at 467. See also Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J. L. REFORM 229, 236-37 (1993) (observing that the explanation requirement of *Batson*'s second step easily satisfied, even before *Purkett*).

²¹⁹ See Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, __ (1997) (exploring wisdom and propriety of imposing personal liability on attorneys who exercise discriminatory strikes, and arguing that discrimination will always be present).

²²⁰ See Charlow, *supra* note __, at 16-17.

²²¹ See Charlow, *supra* note __, at 20-21. Charlow explores the mens rea of pretext in peremptory challenges in great detail. See *id.* at 23.

would be hard-pressed to uncover it through the mask of an allegedly race-neutral reason.²²²

Certain scholars claim that peremptories not only instill bias but also fail to do their job. Some argue that peremptories are not “a narrowly tailored way” of advancing the removal of jurors at the ends of the bias spectrum.²²³ Criticizing peremptories as “exercised in an arbitrary and capricious manner, based on sudden impressions and unaccountable prejudices, which are often crudely stereotypical and may in many cases be hopelessly mistaken,”²²⁴ a critic contends that peremptories only mildly advance lawyers’ goals.²²⁵

Another critic charges that the *Batson* process has become a charade, arguing that “any experienced trial attorney” would know better than to state any preference for or aversion to a particular race, gender or ethnicity.²²⁶ This critic contends that these same trial attorneys can easily undermine any trial judge’s attempted examination of the unstated or subconscious.²²⁷

Other commentators have concluded that peremptory challenges do more harm than good because their discriminatory use outweighs any helpful use they might have.²²⁸ One observes that in considering the various roles we expect the jury to fulfill, we must consider whether the peremptory challenge hinders or helps the jury to fulfill those roles.²²⁹ This critic contends that peremptory challenges “permit discrimination in a setting that should be free from all discrimination,”²³⁰ and that sort of discrimination—i.e., counsel’s choice in shaping the jury—should not be allowed for anyone,

²²² See Charlow, *supra* note __, at 22-23.

²²³ Leipold, *supra* note __, at 984.

²²⁴ Leipold, *supra* note __, at 984.

²²⁵ Leipold, *supra* note __, at 984-85.

²²⁶ Cavise, *supra* note __, at 547.

²²⁷ Cavise, *supra* note __, at 547.

²²⁸ See, e.g., Alschuler, *supra* note __, at 169-70, 208-11 (concluding that peremptory challenges unconstitutional and promote selection of jurors “on basis of insulting stereotypes”); Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMPLE L. REV. 369 (1992) (peremptory use may lead to delay and manipulation in the trial process, resulting in excuse of jurors for inappropriate reasons such as gender, ethnicity, or race); Marder, *supra* note __, at 1136 (concluding that peremptories harmful because they limit diverse perspectives and teach “negative lessons in a public forum about who is a full citizen”).

²²⁹ Marder, *supra* note __, at 1043.

²³⁰ Marder, *supra* note __, at 1078.

constitutionally protected group or not. All peremptory challenges, permissible or not, are criticized as rooted in outdated and incorrect stereotypes handed down from trial manuals and fellow litigators.²³¹ Once peremptory challenges are removed, it is argued, a jury would be fully heterogeneous and free from bias.²³²

Implicit bias regarding race and gender pervades every aspect of our social discourse, however.²³³ This includes the criminal justice system as well. Blaming the *Batson* procedure and the peremptory challenge for all of the instances of bias present in criminal jury selection is a classic example of throwing the baby out with the bathwater. As legal scholars have come to realize, “Race colors law, crime, and community.”²³⁴ Simply eliminating *Batson* will not erase race or gender from the criminal jury selection process.

This is not to say that some of the concerns raised above about counsel using peremptory challenges improperly—consciously or unconsciously—do not exist. Undoubtedly these examples persevere, and occasionally a potential juror may be struck for impermissible reasons that are not remedied by the *Batson* procedure. However, the sometimes failure of a useful remedy does not justify the wholesale elimination of not only the remedy but also the tool itself.

Additionally, as I discuss above, because discrimination can be unconscious and implicit, *Batson* provides the best forum to establish a norm that attorneys should seek to overcome it. By inculcating a non-discrimination norm, *Batson* encourages lawyers and judges to root out their potentially discriminatory thoughts and deeds to meet the doctrine’s ethical aspirations.

D. Defense counsel’s improper use of peremptory challenges and manipulation of the Batson procedure

Both legal scholars and jurists have argued that the *Batson* procedure can be taken advantage of by defense counsel. One way defense counsel misuse *Batson*, it is argued,²³⁵ is by implanting reversible error into the trial by striking jurors on impermissible bases,

²³¹ Marder, *supra* note ___, at 1079.

²³² Marder, *supra* note ___, at 1097.

²³³ See Jerry Kang, *Trojan Horses of Race*, HARVARD L. REV. (forthcoming March 2005) (arguing that most people have implicit biases in the form of negative beliefs and attitudes against racial minorities with real-world consequences).

²³⁴ Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1145 (2003).

²³⁵ See Montzes, *supra* note ___, at 470, worrying about this very scenario.

slipping these impermissible reasons by the trial court through the use of allegedly race-neutral reasons, and then taking advantage of the trial court's failure to see through these false reasons to obtain a new trial.—what I dub the “unclean hands” issue.

This particular concern is born out of the circuit split between the Fifth and Seventh Circuit over whether a defendant may receive a new trial based on the discriminatory peremptory strikes of her own defense counsel.²³⁶ In United States v. Huey,²³⁷ the Fifth Circuit held that the trial court committed reversible error by failing to protect the equal protection rights of the five black jurors who were peremptorily challenged by the defense.²³⁸ Because the trial court “failed to discharge its clear duty” either to elicit a race-neutral explanation for the peremptory challenges or deny the use of those challenges, Huey found that the trial court committed reversible error in implicitly determining that the equal protection rights of these jurors has not been violated, requiring a new trial.²³⁹ Although acknowledging the irony in reversing the defendant's conviction given that it was his counsel who made the discriminatory strikes, the Huey court was convinced that the result was consistent with the teachings of *Batson*, since, “[i]n addition to harming individual defendants and prospective jurors, racial discrimination in the selection of jurors impugns the integrity of the judicial system and the community at large.”²⁴⁰

The Seventh Circuit, however, in United States v. Boyd,²⁴¹ disagreed with the Fifth Circuit on whether a defendant should get a new trial when her own counsel has committed the discriminatory strikes. Boyd held that the defense counsel's improper use of peremptory challenges did not warrant a new trial absent ineffective assistance of counsel, arguing that the defendant could not protest, on appeal, his own agent's “tactical decision.”²⁴²

²³⁶ This fear is also articulated in *Fulfilling the Promise of Batson*, *supra* note ___, where the author postulates that defense counsel will rely on bias as a reason to strike jurors in her discussion of the circuit split.

²³⁷ 76 F.3d 638 (5th Cir. 1996).

²³⁸ Huey, 76 F.3d at 640.

²³⁹ Huey, 76 F.3d at 641.

²⁴⁰ Huey, 76 F.3d at 741. See also Mata v. Johnson, 99 F.3d 1261, 1270 (5th Cir. 1996) (holding trial court's determination that exclusion of black potential jurors from defendant's jury, by mutual agreement between prosecution and defense, was contrary to clearly established Supreme Court precedent, but failing to grant new trial).

²⁴¹ 86 F.3d 719 (7th Cir. 1996).

²⁴² Boyd, 86 F.3d at 721.

Boyd raised the prospect that many a *Batson* critic has echoed:

Many a defendant would like to plant an error and grow a risk free trial: an acquittal is irrevocable under the double jeopardy clause, and a conviction can be set aside. But steps the court takes at the defendant's behest are not reversible, because they are not error; even the "plain error" doctrine does not ride to the rescue when the choice has been made deliberately, and the right in question has been waived rather than forfeited.²⁴³

By assuming that the defendant is interchangeable with her counsel,²⁴⁴ and further assuming that both defense counsel and defendants would do practically anything to get off scot-free, ethical or no, the Boyd court neatly summarizes the prevailing attitude of the "unclean hands" complaint: that defense counsel are not to be trusted.

Another, more general concern over defense counsel tactics is their alleged ability to twist the *Batson* procedure to their nefarious ways, despite the eyes of the prosecutor and the trial court. For example, Justice Thomas, in *Miller El v. Cockrel*, argued that one reason to ignore the jury shuffling in the case was that the defense allegedly used the tactic itself to eliminate whites from the jury.²⁴⁵

These critiques evince a larger distrust of defense counsel, who are believed to be unethical bottom-feeders who would do anything to win their cases. Not only does this view do damage to the general view of criminal defense attorneys, but it injures the reputation of all who practice within the criminal justice system. By alleging that criminal defense counsel are so evasive and untruthful as to be able to fool prosecutors and trial courts, doubt is cast on the abilities of the latter. The "unclean hands" critique insults the entire criminal legal profession.

²⁴³ Boyd, 86 F.3d at 722.

²⁴⁴ The Second Circuit disagrees with Boyd on the matter of defendant and defense counsel being interchangeable. In United States v. Nelson, 277 F.3d 164 (2d Cir. 2002), the court held that the defendant's consent to the district court's impermissible reconstruction plan did not constitute a valid waiver of their claim that the jury was improperly partial, despite explicitly consenting to the proposal, on the record. See id. at 204. As the Nelson court noted, "the defendant's acceptance of an improper jury selection plan . . . does not constitute a valid waiver." Id. at 205.

²⁴⁵ 537 U.S. 322 (2003). For a more detailed exploration of the interplay between racial discrimination and peremptory challenges in Miller-El, see Mattie Johnstone and Joshua M. Zachariah, *Peremptory Challenges And Racial Discrimination: The Effects of Miller-El v. Cockrel*, 17 GEO. J. OF LEGAL ETHICS 863 (2004).

The reasoning in Boyd, however, is not wholly bereft of ethical utility. Based on the legal ethics framework, the Seventh Circuit's approach makes the most "ethical sense" to the unclean hands problem. The problem, ethically, with Huey's approach is that it is too obsessed with assuring that there is a remedy for every wrong. In the process, the Fifth Circuit has created a right that threatens to create tension among the different legal ethical obligations of defense counsel. Acting in the best interest of the client, with the Huey approach, would seem to require the lawyer to violate *Batson* to create an appealable issue. This leads to the adversarial framework of lawyering that causes so much concern to current legal ethics scholars, and undermines the moral integrity that I locate within the *Batson* doctrine.

In contrast, the Seventh Circuit's approach would still command that trial courts consider strikes by defense counsel. This approach would not, however, entertain the admittedly paradoxical spectacle of defendants complaining about their lawyers striking jurors in their own favor, even based on discriminatory reasoning. To encourage, even mildly, defense counsel to act amorally in service of their clients would create "'extreme partisanship' on behalf of the client and 'moral non-accountability' for the lawyer's actions in pursuit of the client's goals."²⁴⁶ This is precisely what *Batson* discourages. *Batson* doctrine, by promoting ethical integrity and non-discriminatory behavior, endorses an attorney's personal moral responsibility, which would preclude acting unethically even in zealous advocacy for the client.

E. "Whose right is it anyway:"²⁴⁷ negative public perception of the criminal jury process

The Supreme Court has observed that discrimination in jury selection causes harm to the litigants, the community and the individual jurors who are wrongfully excluded from participation in the judicial process.²⁴⁸ "[J]ury service—a privilege and duty of

²⁴⁶ Pearce, *supra* note ___, at 1805.

²⁴⁷ Underwood, *supra* note ___, at 725.

²⁴⁸ J.E.B., 511 U.S. at 129. The Court went on to note that:

Striking individual jurors on the assumption that they hold particular views simply because of their gender is practically a brand upon them, affixed by the law, an assertion of their inferiority. It denigrates the dignity of the excluded juror, and . . . reinvoles a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals. . . are presumed

citizenship— [is a] fundamental means of participating in government.”²⁴⁹ There is no question that there is a public right to serve on the jury,²⁵⁰ and that this right must be balanced against the defendant’s right to an impartial jury.

Various critics of *Batson* and the peremptory challenge, however, have so enshrined the public’s right to serve on a jury that it trumps the defendant’s right to an impartial jury. As a jury trial scholar has noted, “[t]he goal of protecting those summoned to serve, once a background feature, has now moved to the center of the analysis.”²⁵¹

One prominent critic, for example, in her observation that two competing visions of the jury underlie the debate about peremptory challenges, argues that the image of the jury as a public institution should predominate, because the community that can potentially serve on the jury has changed over time, from white men to all citizens, and if the jury is to reflect a heterogeneous society, exclusion by peremptory should be unacceptable.²⁵² She also contends that the struggle of certain groups to serve on the jury has given an additional meaning to jury service, which not also “signifies the political acts of belonging to a community and participating as a full and equal citizen.”²⁵³ This scholar concludes that re-imagining the jury without the peremptory would allow her “vision of the jury as a public institution” to thrive.²⁵⁴

unqualified by state actors to decide important questions upon which reasonable persons could disagree.

Id. at 141-42.

²⁴⁹ *People v. Allen*, 86 N.Y.2d 101, 108 (1995) (citations omitted).

²⁵⁰ Although “[a]n individual juror does not have a right to sit on any particular petit jury . . . he or she does possess the right not to be excluded from one on account of race.” *Powers v. Ohio*, 499 U.S. ___, 409 (19 __).

²⁵¹ Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1142 (1993).

²⁵² Marder, *supra* note __, at 1046. Marder argues that the use of peremptories to exclude groups from the jury “can have a deleterious effect on public perception of the system’s fairness because the exclusion takes place under the gaze of the public and with the imprimatur of the state and because when the peremptory is unmasked, it often reveals stereotypes and perpetuates discrimination.” *Id.* at 1073. However, Marder does not take into account that the “unmasking” of the peremptory by the *Batson* procedure in the criminal court takes place outside of the purview of the jury; the jury is dismissed while all challenges, peremptory or for-cause, are exercised in the presence of only the judge, prosecutor, defense counsel and defendant.

²⁵³ Marder, *supra* note __, at 1046.

²⁵⁴ Marder, *supra* note __, at 1047.

Likewise, another *Batson* critic contends that the real harm in racially motivated jury selection is incurred by the excluded jurors and the stigmatized group to which they belong.²⁵⁵ This scholar contends that there is no satisfactory way to explain how "race-based jury selection discriminates against the defendant, as distinct from the jurors."²⁵⁶ Flipping the traditional view of jury selection on its head, she basically argues in favor of treating racial discrimination as a violation of jurors', rather than litigants' rights.²⁵⁷

Interesting, the public also possesses specific views on the ir right to serve on a jury. A recent newspaper article documented how 82% of all New York State jurors called for jury service never make it past *voir dire*, and how the rates elsewhere in the country are not much better.²⁵⁸ This "82% problem" was so disturbing to the New York judiciary that they formed the Commission on the Jury; "having so many people report to the jury room only to be rejected in voir dire leaves the public with a negative impression of what it means to perform one of the core duties of citizenship."²⁵⁹ The Commission is currently considering whether to reduce the number of peremptory challenges in New York criminal cases.²⁶⁰

A recent scholarly study of juror attitudes towards the criminal jury and the peremptory challenge observed that according to the *Batson* critics, "the net result of all these problems with the peremptory is the creation of an embittered and cynical group of former jurors."²⁶¹ This study documented how these critics believe that citizens who observe modern jury selection practices are disgusted as they watch the adversarial process of jury selection--particularly the excused, who are especially resentful.²⁶²

The study pointed out, however, that despite the worry that excused jurors see triviality in selection decisions, feel unfairly treated, and look down on the courts, when the actual jurors themselves were

²⁵⁵ Underwood, *supra* note __, at 725.

²⁵⁶ Underwood, *supra* note __, at 728.

²⁵⁷ Underwood, *supra* note __, at 727.

²⁵⁸ Susan Saulny, *Jury Duty? Prepare for Rejection*, THE NEW YORK TIMES (September 8, 2003).

²⁵⁹ Saulny, *supra* note __, at __ (quoting Chief Judge Kaye).

²⁶⁰ Saulny, *supra* note __, at __.

²⁶¹ Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHICAGO-KENT L. REV. 1061, 1064 (2003).

²⁶² Rose, *supra* note __, at 1064.

surveyed, “the perceived reasons for being excused were *not* associated with ratings of being treated fairly, overall satisfaction, or willingness to serve on a jury in the future.”²⁶³ Additionally, although the peremptory challenge was rarely mentioned as a symbol of unfairness, the study found that jurors were critical of aspects of the challenge for cause, particularly the hardship exemptions.²⁶⁴ The study concluded that the public is relatively accepting towards *voir dire* and its practices, and that the peremptory challenge causes little harm to the views of those excused.²⁶⁵

This last study shows that the concept of the jury as a public institution does not need to eliminate the peremptory—or the rights of the defendant—to protect the public right to serve on a jury. Though scholars are correct to observe that the jury plays a critical role in deciding cases that articulate public values,²⁶⁶ *Batson* and the peremptory challenge actually help keep the delicate balance between the needs of the public versus the needs of the criminal defendant.

By ensuring that no jurors are struck for constitutionally impermissible reasons, the *Batson* procedure allows the important public interest in the selection of the criminal jury. The fact that both the defendant and the potential juror are participants in the same judicial process, with a common interest in eliminating discrimination in the selection of jurors, is what satisfies the requirement for third party standing that “the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.”²⁶⁷ Harm is done to the defendant,

²⁶³ Rose, *supra* note ___, at 1067 (emphasis mine).

²⁶⁴ Rose, *supra* note ___, at 1067.

²⁶⁵ Rose, *supra* note ___, at 1067, 1094-98. Rose observes an interesting correlation between negative views about jury selection and the critics of the peremptory:

The critics of the peremptory are essentially positing a “harm hypothesis,” claiming that observing jury selection and the use of peremptory damages the legitimacy of the court in the jurors’ eyes. However, a contrasting possibility is that jury selection seeks out and identifies those who have pre-existing negative views about the courts or other case-related issues—what might be termed a “bad attitude hypothesis.” If the peremptory challenge successfully eliminates this group of people, it would not be surprising to learn that they view the court in a negative light because this was precisely the characteristic that contributed to their dismissal in the first place.

Id. at 1095 n. 121. Rose also notes that a few unpublished studies suggest that the challenge experience has little impact upon jurors’ general satisfaction with the system. *Id.*

²⁶⁶ Marder, *supra* note ___, at 1050.

²⁶⁷ *Singleton v. Wulff*, 428 U.S. 106, 115 (1976).

the individual juror and the community at large when a juror is illegally stricken. The ethical imperative of *Batson* procedure ensures, however, that this scenario is much less likely to happen.

In some ways, the “public perception” problem can be seen as one of expressive state action.²⁶⁸ When a potential juror is stricken, the action is formalized through the hands of the court. Whether the peremptory challenge is at the hands of the prosecution or the defense, the trial court is the mechanism for that strike. The state, by means of the exercise of real and apparent judicial authority in excusing the challenged juror, directly effects all acts, discriminatory or not, through the trial court.²⁶⁹

As another scholar argues, however, “the appearance of wrongdoing provides a reason to avoid action in situation in which the actor stands in an important relationship with those who are likely to mistake her actions.”²⁷⁰ As applied to the public perception concern, this means that the fear of appearance of wrongdoing—the judge inculcating bias by dismissing potential jurors presumably on the basis of race or gender—provides a reason to avoid this action. A judge’s willingness to raise a *sua sponte* *Batson* objection is thus heightened by this aspect of expressive state action. “It provides a reason for the actor to modify her behavior to accommodate the epistemic limitations of those to whom she is responsible”²⁷¹—that is, the public, or potential jurors.

This all leads back to the normative framework of *Batson*. The norms inculcated by *Batson* doctrine not only promote the aspiration of non-discriminatory behavior, but also take into account the public perception problem. Because *Batson*’s ethical imperative compels responsible behavior by attorneys and jurists on behalf of not only the defendant, but also the potential jurors, there is little conflict between the two sets of rights. *Batson* ethics straddle the divide by compelling lawyers and judges to consider both the defendant and the community in acting in non-discriminatory ways.

²⁶⁸ The debate about what constitutes expressive state action, as recently discussed in the *Pennsylvania Law Review*, is too broad for this article’s scope, and I note it only in passing. For more on whether the expressive content of state action matters because of its effects or whether it matters irrespective of its effects, compare Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 *Penn. L. Rev.* 1363 (2000) (expressive content of state action matters due to its effects) with Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *Penn. L. Rev.* 1503 (2000) (expressive content of state action matters irrespective of its effects).

²⁶⁹ See *People v. Kern*, 75 N.Y.2d 638, 656 (1990).

²⁷⁰ Hellman, *Judging Appearances*, at ___ (beginning of Part III).

²⁷¹ Hellman, *supra* note ___, at Part III.

F. Why proposed substitutions for the peremptory challenge fail

A variety of substitutions have been suggested by critics of the peremptory challenge. Although most center on some version of an expanded for-cause challenge, others are more creative, proposing peremptory challenges by blind questionnaire or even dispensing with the requirement of unanimity for criminal trials. As I discuss below, each of these putative solutions causes more trouble than the current use of the peremptory challenge.

In addition, these approaches overreact to the existence of an ethical imperative, creating procedures that are less likely to lead to effective deliberation. Group polarization—where members of a deliberating group predictably move towards a more extreme point in their spectrum—makes the deliberative process more difficult.²⁷² Group polarization on juries is well documented.²⁷³ As a prominent scholar notes, “[t]o the extent that the private judgments of individuals are moved by discussion, the movement will be toward a more extreme point in the direction set by the original distribution of views.”²⁷⁴

Diversity of race and gender, which results from the non-discrimination norms promulgated by *Batson*, helps eliminate homogeneity.²⁷⁵ Eliminating homogeneity, via diversity, on juries improves the deliberative process, because heterogeneous groups, “building identification through focus on a common task rather than through other social ties,”²⁷⁶ tend to produce the best outcomes.²⁷⁷ Thus a *Batson* regime with peremptory challenges recognizes that diversity may promote deliberation while at the same time eliminating from the jury individuals who may have extreme views, thus either distorting the deliberative process or producing hung juries.

Finally, none of these reform proposals have an adequate substitute for the peremptory challenge, properly limited to exclude racial considerations, let alone possess any form of ethical framework to guide lawyers. Accordingly, although they are interesting thought-

²⁷² See Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 73 (2000). As Sunstein observes, “deliberation predictably pushes groups toward a more extreme point in the direction of their original tendency.” *Id.* at 75.

²⁷³ See Sunstein, *Deliberative Trouble*, *supra* note ___, at 102-03.

²⁷⁴ Sunstein, *Deliberative Trouble*, *supra* note ___, at 87.

²⁷⁵ See Sunstein, *Deliberative Trouble*, *supra* note ___, at 75-76.

²⁷⁶ Sunstein, *Deliberative Trouble*, *supra* note ___, at 109.

²⁷⁷ See Sunstein, *Deliberative Trouble*, *supra* note ___, at 109.

exercises, these alternatives fail on both a practical and more theoretical level.

1. The expanded for-cause challenge

Some in the *Batson* abolishment camp argue for an expanded cause challenge to replace the peremptory challenge.²⁷⁸ The theory here is that the for-cause challenge would be “enhanced to include any sound, strategic, non-discriminatory reason why trial counsel might doubt a juror’s impartiality or capacity to perform.”²⁷⁹

One critic proposes a revised for-cause challenge system, which she argues would allow a mechanism for excusing non-impartial jurors, but would be non-discriminatory since it would eliminate peremptories.²⁸⁰ This scholar would revise the for-cause challenge by making the standards for striking a potential juror for cause somewhat easier, although still relatively narrow.²⁸¹ This system would improve upon the current peremptory system because the judge would have to decide the merits of each and every challenge.²⁸²

Another critic endorses the expanded for-cause challenge because it is more consistent with the “rational decisionmaking” that we prize in judicial proceedings.²⁸³ Although this critic does note that it is possible that for-cause challenges might fail to reach all those who should be removed from the jury, he contends that “the solution is to refine the standards for these challenges, not to allow lawyers to make standardless decisions.”²⁸⁴

The expanded for-cause challenge, however, would be a poor substitute for the peremptory challenge as it currently exists. First, increasing the number of for-cause challenges would lengthen the time and expense of jury selection. Second, because the for-cause challenge has such limited rules, counsel’s ability to shape the jury would be severely curtailed.

Finally, and most importantly for this article, there would be essentially no mechanism for addressing one side’s pattern of striking

²⁷⁸ See Carlson, *supra* note ___, at 1003.

²⁷⁹ Carlson, *supra* note ___, at 1003.

²⁸⁰ Marder, *supra* note ___, at 1107.

²⁸¹ Marder, *supra* note ___, at 1107-08.

²⁸² Marder, *supra* note ___, at 1111-12.

²⁸³ Leipold, *supra* note ___, at 985.

²⁸⁴ Leipold, *supra* note ___, at 985.

potential jurors for illegal bases. Simply because the strikes would then be done through the for-cause challenge as opposed to the peremptory challenge does not mean that trial counsel would not attempt to control the shaping of the jury as much as possible; instead, there would probably still be occasional instances of discriminatory intent in for-cause challenges, either conscious or subconscious. With the revised for-cause challenge system, however, there would be no *Batson* procedure to eliminate these kinds of strikes.

2. *Eliminating the requirement of unanimity in criminal convictions*

Some critics suggest the elimination of the unanimity requirement in criminal juries as a replacement for the peremptory challenge, moving away from an absolute unanimity requirement toward a supermajority rule on juries.²⁸⁵ The elimination of the peremptory challenge and replacement with non-unanimous juries was done in England, is common in Europe²⁸⁶ and has been permitted by the Supreme Court.²⁸⁷

Two reasons have been offered for why non-unanimity should be considered. First, critics argue that most of the analogies between juries and other institutions cut against unanimity, since majority or supermajority rules are used by legislatures, appellate benches, voters and grand juries.²⁸⁸ Second, and more importantly, critics posit that the very idea of unanimity is outdated, as we have now eliminated undemocratic barriers to jury service and permitted all adult citizens to serve on juries.²⁸⁹ Therefore, “preserving unanimity might also be undemocratic, for it would create an extreme minority veto of a kind unknown to the Founders.”²⁹⁰

Though this idea of possibly eliminating unanimity is an interesting one, ironically, it might result in the marginalization of minority jurors, as there would be no procedure to ensure that they would be properly represented on juries. Defense counsel would most

²⁸⁵ Vikram Amar, *More on What's Wrong with the Modern Jury: How Juror Selection Can Be Improved*, FindLaw's Writ (February 20, 2004). See generally Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1191 (1995).

²⁸⁶ European jury systems all allow majority or qualified majority verdicts.

²⁸⁷ See Apodaca v. Oregon, 406 U.S. 404 (1972) (allowing verdicts of ten to twelve jurors).

²⁸⁸ V. Amar, *supra* note ___.

²⁸⁹ V. Amar, *supra* note ___.

²⁹⁰ V. Amar, *supra* note ___.

likely oppose such elimination, because it would lower the bar necessary to convict criminal defendants. Moreover, the requirement of unanimity promotes serious deliberation – since everyone's vote is necessary, everyone is equally counted.²⁹¹ Finally, and most simply, the idea of a unanimous verdict in criminal trials is so enshrined as part of the public perception of criminal justice that it is almost impossible to imagine doing away with it.

More insidiously, however, eliminating the unanimity requirement would exclude the impact of minorities on criminal jury decisions. Based on our current demographics, minorities make up, at most, maybe 10-15% of the criminal jury. Eliminating the unanimity requirement would mean that the voices of minorities on the jury would be systematically excluded. As has been argued in the context of electoral districting, the dominant group would get all the power and the votes of supporters of non-dominant groups or of disaffected voters within the dominant group are wasted, and their votes would lose significance.²⁹²

“A system is procedurally fair only to the extent that it gives each participant an equal opportunity to influence outcomes.”²⁹³ A non-unanimous jury would fail to give each jury member an equal opportunity to influence outcomes because invariably, a few members’ voices would go unheard. Thus by eliminating the unanimity requirement, only the majority group would achieve representation; the non-dominant group, which would invariably include at least one minority jury member, would have no voice. Essentially, a system of representation that fails to provide group representation loses legitimacy, whether it is electoral districting or criminal juries.²⁹⁴ Minorities on a non-unanimous jury would be consistently excluded from decision-making power.

3. Retaining the form, if not the substance of the peremptory challenge

²⁹¹ *But see* A. R. Amar, *supra* note ___, at 1191 (arguing that unanimity cannot guarantee mutual tolerance).

²⁹² Lani Guinier, *Regulating the Electoral Process*, 71 TEX. L.J. 1589, 1591(1993). Guinier argues that voting is done on a group nature, not on an individual nature, and posits “the group nature of representation itself, especially in a system of geographic districting.” *Id.*

²⁹³ Guinier, *supra* note ___, at 1641. As Guinier observes, “outcomes are relevant only to the extent that they enable us to measure degrees of input, not to the extent they achieve some objective, substantive notion of distributive justice.” *Id.*

²⁹⁴ *See* Guinier, *supra* note ___, at 1591-92.

One novel approach that has been advanced for “fixing” the peremptory challenge is to permit a form of peremptory challenges via blind questionnaire.²⁹⁵ The argument here is that because lawyers will not have viewed the jurors, the potential for race and gender bias would be reduced.²⁹⁶ Accordingly, the process would eliminate racial and gender discrimination, it would enhance the probability of a more impartial jury, and the need for the *Batson* procedure would be eliminated.²⁹⁷

The problem with this admittedly creative idea, however, is that bias and discrimination would not necessarily be eliminated by the use of a blind questionnaire. Though lawyers would not be able to see the jurors, they would be able to discern much from the questionnaires themselves, and it is highly likely that discrimination would still stalk the criminal jury selection process.

Ultimately, no substitution for the peremptory challenge will eliminate the role of race, gender and ethnicity, and their attendant issues, from criminal jury selection. Instead of attempting to eliminate the realities of race and gender by fantasizing about abolishing the *Batson* procedure and the peremptory challenge, it is more useful to focus on the affirmative aspects of *Batson* and the normative framework of legal ethics that it provides.

V. Conclusion: Implementing the Legal Ethics of *Batson*

Batson has many affirmative aspects. As we have seen, the procedure positively affects both lawyers and the public by compelling a normative framework of legal ethics which fosters non-discrimination within jury selection and encourages the moral aspirations of the bar.

Since its very inception, however, the *Batson* challenge has come under a wide range of prudential attacks. As I explore above, *Batson* has been blamed for everything from wasting time to instilling the very bias it was meant to eradicate. As tempting as it may be to pin all of contemporary concerns over the jury selection process on *Batson*, though, this impulse should be resisted. Not only is *Batson* not responsible for the plethora of evils articulated by its opponents, it also provides a valuable normative framework of legal ethics, one that is necessary in the arena of criminal justice, particularly in criminal jury selection.

²⁹⁵ Griebat, Jeb C., Note, *Peremptory challenge by blind questionnaire: the most practical solution for ending the problem of racial and gender discrimination in Kansas courts while preserving the necessary function of the peremptory challenge*, 12 KAN. J.L. & PUB. POL'Y 323-350 (2003).

²⁹⁶ Griebat, *supra* note ___, at 324.

²⁹⁷ Griebat, *supra* note ___, at 325.

Criminal jury selection is such a fraught enterprise, carefully scrutinized by lawyer and layman alike, because it is the primary way the public participates in the criminal justice system. With the advent of open trials, legal reporters and even court television, public participation in the criminal jury is a spectator sport, rife with scrutiny and commentary.²⁹⁸ Moreover, the public's participation in the criminal jury is not only the primary way of participating in the polity, but also establishes many of our notions of fairness and equality. Therefore, the recent concerns and fears about who comprises the criminal jury and how it functions should be seen as a reflection of the ever-growing cultural awareness of the criminal justice system.

As more and more groups—African Americans, women, minorities--have become enfranchised, they have demanded participation in the justice system. The easiest and most enshrined way to participate in the criminal justice system has traditionally been serving on the petit jury. A free and open justice system is one of the hallmarks of American democracy, and it is a formulation that informs the modern American identity. As the composition of the criminal jury went from all white to racially mixed, from all male to gender diversity, from all Christian to religious multiplicity, the understanding of what comprised the modern criminal jury was deeply complicated.

Additionally, the use of the peremptory as a tool to “stem the inevitable tide of civil rights” before *Batson* has left a deep distrust in institutional memory about whether the peremptory challenge can ever be used to combat discrimination. Although African-Americans had been legally permitted to vote and participate in the jury system since Reconstruction, all-white juries were still common.²⁹⁹ *Batson*'s grand

²⁹⁸ For some recent examples of this, consider the jury selection for the O.J. Simpson and Scott Peterson murder trials. The *voir dire* for both of these celebrated criminal trials was long, complicated and carefully scrutinized by press and public. I would argue that a spillover effect has occurred in every criminal courtroom in the country. Because the public is so aware of the machinations of jury selection, the process assumes an importance that it previously lacked.

²⁹⁹ Hoffman, *supra* note ____, at 827. As Hoffman notes,

As the engine of Reconstruction began to drive the last vestiges of express racial barriers to jury services out of the state law codes, Congress passed the Civil Rights Act of 1875, which criminalized any de *jure* exclusion of jurors based on race. Still, many southern states boldly continued to enforce state statutes expressly excluding blacks from jury service. . . . It was against this backdrop of comprehensive and unabashed racial exclusion that the Supreme Court began its attempts to defang the peremptory challenge as a tool of racial segregation.

Id. at 828-830.

scheme to strip the peremptory challenge of its discriminatory past and endow it as a tool to root out bias was inspired, but it has left lawyers with a general uneasiness about both the efficacy and the fairness of the tool.

Finally, as one scholar has observed, “deciding who sits on a criminal jury is a deadly serious business.”³⁰⁰ The triad of defense counsel, prosecutors and judges recognize that shaping a jury has important, if not decisive, impact on trials, despite the strength of the evidence.³⁰¹ “It is only a slight exaggeration to say that the battle over who sits on juries is a battle over the content of the criminal justice dispensed in this country.”³⁰²

In essence, the peremptory challenge’s unfortunate history, our greater cultural diversity, our desire to explore the inner workings of the justice system, our concern over and very formulation of fairness, the importance of criminal jury selection and our anxiety over race and gender all get placed onto the peremptory. It is no wonder abolishment seems like such a good option; it eliminates both the discomfort, the racist and sexist history and—allegedly—the bias in one fell swoop. Twenty years post-*Batson*, the law still struggles with the intellectual after-effects of *Batson* and progeny. As much as we are happy to pay lip service to anti discrimination ideals, confronting them within the criminal justice system has made the bar and bench extremely uncomfortable.

The fact that *Batson* doctrine is so intimately intertwined with the norms of non-discrimination, however, should put some of these fears to rest. The structure of *Batson* requires the enforcement of these non-discrimination norms during jury selection at each and every criminal trial; whether a *Batson* challenge is raised or not, the lawyer’s obligation to act professionally and responsibly is required for all lawyers involved.

If one aspiration of legal ethics is, as I have noted before, for lawyers to accept personal responsibility for the moral consequences of their professional actions,³⁰³ then *Batson* helps achieve this goal. I do not claim that the normative framework imposed by *Batson* promises to solve all attorney behavioral problems within the criminal trial; far from it. But *Batson*’s ethical imperative is a step in the right direction. With enough steps like these, the twin ideals of the bar’s

³⁰⁰ Leipold, *supra* note __, at 948. As Leipold notes, “The Supreme Court has had more to say about who sits on criminal juries in the last twenty years that it did in the previous 180.” *Id.*

³⁰¹ Leipold, *supra* note __, at 946.

³⁰² Leipold, *supra* note __, at 946.

³⁰³ Rhode, *supra* note __, at __.

moral accountability, intertwined with the ideal of dispensing a true criminal justice, may very well emerge.