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Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection

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BEYOND *BATSON v. KENTUCKY*: A PROPOSED ETHICAL RULE PROHIBITING RACIAL DISCRIMINATION IN JURY SELECTION

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INTRODUCTION

Recently, a jury found Henry Watson and Damian Williams not guilty of attempted murder.[1] The two black men had attacked a white truck driver named Reginald Denny at an intersection in Los Angeles during the infamous riots which consumed that city in April, 1992.[2] Those riots had followed the acquittals of four white police officers who, themselves, were charged with the brutal beating of a black motorist named Rodney King.[3] With the verdicts in the Watson and Williams trial, many residents of Los Angeles felt a sense of relief.[4] Regardless of what people actually thought of the outcome, many believed the verdicts to be the "closing chapter" to the entire affair.[5] For the justice system, however, the book remains open.

Through the use of the peremptory challenge,[6] defense counsel for the

1. *See* Edward Boyer & John L. Mitchell, *Attempted Murder Acquittal, Deadlock Wind-Up Denny Trial*, L.A. Times, Oct. 21, 1993, at A1; William Hamilton, *Jury Declines to Convict L.A. Defendants on Last Two Charges*, Wash. Post, Oct. 21, 1993, at A3; Seth Mydans, *Acquittal and Deadlock End the Trial of Two in Riot Beating*, N.Y. Times, Oct. 21, 1993, at A1; John Riley, *It's Over at Denny Trial*, N.Y. Newsday, Oct. 21, 1993, at 3.

2. *See supra* note 1.

3. *See* Seth Mydans, *A Jury's Trials: Will Memories of Riots Influence a Verdict*, N.Y. Times, Feb. 7, 1993, § 4, at 7. The riots caused over fifty deaths and at least a billion dollars in damage. *See id.*

4. *See Relief in Los Angeles*, Christian Sci. Monitor, Oct. 25, 1993, at 18; George de Lama, *Worn-Out L.A. Hopes It Has Seen the Last of Blockbuster Trials*, Chi. Trib., Oct. 24, 1993, at 1C.

5. *See Needed: An End to a Sad Chapter*, L.A. Times, Oct. 26, 1993, at B6; Mydans, *supra* note 1, at A1 (quoting Mayor Richard Riordan of Los Angeles as stating that with the verdicts Los Angeles can "look to the future"); Robert Reinhold, *Calm Streets in Los Angeles Ratify Verdict of the Public*, N.Y. Times, Oct. 19, 1993, at A4 (noting most police officers felt that it was "time to move forward").

6. Jury selection begins when the court calls upon a group of people to serve as the "venire." *See generally* Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 85-137 (1977) (discussing the process of assembling the group of prospective jurors). After being summoned, this group of potential jurors is subjected to a process known as "*voir dire*," which literally means " 'to speak the truth' or 'to see what is said.' " *Id.* at 140. *Voir dire* is an often lengthy period of pre-trial questioning to determine an individual's ability to try a case impartially. *See id.* at 139; *see also* Barbara A. Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 545 (1975). During *voir dire*, attorneys challenge jurors in one of two ways in order "to eliminate those who are sympathetic to the other side": (1) by challenging them for cause, or (2) by exercising the peremptory challenge. Babcock, *supra*, at 551.

Attorneys can exercise the challenge for cause as many times as needed. *See* Van Dyke, *supra*, at 140 (stating that "[c]hallenges for cause have the virtue of being unlimited"). The challenge for cause, however, may be utilized only for particular displays of bias as specifically articulated by statute. *See* Babcock, *supra*, at 549 n.16; Van Dyke,

four police officers accused of beating King were able to eliminate each potential black juror on the venire.[7] This discriminatory use of the peremptory challenge, however, was not a new trial practice.[8] Indeed, some six years earlier, Justice Marshall lamented that the practice of peremptorily removing minority jurors from the venire was "both common and flagrant."[9]

In 1986, the Supreme Court attempted to tame the misuse of the peremptory challenge. *Batson v. Kentucky*[10] developed a framework for the lower courts to analyze cases of alleged discrimination in jury selection.[11] In short, it first required the objecting party to demonstrate a prima facie case of discrimination.[12] *Batson* then required the opposing party to rebut the inference of discrimination.[13]

Lower court implementation of the *Batson* decision, however, has been anything but successful in preventing the continued use of the peremptory challenge as a tool of racial discrimination.[14] Attorneys have become adept at rebutting prima facie cases of discrimination by creating "acceptable" reasons for their strikes. Moreover, the courts have readily accepted these pretextual explanations, thereby allowing attorneys to evade the mandate of *Batson*.[15]

In order for *Batson* to become successful in eliminating racial discrimination in jury selection, the use of pretextual reasoning to rationalize peremptory challenges must be halted. While some have looked to the courts for the solution, this Note proposes that the legal community itself

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supra, at 143-44. Moreover, the challenge for cause must be approved by the judge. *See* Babcock, *supra*, at 549; Van Dyke, *supra*, at 143-45; *see, e.g.*, N.Y. Crim. Proc. Law § 270.20 (McKinney 1993) (listing reasons why New York courts may grant a challenge for cause in a criminal case).

In contrast, the number of peremptory challenges is limited. *See* Van Dyke, *supra*, at 145; *see, e.g.*, Fed. R. Crim. P. 24(b) (limiting the number of peremptory challenges, in non-capital felony cases, to six for the government and ten for the defendant); N.Y. Crim. Proc. Law § 270.25 (McKinney 1993) (listing number of strikes for different types of crimes). More importantly, the party exercising a peremptory challenge need not offer the court a reason for striking a particular juror. *See Swain v. Alabama*, 380 U.S. 202, 220 (1965) (stating that the "peremptory challenge is . . . exercised without a reason stated, without inquiry and without being subject to the court's control"); *see also* Babcock, *supra*, at 550; Van Dyke, *supra*, at 139-40.

7. *See* Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1140-41 n.6 (1992).

8. *See* Jonathan B. Mintz, Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 Cornell L. Rev. 1026, 1041-42 (1987) (stating that the evidence of racial discrimination in jury selection would be "voluminous and sadly intuitive"); Van Dyke, *supra* note 6, at 152-60 (cataloging the "[a]ll too frequent[ ] . . . radical reduction or total elimination of . . . particular segment[s] of the population").

9. Batson v. Kentucky, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

10. 476 U.S. 79 (1986).

11. *See infra* notes 22-50 and accompanying text.

12. *See infra* notes 36-41 and accompanying text.

13. *See infra* notes 42-50 and accompanying text.

14. *See infra* Part II.

15. *See infra* Part II.B.

should take the lead in remedying the pretextual problem.[16] Thus, this Note proposes that the American Bar Association formulate an ethical rule, such as the one proposed herein, to prohibit discrimination during jury selection.[17]

Part I of this Note reviews *Batson v. Kentucky* and the subsequent Supreme Court cases expanding its holding.[18] Part II closely examines the issue of pretextuality and its pervasive use by attorneys in their explanations for challenges.[19] Finally, Part III proposes an ethical rule designed to curb lawyers from using peremptory challenges solely for the purpose of racial discrimination.[20] This Note concludes by urging the adoption of such a rule as the best approach to eliminating the peremptory challenge as a tool of racial discrimination.[21]

I. *BATSON* AND ITS PROGENY

A. Batson v. Kentucky

In *Batson v. Kentucky*, the Supreme Court considered the constitutionality of a prosecutor's use of four peremptory challenges to eliminate every potential black juror on the venire in the trial of a black man charged with burglary.[22] The all-white jury found the accused guilty.[23] Continuing its "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire,"[24] the Court reversed the conviction, holding that the practice of using peremptory challenges to dismiss jurors solely on the basis of their race violated the Fourteenth Amendment's Equal Protection Clause.[25]

Batson required the Supreme Court to re-examine the holding of *Swain v. Alabama*,[26] the Court's last major pronouncement on the peremptory challenge.[27] In *Swain*, the defendant claimed he was denied his Equal Protection rights due to the prosecutor's exercise of several peremptory

16. *See infra* notes 284-326 and accompanying text.
17. *See infra* notes 285-87 and accompanying text.
18. *See infra* notes 22-90 and accompanying text.
19. *See infra* notes 91-259 and accompanying text.
20. *See infra* notes 260-326 and accompanying text.
21. *See infra* notes 327-31 and accompanying text.
22. *See* Batson v. Kentucky, 476 U.S. 79, 82-83 (1986).
23. *See id.* at 83.
24. *Id.* at 85. For a detailed discussion of the Court's decisions with regard to jury selection prior to *Batson*, see David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 Va. L. Rev. 811, 812-15 (1988); Mintz, *supra* note 8, at 1029-31; Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. Rev. 1533, 1539-42 (1991).
25. *Batson*, 476 U.S. at 85. The *Batson* holding applies equally to the federal government through the Fifth Amendment's Equal Protection Clause. *See* United States v. Lewis, 837 F.2d 415, 416 n.2 (9th Cir.) (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)), *cert. denied*, 488 U.S. 923 (1988).
26. 380 U.S. 202 (1965).
27. *See Batson*, 476 U.S. at 82.

challenges against black members of the venire.[28] In rejecting the defendant's claim, the *Swain* Court held that only proof of the systematic exclusion of potential black jurors through the peremptory challenge could evidence an equal protection violation.[29] Noting the practical difficulties defendants faced in proving a systematic exclusion over a period of time,[30] the *Batson* Court rejected this evidentiary burden.[31] Rather, the *Batson* Court allowed movants to demonstrate racially discriminatory peremptory challenges through evidence obtained solely from observing the prosecutor at the movant's own trial.[32]

The *Batson* Court outlined a framework for analyzing cases of purposeful discrimination. Under *Batson*, defendants must first show a "prima facie case in the context of discriminatory selection of the venire."[33] Once the defendant provides facts supporting an inference of discrimination, the burden then shifts to the prosecutor to articulate race-neutral reasons for the peremptory challenge.[34] Ultimately, the trial court must determine whether the defendant successfully has demonstrated that the challenge is of a discriminatory nature.[35]

To evidence a prima facie case of purposeful discrimination, the defendant must demonstrate that "the totality of the relevant facts gives rise to an inference of discriminatory purpose."[36] In establishing such a case, the defendant first must show that "he is a member of a cognizable racial group" and that the prosecutor used her peremptory challenges to eliminate members of that racial group from the venire.[37] The movant then must prove to the trial court that the "facts and any other relevant circumstances" surrounding the use of the challenges support an infer-

28. *See Swain*, 380 U.S. at 202.

29. *See* Powers v. Ohio, 111 S. Ct. 1364, 1367 (1991) (describing *Swain* holding).

30. *See Batson*, 476 U.S. at 92 & n.17.

31. *See id.* at 93.

32. *See id.* at 95-96.

33. *Id.* at 96.

34. *See id.* at 97.

35. *See id.* at 98.

36. *Id.* at 94.

37. *Id.* at 96. The *Batson* Court did not address the question of what constitutes a "cognizable racial group." *Batson* involved the peremptory challenge of black jurors. In another case concerning a discriminatory challenge, the Supreme Court extended *Batson*'s holding to Latinos. *See Hernandez v. New York*, 111 S. Ct. 1859, 1872-73 (1991). Currently, the Supreme Court is considering whether women should be considered a cognizable group for the purposes of *Batson*. *See* J.E.B. v. T.B., 113 S. Ct. 2330 (1993).

Lower federal and state courts apply *Batson* to a myriad of groups, including Asians, *see, e.g.*, Kline v. State, 737 S.W.2d 895, 899 (Tex. Ct. App. 1987), Italian-Americans, *see, e.g.*, United States v. Biaggi, 673 F. Supp 96, 101 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1982), Native Americans, *see, e.g.*, United States v. Chalan, 812 F.2d 1302, 1313-14 (10th Cir. 1987), whites, *see, e.g.*, Roman v. Abrams, 822 F.2d 214, 225-28 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989), and, even French-Canadians with Gallic surnames, *see, e.g.*, Commonwealth v. Gagnon, 449 N.E.2d 686, 691-92 (Mass. App. Ct. 1983), *aff'd sub nom.* Commonwealth v. Bourgeois, 465 N.E.2d 1180 (Mass. 1984).

ence of discrimination.[38] The Supreme Court advised the lower courts that evidence of a prima facie case of discrimination could be provided either through the questions and comments made by an attorney during *voir dire*[39] or the existence of "a 'pattern' of strikes against black jurors."[40] The *Batson* Court cautioned, however, that these examples were "merely illustrative" and trial court judges must decide for themselves what circumstances are relevant in any particular case.[41]

Following the demonstration of a prima facie case,[42] the burden shifts to the prosecutor to rebut the inference of discrimination.[43] Rebuttal entails offering a racially neutral explanation for challenging the potential juror.[44] The Supreme Court emphasized that this explanation need not rise to the level of a challenge for cause.[45] The Court cautioned, however, that attorneys could not expect lower courts to rely on the attorney's good faith or intuitive judgment.[46] Valid explanations, the *Bat-*

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38. *Batson*, 476 U.S. at 96.

39. *See id.* at 97. An example of this type of case occurred in *Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992). In *Splunge*, the prosecutor, during *voir dire*, had the following exchange with a potential juror:

> [Prosecutor]: Okay. Now, Mr. Clark, as is very obvious, you are a Negro man, and [the defendant] is a Negro man. The fact that you are both of the same race, what effect, if any, will that have on your ability to be fair and impartial as a juror?
>
> [Juror]: None.
>
> [Prosecutor]: You can put that aside? You're not going to give [the defendant]'s testimony, if he testifies, more credit just because he's a black man? . . .[Y]ou're not going to look on him more favorably just because of race?
>
> [Juror]: No.

Id. at 707-08. The court found this line of questioning sufficient evidence for the defendant to establish a prima facie case.

40. *Batson*, 476 U.S. at 97. Since attorneys rarely provide judges with clear proof of their motives behind their *voir dire* questions or comments, courts tend to focus on whether a pattern of strikes exists. The *Batson* Court, however, left unanswered the question of how many strikes are needed to demonstrate a "pattern." A related problem, also left unresolved, is what to do in the case where a prosecutor permits a small number of token minority jurors on the venire but excludes a larger number from it. For a good discussion of these problems, 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, 170-73, 179-80 (1989); Hopper, *supra* note 24, at 821-25; Mintz, *supra* note 8, at 1033 n.60.

41. *Batson*, 476 U.S. at 97.

42. Commentators suggest that the evidentiary requirements placed on the movant in making a prima facie case should not be an onerous burden. *See* John H. Blume, *Racial Discrimination in the State's Use of Peremptory Challenges: The Application of the United States Supreme Court's Decision in* Batson v. Kentucky *in South Carolina*, 40 S.C. L. Rev. 299, 330 (1989); Hopper, *supra* note 24, at 825. According to these commentators, to place a heavy burden on the movant would controvert the purpose of *Batson*. *Batson*'s goal was to replace the former evidentiary standard formulated by the Court in *Swain v. Alabama*, which was considered "a crippling burden of proof." *Batson*, 476 U.S. at 92 & n.17. *See supra* notes 26-32 and accompanying text (discussing *Swain* holding).

43. *See Batson*, 476 U.S. at 97.

44. *See id.*

45. *See id.*

46. *See id.* at 97-98; *see, e.g.*, Splunge v. Clark, 960 F.2d 705, 708 (7th Cir. 1992)

son Court stated, must be "clear and reasonably specific,"[47] expounding upon "legitimate reasons . . . related to the particular case to be tried."[48] After giving the prosecutor an opportunity to rebut the movant's prima facie case, the trial court must determine if the peremptory challenge was, in fact, race-based.[49] The *Batson* Court concluded that because this evaluation is so fact-specific, turning on issues such as credibility and appearance, an appellate court should give great deference to the findings of the trial court.[50]

B. *Post-*Batson *Cases: Expanding the Holding*

In his *Batson* concurrence, Justice White forewarned that "[m]uch litigation will be required to spell out the contours of the Court's . . . holding."[51] In addition, another commentator has remarked that "clarifying the scope of *Batson* has become almost an annual event for the Court."[52] Indeed, since handing down its decision, the Supreme Court has extended the holding of *Batson* to "effectuate its overarching rationale."[53]

(explanation inadequate where attorney argued: " '[S]he would not be a good juror in this case, and I can assure you that they were not racial motivations at all' "); United States v. Horsley, 864 F.2d 1543, 1544 (11th Cir. 1989) (illegitimate challenge where attorney argued: " 'I don't have any particular reason. I just got a feeling about him' ").

47. *Batson*, 476 U.S. at 98 & n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

48. *Id.*

49. *See Batson*, 476 U.S. at 98. The *Batson* Court made "no attempt to instruct" the lower courts on how to reach such a decision. *Id.* at 99-100. Instead, the Court left it to these lower courts to formulate the appropriate procedures in evaluating a *Batson* challenge (including both parties' roles in such a procedure). Various commentators have suggested possible procedures. *See generally* Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 Yale L.J. 187 (1989) (suggesting that courts should allow both parties to present evidence and participate fully in a *Batson* determination hearing); L. Ashley Lyu, Note, *Getting at the Truth: Adversarial Hearings in Batson Inquiries*, 57 Fordham L. Rev. 725 (1989) (arguing that an adversarial hearing is mandated by the Constitution).

Moreover, the *Batson* Court also left unresolved the issue of a proper remedy for an inadequate explanation. *See Batson*, 476 U.S. at 99-100 n.24 (alluding to two possible remedies: either seating the challenged juror or dismissing the entire venire and reselecting another jury). *But see* Alschuler, *supra* note 40, at 177-78 (arguing that neither remedy discussed by the *Batson* Court is adequate).

Indeed, Chief Justice Burger, in his dissent, took issue with the Court for leaving so many open questions in such an important opinion. Indeed, the Chief Justice "wish[ed] the [lower court] judges well [in] . . . find[ing] their way through the morass the Court creates today." *Batson*, 476 U.S. at 131 (Burger, C.J, dissenting).

50. *See Batson*, 476 U.S. at 98 n.21; *see also* United States v. Williams, 936 F.2d 1243, 1246 (11th Cir. 1991) (advocating that the trial judge is in the best position to evaluate a proffered explanation because "selection . . . is by nature a subjective process which relies heavily on the instincts of the attorneys, the atmosphere in the courtroom, and the reactions of the potential jurors to questioning"), *cert. denied*, 112 S. Ct. 1279 (1992).

51. *Batson*, 476 U.S. at 102 (White, J., concurring).

52. Stephanie Goldberg, *Batson & The Straight-Face Test*, A.B.A. J., Aug. 1992, at 82.

53. *The Supreme Court, 1990 Term, Leading Cases*, 105 Harv. L. Rev. 177, 262 (1991).

Powers v. Ohio[54] eliminated *Batson*'s requirement that the defendant and the excluded juror be members of the same race to demonstrate a successful prima facie case of discrimination.[55] In *Powers*, the prosecutor struck seven black persons on the venire in the murder trial of a white man.[56] The white defendant sought to invoke the protections of *Batson* and have the prosecutor explain the challenges.[57] Because *Batson* required racial identity between the defendant and the excluded juror,[58] the trial court rejected the defendant's request.[59]

Powers first reaffirmed its commitment to the principles enunciated in *Batson*. "[T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the . . . jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life."[60] Before applying *Batson* to the case before it, however, the *Powers* Court needed to address whether a criminal defendant had standing to raise the constitutional rights of the excluded juror.[61] In answering this question in the affirmative, the Court noted that a defendant would be an effective proponent of the excluded juror's rights.[62] Furthermore, considerable barriers existed that made it impractical for the excluded juror to raise his or her own rights.[63] Thus, the Court concluded that race was irrelevant to the standing inquiry.[64]

The Supreme Court next addressed the question of whether *Batson* should apply to private litigants in a civil case. In *Edmonson v. Leesville Concrete Co.*,[65] a black construction worker brought a negligence action

54. 111 S. Ct. 1364 (1991).

55. *See id.* at 1366.

56. *See id.* One commentator speculated that the prosecutor struck the black venirepersons in this case in part due to the common stereotype that suggests blacks are lenient towards defendants. *See The Supreme Court, 1990 Term, Leading Cases*, *supra* note 53, at 257 n.13; *see also* Jere W. Morehead, *Prohibiting Race-Based Peremptory Challenges: Should the Principle of Equal Protection Be Extended To Private Litigants?*, 65 Tul. L. Rev. 833, 837 & n.35 & n.36 (1991) ("[S]tudies found that prosecutors . . . believe that minorities were more likely to favor defendants in criminal cases.").

57. *See Powers*, 111 S. Ct. at 1366.

58. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986).

59. *See Powers*, 111 S. Ct. at 1366. The Ohio Court of Appeals affirmed the conviction and the Supreme Court of Ohio dismissed Powers' appeal. *Id.*

60. *Id.* at 1370.

61. *See id.*; *see also* Singleton v. Wulff, 428 U.S. 106, 112-16 (1976) (discussing third-party standing).

62. *See Powers*, 111 S. Ct. at 1372 (stating that a criminal defendant "has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for [the Supreme Court has] recognized that discrimination in the jury selection process may lead to the reversal of a conviction").

63. *See id.* at 1372-73. Among these obstacles are the difficulties in obtaining evidence, a small financial incentive to litigate and the costs of litigation. Indeed, the Court concluded that "[t]he reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.* at 1373.

64. *See id.*

65. 111 S. Ct. 2077 (1991).

following injury in a job-site accident.[66] During *voir dire*, counsel for defense exercised two of three allotted strikes to eliminate blacks from the jury.[67] Noting that "discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial,"[68] the *Edmonson* Court extended *Batson*'s ban on race-based challenges to civil cases.[69]

In order to arrive at this conclusion, the *Edmonson* Court first needed to establish that the exercise of peremptory challenges by a private litigant constituted state action, subjecting their use to the requirements of the Fifth Amendment.[70] The Court found that the peremptory challenge existed only through the express authorization of the government (in the form of statutes outlining procedures for its use)[71] and performed a traditional governmental function (the selection of an impartial jury).[72] Moreover, the injury suffered by the excluded jurors was intensified by the fact that it occurred within the courthouse, a symbol of individual rights and justice.[73] Thus, the *Edmonson* Court held that the use of the peremptory challenge constituted state action.[74] Therefore, race-based strikes violated the equal protection rights of the challenged juror.[75] Having arrived at this conclusion, the Court then proceeded to find that a movant had standing to raise the excluded juror's rights.[76] Finally, Justice Kennedy, writing for the majority, made clear that "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[77]

The Court's last major pronouncement on *Batson* broadened that decision's holding to include peremptory challenges exercised by a defendant

66. *See id.* at 2080-81.

67. *See id.* at 2081; *see also* 28 U.S.C. § 1870 (1988) (allotting three peremptory challenges to each side in a civil case in federal court).

68. *Edmonson*, 111 S. Ct. at 2082; *see also* Morehead, *supra* note 56, at 847 (stating that the "members of the community who are called for jury duty should not be provided with any less protection against racial discrimination because of their assignment to a civil case rather than a criminal case").

69. *See Edmonson*, 111 S. Ct. at 2088-89.

70. *See id.* at 2082-83. The Court followed the "framework for state action analysis set forth in" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). *Edmonson*, 111 S. Ct. at 2082. *Lugar* first requires a court to consider whether the claimed constitutional violation results from the exercise of a right or privilege having its source in state authority. *Lugar*, 457 U.S. at 939-41. Then the court must determine whether the private party acted as a state actor. *Id.* at 941-42.

71. *See Edmonson*, 111 S. Ct. at 2083.

72. *See id.* at 2085-87. The Court also noted the extent of judicial supervision over *voir dire*. *See id.* at 2084-85.

73. *See id.* at 2087 ("To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.").

74. *See id.* at 2080.

75. *See id.*

76. *See id.* at 2087-88. The *Edmonson* Court followed the third party standing analysis of *Powers v. Ohio*. *See supra* notes 61-64 and accompanying text.

77. *Id.* at 2088.

in a criminal case. In *Georgia v. McCollum*,[78] three whites were indicted following a racially motivated attack on a black couple.[79] Prior to jury selection, the prosecutor, fearing that the defense would use their strikes to eliminate blacks from the jury, sought to have *Batson* apply to the criminal proceeding.[80] The trial court denied the request[81] and the Supreme Court of Georgia affirmed that decision.[82]

The Supreme Court reversed, holding that *Batson* applied with equal force to criminal defendants.[83] As in *Edmonson*,[84] the *McCollum* Court first found that the criminal defendant's exercise of peremptory challenges constituted state action, thereby subjecting their use to the strictures of the Fourteenth Amendment.[85] Indeed, the Supreme Court expressly rejected the notion that a criminal defendant's adversarial relationship with the government precluded a finding of state action.[86] Moreover, as in *Powers*[87] and *Edmonson*,[88] the Court held that a state prosecutor had standing to raise the constitutional rights of the excluded juror.[89] Thus, the *McCollum* Court "reaffirm[ed] . . . that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party."[90]

II. THE PRETEXTUALITY PROBLEM

The success of *Batson v. Kentucky* and its progeny depends largely on what explanations lower courts accept from attorneys attempting to rebut a prima facie case of discrimination. Justice Marshall feared that the use of pretextual reasoning at this stage of the inquiry would render "the protection erected by the Court [in *Batson*] . . . illusory."[91] In his concurrence to *Batson*, he predicted that attorneys could easily assert facially race-neutral reasons for their strikes, regardless of their true intent, and the trial courts would be "ill equipped to second-guess those reasons."[92] Thus far, Justice Marshall's concerns over the use of pretextual reasoning appear well founded. Lower courts have been unable to distinguish legit-

78. 112 S. Ct. 2348 (1992).
79. *See id.* at 2351.
80. *See id.* at 2351-52.
81. *See id.* at 2352. The trial court stated that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." *Id.*
82. *See* State v. McCollum, 405 S.E.2d 688, 689 (Ga. 1991).
83. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992).
84. 111 S. Ct. 2077 (1991). *See supra* notes 65-77 and accompanying text.
85. *See McCollum*, 112 S. Ct. at 2354-57.
86. *See id.* at 2356 ("Lastly, the fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action.").
87. *See supra* notes 61-64 and accompanying text (discussing third party standing).
88. *See supra* note 76 and accompanying text (discussing third party standing).
89. *See McCollum*, 112 S. Ct. at 2357.
90. *Id.* at 2359.
91. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).
92. *Id.*

imate reasons for a peremptory strike from those that serve as "mere . . . excuses for discrimination."[93]

A. *The Supreme Court and Pretextuality*

Significantly, the Supreme Court has provided almost no guidance to the lower courts in assessing attorneys' proffered reasons for peremptory challenges. *Batson* itself instructed judges only that explanations needed to be "clear and reasonably specific" as well as related to the particular case before the court.[94] Without adequate guidelines as to what this means, lower courts in reviewing peremptory strikes are accepting both those rationales that serve as pretext and those that are truly legitimate.[95] And, as a direct result, *Batson*'s goal of eliminating racial discrimination from the jury selection process remains unfulfilled.[96]

Lynn v. Alabama,[97] a case in which the Supreme Court denied certiorari, is illustrative of this unwillingness to come to terms with the crucial issue of pretextual reasoning. In *Lynn*, the prosecutor used his challenges to eliminate all of the potential black jurors on the venire in the murder trial of a black man.[98] During the *Batson* hearing, the prosecutor successfully rebutted the prima facie case of discrimination by giving a juror-by-juror explanation of his strikes.[99]

Justice Marshall, dissenting to the denial of certiorari, took issue with two of the peremptory strikes. Two of the potential jurors were struck because they "live[d] on the Gammage Road in an area where the defendant, Frederick Lynn, was living at the time of this crime."[100] Hence, the prosecutor explained, he felt that there existed the possibility of the defendant and the two jurors knowing one another, thus affecting the

93. Hon. Theodore McMillan & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. Rev. 361, 369 (1990).

94. *Batson*, 476 U.S. at 98 & n.20.

95. *See* Juan F. Perea, Hernandez v. New York*: Courts, Prosecutors, and the Fear of Spanish*, 21 Hofstra L. Rev. 1, 16 (1992) (stating that "many trial courts automatically accept the prosecutor's 'race-neutral' explanations without critical evaluation"); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 43 (1988) (stating that "trial judges accept virtually any explanation").

96. *See* Hopper, *supra* note 24, at 831 ("Only if lower courts perform a critical analysis of the prosecutor's rebuttal in all cases will they give real meaning to the principles underlying *Batson*."); McMillan & Petrini, *supra* note 93, at 369 ("Ineffective scrutiny of prosecutor's explanations is the single greatest problem hindering the effective implementation of *Batson*."); *see also* Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror exclusion and the "Intuitive" Peremptory Challenge*, 78 Cornell L. Rev. 336, 361 (1993) (noting the inability of courts to eliminate pretextual responses which "violate the purpose and spirit of *Batson*").

97. 493 U.S. 945 (1989).

98. *Id.* at 946 (Marshall, J., dissenting).

99. *Id. See* Ex parte Lynn, 543 So.2d 709, 711 (Ala. 1988) (listing the following as reasons for dismissal: relationship to the defendant, possessing a criminal record, working with the defendant's father, residence, a history of drug use, age, and friendship with the defendant's stepmother).

100. *Lynn*, 493 U.S. at 947 (Marshall, J., dissenting).

jurors' ability to hear the case.[101] Justice Marshall proceeded to make two observations about these strikes.

First, if the prosecutor truly believed that the jurors were possibly biased, he could have established this fact through questioning during *voir dire*. Oddly enough, however, the prosecutor did not even ask "these potential jurors whether they actually knew anyone involved in the trial, although he had ample opportunity to do so."[102] Indeed, Justice Marshall noted that "[s]uch an inquiry is a standard part of *voir dire* practice."[103] Moreover, had the prosecutor confirmed his feelings that the jurors were possibly biased because of their residences' proximity to the defendant, the prosecutor then could have utilized the challenge for cause and saved his peremptory challenges.[104] Thus, Marshall concluded that this behavior suggested that the residence of the jurors served as mere pretext for racial discrimination.[105]

Furthermore, Gammage Road was an area "populated primarily by people of color."[106] Justice Marshall commented that in many communities, one's race and one's address are synonymous.[107] Thus, such characteristics that can easily serve as surrogates for race "should not be regarded as a legitimate basis for exercising peremptory challenges without some corroboration on *voir dire* that the challenged venirepersons actually entertain the bias underlying the use of that factor."[108] Significantly, the prosecutor had admitted, during the *Batson* hearing, his knowledge of the racial make-up of the area along Gammage Road.[109] Again, the prosecutor's failure to establish the presence of actual bias leads to a conclusion that residence served as an "overly broad proxy for bias."[110] Thus, Justice Marshall would have granted certiorari "to determine whether . . . reliance on a nonracial criterion in exercising . . . peremptory jury challenges violates [*Batson*] where that criterion is highly correlated to race and the bias that the [attorney] seeks to exclude through the use of that criterion could easily have been discovered on *voir dire*."[111]

Indeed, in not addressing a case such as *Lynn*, the Supreme Court fails to provide adequate guidance to lower courts faced with similar uses of pretextual reasoning. Thus, the confusion surrounding the rebuttal stage of a *Batson* inquiry remains. Moreover, this creates a danger that other lower courts will continue to allow potential surrogates for race, such as

101. *See id.*
102. *Id.*
103. *Id.*
104. *See id.*
105. *See id.*
106. *Id.*
107. *See id.*
108. *Id.*
109. *See id.*
110. *Id.*
111. *Lynn*, 493 U.S. at 945-46.

residence, to serve as legitimate race neutral explanations, even when uncorroborated. The net result is not only that jurors are denied their Equal Protection rights under *Batson*, but also that courts foster racial stereotyping in the jury selection process.[112]

Hernandez v. New York[113] provided the Supreme Court yet another opportunity to discuss the issue of pretextuality. Once again the Court punted. In *Hernandez*, a Latino defendant, on trial for attempted murder, objected to the prosecutor's challenging of all four Latinos on the venire.[114] After the defense raised the objections, the prosecutor explained that two of the strikes were exercised because the jurors had family members with criminal records.[115] The other two were struck because of their Spanish-speaking ability.[116] Indeed, the prosecutor felt that the jurors' knowledge of Spanish would hinder their willingness to "accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses."[117] Despite assurances by the potential jurors that "they would try to follow the interpreter," the jurors' demeanor led the prosecutor to believe otherwise.[118] Moreover, the prosecutor thought that these two Spanish-speaking jurors "would have an undue impact upon the jury."[119]

It was the trial court's acceptance of the reasoning behind these last strikes which the defendant appealed.[120] The defendant argued that the reason given by the prosecutor, the jurors' bilingualism, was not race-neutral but rather was a pretext to keep Latinos off the jury in the trial of a Latino. Pointing to "the high correlation between Spanish-language ability and ethnicity in New York, where the case was tried," the defendant argued that one's proficiency in Spanish could easily serve as a surrogate for race.[121] Indeed, census data reveals that, at the time of the trial,

112. *See* Ex parte Lynn, 543 So. 2d 709, 715 (1988) (Jones, J., concurring specially) ("How long, oh, how long will we persist in the hollow notion that black jurors are less likely to convict criminally accused black defendants than are white jurors to convict white defendants?").

113. 111 S. Ct. 1859 (1991).

114. *See id.* at 1864.

115. *See id.*

116. *See id.* at 1864-65.

117. *Id.*

118. *Id.* at 1865. In a subsequent conversation with the trial court, the prosecutor stated that he "just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it." *Id.* at 1865 n. 1.

119. *Id.* at 1865.

120. *See id.* at 1864. Both the New York Supreme Court, Appellate Division, *see* People v. Hernandez, 140 A.D.2d 543, 528 N.Y.S.2d 625 (N.Y. App. Div. 1988), and the New York Court of Appeals, *see* People v. Hernandez, 75 N.Y.2d 350 (1990), affirmed the judgement.

121. *Hernandez*, 111 S. Ct. at 1866. Apparently, the prosecutor relies on a mistaken assumption that Latino jurors, through their Spanish ability, will be able to distort the testimony given in Spanish to the benefit of the Latino defendant. *See generally* Martha Minow, *Stripped Down Like A Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 Wm. & Mary L. Rev. 1201 (1992) (arguing that the decision wrongly implies that Latinos have sympathies in cases involving Latinos); *see also* Perea,

eighty-four percent of all Latinos in Brooklyn, the trial site, spoke Spanish in their homes,[122] thus leading to the conclusion that "[i]n the Latino community, ethnicity and language are inextricably intertwined."[123]

Surprisingly, the Supreme Court plurality in *Hernandez*[124] found it unnecessary to address this pretextuality argument.[125] Justice Kennedy, writing the plurality opinion, defined a race neutral rationale as one "based on something other than the race of the juror."[126] Therefore, in evaluating a proffered reason for a particular strike, the trial court should examine the "facial validity" of the given explanation.[127] So long as "a discriminatory intent is [not] inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[128]

Had the prosecutor explained that he did not want any Spanish-speaking jurors, the plurality opined, then a court could possibly find that this explanation served as a pretext for discrimination.[129] However, the plurality felt that "that case is not before us."[130] Rather, the prosecutor in *Hernandez*, "did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony."[131] Thus, the *Hernandez* Court concluded that the prosecutor's reasons for the strikes were facially valid and did not evince an intent to exclude Latinos from the jury.[132]

The distinction between a challenge used due to a juror's proficiency in Spanish and one exercised because of a perceived unwillingness by the juror to faithfully accept an interpreter's translation is disingenuous. Indeed, any juror proficient in Spanish would have responded to the prosecutor's questions concerning their bilingualism in exactly the same manner since it would be impossible for the Spanish-speaking juror to

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supra note 95, at 40-46 (refuting notion that Latino jurors will have an undue influence on the jury).

122. *See* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups From Jury Service*, 1993 Wis. L. Rev. 761, 789 & n.85 (1993) (citing 1980 U.S. Census).

123. *Id.* at 791; *see also* Perea, *supra* note 95, at 44 (stating that "Spanish-language ability and Spanish-English bilingualism are inextricably interwoven with Latino or Hispanic origin").

124. Chief Justice William Rehnquist along with Justices White, Kennedy, and Souter composed the plurality in *Hernandez*. Justice O'Connor wrote a concurring opinion in which Justice Scalia joined. Justices Stevens, Blackmun, and Marshall dissented. Justice Stevens wrote the dissent in which Justice Marshall joined while Justice Blackmun only joined part of it.

125. *See Hernandez*, 111 S. Ct. at 1867.

126. *Id.* at 1866.

127. *Id.*

128. *Id.*

129. *See id.* at 1873.

130. *Id.*

131. *Id.* at 1867.

132. *See id.* at 1867-68.

ignore completely the actual testimony given in Spanish.[133] Hence, despite the Supreme Court's statements to the contrary, the explanation given by the prosecutor does have the effect of a "pure, language-based reason."[134] And this the Supreme Court stated would have been an unacceptable rationale.[135] Thus, by mischaracterizing the reasons given in *Hernandez*, the Supreme Court successfully averted the need to confront the hard question of pretextuality.[136]

As a result, the Court's decision in *Hernandez* actually encourages the use of pretext. Indeed, *Hernandez* offers a limited view of the concept of race neutrality. Arguably, potential racial surrogates—like language in *Hernandez* or residence in *Lynn*[137]—always can be described, at least facially, as based on "something other than race."[138] Therefore, such exclusions routinely will be accepted. So long as attorneys do not blatantly discriminate, they can offer pretextual reasons confidently, knowing that courts will not delve beyond an explanation's facial validity. And, consequently, the *Batson* decision is reduced "to a superficial check only for the most egregious forms of discrimination."[139]

Moreover, *Hernandez* presents an excellent example of the havoc pretextual reasoning can have on minority representation on the jury. According to the 1990 census data, seventy-five percent of all Latinos speak Spanish.[140] Thus, in cases where Spanish testimony will be introduced into evidence, roughly three of four Latino jurors may be eliminated from the venire solely because of their language abilities.[141]

133. Indeed, the defendant attempted to make this point in his brief to the Court. *See id.* at 1867. One commentator has noted that "following the prosecutor's instruction to abide solely by the official English interpretation would have been as unnatural and impossible as asking them to stop breathing during the duration of the trial." Ramirez, *supra* note 122, at 762.

134. *Hernandez*, 111 S. Ct. at 1867. *See generally* Perea, *supra* note 95 (arguing that the peremptory exclusion of bilingual jurors is not race neutral).

135. *See id.* at 1872-73. The Court stated:

> We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

Id.

Indeed, the Court has held language-based restrictions implicate the Equal Protection Clause. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating law prohibiting the teaching of languages other than English).

136. *See* Ramirez, *supra* note 122, at 806 (stating that the "Court ignored the factual reality of the case and proclaimed that this case was about two individually deficient responses").

137. *See supra* notes 97-111 and accompanying text.

138. *Hernandez*, 111 S. Ct. at 1866.

139. Swift, *supra* note 96, at 356.

140. *See* Ramirez, *supra* note 122, at 762 & n.5 (citing 1990 U.S. Census).

141. The *Hernandez* plurality did state that evidence of such disparate impact "does have relevance to the trial court's decision" on the question of race neutrality. *Hernandez*, 111 S. Ct. at 1868. Nonetheless, the Court ignored this statistical evidence of potential Latino exclusion in *Hernandez*.

"Obviously, *Hernandez* poses a threat to [Latino] persons' participation as jurors"[142]—clearly not a result intended by *Batson*.[143]

B. *The Lower Courts and Pretextuality*

This Note divides pretextual reasoning into three distinct categories: (1) explanations that serve as racial and ethnic surrogates, (2) reasons that are based on unequal application between white jurors accepted and minority venirepersons peremptorily struck, and (3) rationales relying on an attorneys' subjective impressions of a particular individual during *voir dire*.[144] A review of cases accepting reasons falling into these three categories will help outline the trouble lower courts are experiencing with pretext.

1. Racial and Ethnic Surrogates

Courts repeatedly accept justifications based on nonracial characteristics that are "such a close proxy for race [or ethnicity] that '[they] would not supply a neutral explanation for challenging [minority] jurors.' "[145] Such racial surrogates are present when "there is an extraordinary and dramatic statistical correlation between the trait and race, ethnicity, or gender."[146] Thus, one commentator has used the term "super-correlated" to describe these traits.[147] Indeed, these rationales, while facially "race neutral,"[148] often exhibit, at best, tenuous reasoning, a far cry from the requirements set forth by the Supreme Court in *Batson*.[149] Moreover, the risk of pretext is great with an explanation which may also serve as a proxy for race, as such rationales tend to eliminate large segments of the minority population, regardless of the individual characteristics of a particular juror.[150]

Residence provides a particularly good example of a racial surrogate.

142. Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. Rev. 419, 433 (1992).

143. As Justice Stevens' dissent stated, "[i]f any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, 'the Equal Protection Clause would be but a vain and illusory requirement.' " *Hernandez*, 111 S. Ct. at 1876 (Stevens, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986)).

144. *See also* Hopper, *supra* note 24, at 826-29 (creating three categories of classification: a juror's connection to the case at bar, the juror and defendant share some nonracial characteristic, and an attorney's subjective impressions).

145. Alschuler, *supra* note 40, at 175 (quoting Batson v. Kentucky, 476 U.S. 79, 97 (1986)).

146. Ramirez, *supra* note 122, at 2 & n.8.

147. *Id.*

148. *See* Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991); *see supra* notes 126-28 and accompanying text (discussing race neutral requirement).

149. *See* Batson v. Kentucky, 476 U.S. 79, 98 & n.20 (1986) (requiring a neutral explanation to be both clear and specific as well as related to the particular case to be tried).

150. *See* Serr & Maney, *supra* note 95, at 53-54 (stating that "these facially neutral reasons provide prosecutors with a 'cover' for racial discrimination").

Especially in urban areas, residence often will correlate significantly with either race or ethnicity.[151] Indeed, as one court has noted, "[r]esidence . . . acts as an ethnic badge . . . [and] can be the most accurate predictor of race."[152] Moreover, academic studies have concurred with this conclusion.[153] Nonetheless, courts routinely accept residence as a legitimate excuse without the scrutiny the rationale warrants.[154]

In *United States v. Uwaezhoke*,[155] a black defendant, on trial for his participation in a heroin conspiracy, objected to the government's peremptory challenge of a black woman.[156] In defending the strike, the prosecutors stated that the prospective juror was a single parent with two children, worked as a postal worker, and rented an apartment in the city of Newark, New Jersey.[157] Thus, the cause for the strike, the prosecutors explained, was that she might have been "involved in a drug situation where she lives."[158] The district court accepted the proffered rationale and denied the defendant's claim that the challenge was mere pretext.[159] The Third Circuit affirmed, noting that the peremptory strike was "clearly race-neutral on its face."[160]

Uwaezhoke illustrates exactly the tenuous reasoning often underlying challenges based on racial surrogates. Relying on the prospective juror's occupation and residence, the prosecutors jumped to the conclusion that

151. Indeed, in many cities, neighborhoods are named, sometimes derogatorily, after the race or ethnicity residing in them. For instance, New York City has Chinatown, Little Italy, and Spanish Harlem. *See* Fodor's New York 8-9 (1991).

152. United States v. Bishop, 959 F.2d 820 (9th Cir. 1992).

153. *See, e.g.*, Michael F. Potter, Note, *Racial Diversity in Residential Communities: Societal Housing Patterns and a Proposal for a "Racial Inclusionary Ordinance"*, 63 S. Cal. L. Rev. 1151, 1154 (1990) (finding that race determines housing patterns); Richard H. Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 N.W. U. L. Rev. 874, 875 (1988) (remarking that "[e]very major metropolitan area in the U.S. still has a large ghetto; in many cities, over eighty percent of the black population lives in virtually all-black neighborhoods").

154. *See, e.g.*, Lynn v. Alabama, 493 U.S. 945, 946 (1989) (striking juror because of residence acceptable); Williams v. Chrans, 957 F.2d 487, 489-90 (7th Cir. 1992) (accepting explanation that prospective juror lived in the same neighborhood as the crime scene even though prospective juror indicated he had no previous knowledge of the crime); United States v. Williams, 936 F.2d 1243, 1247 (11th Cir. 1991) (holding strike based on venireperson's residence near "a family the prosecutor had convicted on charges of conspiracy to distribute five years earlier" legitimate; prosecutor reasonably may have concluded that an "associational link" existed), *cert. denied*, 112 S. Ct. 1279 (1992); United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990) (approving strike of minority venireperson who lived in vicinity of the homes of two government witnesses), *cert. denied*, 498 U.S. 863 (1990); United States v. Mitchell, 877 F.2d 294, 303 (4th Cir. 1989) (allowing strike of black jurors because they resided in a black Congressman's district); Taitano v. Commonwealth, 358 S.E.2d 590 (Va. Ct. App. 1987) (striking of juror who resided near criminal defendant considered nonpretextual); *see also supra* notes 97-112 and accompanying text.

155. 995 F.2d 388 (3d Cir. 1993).

156. *See id.* at 389-90.

157. *See id.* at 391.

158. *Id.*

159. *See id.*

160. *Id.* at 393.

"she may be living in a low-income area that has a drug problem."[161] From this, the prosecutors then inferred that because one "lives in a poor neighborhood in Newark . . . [the person must] have had personal experiences with drug trafficking that would make their reaction to trial evidence [in a drug case] unpredictable."[162] In an attempt to bolster their contentions, the government's brief to the Third Circuit noted that Newark has an infamous " 'reputation as a national leader in the areas of drug crime and violent crimes.' "[163]

Even if the prosecutor made a bona fide assumption that this particular juror lived in a drug-infested area, the inference that she could not try the case in an impartial manner does not necessarily follow. Indeed, the reasons offered by the Third Circuit as to why the inference is logical appear blatantly stereotypical. The court suggested that perhaps the prosecutor "may rationally believe" that the struck juror would not have convicted a black drug dealer for fear of either retaliation or an "unpleasant contact with the police in the context of drug trafficking."[164] This kind of reasoning amounts to little more than an assumption that one who lives in a black neighborhood cannot fairly try a black defendant.[165]

Moreover, during *voir dire*, neither of the two government attorneys ever asked the venireperson a single question in an effort to corroborate their assumptions.[166] Thus, they simply assumed that a black, single woman living in Newark resided in low-income housing and, further, that areas of low-income housing must experience drug problems.[167] In other words, the prosecutors simply equated low-income, black neighborhoods with drug problems. Even worse, these stereotypes were judicially sanctioned by both the trial and circuit court in accepting them as legitimate reasons for striking the juror.[168] Indeed, the *Uwaezhoke* panel stated that counsel may "rely on educated guesses about probabilities based on their limited knowledge of a particular juror and their own life experiences."[169]

However, when these educated guesses are nothing more than uncorroborated stereotypes, *Batson v. Kentucky* commands their prohibi-

161. *Id.* at 400 (Pollack, J., dissenting).

162. *Uwaezhoke*, 995 F.2d at 394.

163. *Id.* at 400 (Pollack, J., dissenting) (quoting Government's Brief to the Third Circuit, at 16).

164. *Uwaezhoke*, 995 F.2d at 394 n.5. This last inference is particularly troubling as it suggests that perhaps a black woman, earning lower wages, somehow is involved with drugs herself.

165. *See* Ex parte Lynn, 543 So. 2d 709, 715 (1988) (Jones, J., concurring specially) ("How long, oh, how long will we persist in the hollow notion that black jurors are less likely to convict criminally accused black defendants than are white jurors to convict white defendants?").

166. *See Uwaezhoke*, 995 F.2d at 390-91.

167. *See id.* at 393-94.

168. *See id.* at 394.

169. *Id.* at 394 n.5.

tion.[170] As one court stated, "Through mental association, African-Americans, their neighborhoods, crime and violence all become amalgamated, giving rise to tenacious stereotypes—innocent and unintentional perhaps, but stereotypes nonetheless. They are and must remain unwelcome in the courtroom."[171]

Furthermore, *Uwaezhoke* also indicates the impact that such racial proxies can have on minority representation on the jury. The justification given by the government easily could eliminate large segments of the minority population. As Judge Pollack, dissenting in *Uwaezhoke*, commented that while one cannot say with assurance what impact the exclusion would have on the future compositions of juries, one can conclude with "considerable confidence" that "such exclusion would, to a significant degree, disproportionately disqualify black jurors."[172] Thus, Judge Pollack queried, "in a city which is 58.5% black, is the exclusion from jury service in drug cases . . . of all persons who live in a 'low-income area' compatible with *Batson*?"[173]

Religious activities provide yet another legitimate proxy for race. *United States v. Woods*[174] involved a case in which the defendant, a black minister from Charleston, South Carolina, was on trial for mail fraud.[175] During jury selection, the United States attorney exercised four peremptory challenges against black members of the venire.[176] On appeal, the defendant challenged the district court's acceptance of the explanation for one of the prospective jurors.[177] That juror, a black man also from Charleston, was struck because "he frequently attended church and visited various churches in the Charleston area."[178] Thus, the prosecution felt that "he may have been a constituent of the defendant."[179]

In affirming the district court's validation of the excuse, the Fourth Circuit agreed that since the juror "stated he attended various churches in the area, he could have attended the defendant's church."[180] Significantly, the government failed to ask the prospective juror if he ever had

170. *See supra* notes 22-50 and accompanying text.

171. United States v. Bishop, 959 F.2d 820 (9th Cir. 1992). In *Bishop*, the Ninth Circuit invalidated a peremptory challenge of a black woman. The challenge was explained as due to the fact that she lived in Compton, a neighborhood in South Central, Los Angeles. *See id.* at 825. Noting that seventy-five percent of Compton's residents were black, the *Bishop* Court found the proffered reason acted as a discriminatory racial proxy. *See id.* at 826. Indeed, the reason "amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant." *Id.* at 825.

172. *Uwaezhoke*, 995 F.2d at 401 (Pollack, J., dissenting).

173. *Id.* at 403.

174. 812 F.2d 1483 (4th Cir. 1987).

175. *See id.* at 1484.

176. *See id.* at 1485.

177. *See id.*

178. *Id.*

179. *Id.*

180. *Id.* at 1487.

actually attended the church where the defendant preached.[181] Thus, the court permitted the following assumption to be made: since a black venireperson attends church, it follows that the church must have a black minister. Such tenuous inferences cannot be considered legitimate as they amount to nothing more than unconfirmed stereotypes.

Furthermore, religious activities have the potential to eliminate large numbers of minorities, regardless of a venireperson's individual characteristics. Thus, in *United States v. Clemmons*,[182] a prosecutor struck a venireperson because he felt that the juror, whose last name was Das, was " 'probably Hindu in religion;' " and, Hindus " 'may have religious beliefs that may affect [the juror's] thinking.' "[183] This rationale was accepted by the trial court and subsequently affirmed.[184] Strikingly, however, the prosecutor never asked the venireperson if he was Hindu.[185] Moreover, as nearly all Hindus are of Indian origin,[186] the Third Circuit effectively gives attorneys a license to exclude a large segment of the Asian Indian population.[187]

Membership in a group traditionally associated with minorities is an additional example in this category. In *United States v. Payne*,[188] for example, a black defendant in a criminal trial objected to the prosecutor's striking of two jurors because of their race.[189] In rebutting the prima facie case of discrimination, the government argued that the reason for the challenges was that the two individuals were associated with two black activist groups, the NAACP and the Black Caucus.[190] The Sixth Circuit affirmed the district court's acceptance of the proffered reasons, holding that "the distinction the government drew between the race of the two individuals who were excused and the affiliations and activities of these two individuals" was legitimate.[191] This distinction, however, seems to ignore the fact that membership in these groups strongly corre-

181. *See id.* at 1485.

182. 892 F.2d 1153 (3d Cir. 1989), *cert. denied*, 496 U.S. 927 (1990).

183. *Id.* at 1156.

184. *See id.* at 1157.

185. *See id.* at 1156. Moreover, even if the juror was Hindu, one must wonder how that "affect[s] his thinking," *id.*, especially, in a case where the defendant was on trial for selling stolen treasury bonds. *See id.* at 1154. This justification certainly does not seem "related to the particular facts in the case to be tried." Batson v. Kentucky, 476 U.S. 79, 98 (1986).

186. *Id.* at 1161 (Higginbotham, J., concurring). Indeed, "in common usage the word 'Hindu,' in addition to identifying the religious faith, has often served as a shorthand reference to Asian Indians." *Id.* at 1161 n.8.

187. Another example is the elimination of Latino jurors due to their Catholicism. *See Perea, supra* note 95, at 18. Catholicism is considered an integral part of the Latino identity. *See id.* Indeed, some 80 to 95% of all Latinos consider themselves Catholics. *See id.* at 18 n.87.

188. 962 F.2d 1228 (6th Cir.), *cert. denied*, 113 S. Ct. 306 (1992).

189. *See id.* at 1233.

190. *See id.*

191. *Id.*

lates with race.[192] Thus, the danger of pretext should not have been rejected so readily.

Closely related to racial surrogates are those reasons likely to result in a disproportionate number of minority persons being excluded from the jury. Indeed, like the excuse based on racial surrogates, these type of strikes, while facially race neutral, can easily serve as pretext for racial discrimination. Furthermore, rarely will these rationales have any legitimate relation to the facts of the particular case to be tried.[193] Thus, the *Hernandez* Court stated that "disparate impact should be given appropriate weight in determining whether" a prima facie case has been rebutted.[194]

Frequent excuses that fall into this sub-grouping are unemployment,[195] lack of substantial income,[196] insufficient education,[197] and relatives with criminal records.[198] Moreover, these reasons tend to become magnified in urban areas "where the burden of unemployment, low income, or poor education is likely to fall disproportionately upon minorities."[199] Indeed, commentators have noted that black neighborhoods in cities tend to lack employment opportunities and have inferior schools, increased criminal activities and higher poverty rates.[200] Thus, exclu-

192. The National Association for the Advancement of Colored People was founded in 1909 with the explicit purpose of "advanc[ing] the interests of colored citizens." NAACP v. NAACP Legal Defense Fund, Inc., 735 F.2d 131, 132 (D.C. Cir.), *cert. denied*, 472 U.S. 1021 (1985). As one commentator has noted, the NAACP is primarily considered a "black group." Roger Alan Stone, *The Mass Plaintiff: Public Interest Law, Direct Mail Fundraising and the Donor/Client*, 25 Colum. J.L. & Soc. Probs. 197, 206 n.62 (1992).

193. *See* Serr & Maney, *supra* note 95, at 54; *see also* Batson v. Kentucky, 476 U.S. 79, 98 (1986) (discussing requirements for rebuttal).

194. Hernandez v. New York, 111 S. Ct. 1859, 1867 (1991). However, disparate impact, consistent with the Supreme Court's Equal Protection analysis, will not be dispositive of racially discriminatory intent. *See id.* at 1867-68.

195. *See infra* notes 202-10 and accompanying text.

196. As one judge has noted, "[u]nhappily, 'poverty level' correlates closely with race." United States v. Uwaezhoke, 995 F.2d 388, 400 (3d Cir. 1993) (Pollack, J., dissenting). For a case invoking this explanation, see *United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987). In *Cartlidge*, a prospective juror was stricken because his low income occupation might have allowed him to identify with a black defendant on trial for charges relating to the defendant's participation in a drug conspiracy. *See id.* at 1070. Apparently, the prosecutor assumed that the prospective black juror's low-income status would cause that juror to relate to the black defendant's presumable need for money. This assumption is dubious at best. *See id.*; Serr & Maney, *supra* note 95, at 45-46 n.249.

197. *See, e.g.*, United States v. Mixon, 977 F.2d 921, 923 (5th Cir. 1992) (accepting challenges of two jurors due to their low-level of education); United States v. Hinojosa, 958 F.2d 624, 631-32 (5th Cir. 1992) (approving exclusion of three blacks on the venire because of insufficient education).

198. *See, e.g.* United States v. Hughes, 970 F.2d 227, 231 (7th Cir. 1992) (allowing strike of a potential black juror with a cousin who had served two years in jail for a drug conviction despite fact that juror stated she would have no trouble being fair and impartial); United States v. Johnson, 941 F.2d 1102, 1109 (10th Cir. 1991) (holding legitimate where juror struck because her brother was once convicted of a crime).

199. *See* Serr & Maney, *supra* note 95, at 54.

200. *See* Potter, *supra* note 153, at 1176-78; Sander, *supra* note 153, at 875.

sions producing a disparate impact upon minorities deserve heightened scrutiny.

Perhaps most troubling are the cases involving unemployment, a somewhat frequent excuse.[201] *United States v. Ferguson*[202] provides an excellent illustration as to why such heightened scrutiny is merited. In *Ferguson*, a black defendant stood trial for possession of an illegal firearm.[203] During *voir dire*, the prosecutor supplied unemployment as his rationale for striking both a black male and a black female from the jury.[204] While noting the "reasons may appear insubstantial,"[205] the Seventh Circuit nonetheless affirmed the district court's acceptance of the given explanation.[206] However, one must (and the trial court necessarily should have) question the connection between an unemployed juror and a black defendant illegally possessing a gun.[207] Moreover, labor statistics for Chicago, the site of the trial, indicated that 18.8% of all black males and 14.8% of all black females were unemployed in the year of the trial.[208] Thus, roughly one of every five black males and one of every seven black females "were denied the honor and privilege of jury duty" simply for being black and unemployed.[209]

Indeed, in cases where racial surrogates, and their disparate impact counterparts, are employed, courts should use extreme caution in analyzing them. Both merit special scrutiny as they are inherently suspect of serving as mere pretext. Therefore, attorneys should be required during *voir dire* to bring out those facts which support the rationales for their strikes. Moreover, courts need to ensure that given explanations rationally relate to the case before them. Without these preventative measures, *Batson* cannot succeed.

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201. *See, e.g.*, United States v. Jackson, 914 F.2d 1050, 1052 (8th Cir. 1990) (allowing strike of one black juror to stand due to individual's unemployment); United States v. Moreno, 878 F.2d 817, 820 (5th Cir.) (accepting as legitimate peremptory challenges of two black females and one Latino male due to their unemployed status), *cert. denied*, 493 U.S. 979 (1989); United States v. Ross, 872 F.2d 249, 250 (striking of two unemployed prospective jurors valid).

202. 935 F.2d 862 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992).

203. *See id.* at 863.

204. *See id.* at 864.

205. *Id.* at 865.

206. *See id.* at 865-66.

207. As Judge Cudahy stated in his concurrence, "[u]nless we are to assume that youth [a reason for another strike] and unemployment are universally plausible reasons for jury strikes, there should be some indication of a nexus between the crime charged and the characteristics of the challenged juror." *Id.* at 867 (Cudahy, J., concurring).

208. *See Geographic Profiles of Employment and Unemployment, 1990*, Bureau of Labor Statistics, June 1991, at 92. The unemployment rates for white males and white females were 3.9% and 4.5% respectively. *See id.*

209. Powers v. Ohio, 111 S. Ct. 1364, 1369 (1991). In *Jackson*, *supra* note 202, a similar impact is achieved. In St. Louis, site of the trial, 14.5% of all black women were unemployed. *See Geographic Profiles of Employment and Unemployment, 1989*, Bureau of Labor Statistics, May 1990, at 101.

2. Uneven Application

The second grouping of cases involves those in which the courts accept a given rationale for a strike of a minority juror even though white jurors exhibiting the same characteristics which prompted the peremptory strike remain unchallenged and thus are allowed on the jury. In *United States v. Alvarado*,[210] for example, the prosecutor challenged four black venirepersons in the trial of a black man accused of extortion.[211] As to one of the strikes, the prosecutor explained that the prospective juror had children the same age as the defendant and therefore "might be unduly sympathetic."[212] The defendant, however, argued these reasons were pretextual as the prosecutor failed to peremptorily challenge white members of the venire with children the same age as the defendant.[213] During the *Batson* inquiry, the prosecutor even admitted his failure to challenge white jurors with this characteristic.[214] Nevertheless, the trial court accepted the proffered rationale and the Second Circuit affirmed.[215] Furthermore, the Second Circuit noted that while the given rationale appeared "dubious,"[216] it should not be rejected "simply because it applies to a non-minority venireperson who was not challenged."[217]

Pretext, however, is much more likely when unequal application of a "peremptory policy" is demonstrated.[218] Indeed, as one circuit court has observed, "[w]hat constitutes a neutral explanation is a question of comparability. . . . In order to have a neutral explanation, the characteristics of the struck individual cannot be present in those white panel members not struck."[219] Thus, courts should not accept rationales when white jurors are not subjected to the same criteria.

In *Jones v. Ryan*,[220] the Third Circuit invalidated a peremptory challenge for just this reason. In *Jones*, a twenty-three year-old defendant was on trial for robbery and assault.[221] The prosecutor, using his peremptory challenges, eliminated three of the four black venirepersons during *voir dire*.[222] As to the first juror struck, the prosecutor explained that it was his "general policy" to use his challenges to eliminate potential jurors with children the same age as the defendant.[223] The second strike

210. 951 F.2d 22 (2d Cir. 1991).
211. *See id.* at 23-24.
212. *Id.*
213. *See id.* at 25.
214. *See id.* Indeed, the prosecutor attempted to argue that the government had "other reasons for challenging" the juror but specified none. *Id.* Calling this attempt "lame," the Second Circuit rejected this "factor." *Id.*
215. *See id.* at 26.
216. *Id.*
217. *Id.* at 25.
218. Serr & Maney, *supra* note 95, at 57.
219. United States v. Wilson, 853 F.2d 606, 610 (8th Cir. 1988).
220. 987 F.2d 960 (3d Cir. 1993).
221. *See id.* at 962.
222. *See id.*
223. *Id.* at 964.

was used against a young juror. In support of this strike, the prosecutor expressed a policy that "if it's a white defendant, a green defendant, a red defendant, black defendant, if there's a potential juror of the same approximate age and race as the defendant . . . I will keep them off the jury."[224] Finally, the prosecutor challenged the third juror for failure to make eye contact.[225]

On appeal, the defense objected to the acceptance of these rationales by arguing they were pretextual. Indeed, despite the prosecutor's general policy of striking jurors with children of an age similar to the defendant, the record revealed that two white venirepersons had children of an age approximately the same as the defendant.[226] Furthermore, while the prosecutor also alleged a policy of striking jurors the same age as a defendant, the record showed that three whites went unchallenged even though their ages were roughly the same as the defendant.[227] Noting that the prosecutor's general policies were "discarded where the venirepersons were white,"[228] the Third Circuit held the challenges to be pretextual and reversed.[229]

While some courts also have nullified strikes because of unequal application of a given rationale,[230] others still persist in accepting the such strikes regardless of evidence of this type of pretext.[231] Contributing to this problem is the fact that records rarely reflect what transpired during *voir dire* as accurately as did the record in *Jones*.[232] Thus, in *United*

224. *Id.*

225. *See id.* This challenge was not discussed on appeal. *See id.* at 974; *see also infra* notes 236-60 and accompanying text (discussing this type of subjective strike).

226. *See Jones*, 987 F.2d at 973.

227. *See id.* at 973-74.

228. *Id.* at 974.

229. *See id.* at 975.

230. *See, e.g.*, United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (nullifying strike of Hispanic person because prosecutor gave juror's residence in La Mesa, California as reason, but failed to strike a white juror who also resided in La Mesa).

231. *See, e.g.*, United States v. Clemons, 941 F.2d 321, 324 (5th Cir. 1991) (accepting proffered rationale of youth even though nineteen-year-old white juror was accepted); United States v. Williams, 936 F.2d 1243, 1246 (11th Cir. 1991) (accepting rationale for strike of a black woman because of a previous association with defense counsel, despite fact that several white jurors also had contact with defense counsel), *cert. denied*, 112 S. Ct. 1279 (1992); United States v. Bennett, 928 F.2d 1548, 1551 (11th Cir. 1991) (allowing youth, unemployment, and relatives with drug convictions as reasons for strikes of black venirepersons regardless of fact that one white juror was young and unemployed and another had been convicted of drug charges); Barfield v. Orange County, 911 F.2d 644, 648-49 (11th Cir. 1990) (deeming acceptable a strike of a black woman for being employed by school board while two white women also employed by school board were not stricken), *cert. denied.*, 111 S. Ct. 2263 (1991); United States v. Alston, 895 F.2d 1362, 1367 n.5 (11th Cir. 1990) (finding no pretext in challenges to potential black jurors based on age, family drug problems, and misunderstanding *voir dire* questions even though prosecutor did not strike white jurors exhibiting the same characteristics); United States v. Lance, 853 F.2d 1177, 1180 (5th Cir. 1988) (holding strike of black venireperson nonpretextual even though white juror exhibited the same characteristics of being young and single).

232. *See supra* notes 220-29 and accompanying text.

States v. Bennett,[233] in part because a white juror with a family member convicted of a drug offense could not be identified in the transcript, an attempted comparison between black venirepersons struck due to their relatives having drug-related convictions and the accepted white jurors with this characteristic failed.[234] To prevent unequal application of strikes, courts should expect that if, as an attorney claims, a minority venireperson is excluded for having a particular attribute, then white venirepersons possessing the same characteristic similarly should be challenged. Courts cannot continue to ignore the significant likelihood that pretext exists when attorneys fail to do so.

3. Subjective Impressions

This last category of cases includes those in which a court accepts explanations based on an attorney's subjective impressions of a juror. For example, *Barfield v. Orange County*,[235] the plaintiff brought a Section 1983[236] and Title VII[237] action against her employer, the Orange County Sheriff.[238] The plaintiff, a black woman, claimed she was fired from her job as a corrections officer due to her race.[239] During *voir dire*, the defense challenged the only two black women on the venire.[240] One juror, the prosecutor explained, was struck because she "was looking at me, and looking at my client, and looking at the defendant's table with an expression that conveyed to me some hostility, and it was my gut feeling, based on her facial expression that she was likely to not be fair and impartial to the Sheriff."[241] The trial court accepted this rationale and the Eleventh Circuit affirmed, holding that "hostile facial expressions and body language are legitimate" reasons for a strike.[242]

Appellate courts have accepted a multitude of such subjective-impression explanations. In addition to strikes for perceived hostility,[243] courts have allowed strikes of jurors due to attorney impressions of their demeanor,[244] their attitude,[245] their dress,[246] and inattentiveness during *voir*

233. 928 F.2d 1548 (11th Cir. 1991).
234. *See id.* at 1151.
235. 911 F.2d 644 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263 (1991).
236. 28 U.S.C. § 1983 (1988).
237. 42 U.S.C. § 2000-e. (1988).
238. *See Barfield*, 911 F.2d at 645.
239. *See id.*
240. *See id.* at 646.
241. *Id.* The other juror was challenged because of a family member who had a criminal record. *See id.*
242. *Id.* at 648.
243. *See* Brown v. Kelly, 973 F.2d 116, 119 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1060 (1993) (hostility); United States v. Todd, 963 F.2d 207, 211 (8th Cir. 1992) (hostility); United States v. Matthews, 803 F.2d 325, 331 (7th Cir. 1986) (hostility), *rev'd on other grounds*, 485 U.S. 58 (1988).
244. *See* United States v. Lance, 853 F.2d 1177, 1181 (5th Cir. 1988) (demeanor); United States v. Forbes, 816 F.2d 1006, 1010-11 (5th Cir. 1987) (demeanor).
245. *See Brown*, 973 F.2d at 119 (juror not serious in responding to questions); United

dire.[247] Moreover, a juror's facial expressions,[248] eye contact,[249] nervousness,[250] and tone of voice[251] all have been considered valid reasons as well. Indeed, in one case, a juror's "slouching" resulted in his being peremptorily challenged.[252]

Subjective explanations prove problematic in that these types of reasons easily mask discriminatory motives, making them subject to abuse. An attorney wishing to keep minorities off the jury can simply provide the court with a subjective rationale based on an unverifiable impression. Since judges usually remain unaware of a particular juror mannerisms, "trial courts are ill-equipped to second-guess [these] reasons."[253] Indeed, how can a judge know if the juror actually expressed negative "body language"[254] or if a juror "spent a great deal of time examining me?"[255] Moreover, a written record will not reflect such subjective opinions, thus making an appeal of these challenges much more difficult.

As Justice Marshall noted, in his concurrence to *Batson*, "outright prevarication [is not] the only danger here."[256] Racist attitudes of both attorneys and judges alike, either consciously or unconsciously, may contribute to their discriminatory characterization of minority jurors.[257] Because " 'seat-of-the-pants instincts' may often be just another term for racial prejudice,"[258] impression-based explanations need heightened scru-

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States v. Vaccaro, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987) (poor attitude).

246. *See* United States v. Clemons, 941 F.2d 321, 323-24 (juror dressed like a "rock star"); *see also* Alschuler, *supra* note 40, at 174 n.85 (citing cases).

247. *See generally* United States v. Sherrills, 929 F.2d 393 (8th Cir. 1991) (striking three jurors for inattentiveness); United States v. Rudas, 905 F.2d 38 (2d Cir. 1990) (inattentiveness).

248. *See* United States v. Hendrieth, 922 F.2d 748, 749-50 (11th Cir. 1991) (rubbing and rolling her eyes); United States v. Ruiz, 894 F.2d 501, 506 (2d Cir. 1990) (facial expressions).

249. *See* Dunham v. Frank's Nursery & Crafts, Inc., 967 F.2d 1121, 1124-25 (7th Cir. 1992) (looking sympathetically at plaintiff); Reynolds v. Benefield, 931 F.2d 506, 512 (8th Cir. 1991) (staring at defense attorney); United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987) (avoiding eye contact with attorney).

250. *See* Brown v. Kelly 973 F.2d 116, 119 (2d Cir. 1992) (juror appeared nervous), *cert. denied*, 113 S. Ct. 1060 (1993).

251. *See id.* (stating juror was "timid in speaking").

252. *Reynolds*, 931 F.2d at 510 (commenting that juror also looked bored, disinterested, and hostile). *See also* United States v. Terrazas-Carrasco, 861 F.2d 93, 95 n.1 (5th Cir. 1988) (striking juror who exhibited negative body language).

253. Batson v. Kentucky, 476 U.S. 79, 105 (1986) (Marshall, J., concurring). *See also* Serr & Maney, *supra* note 95, at 59 n.317 ("It is very unlikely that a trial judge can remember all the idiosyncracies exhibited by the prospective jurors during *voir dire*, especially when the [attorney] gives his explanation, if at all, subsequent to the questioning of all venirepersons."); Swift, *supra* note 96, at 362 (calling these "soft-data" explanations "unimpeachable").

254. *Terrazas-Carrasco*, 861 F.2d at 95 n.1.

255. United States v. Matthews, 803 F.2d 325, 331 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988).

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

257. *See id.*

258. *Id.*

tiny;[259] yet, courts routinely accept them without it.

III. A Possible Solution: Legal Ethics

Batson v. Kentucky and its progeny[260] impose a Herculean task upon the courts. Together, the decisions force trial judges to assess the motives of attorneys exercising peremptory challenges against potential minority jurors. As Justice Marshall commented, the "implicit assumption [of *Batson*] that courts are capable" of evaluating such challenges for alleged racial discrimination is *Batson*'s "greatest flaw."[261] Indeed, the emerging case law is proving Justice Marshall correct.[262]

Through the use of pretextual reasoning, attorneys remain free to strike jurors predicated on clear, yet sometimes subtle, racial stereotypes. With courts either unable[263] (or unwilling[264]) to detect such race-based challenges, racism still permeates the jury selection process. As one judge has noted, *Batson*'s "cumulative record causes me to pause and wonder whether the principles enunciated in *Batson* are being undermined by excuses that have all form and no substance."[265] If this pretextual loophole is allowed to remain open, Justice Marshall's looming prediction that *Batson* will provide only an "illusory" protection will become reality.[266]

A. *Closing the Loophole: Current Proposals*

It has been suggested that "[s]o long as peremptory challenges are permitted, trial and appellate judges will continue to have difficulty in ascertaining whether . . . motives in exercising peremptory challenges are good

259. *But see generally* Swift, *supra* note 96 (calling for total elimination of these subjective explanations).

260. *See supra* Part I.

261. Wilkerson v. Texas, 493 U.S. 924, 928 (Marshall, J., dissenting).

262. *See supra* Part II.

263. As Justice Marshall stated in his concurrence to *Batson*, "[a] judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported . . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet." Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring). *See also Developments In the Law—Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1581 (1988) ("Moreover, in part because the prosecutor's prejudice might be subtle, unconscious, and shared by the judge, the prosecutor may be able to articulate non-racial explanations that the judge would find reasonable.").

264. Judge Higginbotham states that "I have been . . . disturbed . . . by a series of other cases where the *Batson* issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted . . . . [C]ourts must take seriously our responsibilit[ies] [under *Batson*]." United States v. Clemmons, 892 F.2d 1153, 1159, 1163 (3d Cir. 1989) (Higginbotham, J., concurring), *cert. denied*, 496 U.S.927 (1990).

265. *Id.* at 1162.

266. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

or bad."[267] Thus, some argue that only the total elimination of the peremptory challenge will solve the problem of pretextual reasoning. Justice Marshall in his concurrence in *Batson* advocated such an approach, calling for a complete ban on the peremptory challenge.[268] Several commentators have supported this position as well.[269]

The interests in saving the peremptory challenge, however, make this alternative both unlikely and unattractive. Although the Constitution does not guarantee the use of peremptory challenges, they remain, nonetheless, "one of the most important of the rights secured" to a party in a court.[270] Not only does the challenge have a "venerable tradition in this country,"[271] the challenge serves a vital function. Peremptory challenges weed out biased jurors to the benefit of both sides.[272] Perhaps more important, though, the peremptory challenge allows litigants to believe that their cases are being tried by an impartial jury.[273] Thus, the Supreme Court has stated that the challenge must be viewed as "essential to the fairness of trial by jury."[274]

Others propose "expand[ing] upon the foundation[s]" of *Batson* to bolster its effectiveness.[275] One such approach would limit the number of peremptory challenges allocated to each side.[276] Thus, by reducing the

267. *Clemmons*, 892 F.2d at 1162 n.10 (Higginbotham, J., concurring).

268. *See Batson*, 476 U.S. at 107 (Marshall, J., concurring) ("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.").

269. *See, e.g.*, Alschuler, *supra* note 40, at 209; McMillan & Petrini, *supra* note 93, at 374; Van Dyke, *supra* note 6, at 167-69.

270. Swain v. Alabama, 380 U.S. 202, 219 (1965) (quoting United States v. Pointer, 151 U.S. 396, 408 (1894)). *See also* Batson, 476 U.S. at 121 (Burger, C.J., dissenting) (stating that unexplained peremptories have been regarded as a way to strengthen the jury system).

271. Batson, 476 U.S. at 120 (Burger, C.J., dissenting). "The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed." *Id.* at 119. For a detailed discussion of the history of the peremptory challenge, see *Swain v. Alabama*, 380 U.S. 202, 212-16 (1965) (tracing history of challenge from its development in English trials through its acceptance in American courts).

272. *See Batson*, 476 U.S. at 118-19 (Burger, C.J., dissenting) ("Long ago it was recognized that '[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial.' ") (quoting W. Forsyth, History of Trial by Jury 175 (1852)); *Swain*, 380 U.S. at 219 (stating that one of "[t]he function[s] of the challenge is . . . to eliminate extremes of partiality on both sides"); *see also* Babcock, *supra* note 6, at 552-56 (discussing function of peremptory as a means of preserving fairness in our judicial system).

273. *See* Babcock, *supra* note 6, at 552 (stating that "the jury not only should be fair and impartial, but should seem to be so to those whose fortunes are at issue"); *see also Swain*, 380 U.S. at 219 (commenting that "[t]he peremptory satisfies the rule that 'to perform its high function in the best way, "justice must satisfy the appearance of justice" ' ") (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

274. Lewis v. United States, 146 U.S. 370, 376 (1892). *See also Swain*, 380 U.S. at 219 ("The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.").

275. Hopper, *supra* note 24, at 836.

276. *See id.*; Van Dyke, *supra* note 6, at 169.

chance of eliminating each minority member of the venire, the probability of a heterogenous jury substantially increases. This approach, however, is problematic. A party only needs a small number of challenges to eliminate minority venirepersons when only a few minority members are represented on the venire in the first place.[277] Another variation on this position suggests limiting the number of strikes to a percentage of the number of minority members on the venire, in effect creating a situation where neither party can produce an all-white jury.[278] However, this approach fails to take into account that some peremptory challenges legitimately remove biased jurors, regardless of their race.

One district judge recently tried a novel approach to the problem. During *voir dire*, an attorney exercised her peremptory challenges against the only two black jurors on the venire.[279] Upon the judge's request for a non-racial reason for the two challenges, the lawyer responded that one strike removed a juror receiving disability payments while the other eliminated a juror serving as an employee for a school board.[280] The attorney, however, had left unchallenged a white female juror who served on a school board and a white male juror employed as a teacher; thus, suggesting that the proffered reason was mere pretext.[281] Noting the "inconsistent and somewhat evasive explanations" for the challenges, the trial court judge concluded that they were racially-motivated and proceeded to impose sanctions on the attorney.[282]

Monetary sanctions will not prove an effective deterrent, either. To impose such sanctions, courts will continue to be burdened with the responsibility of evaluating challenges for possible racial motivation, a task they apparently are not well-suited to perform. Moreover, one need turn only to the mass of Rule 11 jurisprudence to discover the problems inherent in this approach.[283]

B. *Another Alternative: An Ethical Rule*

The proposals discussed above rely almost exclusively on the courts to

277. Indeed in the Rodney King trial, which took place in the mostly all-white Ventura County, the venire included only five black members. After challenges for cause, only three potential black jurors remained. All three were struck by defense counsel. *See* Barbara A. Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. Cin. L. Rev. 1139, 1140-41 n.6 (1992).

278. *See* Hopper, *supra* note 24, at 837.

279. *See* Deborah Pines, *Lawyer Fined For Improper Jury Practice; Race-Based Challenges Incur Judge's Sanction*, N.Y.L.J., Dec. 24, 1992, at 1 (discussing case of *Pueblo v. Supermarkets General* before Judge Louis Freeh).

280. *See id.* Apparently, the attorney felt the juror's employment suggested a "liberal bent." *Id.*

281. *See id.*

282. *Id.* Pursuant to 28 U.S.C. § 1927 and the Southern District's Local Rule 4(k), Judge Freeh fined the attorney for court costs for the 39 jurors on the venire at $40 a day for a total of $1,560. *See id.*

283. *See generally* Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 Fordham L. Rev. 475, 480-82 (1991) (discussing criticisms of Rule 11 including the "avalanche of satellite litigation").

remedy the pretextual problem. However, the courts, most notably the Supreme Court, have shown a reluctance to undertake such a responsibility. With this in mind, this Note proposes another option: shifting the onus of countering the use of pretextual reasoning from the courts to the legal profession through the implementation of an ethical rule. If the *Batson* mandate is to be achieved, not only must courts scrutinize proffered reasons more carefully,[284] but attorneys must recognize their obligation not to offer pretextual rationales in the first place as well. An ethical rule would serve this function.

1. A Proposed Ethical Rule

The following rule and comment could be incorporated into the American Bar Association's *Model Rules of Professional Conduct*:

RULE 3.1.5 Conduct During Jury Selection[285]

A lawyer shall not discriminate on the basis of race, sex, religion, or national origin against a member of the venire during jury selection.

COMMENT:

Discrimination in the jury selection process has no place in our judicial process. The discriminatory use of peremptory challenges not only harms litigants and the excluded juror but undermines public confidence in our judicial system.[286] Thus, a lawyer exercising peremptory challenges in a discriminatory manner[287] suggests an inability to fulfill the lawyer's professional role as a public citizen concerned with the fair administration of justice.

2. Justification for the Rule

The *Model Rules of Professional Conduct*,[288] promulgated by the American Bar Association, dictate the ethical norms of lawyering.[289]

284. *See* United States v. Clemmons, 892 F.2d 1153, 1163 (3d Cir. 1989) (Higginbotham, J., concurring) (arguing that "courts must take seriously our responsibility to determine whether the justification . . . makes sense in light of the facts giving rise to an inference of discrimination"), *cert. denied*, 496 U.S. 927 (1990).

285. The proposed ethical rule could have fallen under either Section 3, dealing with the lawyer's responsibilities as an advocate, or Section 8, discussing the lawyer's responsibilities in maintaining the integrity of the profession. Section 3 seems a more appropriate place for the proposed rule as it concerns the lawyer's duties at trial. Section 8, on the other hand, addresses the conduct of lawyers outside the courtroom.

286. *See* Batson v. Kentucky, 476 U.S. 79, 86-88 (1986) (discussing these harms).

287. Such discrimination would include the use of pretextual reasoning. *See supra* Part II.B.

288. The *Model Rules of Professional Conduct* (hereinafter *Model Rules*) replaced the *Model Code of Professional Responsibility* in 1983. *See* Geoffrey C. Hazard & Susan P. Koniak, *The Law and Ethics of Lawyering* 12-14 (1990) (discussing evolution of ethical codes in American lawyering). As of 1992, forty-one states have adopted the Model Rules or some form of it. *See* ABA/BNA Lawyer's Manual on Professional Conduct § 01:3-4 (1992).

289. *See Model Rules* Preamble ("Many of a lawyer's professional responsibilities are

These rules define "the minimally acceptable behavior for lawyers."[290] Ideally, failure to comply with these enunciated principles will result in a lawyer subjecting herself to disciplinary action by the governing entity.[291] The ethical rules, however, provide more than just simple regulation of the attorney's professional behavior. Perhaps more importantly, the ethical rules outline the symbolic aspirations of the entire profession.[292]

Lawyers, as principal participants, possess a special duty in promoting the "efficacy and legitimacy" of our judicial system.[293] Thus, a central and overriding goal of the legal profession concerns ensuring "the impartial and efficient administration of justice."[294] Certainly the Preamble to the *Model Rules* stresses this ideal. Indeed, the Preamble asserts that:

> A lawyer is . . . a public citizen having special responsibility for the quality of justice.
>
> . . . .
>
> A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it. . . .
>
> As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of the service rendered by the legal profession. . . . A lawyer should be mindful of the deficiencies in the administration of justice. . . .
>
> . . . .
>
> Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.[295]

Moreover, several of the individual rules seek to promote these objectives.[296] Thus, the *Model Rules* prohibit lawyers from filing frivolous and meritless claims,[297] from delaying litigation,[298] from failing to dis-

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prescribed in the Rules."); *Model Rules* Scope ("The Rules simply provide a framework for the ethical practice of law.").

290. Naomi Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 Geo. J. Legal Ethics 23, 29 (1990).

291. *See Model Rules* Scope ("Compliance with the Rules . . . depends . . . when necessary, upon enforcement through disciplinary proceedings."); *see also* Hazard & Koniak, *supra* note 289, at 906-10 (discussing disciplinary procedures).

292. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 647 (1985) (arguing "the most significant function of official codes will be symbolic"); Cahn, *supra* note 291, at 29.

293. Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 Tex. L. Rev. 689, 707 (1981); *see* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39, 43 (1989).

294. Rhode, *Why the ABA Bothers*, *supra* note 294, at 707.

295. *Model Rules* Preamble.

296. *See* Rhode, *Why the ABA Bothers*, *supra* note 294, at 707 (discussing rules prohibiting "misrepresentations in negotiations, unfounded pleadings, and subornation of perjury" as promoting justice).

297. *See Model Rules* Rule 3.1.

298. *See Model Rules* Rule 3.2. The comment to Rule 3.2 states that "[d]ilatory practices bring the administration of justice into disrepute." *Model Rules* Rule 3.2 cmt.

close adverse legal authority to the tribunal,[299] from offering false or tampered with evidence,[300] and from seeking to influence impermissibly either a judge or juror.[301]

Hence, the *Model Rules* seek to protect the public, preserve the integrity of the legal profession, and sustain public confidence in the profession as well as in the judicial system. A specific ethical rule forbidding the discriminatory use of peremptory challenges (including those offered under the guise of pretext) would further manifest the legal profession's commitment to these principles. By remaining silent on the issue,[302] however, the legal community renders an enormous disservice not only to itself but also to the general public.[303] Silence "suggest[s] that [the discriminatory use of peremptory challenges] raise[s] no significant ethical problems."[304] Clearly, this is not the case.

Employing the peremptory challenge to eliminate minority participation flies in the face of the tenets enunciated by the *Model Rules*. Indeed, "racial neutrality in jury selection is . . . vital to the integrity" of our judicial system."[305] Discrimination in the selection of jurors creates an appearance of bias and "undermine[s] public confidence in the fairness of

299. *See Model Rules* Rule 3.3. Indeed, the comment to the Rule states that a "legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." *Model Rules* Rule 3.3 cmt.

300. *See Model Rules* Rule 3.3.

301. *See Model Rules* Rule 3.5.

302. The Model Rules consists of eight rules concerning the lawyer's responsibilities as an advocate. Notably, not one addresses jury selection. *See Model Rules* Rules 3.1-3.8.

Indeed, the closest the Model Rules come to dealing with the topic can be found in either Rule 4.4, concerning respect for the rights of third parties, *see Model Rules* Rule 4.4, or in Rule 8.4(d) under the heading of misconduct by "engag[ing] in conduct that is prejudicial to the administration of justice." *Model Rules* Rule 8.4(d).

However, Rule 4.4 attempts to prevent a lawyer from "embarrass[ing], delay[ing] or burden[ing] a third person." *Model Rules* Rule 4.4. While the comment indicates a lawyer may not "disregard the rights of third persons," it seems quite a stretch to interpret this Rule as embracing a ban on discrimination in jury selection. *See Model Rules* Rule 4.4 cmt.

Rule 8.4(d) fails to cover discrimination in jury selection as well. As the comment to the Rule indicates, the Rule was designed primarily to address offenses "involving violence, dishonesty or breach of trust, or serious interference with the administration of justice." *Model Rules* Rule 8.4(d) cmt. This Rule does not seem to cover the use of peremptory challenges to discriminate. Even if the Rule could be so construed, it is doubtful the Rule covers the use of pretextual reasoning. The comment modifies the ethical obligation by stating that "[a] lawyer may refuse to comply with an obligation . . . upon a good faith belief that no valid obligation exists." *Id.* Currently, with the use of pretextual reasoning being routinely accepted by courts, it does not seem to cross the bounds of the law.

303. *See* Richard A. Matasar, *Teaching Ethics in Civil Procedure Courses*, 39 J. Legal Educ. 587, 588 n.5 (1989) (writing that "the failure to face up to the many troubling aspects of lawyering does not serve either the profession or individual lawyers well").

304. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Tex. L. Rev. 639, 644 (1981).

305. United States v. Clemmons, 892 F.2d 1153, 1163 (3d Cir. 1989) (Higginbotham, J., concurring), *cert. denied*, 496 U.S. 927 (1990).

our system of justice."[306] Moreover, when discriminatory practices are tolerated in our judicial system, they provide "a stimulant" to racial prejudice in other facets of our society.[307] Thus, an ethical rule symbolically "serves a significant expressive function"[308]—it evidences the legal profession's acknowledgement of an egregious problem within our judicial system and, more importantly, a commitment to contributing to its solution.

This ethical rule would help to "persuade the general public that practioners are especially deserving of confidence, respect, and substantial renumeration."[309] In this respect, the code of ethics can be likened to a contract.[310] Society "negotiates a deal with the profession: the society will confer the benefits and privileges of a legal monopoly upon the group in return for a promise of public service, i.e., a promise to carry on professional practice in accordance with high standards of performance, for the public good."[311] Ethical rules collectively serve as the benchmark for the public to evaluate their bargain.[312]

By codifying an ethical rule banning racial discrimination in the exercise of the peremptory challenge, the legal profession demonstrates its willingness to uphold this societal bargain. Indeed, the legal community, through the proposed Rule, will alleviate societal concerns about the fairness of the judicial system and the protection of innocent persons,

306. Batson v. Kentucky, 476 U.S. 79, 87 (1986). Worse yet is the tremendous costs of violence that flows as a direct result of discriminatory selection procedures. *See* Georgia v. McCollum, 112 S. Ct. 2348, 2355 (1992) ("The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace."). Indeed, indicative of this is the rioting after the jury returned not-guilty verdicts in the trial of the officers accused of beating Rodney King. There, the urban unrest "stemm[ed] in part from what many saw as the verdict's statement of racial injustice in the American judicial system." Michael J. Desmond, *Limiting a Defendant's Peremptory Challenges:* Georgia v. McCollum *and the Problematic Extension of Equal Protection*, 42 Cath. U.L. Rev 389, 390 (1993). *See also* Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 Tul. L. Rev. 1807, 1810 (1993) (describing unfairness of the verdicts).

Another example of such violence followed the not-guilty verdicts in the 1980 trial of four white police officers accused of beating a black motorist in Miami. *See Smoke Signals From Miami*, The Economist, May 24, 1980, at 35; Alschuler, *supra* note 40, at 195-96 (discussing Miami riots).

307. *Batson*, 476 U.S. at 87-88 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

308. Rhode, *Why the ABA Bothers*, *supra* note 294, at 697.

309. Rhode, *Why the ABA Bothers*, *supra* note 294, at 693.

310. *See* Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 Ann. Surv. Am. L. 7, 12-13 (1989).

311. *Id.* at 13.

312. *See id. See also* Rhode, *Why the ABA Bothers*, *supra* note 294, at 707 (Rhode argues that a "lawyers' status . . . [is] tied to client, colleague, and public perceptions about the quality of justice they help generate. Accordingly, a primary function of ethical codes is to reconcile the sometimes competing interests of these three constituencies.").

namely jurors, from harm.[313] And, society, in return, will continue to allow lawyers the "benefits and privileges" of a legal monopoly; chief among them, continued self-regulation.[314]

Furthermore, both the nature of the legal profession and its purported commitment to improving the quality of justice warrant an ethical rule. The *Model Rules* contemplate lawyers as having a special duty to ensure fairness in our system and "not [to] tolerate laws, behavior, or attitudes that indicate that any member of society is being treated unfairly because he or she belongs to a particular segment of society."[315] As the protectors of individual rights, lawyers, to a large extent, have an obligation "to attempt to eliminate discrimination—which represents an unjust denial of individual rights—from all of society."[316]

Indeed, these principles have not been lost on some jurisdictions.[317] Recently, Minnesota, New York, New Jersey, and Rhode Island amended their ethical codes to adopt a rule designed to prohibit lawyers from discriminating while practicing law.[318] These rules contain the aspirational goals of promoting equality and confidence in the legal system. Moreover, they attempt to use discipline to mandate social change.[319] The logical next step should be for the American Bar Association to formulate an ethical rule on the national level.

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313. *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986) (discussing harm inflicted upon jurors excluded from service on jury).

314. Moore, *supra* note 311, at 13. As the Preamble to the Model Rules indicates, "[t]o the extent that lawyers meet the obligations of their professional calling, the occasion for governmental regulation is obviated." *Model Rules* Preamble. Indeed, one way to "preempt" government regulation is to "persuad[e] the public that the profession has itself adopted appropriate standards of conduct." Rhode, *Why the ABA Bothers*, *supra* note 294, at 714.

315. Suzannah B. Wilson, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform*, 67 Ind. L. Rev. 817, 840 (1992).

316. *Id.* at 841-42.

317. Fourteen states have adopted various ethical rules banning lawyer discrimination in one context or another. *See* Randall Samborn, *Ethics Codes Seek to Bar Discrimination*, Nat'l L.J., Nov. 29, 1993, at 1. Moreover, the ABA plans to debate such an anti-discrimination ethical rule at their winter convention. *See id.* That rule would make it professional misconduct to "knowingly manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status." *Id.*

318. For Minnesota, see 52 M.S.A., Minn. Rules of Professional Conduct 8.4(g) (1992). For New Jersey, see N.J. Rules of Professional Conduct 8.4(g) (1991). For New York, see N.Y. Model Rules on Professional Conduct DR-102(A)(6) (1992). And, for Rhode Island, see R.I. Rules of Professional Conduct 8.4(d) (1992). While presumably these rules could be interpreted to include banning discriminatory use of peremptory challenges, this Note still advocates the incorporation of a more specific rule.

319. *See generally* Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination By Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 5 (1993) (discussing advent of ethical rules banning discrimination); Andrew Pugh, Note, *The Anti-Discrimination Amendments to Rule 8.4 of the Minnesota Rules of Professional Conduct: An Unnecessary and Unprecedented Expansion in Professional Regulation*, 19 Wm. Mitchell L. Rev. 211 (1993) (discussing Minnesota's rule).

3. A Possible Criticism

An immediate criticism of this proposed Rule is that disciplinary entities rarely enforce the Model Rules; thus, some argue that the ethical rules fail in actually changing the behavior of attorneys.[320] Ethical rules, however, need not be enforced in order to prove effective.[321] As one author has written, "[t]he use of coercive sanctions is by no means the sole, or even the most important means by which a profession uses a code to regulate the conduct of its members."[322]

Indeed, by forcing individual attorneys to confront the ethical consequences of their actions, ethical rules can help to shape the moral conscience of the legal profession.[323] In this respect, ethical rules can produce results through self-restraint and peer pressure.[324] Moreover, the instruction of legal ethics in law school provides an additional forum for instilling professional norms and attitudes.[325] Thus, law school students "develop[ ] an awareness of the importance of ethical principles" early in their careers.[326] But more importantly, the Rule will teach a future generation of laws the importance of eliminating racial discrimination in the courtroom.

CONCLUSION

In *Batson v. Kentucky*[327] and its progeny,[328] the Supreme Court attempted to prevent the use of racially discriminatory peremptory challenges. Lower court implementation of *Batson*, however, demonstrates that attorneys still remain able to strike minority jurors from the venire solely on account of their race. To accomplish this goal, attorneys have resorted to pretextual reasoning and the courts seem unable to stop this practice.[329] As a solution, this Note proposes an ethical rule to combat

320. *See* Abel, *supra* note 304, at 647-49; Cahn, *supra* note 291, at 30. *But see* Rhode, *Why the ABA Bothers*, *supra* note 294, at 708 ("there has been little empirical investigation regarding compliance with professional standards").

321. *See* Moore, *supra* note 311, at 14; Rhode, *Why the ABA Bothers*, *supra* note 294, at 709.

322. Moore, *supra* note 311, at 14.

323. *See* Cahn, *supra* note 291, at 27 (writing that "legal ethics help shape the conscience of lawyers"); Rhode, *Why the ABA Bothers*, *supra* note 294, at 709 (stating that ethical standards "sensitiz[e] individuals to the full ethical dimensions of their conduct"); *see also* Rhode, *Ethical Perspectives*, *supra* note 293, at 643. Rhode argues that the essence of ethical rules is to force lawyers to realize the consequences of their professional actions and then accept personal responsibility for them. In effect, ethical rules remove a "source of rationalization for dubious conduct." *Id.* at 648.

324. *See* Moore, *supra* note 310, at 14; Rhode, *Why the ABA Bothers*, *supra* note 294, at 709.

325. *See* Moore, *supra* note 310, at 18 & n.65 (discussing instruction of ethics in law school).

326. Moore, *supra* note 310, at 18.

327. 476 U.S. 79 (1986). *See supra* notes 22-50 and accompanying text.

328. *See supra* notes 51-90 and accompanying text.

329. *See supra* notes 90-259 and accompanying text.

the problem of discrimination in the context of jury selection.[330] Indeed, such a rule would evidence a commitment by the legal profession to equality and fairness in the administration of justice as well as a willingness to combat racism in the courtroom.[331]

330. *See supra* notes 284-87 and accompanying text.
331. *See supra* notes 284-326 and accompanying text.