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Prosecutors and Peremptories

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Prosecutors and Peremptories

*Alafair S. Burke**

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INTRODUCTION

Recently, I had the pleasure of hosting Professor Paul Butler as a guest instructor to my Criminal Procedure II course, which covers constitutional rights during criminal adjudication. This course—the “bail to jail” portion of criminal procedure—is comprised almost entirely of students who intend to practice criminal law. To open a discussion about *Batson v. Kentucky*,¹ Professor Butler started with a simple case hypothetical of a young African-American male charged with selling ecstasy at a nightclub. Professor Butler divided the class into three groups: prosecutors, defense attorneys, and judges. “Lawyers,” Professor Butler asked the students, “who are your ‘ideal jurors?’”

The prosecutors wanted older jurors, seen as quicker to convict, less likely to question authority, and more alarmed by a relatively new drug like ecstasy. In contrast, the defense attorneys wanted younger people who might be more discerning of police testimony and less judgmental about drugs.

“What about race?” Professor Butler asked.

It was an African-American student, playing the role of prosecutor, who raised her hand first. Most black jurors would be less likely to convict, she reasoned, but some older black jurors might see the defendant as a thug who misrepresented his community.

“What do the rest of you think?” Professor Butler asked.

The students playing defense attorneys generally thought African-American jurors would be more sympathetic to the defendant and more scrutinizing of police witnesses. So did the students playing prosecutors. But there was some disagreement among students about the interplay of race with age and class. Interestingly, not a single student said race was irrelevant. When asked, “Who is your ideal juror?” students may have debated *how* race mattered, but none appeared to question that it *did* in fact matter.²

In *Batson*, the Court prohibited the use of race-based peremptory challenges.³ Invoking the Equal Protection Clause, the Court reasoned that “[c]ompetence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial,”⁴ and that “race simply ‘is unrelated to [a person’s] fitness as a juror.’”⁵ Yet twenty-five years later, criminal procedure students, when prompted to make transparent their unspoken feelings about race, continue to rely on preconceived notions of race-based attitudes in

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

2. As Professor Butler notes in his influential book, “While virtually every criminal lawyer agrees that race matters, there are different schools of thought about how.” PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 12 (2009). Professor Butler also asserts that “[t]he prosecutor who says he doesn’t consider race when choosing jurors is either stupid or a liar.” *Id.*

3. *Batson*, 476 U.S. at 84.

4. *Id.* at 87 (citing *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223–24 (1946)).

5. *Id.* (quoting *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting)).

describing their “ideal juror,” and attorneys continue to exercise peremptory challenges in ways that disproportionately keep people of color from serving on juries.

The chasm between jurisprudence and actual practice may be explained in part by the contrast between a juror who is “competent” and “fit,” the characteristics addressed by the Court in *Batson*, and one who is ideal, the concern of competitive litigators. While few today would dispute *Batson*’s underpinning that race does not render a juror unsuitable or unqualified for jury service, perhaps equally few would argue that race plays *no* predictive value in assessing a potential (albeit fit and competent) juror’s view of the world. Lawyers have come to see the premise of *Batson* as a fiction—not because they believe a person’s race makes him inherently incapable of being impartial, but because they see peremptory challenges as a way to identify and eliminate *partial* jurors.⁶

Lawyers also view *Batson* as fiction because they have learned that the three-part test designed to prevent race-based peremptory challenges is “toothless.”⁷ Under the first part of the *Batson* test, the party opposing a peremptory challenge bears the initial burden of raising a *prima facie* case of discrimination.⁸ Then under the second part, to rebut the inference of discrimination, the party exercising the peremptory must offer a race-neutral explanation for the challenged strike.⁹ At the final stage, the trial court must then assess all available information and determine if the party challenging the strike has proven that the party exercising the strike

6. Indeed, despite the Court’s holding in *Batson*, other Supreme Court decisions appear to implicitly acknowledge the relevance of race to jury decision making. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (noting in the affirmative-action context that race “is likely to affect an individual’s views”); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (treating the prohibition of black citizens from juries as a violation not of the rights of the venireperson, but of black defendants), *abrogated on different grounds by* *Taylor v. Louisiana*, 419 U.S. 522 (1975). Further, at least some Justices have discussed the relationship explicitly. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148 (1994) (O’Connor, J., concurring) (“We know that like race, gender matters.”); *id.* at 156 (Rehnquist, C.J., dissenting) (“The two sexes differ [T]hese differences may produce a difference in outlook which is brought to the jury room.”); *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) (“[S]ecuring representation of the defendant’s race on the jury may help to overcome racial bias”); see also Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net To Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1083 (2011) (observing that *Strauder* reveals the Court’s presumption that racial composition of juries can affect outcomes); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 67–72 (1993) (noting the Court’s inconsistent treatment of the relevance of race to jury decisions).

7. Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501, 527–28 (criticizing “*Batson*’s toothless bite”).

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

9. *Id.* at 97.

intentionally discriminated.¹⁰ Even if the party opposing a peremptory challenge makes out a prima facie case of discrimination, the burden of rebutting that inference in stage two is extremely low. The Court has emphasized that the race-neutral reason need not be plausible, let alone rise to the level of a challenge for cause.¹¹ Moreover, trial courts often accept race-neutral reasons that are easy to invoke and/or difficult to disprove, such as demeanor evidence,¹² or which correlate with race, such as having a family member who had been a criminal defendant.¹³ It is no surprise, then, that a recent empirical study by Professors Bellin and Semitsu found that the overwhelming majority of appeals based on *Batson* were rejected.¹⁴ Perhaps even more unsurprisingly, the justice system's pattern of excluding people of color from juries still stubbornly lingers.¹⁵

This Article calls on prosecutors to implement voluntary reforms seeking to minimize the government's exercise of racialized peremptory challenges in criminal cases. I purposefully use the word "racialized" here to distinguish a lawyer's disproportionate use of peremptory challenges by race from the intentional discrimination emphasized by the Court in *Batson* and its progeny.¹⁶ The Article proceeds in three parts. Part I builds the case that

10. *Id.* at 98; see also *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 239 (2005).

11. See *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (per curiam).

12. Bellin & Semitsu, *supra* note 6, at 1093–95.

13. *Id.* at 1096; Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2021 (1998) (observing that courts often accept "a sweeping scope of permissible neutral explanations for prosecutorial strikes" even when they are "correlated to some degree with race").

14. Bellin & Semitsu, *supra* note 6, at 1092 (surveying 269 federal court decisions reviewing *Batson* claims, and reporting that 85.1% of the decisions rejected the *Batson* claim, while only 6.6% ordered a new trial).

15. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010), available at <http://www.law.berkeley.edu/files/IllegalRacialDiscriminationJurySelection.pdf> (establishing that prosecutors in the South still systematically exclude African Americans from juries); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001) (analyzing capital murder trials in Philadelphia and concluding that "discrimination in the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread"); Bellin & Semitsu, *supra* note 6, at 1077 ("[V]irtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials."); Camille A. Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) ("*Batson's* promise of protection against racially discriminatory jury selection has not been realized."); Bidish Sarma, Commentary, *When Will Race No Longer Matter in Jury Selection?*, 109 MICH. L. REV. FIRST IMPRESSIONS 69, 71 (2011) (decrying the failure of courts to enforce *Batson* as "judicial intransigence"); Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES (June 1, 2010), <http://www.nytimes.com/2010/06/02/us/02jury.html> ("[T]he practice of excluding blacks and other minorities from Southern juries remains widespread . . .").

16. See Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 38–40 (1997) (critiquing *Batson's* emphasis on the lawyer's state of mind). In contrast to

prosecutors should care about the prevention of *Batson* violations. Part II sets forth the institutional pressures and cognitive biases that might lead even well-intentioned prosecutors to exercise peremptory challenges in a race-based manner. Part III concludes by calling on prosecutors to take steps to neutralize their own exercises of peremptory challenges, including the collection and publication of both individual and office-wide statistics reflecting the numbers of peremptory challenges exercised and the race of the affected venirepersons and resulting juries.

I. WHY PROSECUTORS SHOULD CARE

A quarter of a century after the Court's decision in *Batson*, overwhelming evidence demonstrates that lawyers continue to exercise peremptory challenges in racialized ways. For example, one study of capital murder trials in Philadelphia found that prosecutors struck 51% of black jurors and 26% of nonblack jurors, while defense counsel struck 26% of black jurors and 54% of nonblack jurors.¹⁷ A recent two-year study of eight southern states found that prosecutors routinely dismissed African-American venire members for pretextual reasons.¹⁸ In one Alabama county, prosecutors exercised peremptory challenges against 80% of African-American venire members.¹⁹ In a Louisiana parish, 80% of criminal cases are heard by all-white juries.²⁰ It is no wonder that scholars and judges alike "have concluded that race-based juror strikes continue to plague American trials."²¹

In light of *Batson*'s failure to alter a stubborn pattern of using peremptory challenges in racialized ways, scholars have repeatedly called for the abolishment of peremptory challenges.²² But, despite criticism of the

intentional racial discrimination, and as explored more fully in *infra* Part II.B, racialized peremptory challenges might result from unconscious stereotypes and cognitive biases.

17. Baldus et al., *supra* note 15, at 52–53.

18. EQUAL JUSTICE INITIATIVE, *supra* note 15, at 6.

19. *Id.* at 14.

20. *Id.*

21. Bellin & Semitsu, *supra* note 6, at 1077; see *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 267–70 (2005) (Breyer, J., concurring) (citing multiple studies showing the continuation of race-based jury selection).

22. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 864 (1997); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1047, 1114–36 (1995); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 503 (1996) ("It is time for the peremptory challenge to go."); Nelson, *supra* note 15, at 1723; Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 104–07 (2009); Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2137–42 (2006). In *Batson*, Justice Marshall called for the end of peremptory challenges in his concurring opinion, see *Batson v. Kentucky*,

practice, every jurisdiction in the country continues to employ peremptory strikes.²³ The Supreme Court has viewed the prevalence and longevity of the peremptory challenge in American trials as evidence of the “long and widely held belief that peremptory challenge is a necessary part of trial by jury.”²⁴ With no judicial or political movement toward the outright elimination of the peremptory challenge,²⁵ other scholars have called for improvements to the current system. For example, some have proposed refinements to the *Batson* three-part test,²⁶ while others have suggested incorporating affirmative-action principles into jury selection.²⁷ Some have noted that alterations to the voir dire process itself could improve the quantity and quality of information available to lawyers about venire members and thereby reduce the influence of racial stereotypes on jury selection.²⁸ Many have emphasized the role that ethical rules and disciplinary sanctions can play in encouraging lawyers to comply with *Batson*’s requirements.²⁹

476 U.S. 79, 102–03 (Marshall, J., concurring), a position that was later embraced by Justice Breyer. See *Miller-El II*, 545 U.S. at 273 (Breyer, J., concurring).

23. Bellin & Semitsu, *supra* note 6, at 1085 (reporting that the peremptory challenge “continues to be available in all American jurisdictions”).

24. *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *overruled by Batson*, 476 U.S. 79.

25. Bellin & Semitsu, *supra* note 6, at 1107 (“The legislators who possess the requisite authority to act in such a sweeping fashion have shown no inclination to implement such a change.”); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 246 (2005) (noting the absence of legislative or judicial efforts to eliminate the peremptory challenge).

26. Bellin & Semitsu, *supra* note 6, at 1120–25 (suggesting a reform to *Batson* that would permit courts to invalidate a peremptory challenge because of the appearance of discrimination without making a finding of intentional discrimination).

27. See generally John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297 (2005) (arguing that *Grutter v. Bollinger* should apply to jury selection so that a minority defendant may consider race as a factor to obtain a diverse jury).

28. Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J.L. & PUB. POL’Y 323 (2003) (suggesting the use of blind questionnaires to reduce the influence of stereotyping on jury selections); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981 (1996) (advocating use of blind questionnaires); Page, *supra* note 25, at 254–57; Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 BROOK. L. REV. 95 (2008) (recommending use of video recording during voir dire); Collin P. Wedel, Note, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection To End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293 (2011).

29. Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209 (2003); Andrew G. Gordon, *Beyond Batson v. Kentucky: A Proposed Ethical Rule Prohibiting Racial Discrimination in Jury Selection*, 62 FORDHAM L. REV. 685 (1993) (analyzing a proposed change to the ABA’s Model Rules of Professional Conduct to address *Batson* problems); Mattie Johnstone & Joshua M. Zachariah, *Peremptory Challenges and Racial Discrimination: The Effects of Miller-El v. Cockrell*, 17 GEO. J. LEGAL ETHICS 863 (2004) (suggesting a modification of ethical rules as a better guarantee that lawyers will conduct themselves appropriately during jury selection); Charles J. Ogletree, *Just Say No!: A Proposal To*

Doctrinal change, rules of ethics, and disciplinary sanctions would not be necessary, however, if lawyers abated racialized jury selection through their own voluntary conduct.³⁰ The focus of much of the current *Batson* scholarship assumes that lawyers, like the students in my class, will inevitably consider race during jury selection and that the legacy of barring people of color from jury service will therefore inevitably continue unless we find external ways to detect and punish the discrimination. Stephanos Bibas has noted, though, that external regulation of prosecutors, whether *ex ante* or *ex post*, has proven largely to be ineffective.³¹ In contrast, prosecutors themselves have the institutional ability to transform prosecutorial culture and incentives from the inside.³² This Article speaks directly to prosecutors and calls on them to voluntarily implement internal practices to avoid racialized jury selection.

Although *Batson* applies to all litigators—criminal and civil, plaintiff/prosecution and defense—prosecutors are often the antagonists in the story of *Batson*'s failure. In the prevailing *Batson* rhetoric, prosecutors have every incentive to discriminate against venire members of color, and the Court's toothless doctrine permits them to do so without penalty. In light of racialized public opinions about crime,³³ prosecutors might be especially tempted to use race as a proxy for a juror's predisposition. Empirical evidence demonstrates that people of color are more likely to be skeptical of law enforcement than white jurors.³⁴ They are also less likely to

Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 AM. CRIM. L. REV. 1099, 1117, 1122 (1994) (recommending dismissal with prejudice and disciplinary actions against prosecutors as a response to *Batson* violations).

30. See Laura I Appleman, *Reports of Batson's Death Have Been Greatly Exaggerated: How the Batson Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607, 608 (2005) (arguing that *Batson* is a vehicle through which the Supreme Court seeks to achieve professional responsibility aspirations); Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 500 (1998) (criticizing the lack of guidance in the Supreme Court's *Batson* jurisprudence and calling on ethical prosecutors and trial court judges to be "vigilant" about avoiding bias during jury selection).

31. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 978–79 (2009).

32. See *id.* at 979–1015; Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 516 (2007) ("[P]rosecutors hold the key to moderate but meaningful reform."); Fred C. Zacharias & Bruce A. Green, *The Duty To Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 11 (2009) (noting, in the context of wrongful convictions, the importance of self-regulation by prosecutors).

33. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1264 (2000) (stating that it "is often true [that] the views of jurors of color and female jurors diverge from the mainstream").

34. See Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 156–57 (2004) (discussing "substantial differences between Blacks and Whites" on views of law enforcement and courts); Rod K. Brunson, "Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences, 6 CRIMINOLOGY & PUB. POL'Y 71, 72, 94–96 (2007) (reporting

convict black defendants or to impose the death penalty than white jurors.³⁵ Moreover, because people of color are still a minority in most jurisdictions, a prosecutor seeking to use peremptory challenges to strike venirepersons of color is more likely to be able to do so than a defense attorney who might seek to strike white venirepersons. Finally, the narrative goes, prosecutors are easily able to evade *Batson* by offering rote, facially neutral articulations to justify striking jurors of color. And, even in the rare case when a trial court prohibits a prosecutor from exercising a peremptory challenge, the prosecutor is not punished for having made the attempt. In sum, the prevailing narrative places the interests protected by *Batson* (the rights of individual defendants and potential jurors) at odds with the interests of the prosecutor (obtaining a conviction).

However, by emphasizing a prosecutor's short-term interest in obtaining a conviction in an individual case, this narrative overlooks the potential convergence of prosecutors' longer-term interests and the individual interests protected by *Batson*.³⁶ For both normative and utilitarian reasons, prosecutors should embrace the goal of diversely constituted juries. As a normative matter, the special role of prosecutors in our adversarial system should make them especially committed to fulfilling *Batson*'s original mission of colorblind jury selection.³⁷ Unlike other lawyers whose clients

that negative interactions between police and black citizens and communities undermined reported trust in law enforcement).

35. William J. Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497 (2004) (examining racial differences in decision-making processes in capital sentencing trials based on data from the Capital Jury Project); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 179, 259–60 (2001) (finding that a greater proportion of white jurors led to an increased likelihood of a death sentence for black defendants, especially when the victim was white, and suggesting the "racialization" of perceptions of violent crime); Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1954 (2009) ("[T]he overwhelming consensus among researchers is that Black defendants are more likely to be found guilty than White defendants, especially when the jurors are White."); Barbara O'Brien, Samuel R. Sommers & Phoebe C. Ellsworth, *Ask and What Shall Ye Receive? A Guide for Using and Interpreting What Jurors Tell Us*, 14 U. PA. J.L. & SOC. CHANGE 201, 218–26 (2011) (comparing self-reports with behavioral data to examine the influence of racial composition on jury deliberations); see also Dolores A. Perez et al., *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249, 1249 (1993) (concluding that majority-white mock juries were more likely than majority-Latino mock juries to convict a defendant, especially if the defendant was Latino).

36. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that civil-rights reforms find ground only when the interests of blacks converge with the interests of whites).

37. See generally Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369 (2010) (arguing that prosecutors should voluntarily waive peremptory challenges because a prosecutor owes affirmative duties to the opposing party and not just to an individual client).

hire them to be zealous advocates, the public expects prosecutors not merely to convict, but to further justice.

According to the Supreme Court's oft-quoted decision in *Berger v. United States*, the prosecutor's responsibility

is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.³⁸

As “ministers of justice,” prosecutors should care not only about the outcome of a trial, but also the process used to obtain it. A conviction is fairly obtained only if a jury has been fairly comprised. Prosecutors also represent a diversely constituted public. As such, they are in essence lawyers for the very communities disenfranchised by race-based peremptory challenges.

Moreover, as a matter of utility, prosecutors should strive to avoid racialized jury selection to advance the perception of a fair process. Although a fair process is a noble normative goal in and of itself, social scientists have demonstrated that procedural fairness also serves multiple instrumental purposes. Tom Tyler's influential work has found that people are more likely to comply with legal authority when they perceive it to be legitimate,³⁹ thereby creating a more enduring form of compliance than one that is based in fear.⁴⁰ People are also more likely to cooperate with law enforcement when they perceive law enforcement's authority as legitimate.⁴¹ Importantly, an individual's personal experience with law enforcement shapes his view of the legitimacy of law enforcement:

Personal experience does have political impact. The judgments of adults about their obligation to follow legal authorities respond to

38. *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* *Donnelly v. DiChristoforo*, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting) (“The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.”).

39. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (1990); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 400 (2000) (summarizing empirical work); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 716–17 (2000).

40. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 204 (2002).

41. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 267 (2008) (“Cooperation increases not only when the public views the police as effective . . . but also when citizens see the police as legitimate authorities who are entitled to be obeyed.”).

their experiences with particular police officers and judges. Because experience influences legitimacy, legal authorities cannot take citizens' allegiance for granted. It can be eroded by unsatisfactory experiences with police officers or judges. And legitimacy will be eroded if the legal system consistently fails to meet citizens' standards. On the other hand, the existing reserve of legitimacy can be increased over time by positive personal experiences with police officers and judges.⁴²

Racialized jury selection contributes to the perception of illegitimacy of the legal system in both trial defendants and the potential jurors who witness the jury selection process.⁴³ Defendants are less likely to perceive their trial as fair when convicted by an all-white jury. Excused venirepersons will be less likely to perceive the court system as legitimate when stricken from the jury for no apparent reason. These personal experiences undermine the perception of legitimacy of the criminal justice system, which in turn undermines both compliance and cooperation with law enforcement.⁴⁴ Accordingly, prosecutors have not only normative reasons to strive for race-neutral jury selection, but also utilitarian interests.⁴⁵

II. WHY PROSECUTORS EXERCISE RACIALIZED PEREMPTORY CHALLENGES

Despite the reasons prosecutors should be protectors of race-neutral jury selection, both institutional pressures and cognitive biases might cause them to exercise peremptory challenges in a race-based way, even when they do not intend to discriminate on the basis of race.

A. CULTURAL INFLUENCES

Other scholars have previously noted that many prosecutors' offices tend to emphasize conviction rates over other measures of success,⁴⁶ such as

42. TYLER, *supra* note 39, at 106.

43. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 125 (1990) ("[T]he racially mixed verdict would be a step toward legitimizing the criminal justice system in the eyes of the African-American community, which currently has little faith in the legal system's ability to be fair and to dispense evenhanded justice."); Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003) ("Regardless of any direct effects on verdict[s], unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes.").

44. See Ellis & Diamond, *supra* note 43, at 1039-41 (using research on procedural justice to "help explain the mechanism through which the racial composition of juries can affect perceptions of those juries and their verdicts").

45. Cf. I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 837 (2008) ("[M]ore policing of the police, far from tying the hands of law enforcement, can actually work to reduce crime in the general community.").

46. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) ("Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement."); Tracey L.

the fairness of the process used to obtain convictions. Prosecutors who view race as a proxy for antipathy toward police or distrust of the criminal justice system may search for “neutral” reasons to strike people of color from the venire, and *Batson*’s framework does little to dissuade this practice. Because *Batson* emphasized intentional discrimination, prosecutors do not think they are doing anything wrong as long as they can articulate some other reason to strike the venireperson in question.

The training of prosecutors regarding voir dire follows accordingly. There is some evidence that at least some prosecutors are trained specifically in the art of excluding people of color from juries. Perhaps the most infamous example of such training is the videotape of experienced prosecutor Jack McMahon in the late 1980s, instructing other prosecutors on how to strike black jurors without running afoul of *Batson*: “When you do have a black juror, you question them at length Mark something down that you can articulate later if something happens If you go in there any one of you think you’re going to be some noble civil libertarian You’ll lose You’re there to win.”⁴⁷ Although that video captured only one (blatant) example of training prosecutors to evade *Batson*, and is nearly as old as *Batson* itself, a recent two-year study of jury selection practices in eight southern states “found evidence that some prosecutors employed by state and local governments actually have been trained to exclude people on the basis of race and instructed on how to conceal their racial bias.”⁴⁸ Although the report cites the infamous McMahon training video, it also cites more recent examples from Texas and Alabama.⁴⁹

Even if prosecutors are not instructed on how to strike venirepersons of color, the typical training regarding jury selection focuses neither on *Batson* nor the importance of avoiding even unconscious discrimination, but on how to select a jury that is likely to convict. For example, the voir dire section of a leading basic training manual, the APRI’s *Basic Trial Techniques for Prosecutors*, states nothing about *Batson* other than that lawyers cannot use peremptory challenges for a discriminatory purpose.⁵⁰ That single, abbreviated admonishment is immediately followed by a reminder to the

Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 910 (1995) (proposing financial incentives for desirable prosecutorial conduct); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 390 (2001) (“The desire to win inevitably wins out over matters of procedural fairness”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 108 (1991) (“Prosecutors who restrain themselves may convict at a lower rate and thus appear less competent to their superiors.”).

47. Videotape: Jury Selection with Jack McMahon (DATV Productions 1987), available at <http://video.google.com/videoplay?docid=5102834972975877286>.

48. EQUAL JUSTICE INITIATIVE, *supra* note 15, at 4.

49. *Id.* at 16.

50. AM. PROSECUTORS RESEARCH INST., BASIC TRIAL TECHNIQUES FOR PROSECUTORS 9 (2005), available at http://www.ndaa.org/pdf/basic_trial_techniques_05.pdf.

lawyer that the reasons “for your strike need not rise to the level of cause (or even come close).”⁵¹ The manual describes voir dire as “a de-selection process in which both parties eliminate the worst jurors for their cases,” and in which an important prosecutorial goal is to “identify venire persons who are (1) biased or prejudiced against the police, you or your office, the case or the victim; and/or (2) sympathetic or empathic toward the defendant.”⁵² The manual then goes on to suggest the types of questions that a prosecutor should ask during voir dire, suggesting that the prosecutor’s first interest in voir dire is to shape the jury in his favor.⁵³ In contrast, prosecutors receive far less training about the importance of race-neutral jury selection, the potential causes of racialized jury selection practices, and strategies for avoiding racial bias during the jury selection process.⁵⁴

B. COGNITIVE BIASES

Perhaps one reason why prosecutors’ offices do not have more intensive training regarding *Batson* is the assumption that well-intentioned lawyers do not need to worry about their jury selection practices. As other scholars have noted, a critical flaw in *Batson*’s underpinnings is the Court’s emphasis on intentional racism. In light of the Court’s three-part test, a trial court’s finding of a *Batson* violation amounts to calling the prosecutor a liar and/or a racist.⁵⁵ Accordingly, well-meaning prosecutors are likely to assume that they do not need to worry about running afoul of *Batson*.

However, recent scholarship on prosecutorial discretion has shifted its focus to the ways cognitive biases that affect all human decision making,

51. *Id.*

52. *Id.*

53. *Id.* at 10–21.

54. In his concurring opinion in *Miller-El II*, Justice Breyer documented the embrace of stereotypes by bar journals, jury selection guides, and other materials intended to educate lawyers about voir dire, leading him to conclude that “the use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before.” *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 270 (2005) (Breyer, J., concurring); see also Jeffrey L. Kirchmeier, Stephen R. Greenwald, Harold Reynolds & Jonathan Sussman, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1369 (2009) (advocating further training about *Batson* for both new and experienced prosecutors).

55. See Bellin & Semitsu, *supra* note 6, at 1113–16; Charlow, *supra* note 16, at 12–14, 17, 20; Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999) (arguing that *Batson* permits lawyers to be less than honest about their true reasons for challenging venire members); Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands*, 5 OHIO ST. J. CRIM. L. 131, 158 (2007) (noting that *Batson* requires trial judges “to make a finding that someone with whom you must sit down at the next bar luncheon is a racist—and a liar to boot”); Page, *supra* note 25, at 177–78 (“[T]o refuse to accept a peremptory challenge is the equivalent of calling the attorney a liar, and maybe racist or sexist as well”); Tania Tetlow, *How Batson Spawned Shaw—Requiring the Government To Treat Citizens as Individuals When It Cannot*, 49 LOY. L. REV. 133, 165 (2003) (“In order to grant a *Batson* challenge against an attorney, the judge must call him a liar, a judicial determination that raises legal ethics considerations.”).

rather than flawed values, can distort prosecutorial decision making.⁵⁶ Under this analysis, even a well-intentioned prosecutor might unintentionally rely upon what she honestly believes are neutral reasons for striking jurors of color, but which are in reality pretextual justifications. As Anthony Page noted in his thorough exploration of the roots of unconscious discrimination in jury selection, an attorney exercising a peremptory challenge often “will neither know what the reason actually was nor even know that she does not know.”⁵⁷

However well-intentioned, prosecutors—like all people, because of unintentional cognitive biases—will face difficulties in achieving race-neutral decision making.⁵⁸ They may approach jury selection with preexisting stereotypes about race—not the most invidious stereotypes imaginable (e.g., that people of color are not sufficiently attentive, intelligent, or hardworking to serve as jurors), but about perceived correlations between race and predisposition (e.g., people of color are less trusting of law enforcement).⁵⁹ These stereotypes are remarkably impervious to change.⁶⁰ People continue to perceive group-based correlations even in the presence of powerful, disconfirming evidence.⁶¹

56. Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); Bibas, *supra* note 46, at 2496–527; Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1600 (2005); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 140–41 (2004); Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009); Myrna Raeder, *What Does Innocence Have To Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327.

57. Page, *supra* note 25, at 177.

58. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”); *see also* Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1029–33 (2008) (examining how unconscious bias might affect a judge's fairness in the jury selection process); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197–201 (2009) (same).

59. See *supra* notes 33–35 and accompanying text for a discussion of evidence that race may in fact influence juror opinions.

60. Page, *supra* note 25, at 200–02.

61. See TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 54 (2002) (“[O]nce a correlation is learned, the nonconscious system tends to see it where it does not exist, thereby becoming more convinced that the correlation is true.”). *See generally* Craig A. Anderson, Mark R. Lepper & Lee Ross, *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037 (1980) (documenting belief perseverance); Lee Ross, Mark R. Lepper & Michael Hubbard, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975) (same).

Indeed, prosecutors who begin jury selection with race-based stereotypes are likely to conduct voir dire in a way that only strengthens their suspicions of venirepersons of color. Psychologists have demonstrated that people suffer from confirmation bias, "the tendency to test a hypothesis by looking for instances that confirm it rather than by searching for potentially falsifying instances."⁶² In a classic study of confirmation bias, subjects were asked to identify the rule determining the numeric sequence of two, four, six.⁶³ To test their hypotheses, they were permitted to offer other triplets of numbers. While subjects overwhelmingly hypothesized that the sequence was comprised of multiples of two, the actual rule was simple: any three ascending numbers. More importantly, to test their hypothesis, subjects tended to offer triplets that were consistent with their theory—eight, ten, twelve—rather than inconsistent—eight, nine, twelve. As a result, they failed to falsify their (incorrect) hypothesis.⁶⁴

Preexisting beliefs affect not only how people search for information, but also how they store and process it. Psychologists describe the phenomenon of selective information processing as the tendency of people to readily accept information that supports their prior beliefs, while devaluing contradictory evidence.⁶⁵ In one classic demonstration of selective information processing, subjects were asked to evaluate two studies of capital punishment, one concluding that the death penalty effectively deterred crime, the other showing no deterrent effect.⁶⁶ The researchers demonstrated that subjects who initially favored the death penalty were more likely to evaluate the pro-deterrence study as persuasive, while death penalty opponents reached the opposite conclusion.⁶⁷ Moreover, the

62. D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 7 (2002).

63. P.C. Wason, *On the Failure To Eliminate Hypotheses in a Conceptual Task*, 12 QJ. EXPERIMENTAL PSYCHOL. 129, 130 (1960).

64. *Id.* at 135.

65. See, e.g., Craig A. Anderson et al., *Argument Availability as a Mediator of Social Theory Perseverance*, 3 SOC. COGNITION 235, 246-48 (1985); Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 574, 576, 579-81 (1992); Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5, 5-6 (1996); Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1231-32, 1239-41 (1984); Arthur G. Miller et al., *The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change*, 64 J. PERSONALITY & SOC. PSYCHOL. 561, 566-67 (1993); Norbert Schwarz et al., *Interactive Effects of Writing and Reading a Persuasive Essay on Attitude Change and Selective Exposure*, 16 J. EXPERIMENTAL SOC. PSYCHOL. 1, 13-16 (1980) (reporting that subjects found sample letters to the editor more convincing and less biased when the letters supported their own positions).

66. See Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2100 (1979).

67. *Id.* at 2101-04.

subjects were wholly unaware that their evaluations were influenced by the studies' outcomes. Instead, the subjects offered seemingly neutral reasons, such as criticisms of the methodology employed by the study opposing their viewpoint. As a result of selective information processing, both groups of subjects reported a strengthening of their preexisting beliefs, even though all of the subjects reviewed the same contradictory evidence.⁶⁸

Because of confirmation bias and selective information bias, a prosecutor's preexisting wariness of venire members of color will be resistant to change. In hypothesis-testing terms, a prosecutor approaching jury selection with stereotypes will be testing her theory that a venireperson of color is less likely to convict. The human tendency toward confirmation bias may lead her to question the venireperson of color differently than a white venireperson. The prosecutor might, for example, be more likely to ask black venire members questions that would reveal negative experiences with law enforcement or discomfort with the death penalty.⁶⁹

Once the venireperson answers those questions, selective information bias might distort the prosecutor's interpretation of the venire member's responses. Answers that appear to be consistent with preexisting stereotypes (a negative experience with law enforcement or a relative's criminal conviction) will be seen as confirmatory evidence. Meanwhile, the prosecutor may interpret ambiguous information in a manner that is consistent with the preexisting stereotype, and may ignore or undervalue responses that are inconsistent with the stereotype.⁷⁰ For example, a pause in the venire member's answer might provoke an adverse inference about the person's views about police or prosecutors, and a positive statement about a police officer might be seen as less important than some other indication of a negative predisposition.

Moreover, because of confirmation bias in recall, when it is time to begin exercising peremptory challenges, the prosecutor might be more likely to readily recall information suggesting that venirepersons of color are predisposed against the prosecution.⁷¹ The fact that lawyers have to make quick, "seat-of-the-pants"⁷² decisions about whether to strike a given venire member while quickly processing information about other venire members and the effect of a strike on overall jury composition only increases the power of preexisting beliefs. Psychologists have demonstrated that reliance on heuristics and stereotypes is highest when people are under time pressure and cognitive load.⁷³

68. *Id.*

69. Page, *supra* note 25, at 218.

70. *Id.* at 218–19.

71. *Id.* at 220.

72. *Batson v. Kentucky*, 476 U.S. 79, 138 (1986) (Rehnquist, J., dissenting).

73. Melissa L. Finucane, Ali Alhakami, Paul Slovic & Stephen M. Johnson, *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1, 8 (2000); *see also*

Scholars and commentators increasingly discuss the role that “tunnel vision” plays in wrongful convictions,⁷⁴ where police and prosecutors develop an opinion about a defendant’s guilt and then filter all information through that lens.⁷⁵ As a result of cognitive bias, prosecutors might unconsciously use a kind of tunnel vision in jury selection, unconsciously assigning differential value to potential jury selection criteria in race-based ways.⁷⁶ A recent study by Sommers and Norton demonstrates how lawyers might engage in racialized jury selection without any awareness of the true reasons underlying their decisions.⁷⁷ The researchers described two potential jurors to their subjects, giving each juror a trait that might potentially lead to a peremptory challenge.⁷⁸ Juror #1 was described as a journalist who had written about police misconduct several years earlier, while Juror #2 was an advertising executive with very little scientific background who was wary of statistical evidence.⁷⁹ For half of the subjects, Juror #1 was black and Juror #2 was white; for the other half, Juror #1 was

Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 35 (2007) (discussing how the workload of judges can affect judicial reliance on intuition and heuristics); Page, *supra* note 25, at 212 (discussing reliance on heuristics in jury selection context); Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 271, 292 (2006) (noting political actors’ reliance on heuristics and stereotypes during crises).

74. COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 19–22 (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_02.pdf (reporting that a special commission on capital punishment in Illinois identified tunnel vision as a contributing factor in several cases in which defendants were released from death row); FTP HEADS OF PROSECUTIONS COMM. WORKING GRP., REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE 3, 35–41 (2005), available at <http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf> (reporting that tunnel vision is one of the leading causes of wrongful convictions in Canada); Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848–51, 861–64 (2002) (examining evidence from Canada and Britain demonstrating the role that prosecutorial tunnel vision plays in wrongful convictions).

75. Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 898–99 (2008) (“[P]olice and prosecutors—as human beings—are likely, once they have identified a suspect or formed a theory of guilt, to seek confirming evidence and not seek disconfirming evidence.”); see also Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 428–29 (2009) (“Research on the causes of wrongful convictions has produced a large body of scholarship describing the problem of ‘tunnel vision,’ the unconscious cognitive biases that plague both police and prosecutors.”).

76. See Page, *supra* note 25, at 224–25 (discussing how lawyers might unconsciously assign differential weight to criteria according to race).

77. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 265 (2007).

78. *Id.*

79. *Id.*

white and Juror #2 was black.⁸⁰ Subjects were allowed to exercise peremptory challenges against venire members “because (a) you don’t think they would be able to be fair jurors or (b) you do not think they would be sympathetic to your case.”⁸¹

Overall, subjects were more likely to strike the journalist.⁸² Importantly, however, the researchers found that all of their subjects, including practicing attorneys, were more likely to strike the black prospective juror. The black venire member, whether described as the journalist or the advertising executive, was challenged by 63% of subjects.⁸³ When the journalist was described as black, subjects struck him from the jury 77% of the time, but only 53% of the subjects struck the journalist from the jury when he was described as white.⁸⁴ The advertising executive was struck by only 23% of subjects when he was described as white, but was struck by 47% of subjects when described as black.⁸⁵ Moreover, when asked to justify the strikes, subjects focused not on race, but the supposedly race-neutral factor that happened to belong to the black juror.⁸⁶ In other words, subjects who believed the journalist was black concluded that familiarity with police misconduct was the less-favorable trait, while subjects who believed the advertising executive was black concluded that wariness of statistical evidence was the less-favorable trait.⁸⁷

III. PROSECUTORIAL BEST PRACTICES

To minimize the risk of race-based challenges, prosecutors’ offices should implement voluntary reforms designed to bolster the prosecutor’s role in protecting race-neutral jury selection and to neutralize the biases that might lead to racialized peremptory challenges.

A. TRAINING IN UNCONSCIOUS AND COGNITIVE BIASES

One method of improving prosecutorial neutrality during jury selection would be to train prosecutors about the prevalence of unconscious stereotypes, types of cognitive biases, and the potential distorting effects of stereotypes and biases on prosecutorial decision making, including neutral jury selection. Some psychological research suggests that self-awareness of

80. *Id.*

81. *Id.* at 266 (internal quotation marks omitted).

82. *Id.* at 267. Sixty-six percent of subjects struck Juror #1, while thirty-four percent challenged Juror #2. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 267–68.

87. *Id.* at 267.

cognitive limitations can improve the quality of individual decision making.⁸⁸

Prosecutors may not initially believe that they personally are at risk of discriminatory jury selection practices, but training sessions might begin by replicating one of the many studies that have shown the influence of race upon peremptory challenges in the aggregate. For example, a prosecutor's office might give attorneys the case hypothetical used by Sommers and Norton. Recall that in that experiment, subjects could exercise a limited number of peremptory challenges and were given two juror profiles, each containing a potential basis for exercising a strike (either familiarity with police abuse or a wariness of statistical evidence), but with different racial identities provided (half of the subjects thought Juror #1 was black, while the other half believed Juror #2 was black).⁸⁹ As Bellin and Semitsu have noted, evidence of racial bias was never apparent in any decision maker's individual case.⁹⁰ A replication of this experiment within a prosecutor's own office would be powerful evidence of unconscious bias. Each individual prosecutor might believe that he or she has a race neutral-reason for striking a juror who happens to be black, but the data in the aggregate, if replicated, would form incontrovertible evidence of the unconscious role of race.

B. "SWITCHING" EXERCISES

Another method of neutralizing bias would be to encourage prosecutors to engage in "switching" exercises during voir dire, asking themselves to pretend that venire members are of a different race or gender. Cynthia Lee has suggested that jurors determining reasonableness claims in self-defense and provocation cases should be instructed to conduct switching exercises,⁹¹ a suggestion that at least one court has implemented.⁹² In that context, jurors attempt to neutralize their own biases by asking themselves whether they would view a case differently if the race, gender, or sexual orientation of the parties involved in the case were changed. Bennett Capers has extended Lee's work into the realm of criminal procedure, arguing that

88. See RICHARD NISBETT & LEE ROSS, *HUMAN INTERFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGEMENT* 191 (1980) ("The effectiveness of a variety of procedures for discrediting information also may depend on their capacity to make subjects aware of some of the processes underlying the perseverance of their beliefs.").

89. See *supra* notes 77-81 and accompanying text.

90. Bellin & Semitsu, *supra* note 6, at 1104.

91. CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 224-25 (2003) (recommending race-switching jury instructions to limit the influence of racial stereotypes in jurors); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 564-66 (2008) (recommending gender and sexual-orientation switching to make jurors aware of antigay bias in cases involving claims of gay panic).

92. LEE, *supra* note 91, at 257-58 & 343 n.103 (quoting Jury Instruction No. 36, *Alaska v. Lockhart*, No. 3AN-S96-2362).

not only jurors, but also police officers, prosecutors, and judges should use switching exercises to neutralize implicit gender, race, and other biases.⁹³

Prosecutors might be especially receptive to engaging in switching exercises given that evidence of racially disparate treatment of venire members is one of the only forms of proof that has led to reversals of convictions based on *Batson*. Bellin and Semitsu's recent empirical study reported that, in the eighteen successful post-trial *Batson* challenges that they identified, only "ten involved undeniable evidence of implausibility based on side-by-side comparisons of similarly situated jurors of different races."⁹⁴ The Supreme Court has noted that prosecutors evidence disparate treatment if they strike a venire member of color using reasoning that would appear to apply to white venire members who are not struck.⁹⁵ Discrimination can also be reflected in disparate questioning, where prosecutors pursue a line of questioning only with venire members of color.⁹⁶ By engaging in switching exercises and pretending that venire members are of different races and genders, prosecutors might be able to determine whether they are employing either disparate questioning or reasoning during the peremptory challenge process.

C. STATISTICS: THE PROOF IS IN THE PUDDING

Another method of identifying and neutralizing bias during the peremptory challenge process would be to collect and publish both individual and office-wide data regarding the exercise of peremptory challenges.⁹⁷ Just as they collect statistics regarding conviction rates, prosecutors' offices should track the number of peremptory challenges

93. I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 24 (2008) ("Just consider what justice might look like if law enforcement officers, prosecutors, jurors, and even judges engaged in switching exercises—or imaginative acts of cross gender/race/class/status dressing—with respect to suspects, defendants, victims, witnesses."); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 75–76 (2009) (extending Lee's work to the area of criminal procedure by encouraging police officers to engage in switching exercises to neutralize implicit racial bias).

94. Bellin & Semitsu, *supra* note 6, at 1099 (citing *Snyder v. Louisiana*, 552 U.S. 472, 482–86 (2008)).

95. *Snyder*, 552 U.S. at 483 (noting that the prosecutor's stated reason for striking a black venire member based on his schedule as a student-teacher was implausible in light of the prosecutor's acceptance of white jurors with similar time demands); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

96. *Miller-El II*, 545 U.S. at 261.

97. Peter Joy has suggested to the press that prosecutors be required to maintain peremptory challenge statistics. Donna Walter, *Missouri Supreme Court Judge Suggests New Limit to Peremptory Challenges*, ST. LOUIS DAILY REC., Mar. 2, 2002, (available on LexisNexis) (noting Professor Joy's opposition to reducing the number of peremptory challenges and identifying Joy's proposed reforms, including the maintenance of statistics to reveal discriminatory patterns).

exercised, the reasons for the challenges, the race of the affected venirepersons, and the composition of the resulting juries.

Looking to data collection for reform has precedent in the policing context where many jurisdictions, in response to concerns about racial profiling, require police officers to maintain data regarding the individuals selected for questioning, stops, and frisks.⁹⁸ Release of these data revealed, for example, that nearly ninety percent of the New York City Police Department's stops in 2006 were of nonwhites, and that nonwhites generally underwent more intrusive stops than did similarly situated whites.⁹⁹ In contrast, data in Cincinnati revealed no evidence to support an inference of widespread racial profiling, but did identify ten officers who appeared to be stopping significantly more black drivers than did other officers patrolling under the same circumstances.¹⁰⁰

Maintaining data regarding prosecutorial exercises of peremptory challenges would serve multiple purposes. A policy requiring prosecutors to report their jury selection practices would raise internal awareness about the importance of race-neutral jury selection, making clear that avoiding the distorting influence of race and choosing representative juries is a separate and valuable objective apart from choosing a jury that is most likely to accept the prosecution's case. Keeping statistics regarding the race of venirepersons struck by peremptory challenges should also deter racialized strikes in the first place. Simply knowing that one must report jury selection decisions by race might encourage prosecutors to second guess their own unconscious biases—by, for example, engaging in switching exercises—and to avoid exercising strikes in ways that would create a racialized pattern in the data.

Maintaining statistics on peremptory challenges would also help reveal both individual and institutional patterns that may exist. Offices could ask individual prosecutors to explain any troubling trends in their own jury selection decisions, requiring them to undergo further training or discipline as appropriate. Office-wide patterns might persuade supervisors that more drastic intervention is required, such as an internal policy forbidding or

98. See MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TRAFFIC STOP DATA COLLECTION POLICIES FOR STATE POLICE, 2004, at 1–3 (2005) (reporting that twenty-nine of forty-nine state police agencies with patrol duties required officers to collect the race or ethnicity of stopped drivers, and that twenty-two of these agencies made the resulting data available to the public); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 364 (2001) (advocating a requirement that law-enforcement agencies “collect, maintain, and report” data regarding the race of people who are stopped and searched).

99. GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES iii, xiv (2007), available at http://www.rand.org/pubs/technical_reports/2007/RAND_TR534.pdf.

100. GREG RIDGEWAY, CINCINNATI POLICE DEPARTMENT TRAFFIC STOPS: APPLYING RAND'S FRAMEWORK TO ANALYZE RACIAL DISPARITIES xii–xiii (2009), available at http://www.rand.org/pubs/monographs/2009/RAND_MG914.sum.pdf.

limiting the exercise of peremptory challenges.¹⁰¹ Even more potentially transformative would be a practice of making the collected data public. Defense attorneys could use any data showing the disproportionate exclusion of venire members of color to help establish prima facie *Batson* violations in future litigation.¹⁰² Judges might be less likely to accept implausible but race-neutral justifications for peremptory challenges if they are aware of individual or office-wide disparate impact in the aggregate. The public would be better informed about prosecutorial practices and therefore better equipped to hold the prosecutor's office accountable at the ballot box.¹⁰³ Full and public disclosure about prosecutorial jury selection practices also demonstrates a prosecutor's office's commitment to transparency, which in turn promotes the appearance of prosecutorial accountability and institutional fairness.¹⁰⁴

CONCLUSION

Much of the current *Batson* literature casts prosecutors as antagonists, but prosecutors themselves are in the best position to redefine their role by monitoring and modifying their own conduct. Prosecutors are not only aware of the special function they play in the adversary system, they take great pride in it. They see their obligation to do justice as separating them from other lawyers who are merely zealous advocates.¹⁰⁵ However, as a

101. Howard, *supra* note 37, at 406–19 (arguing that prosecutors should voluntarily waive peremptory challenges because their marginal benefits are outweighed by their damage to the fairness of the system).

102. *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 342–47 (2003) (observing that a historical pattern of racial discrimination at a district attorney's office was a factor in concluding that prosecutors had violated *Batson*); see also Joseph L. Gastwirth, Case Comment, *Statistical Tests for the Analysis of Data on Peremptory Challenges: Clarifying the Standard of Proof Needed To Establish a Prima Facie Case of Discrimination* in *Johnson v. California*, 4 LAW, PROBABILITY & RISK 179 (2005) (arguing that formal statistical analysis could aid courts weighing *Batson* claims); Amanda S. Hitchcock, "Deference Does Not by Definition Preclude Relief": *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328, 1345 (2006) (noting that statistics can be "probative of an inference of discrimination, which is all the defendant need show at the prima facie stage of the *Batson* process"); Jennifer A. Larrabee, "DWB (Driving While Black)" and *Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291, 311 (1997) (noting that although statistics will not determinatively prove discrimination during jury selection, they will often "be the only way to prove 'the concealed nature of most discriminatory acts'").

103. Bibas, *supra* note 31, at 989–91 (discussing the importance of information to the public's ability to monitor prosecutors).

104. For a general discussion of the importance of transparency to prosecutorial accountability, see ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Medwed, *supra* note 56, at 177–78.

105. See Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1080 (2006) (reporting that colleagues at the U.S. Attorney's Office "view being a prosecutor as more of a calling than a job" and as "part of their personal identity"); Alafair S. Burke, *Prosecutorial Passion*,

culture, prosecutors have not yet incorporated this defining aspect of a prosecutor's professional identity into the jury selection process. As Professor Butler has noted, it is only a "myth" that lawyers want an "impartial jury," and, in this respect, prosecutors behave like every other lawyer who "wants a jury that is predisposed to decide the case in favor of his client."¹⁰⁶ This Article, in contrast, has built the argument that prosecutors, unlike other lawyers, should strive for race-neutral jury selection for both ethical and utilitarian reasons.¹⁰⁷ In light of prosecutors' special role in the legal system, their goal, including during voir dire, should be to create fair trials and enhance the legitimacy of the criminal justice system.

In some respects, this conception of a prosecutor's job during jury selection reflects a larger assumption about the general role of a prosecutor. It mirrors an assumption that it is not up to the prosecutor to personally assess the defendant's guilt and then select the jury that is most likely to agree with that personal conclusion. Rather, the prosecutor should select a jury that is reflective of the broader community and then permit that jury to reach the ultimate decision about the defendant's guilt.¹⁰⁸ Skeptical prosecutors may worry that diversely constituted juries are more likely to acquit defendants than all-white juries. Even if that is the case, prosecutors should be willing to accept these trial losses at the cost of fairness. Moreover, a prosecutorial willingness to lose cases before fairly constituted juries might ultimately change the very attitudes that prosecutors seek to avoid when they strike people of color.

Cognitive Bias, and Plea Bargaining, 91 MARQ. L. REV. 183, 186–87 (2007) (discussing "prosecutorial passion").

106. BUTLER, *supra* note 2, at 12.

107. See *supra* Part III.

108. See Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79 (2010) (arguing that prosecutors should remain agnostic about a defendant's guilt).