Batson "Blame" and Its Implications for Equal Protection Analysis

Robin Charlow
Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation
Robin Charlow, Batson "Blame" and Its Implications for Equal Protection Analysis, 97 IOWA L. REV. 1489 (2012)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1274

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawlas@hofstra.edu.
Batson “Blame” and Its Implications for Equal Protection Analysis

Robin Charlow*  

I. INTRODUCTION ........................................................................................................ 1490 

II. BATSON’S ATTRIBUTION OF BLAME ................................................................. 1491 

III. EQUAL PROTECTION THEORY AND BLAME ................................................. 1500 

IV. CONCLUSION ........................................................................................................ 1509 

* Professor of Law, Hofstra University Maurice A. Deane School of Law. Thanks to my fellow symposium participants and to colleagues at the Hofstra Law Faculty Workshop for their helpful comments on earlier drafts, as well as to Matthew Berger and David Alamia for their excellent research assistance.
I. INTRODUCTION

On this twenty-fifth anniversary of *Batson v. Kentucky*, it is unsettling to observe that so many consider the decision a failure in terms of its apparent purpose—to remedy and prevent discrimination in jury selection. According to numerous commentators, the elimination of potential jurors on the basis of race and gender is a daily occurrence in courtrooms across the country, and despite *Batson*’s ruling to the contrary, largely nothing is done about it.

---

2. See, e.g., 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, 1009 (1996) ("[C]ase studies ... tell us ... that *Batson*’s requirement of articulating a neutral explanation for suspect peremptory challenges creates no substantial hurdle for 'those ... who are of a mind to discriminate,' let alone for those who discriminate unconsciously." (third alteration in original) (footnote omitted) (quoting *Batson*, 476 U.S. at 96)); Bidish Sarma, Commentary, *When Will Race No Longer Matter in Jury Selection?*, 109 Mich. L. Rev. First Impressions 69, 69 (2011), http://www.michiganlawreview.org/assets/1/09/sarma2.pdf ("The evidence that district attorneys still exclude minorities because of their race is so compelling that it is tempting to assume that race will always factor into lawyers’ decisions about whom to keep on the jury and whom to exclude."); Jason Riley, *Blacks Being Excluded from Louisville Juries*, Courier-J. (Louisville, Ky.) (Nov. 6, 2005), http://www.courier-journal.com/article/20051106/NEWSo/511060483/Blacks-being-excluded-from-Louisville-juries (reporting on the grossly disproportionate exclusion of African Americans at every phase of jury selection in the state in which *Batson* originated); see also Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 483 (1996) ("A system which, like the current one created by *Batson*, seeks to accommodate both the inherent [unfettered] aspects of the peremptory challenge and the scrutiny of anti-discrimination laws is one ... which either does not exist or is impossible to locate."); Carol S. Steiker & Jordan M. Steiker, *Report to the ALI Concerning Capital Punishment* (pt. II), 89 Tex. L. Rev. 367, 383 (2010) ("[T]he Court’s reliance on *Batson* as a means of preventing racial discrimination in capital jury selection is profoundly misplaced. Studies of the effectiveness of *Batson* in reducing the race-based used [sic] of peremptory strikes have demonstrated only an extremely modest effect.").
3. See sources cited supra note 2; see also EQUAL JUSTICE INITIATIVE, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 4 (2010), available at http://ejionline.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf ("Too many courtrooms across this country facilitate obvious racial bigotry and discrimination every week when criminal trial juries are selected. The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility and reliability of the criminal justice system ... ."); 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, 1077 (2011) ("[V]irtually every commentator (and numerous judges) who have studied the issue have concluded that race-based juror strikes continue to plague American trials."); Montoya, supra note 2, at 1009 (analyzing survey results that show many practicing lawyers believe that *Batson* does not effectively prevent unlawful discrimination); Sarma, supra note 2, at 70 ("Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread ... .") (quoting EQUAL JUSTICE INITIATIVE, supra, at 5) (internal quotation marks omitted); id. at 70 ("[C]ourts have shirked their duty to take seriously these recurring claims of racial discrimination.") (internal quotation marks omitted)); Michael Janofsky, *Under Siege, Philadelphia’s Criminal Justice System Suffers Another Blow*, N.Y. Times (Apr. 10, 1997), http://www.nytimes.com/1997/04/10/us/under-siege-philadelphia-s-criminal-justice-system-suffers-another-blow.html?pagewanted=all&src=pm (reporting repercussions from the
Although I can only accomplish this in very broad strokes in this symposium context, I suggest two related points. First, in Part II, I posit that "blame" might account for some degree of Batson's ineffectiveness. That is, the failure of Batson to live up to its promise may, at least in part, stem from the association of a Batson violation with personal fault or failing. Blame in this context may be warranted or unwarranted, depending on the circumstances, but even when justified, it is quite possibly counterproductive to the ultimate goal of eliminating discrimination in the use of peremptory strikes.

In Part III, I make the second and related point that blame seems inevitable under Batson. This is because Batson enforces the Constitution's equal protection guarantee, and blame appears to follow inexorably from both of the two dominant theories of equal protection analysis: anticlassification and antisubordination. Indeed, this could be a problem for equal protection law more generally, well beyond the issue of discriminatory juror challenges. Assuming blame is unavoidable under current theory and interferes with rooting out discrimination, this Essay briefly explores a possible alternative view of equal protection—antibalkanization—that may better resolve the problem of discriminatory peremptories without necessarily raising the specter of blame. This Essay concludes by considering the applicability of this alternative theory to the Sixth Amendment, instead of the Equal Protection Clause, in the service of addressing discriminatory peremptory strikes.

II. BATSON'S ATTRIBUTION OF BLAME

In an earlier article, I argued that a court's finding of a Batson equal protection violation amounts to an imputation of discriminating and lying on the part of the striking attorney, potentially warranting professional disclosure of a training video in which an assistant district attorney instructs inexperienced colleagues how to exclude blacks from juries).

4. Cf. Adam M. Gershowitz, Prosecutorial Shaming: Naming Attorneys To Reduce Prosecutorial Misconduct, 42 U.C. DAVIS. L. REV. 1059, 1084-88 (2009) (discussing reasons judges are reluctant to identify prosecutors, including some who committed Batson violations, by name when their cases are being reversed for misconduct; most such reasons assume that naming is shaming); Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 SUP. CT. ECON. REV. 1, 13 (1993) ("Judges' desire to be popular with lawyers may express itself in reluctance to impose sanctions upon or even to criticize lawyers who perform below reasonable professional standards . . .").

5. Assignment of blame and fault may be problematic in a broad range of criminal law contexts, in particular those involving prosecutors and police, since it leads to behaviors that work against desired aims. See, e.g., Alafair S. Burke, Talking About Prosecutors, 31 CARDOZO L. REV. 2119, 2121, 2130-31 (2010) (questioning the utility of the rhetoric of fault because it "invites prosecutors to resist and disengage from the study and prevention of wrongful [conduct and] convictions").
The charge of discrimination is inherent in the ruling itself—the ruling is an official finding that an attorney unconstitutionally struck a potential juror because of his or her race or sex. Further, the accusation of misrepresentation is also inherent in the ruling—the attorney is required to provide a nondiscriminatory reason for his strike at the second step of the Batson procedure, which the judge has necessarily rejected at the third step. As Sheri Lynn Johnson later more colorfully described it, making a Batson-violation ruling is equivalent to calling the striking attorney “a racist—and a liar to boot.” For this reason, I worried that this unfortunate but unavoidable association of personal fault with Batson infringements could result in judges’ disinclination to rule that attorneys had indeed committed Batson violations.

It is now clear that judges have been hesitant to make rulings of Batson breaches when the issue has been raised, although given the information currently available, we do not know exactly why. There may be anecdotal
evidence that blame is one consideration, but without more data than is presently available, it is impossible to ascertain just how great a role blame actually plays in this calculus.

Nevertheless, it does not require hard data to surmise that, logically, blame bears at least some of the load. No one wishes to accuse those with whom they regularly associate, both professionally and often personally, of moral wrongdoing. Yet virtually every Batson ruling potentially carries such a stigma.

Moreover, because Batson-violation rulings are effectively indictments of personal morality, they are unlike most other routine trial rulings. Batson violations necessarily involve findings of such socially unacceptable behavior as intentional race or sex discrimination, as well as false representations of the reasons for those unsociable acts. Other common trial rulings concerning matters such as evidence, witness examination, and the like do not regularly and similarly involve ethical judgments about the behavior of the attorneys involved. But rulings that an attorney has purposefully discriminated by race or sex and then lied about having done so seem freighted with a dimension of personal moral delinquency that simply does not characterize many other trial-related holdings. Thus, a judge finding a Batson violation is doing something possibly quite different from a judge making most other common legal rulings. Calling attorneys racists and liars is just not the same as labeling them overstepping cross-examiners or charging them with offering inadmissible evidence. In short, Batson findings impute personal moral failing to the acting attorney in a way that most other legal rulings usually do.

show that when judges find violations of professional standards by prosecutors, the prosecutors are rarely punished for their misconduct. E.g., KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA, 1997–2009, at 5 (online ed. 2010), http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct_Exec_Sum.pdf (reporting on the “alarm Warning” scope and persistence of unpunished prosecutorial misconduct in California); see Gershowitz, supra note 4, at 1062–63 & nn.7–12. A general failure to sanction would likely include instances of Batson violations.

10. See, e.g., Charlow, supra note 6, at 11 (explaining that a friend who is a judge expressed concern that her Batson rulings created an uncomfortable situation owing to their inherent imputation of blame).

11. See Roberts, supra note 9, at 93 (discussing the difficulty for a judge of telling “a ‘fellow member of the bar’ that he or she has been using race unlawfully,” especially “when judge and attorney frequently share the same courtroom” (quoting Sheri Lynn Johnson, Respectability, Race Neutrality, and Truth, 107 YALE L.J. 2619, 2657 (1998) (book review))); cf. Posner, supra note 4, at 13 (suggesting that judges may be reluctant to impose sanctions on or even criticize lawyers who practice before them, owing to a desire to be popular with members of the bar).

12. There are some other rulings that may similarly involve an ethical dimension, such as a prosecutor’s deliberate omission to turn over exculpatory evidence to the defense, as required under Brady v. Maryland, 373 U.S. 83, 87 (1963). Interestingly, as in the case of discriminatory peremptories, judges seem similarly reluctant to name and sanction errant attorneys for Brady violations. See, e.g., Gershowitz, supra note 4, at 1080 (“[C]ourts named the prosecutor
If a Batson finding is indeed a conclusion of moral fault, then perhaps any associated blame is warranted and should not trouble us. To determine whether Batson-violating strikes are truly blameworthy, it is necessary to explore what specific kinds of acts might lead to findings of Batson violations. There are several different types of potentially discriminatory peremptory strikes, and some may be more righteously condemned than others.

Historically, when race relations in America were characterized by overt racial prejudice, African Americans were considered intellectually and otherwise unfit to participate as jurors and routinely struck from the pool of potential candidates out of blatant bias. The era of overt bias could be described as embodying a subordination model of interracial social interaction, in which one race was considered superior and another inferior. Clearly, strikes based on conclusions of racial inferiority are morally inappropriate by today’s reckoning. While such strikes may still sometimes occur, over time, as overt bias and notions of subordination essentially became socially unacceptable, we appear to have moved into a period in which race relations might be characterized as more about unconscious bias and unequal concern or regard than about overt prejudice. As a result, discriminatory peremptories are also more likely to take different forms.

Today, many arguably discriminatory peremptories result from a deliberate choice to remove jurors of a particular race or group because of stereotyped or “tribalist” (common group affinity) thinking about the sympathies of different races or sexes, rather than from notions of inferiority

[13] Neal v. Delaware, 103 U.S. 370, 393–94 (1880) (“[T]hat none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries.” The exceptions . . . were rare.” (quoting the lower court’s decision)).

[14] See ELLIS COSE, THE END OF ANGER: A NEW GENERATION’S TAKE ON RACE AND RAGE 28 (2011) (“We are witnessing . . . a fundamental shift in the nature of the black-white relationship in America . . . . As white racism has become unacceptable, unremittent black anger has become inappropriate . . . .”); id. at 131–32 (quoting a young black MBA employed by a strategic consulting firm who relates that while overtly racist or sexist comments in her workplace are “almost unimaginable,” people still act with possibly unconscious racial thoughts and perceptions “in the background”); Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV 1489, 1514 (2005) (“There is now persuasive evidence that implicit bias against a social category . . . predicts disparate behavior toward individuals mapped to that category. This occurs notwithstanding contrary explicit commitments in favor of racial equality.”); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 335 (1987) (“Increasingly, as our culture has rejected racism as immoral and unproductive, [unconscious] hidden prejudice has become the more prevalent form of racism.”); Antony Page, Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U. L. REV. 155, 191 (2005) (“Today, few Americans are prepared to publicly state that they have racist, or to a lesser degree, sexist beliefs, since holding those beliefs is generally no longer socially acceptable.”).
or subordination. Attorneys are concerned about jurors sympathizing with the opposing side. They have a duty to work as ardent advocates for their clients. Particularly in the federal system, where voir dire is often quite limited (though in state courts as well), they do not have much information about any individual potential juror, except for such obvious physical characteristics as race and a few revealed facts (typically name, address, and occupation). Attorneys assume that sympathies correlate with such factors as race or sex (stereotyping), or with racial, ethnic, or gender commonality with their client (tribalism), and they exercise peremptories accordingly.

These assumptions and stereotypes concerning sympathy may even be accurate. Research indicates that group stereotypes and preferences form as a result of the routine psychological process of categorization. When we first meet people or encounter objects, we automatically begin to categorize them in order to bring order to our complex world and to simplify and make sense of it. Fairly obvious characteristics such as race and sex are

15. Tania Tetlow, How Batson Spawned Shaw—Requiring the Government to Treat Citizens As Individuals When It Cannot, 49 LOY. L. REV. 133, 139–40 (2003) (explaining that the dissenters in Batson and its progeny correctly observed that “[l]awyers . . . exercise peremptories based upon their guesses about the loyalty and potential partiality of jurors,” rather than, as the majority seemed to reason, on determinations of an individual juror’s competence or potential bias); see also Page, supra note 14, at 181 (describing the results of cognitive research suggesting that the “ordinary, routine and completely normal” psychological process of categorization, which we all employ in order to understand our world, “can, of its own accord, lead to stereotyping and discrimination”).

16. Tetlow, supra note 15, at 133 (“[A] prosecutor facing a jury pool must exercise a peremptory challenge based on little more than the juror’s occupation, appearance, and neighborhood.”).

17. See, e.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 137–38 (1994) (explaining that the respondent’s attorney in a paternity case asserted that his decision to strike “virtually all the males from the jury . . . ‘may reasonably have been based upon the perception, supported by history, that men . . . might be more sympathetic and receptive to the arguments of a man alleged . . . to be the father of an out-of-wedlock child, while women . . . might be more sympathetic and receptive to the arguments of the complaining witness who bore the child” (quoting Brief for Respondent at 10, id. (No. 92-1239))); see also Powers v. Ohio, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting) (“Unlike the categorical exclusion of a group from jury service, which implies that all its members are incompetent or untrustworthy, a peremptory strike on the basis of group membership implies nothing more than the undeniable reality (upon which the peremptory strike system is largely based) that all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members.”).

18. See Page, supra note 14, at 187 (reviewing psychological research literature establishing that stereotyping, or “social categorization,” is merely a subset of the routine mental process of categorization); id. (“Stereotyping, like categorizing, consists of inferring a relatively complete idea about a specific subject based on a small amount of information.”).

19. Lawrence, supra note 14, at 337 (“All humans tend to categorize in order to make sense of experience. Too many events occur daily for us to deal successfully with each one on an individual basis; we must categorize in order to cope.”); Page, supra note 14, at 186 (noting that categorization, “probably ‘the most basic and essential of all cognitive processes,’ . . . serves to simplify the world, [allowing us to avoid being] engulfed in a tidal wave of details” (quoting
readily perceived in other people and often used to categorize.\textsuperscript{20} We engage in stereotyping, a subset of categorizing, by generalizing from characteristics associated with those in each social category. We also find ourselves more or less comfortable with, or sympathetic to, people in a category simply because it is familiar to us. Usually, this is based on whether we ourselves belong to the same or a different category (a kind of tribalism).\textsuperscript{21} Thus, whether innate, learned, or both, the "natural" process of categorization inevitably results in both stereotyping and tribalism.\textsuperscript{22}

This process renders the connection between stereotyping and tribalism, on the one hand, and assumed group-member sympathy, on the other hand, often accurate. That is, as a result of the psychological process that produces stereotypes, we in fact often sympathize based on group stereotypes and common group identity.\textsuperscript{23} As a consequence, if we are to obtain juries not predisposed against, or at least not less sympathetic to, particular parties, we should perhaps allow strikes based on stereotyping.\textsuperscript{24} At a minimum, this psychological evidence probably suggests that a properly


\textsuperscript{20} Page, \textit{supra} note 14, at 187 ("[P]eople categorize other people by race, sex, ethnicity and the like in the same way that they categorize furniture as chairs, tables, couches and the like." (quoting Susan T. Fiske, \textit{Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice}, in \textit{UNINTENDED THOUGHT} 253, 253 (James S. Uleman & John A. Bargh eds., 1989))).

\textsuperscript{21} Id. at 187-88 (observing that a "stereotype can be understood as a cognitive structure that contains sweeping concepts of the behaviors, traits and attitudes associated with the members of a social category," and that by oversimplifying, stereotyping inevitably leads to bias). Studies show that even in artificially formed groups, "[p]eople experience more positive feelings towards those individuals in the same group as they are," \textit{Id.} at 195, while they "see those in other groups as a more homogeneous mass . . . and in a more negative manner." \textit{Id.} at 196 (footnote omitted).

\textsuperscript{22} Id. at 181 (stating that since the late 1970s, psychologists have been "explor[ing] the notion that discrimination . . . may [result from] ordinary, routine and completely normal cognitive mental processes"); \textit{Id.} at 187 ("Normal, routine and unconscious cognitive processes lead to the formation of categories. . . . Stereotyping is . . . a subset of [such] categorization . . . .") (footnote omitted).

\textsuperscript{23} See Hilarie Bass, \textit{Are We Really Color-blind After All?}, \textit{LITIGATION}, Winter 2011, at 1, 1 (commenting on the "immense" implications for the justice system of studies indicating that "we are all affected by unconscious biases [as the] result of an innate human tendency to feel more comfortable with one's own kind that is reinforced by repeated exposure to societal stereotypes by families, the media, advertising, social interactions, and all other forms of sensory input").

\textsuperscript{24} Tetlow, \textit{supra} note 15, at 143 ("Criminal defendants, in particular, should retain permission to stereotype by race about the probability of a potential juror's racist beliefs or racial allegiances. Application of the \textit{Batson} rule disables this mechanism of obtaining a fair jury. "Unless jurors actually admit prejudice during \textit{voir dire}," the defendant will be without authority to strike them." (quoting Georgia v. McCollum, 505 U.S. 42, 61-62 (1992) (Thomas, J., concurring))).
ardent advocate’s correct choice in some circumstances might be to follow the dictates of an assumed race-connected or gender-connected sympathy.25

Another possible type of discriminatory peremptory challenge might be one that results from what has been called “unconscious racism.”26 I hesitate to use this term because it carries a pejorative connotation, and my larger point is that we might want to reconsider our fixation with fault-based constructs. I will use it here as a shorthand to mean that the striking attorney is unaware that his or her strike was based on race, though a court could nevertheless rule, quite possibly correctly, that in fact it was. The attorney believes he or she was motivated to strike by some other factor, but a judge weighing the available evidence concludes that the challenge was really based on race. For example, this might occur where the attorney is motivated by racial stereotyping or tribalism of which he or she is unaware. There is a natural human tendency to view our own behavior as particularly moral, so that the idea that one is acting in a racist manner is difficult to swallow; we (in this case, the striking attorney) thus deceive ourselves into believing that we are not.27

Finally, some potentially discriminatory peremptories may result from unequal regard or concern, or what one might call differing sensitivity.28 In this circumstance, the striking attorney does not consider with equal concern how his or her strike will differentially impact members of different racial or other groups. For example, in a securities-fraud case involving a wealthy defendant, defense counsel might strike all potential jurors who live in poor areas of the city on the assumption that they will not be able to understand the nuances of the issues or relate well to the person or world view of the wealthy defendant. This could incidentally result in the complete or near complete exclusion of African Americans or Latinos, an unintended but, to the striking attorney, not particularly concerning side effect. The

25. Id. at 136 (“It ignores human experience to pretend that race is not a potentially valuable predictor of certain beliefs, which are, after all, often the result of common experience.”).

26. In his 1987 article The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, Charles Lawrence argued that we are all pervasively influenced by “a common ... cultural heritage” and system of beliefs concerning race, both of which reflect “negative feelings and opinions about nonwhites.” Lawrence, supra note 14, at 322. As a result, according to Lawrence, “we are all racists,” yet “most of us are unaware of our racism,” hence the term “unconscious racism.” Id. at 322–23.

27. “Studies demonstrate that people tend to overestimate their ability to act ethically, both prospectively ... and in hindsight when asked to evaluate how ethical they have been in the past.” Tigran W. Eldred, The Psychology of Conflicts of Interest in Criminal Cases, 58 U. Kan. L. Rev. 43, 71 (2009); id. at 71 nn.138–42 (citing and describing a variety of articles reporting on psychological research dealing with this phenomenon).

28. Charles Lawrence, borrowing from Paul Brest, refers to a kind of “selective sympathy or indifference” that seems very close to the same notion. Lawrence, supra note 14, at 348 & n.135 (quoting Paul Brest, Foreword, In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7–8 (1976)) (internal quotation marks omitted); see also id. at 349, 357 n.185.
same attorney might have acted with less indifference had members of his or her own group been adversely affected, but might treat the racially unbalanced effect of the strikes with less regard when a different racial group is the one excluded. Technically, under current law, this would not be a Batson violation because the strikes were not based intentionally on race or sex, but rather on a different factor. 29 However, some would still view the grossly disproportionate or complete exclusion of racial or ethnic minorities as a problematic outcome and consider this an instance of discriminatory peremptories. 30

Many of the above examples of conscious and unconscious stereotyping and tribalism, as well as unequal regard, are likely tied to the previously described psychological process of “categorization.” We tend to pigeonhole people into racial categories and then make assumptions about them that correlate with those categories, both consciously and unconsciously. We also afford different levels of regard to categories, depending on whether we ourselves belong and how well we can relate to a given category.

Which, if any, of these different types of discriminatory peremptory challenges are deserving of blame? 31 Historical overt racial discrimination is clearly culpable because it is based on the morally discredited notion of racial inferiority and subordination, but it is also largely no longer the issue.

The blameworthiness of conscious or unconscious stereotyping or tribalism is more difficult to determine. If stereotyping makes sense in terms of securing a fair trial for one’s client—for example, for a criminal defendant—then perhaps it should not be ethically condemned. 32 Also, if stereotyping and tribalism are the consequence of an automatic psychological categorization process, then perhaps we should not blame attorneys for acting according to such a normal, routine process of

29. See, e.g., Hernandez v. New York, 500 U.S. 352 (1991) (upholding the use of peremptory challenges against some Spanish-speaking potential jurors based on the prosecutor’s suspicion that they might not readily accept the official translation of key Spanish-language testimony, despite the obviously disproportionate effect on Latinos).

30. See, e.g., Quin M. Sorenson, Comment, Backdooring Batson: The Improper Use of Racial Memory and Other “Peculiar” Characteristics in Juror Challenges, 35 COLUM. HUM. RTS. L. REV. 71, 87 (2003) (criticizing Hernandez on the ground that, “[e]ven if the challenging attorney is not consciously acting in a discriminatory manner, the Equal Protection rights of the excluded jurors are violated if the attorney’s use of peremptory challenges is based on a characteristic exclusive to one race”); cf. Johnson, supra note 7, at 158 (suggesting that proffered race-neutral reasons for strikes that amount to “recitation of stereotypes about African Americans,” such as having relatives who have been criminally prosecuted, “should be viewed with greater suspicion than citation of non-stereotyped characteristics or responses” because in such circumstances “skepticism is warranted”).

31. Some would argue that all are both unconstitutional and morally wrong. See discussion, supra note 26 (discussing Charles Lawrence’s opinion).

32. See, e.g., Tetzl, supra note 15, at 141 (“In the jury selection process, stereotyping decisions serve an important instrumental goal; peremptory challenges balance the makeup of the jury in the interest of a fair trial.”).
information sorting, whether conscious or unconscious. Not everyone in the legal or psychological communities would agree with this last point. However, to the extent that is because they believe categorization is sometimes so undesirable that we ought to try to train ourselves to avoid it, this would still not mean that following such impulses, especially when doing so unconsciously, is necessarily immoral or faultworthy.

The blameworthiness of unequal regard or sensitivity is also problematic. Since this type of discrimination is “in spite of,” not “because of,” race or sex, the Supreme Court has indicated that it would not amount to purposeful discrimination, which is required for an equal protection violation under Batson. This does not mean that such discrimination should be ignored in a broader quest for social justice and inclusion, but it might mean that it is less obviously unethical than intentional discrimination. In other words, in the case of unequal regard, one has acted out of an often unconscious absence of commensurate concern, which seems perhaps less morally delinquent than having acted with an affirmative discriminatory purpose. Moreover, if we focus on the previously discussed evidence of the natural process of categorization, which could well have led to the inequality in concern, the moral ambiguity of such strikes is only heightened.

Despite having digressed to consider blameworthiness, it is important to remember that, regardless of whether or not blame is deserved, a fault-based overlay is probably counterproductive to eliminating discriminatory strikes. People do not generally react well to being accused of bad behavior, or

33. See Page, supra note 14, at 187 (explaining that categorizing and stereotyping are the results of “[n]ormal, routine and unconscious cognitive processes”). But see Susan T. Fiske, Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice, in UNINTENDED THOUGHT 253 (James S. Uleman & John A. Bargh eds., 1989) (arguing that the ease of categorization and concomitant stereotyping should not be taken to imply a lack of intent or responsibility for resulting discrimination).

34. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986) (establishing that in the third step of the peremptory-challenge analysis, the court determines whether the accused attorney engaged in “purposeful discrimination,” meaning he or she intentionally struck a juror based on race); Personnel Adm’r v. Feeney, 442 U.S. 256, 279 (1979) (“[Discriminatory purpose] implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”).

35. Contra Charles Lawrence III, Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,” 40 CONN. L. REV. 931, 946 (2008) (explaining the author’s reasoning, in his seminal work on racism, that calling his white liberal friends “racist” was necessary in order to indicate that no one is absolved from responsibility for our collective participation in “America’s racism”). Lawrence was concerned that avoiding the racist label meant giving a “pass” on responsibility for remedying the problems that stem from pervasive negative racial attitudes, a responsibility that we all bear. Id. However, avoiding personally derogatory labels may be more conducive to enlisting individuals in taking ownership of the problem and engaging in remedial efforts.
worse, morally bereft character.\textsuperscript{36} We like to think of ourselves as ethical and view our own conduct through that lens.\textsuperscript{37} Being labeled unethical or immoral is not only psychologically distressing, but may also have practical repercussions.\textsuperscript{38} In this particular context, if we want attorneys to cooperate and alter their thinking or behavior to avoid racially and sexually discriminatory strikes, criticizing them with fault-based rhetoric and attaching inflammatory labels like “racist” and “liar” to them may not be the best way to go about it. Blaming could lead instead to pushback and intransigence.\textsuperscript{39} Moreover, as mentioned earlier, blaming may also be too extreme for judges, who often deal with attorneys they know personally, resulting in their disinclination to find \textit{Batson} violations at all.\textsuperscript{40} If we are not prepared either to eliminate peremptories altogether—which is still an option—or to live with the current state of ineffectual policing of them, we may need to get beyond blame.

III. EQUAL PROTECTION THEORY AND BLAME

Is it possible to rule that someone has violated the Constitution’s equal protection guarantee without implicating personal blame? This depends on what we understand to be an equal protection violation.

There are two dominant and competing theories for determining whether equal protection has been offended. The “anticlassification” view of equal protection has evolved as the approach adopted by the Court’s majority.\textsuperscript{41} Anticlassification theory is concerned with the treatment of

\textsuperscript{36}. Sharon Lamb, \textit{The Trouble with Blame: Victims, Perpetrators, and Responsibility} 11 (1996) (“The more you blame a person, the more ashamed he feels and the greater his tendency will be to hide his head, deny his wrongdoing, or look outward for causality. There does not seem to be any easy way to both blame and encourage another to take responsibility for his actions.”).

\textsuperscript{37}. Eldred, \textit{supra} note 27, at 68 (“[W]hen one engages in questionable ethical behavior, one’s automatic process of self-defense, born out of the motivation to see one’s self as moral, justifies the behavior as being consistent with ethical norms.”).

\textsuperscript{38}. For example, there is a demonstrated association between bad moral character and inculpation. One study indicates a tendency to inculpate persons of bad character while absolving those of good character who committed the exact same act. Janice Nadler & Mary-Hunter McDonnell, \textit{Moral Character, Motive, and the Psychology of Blame}, 97 \textit{CORNELL L. REV.} 255, 273–91 (2012).

\textsuperscript{39}. See \textit{supra} note 5.

\textsuperscript{40}. See \textit{supra} notes 4 and 8.

\textsuperscript{41}. See Reva B. Siegel, \textit{Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown}, 117 \textit{HARV. L. REV.} 1470, 1473 (2004) [hereinafter Siegel, \textit{Equality Talk}] (“Scholars debate what our constitutional understanding of equality ought to be, but most would agree that American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century.”); Reva B. Siegel, \textit{From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases}, 120 \textit{YALE L.J.} 1278, 1287 (2011) [hereinafter Siegel, \textit{Colorblindness}] (“On the conventional account, the anticlassification understanding of equal protection ultimately prevailed . . .”).
individuals; under an anticlassification regime, it is a presumptive violation of the Equal Protection Clause for the government to classify any person by race.\textsuperscript{42} The intent to discriminate by classifying in this way is required for a violation.\textsuperscript{43}

Often contrasted with the anticlassification approach is the "antisubordination" understanding of equal protection. Antisubordination theory initially arose as a means of determining the proper outcome in affirmative-action disputes and appears to be the favored understanding of equal protection in the legal academy.\textsuperscript{44} Under this principle, constitutional equal protection is concerned with inequalities in group status; it is an antisubordination Equal Protection Clause violation for the government to treat a group (such as a racial group) or its members as subordinate, inferior, or less worthy because of their group status or common group characteristic.\textsuperscript{45}

In addition to these two theories, Reva Siegel recently suggested that, in the specific context of affirmative-action cases, the Court's "race moderates" (those who sometimes vote to uphold and sometimes to strike affirmative-action measures, such as Justice Kennedy and former Justice O'Conner) are really following a third model, an "antibalkanization" approach.\textsuperscript{46} Under an

\begin{itemize}
\item \textsuperscript{42} Siegel, \textit{Colorblindness}, supra note 41, at 1287 (noting that the anticlassification theory views the "paradigmatic harm not as group subordination but rather the classification of any individual by race").
\item \textsuperscript{43} \textit{Id.} at 1291 (citing 1970s Supreme Court decisions ruling that facially neutral practices with a disparate impact do not amount to an equal protection violation unless they were adopted with a discriminatory purpose); \textit{see also} Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979); Washington v. Davis, 426 U.S. 229, 240 (1976); Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 198 (1973).
\item \textsuperscript{44} Siegel, \textit{Colorblindness}, supra note 41, at 1281 ("The Justices who vote to uphold affirmative action policies as constitutional are said to reason from an antisubordination principle that identifies racial stratification (rather than classification) as the wrong . . . "); \textit{id.} at 1288 n.23 (listing authorities, mostly academics, who "have urged that equal protection is best understood as concerned with group subordination"). One could maintain that those who call for equal protection enforcement based solely on the disparate impact of government action are espousing a third, competing understanding of the constitutional guarantee. For a variety of reasons too complex to outline in this limited context—but mostly because it is considered an especially broad principle that could result in a cascade of litigation—I am not considering disparate impact a viable competitor to the two theories discussed in the text. \textit{Cf.} Lawrence, \textit{supra} note 14, at 345 n.115 (ascribing to Owen Fiss a variant of disparate-impact analysis as the essence of equal protection injury); \textit{id.} at 354 (referring to the "parade of horribles" that some believe a disparate-impact rule could engender); \textit{id.} at 364–65, 365 nn.225–28 (examining issues that could illustrate why disparate impact might not be a realistic contender for a constitutional equal protection rule).
\item \textsuperscript{45} Siegel, \textit{Colorblindness}, supra note 41, at 1288–89 ("[T]he antisubordination principle is concerned with protecting members of historically disadvantaged groups from the harms of unjust social stratification."); \textit{accord} Siegel, \textit{Equality Talk, supra} note 41, at 1472–73.
\item \textsuperscript{46} Siegel, \textit{Colorblindness, supra} note 41, at 1281–82 (describing as "race moderates" the Justices "in the middle of Supreme Court conflicts over race equality . . . who allow and limit civil rights initiatives in order to preserve social cohesion" and deeming their approach to equal
antibalkanization principle, equal protection is ultimately concerned with threats to social cohesion.47 The affirmative-action rule that Siegel derives from these Justices' presumed antibalkanization focus is that race-conscious but facially neutral government policies promoting the socially desirable goal of equal opportunity are constitutional as long as they "do not make race so salient as to affront dignity and threaten divisiveness."48

While the antibalkanization principle may not currently be applicable outside the limited affirmative-action situation in which Siegel observed it, it may relate to my point concerning Batson and blame. As I intend to show shortly, the prevailing equal protection anticlassification theory essentially requires imputation of blame. Though many have urged substitution of the alternative antisubordination theory, that theory also invokes blame. The antibalkanization principle, however, might provide a way out of this dilemma. It could allow for finding an equal protection violation without necessarily implicating personal fault. To determine whether this is so, we need to examine the role of blame in each theory.

Under an anticlassification approach, using race to classify individuals is in itself discriminatory and therefore bad.49 One must do so purposefully for there to be a violation.50 Consequently, a court's finding of an equal protection violation under this theory—the theory endorsed by the Court—translates into a finding of conscious, purposeful, deliberate, and discriminatory action, something usually considered morally as well as legally wrong. Because the bad behavior is intentional, the actor is necessarily personally at fault. Thus, it would seem that an anticlassification-violation ruling, by its very nature, unavoidably entails blame.

When it comes to antisubordination, one must surmise how it would pertain if employed here, since it has never commanded a majority of the Court and therefore has not actually been used to test the constitutionality of peremptories. If the Court applied an antisubordination rule to peremptories, it would probably be a violation of equal protection to strike a protection the "antibalkanization' perspective" (footnote omitted)). For a fuller development of this theme, see id. at 1293–1303.

47. Id. at 1281.

48. Id. at 1356–57.

49. See Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (adopting and applying the presumption that overt governmental racial classifications are in themselves unconstitutional); see also Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) ("[G]overnment must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny . . . ."); Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979) ("Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.").

50. Feeney, 442 U.S. at 272 (holding that classification with a disparate impact "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose").
potential juror only if the attorney did so in order to subordinate members of a particular race or sex, or to treat those groups as inferior. Following such a rule, many racially based peremptories might not qualify as equal protection violations.

For example, suppose the attorney for a black defendant deliberately strikes whites. There is not usually any particular reason to think such strikes stem from a notion of the racial inferiority of whites. The attorney is not likely to be treating whites in a subordinating manner. Therefore, under antisubordination theory, this would not amount to an equal protection violation.

On the other hand, suppose a white prosecutor strikes blacks. Some—notably Charles Lawrence—might say this is an instance of subordination. Lawrence's equal protection theory focuses on the commonly understood social or cultural meaning of such an act. He might conclude this is an antisubordination violation because a significant portion of the population would generally view this as a situation in which the power and legal apparatus of the state is used, as it historically had been used, to eliminate blacks from juries and from participation as full citizens. But many peremptory strikes are based instead on stereotyped assumptions about the sympathies of members of different groups, including racial groups. Therefore, what if this white prosecutor maintains that he usually or even always strikes those of the same race as the defendant, whatever race that may be in each case, based on an (often accurate) assumption about presumed sympathy? Viewed from this perspective, a white prosecutor's

---

51. Lawrence, supra note 14, at 350–55.
52. Id. at 350–51 (“The social meaning of racial segregation in the United States is the designation of a superior and an inferior caste, and segregation proceeds 'on the ground that colored citizens are . . . inferior and degraded.'” (alteration in original) (quoting Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting)); id. at 355–56 (presenting the "cultural meaning" test for measuring unconscious but unconstitutional discrimination, in which courts "would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance"). Lawrence argued that if, considering the social and historical context in which a governmental decision was made, "a significant portion of the population thinks of the governmental action in racial terms," there would be a presumption that the decisionmakers were influenced by this meaning and heightened scrutiny would apply. Id. at 356. For applications of his cultural meaning test, see id. at 362–65 (demonstrating application of the test to easy cases), id. at 365–78 (applying the test to harder cases), and id. at 378–81 (explaining additional difficulties with using the test).
53. For a discussion of the accuracy of presumed sympathies, see supra note 17. See also Batson v. Kentucky, 476 U.S. 79, 138–39 (1986) (Rehnquist, J., dissenting) (“The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group . . . may be extremely useful in eliminating from the jury persons who might be biased in one way or another.” (footnote omitted) (citations omitted)); Bellin & Semitsu, supra note 3, at 1081 (“[R]ace-based peremptory strikes might constitute a rational form of discrimination.”); id. at 1083 (“[W]e cannot realistically expect the salience of race-based jury selection to recede until the societal relevance of race diminishes.”); cf. Andrew E.
strikes of blacks in a case with a black defendant might not seem to be instances of subordination, or at least not necessarily so. The prosecutor does not care what particular race the defendant or the prospective juror is, as long as they are the same race, and is not acting from any belief about the inferiority or superiority of particular individual races.

Since all of the peremptory challenges just mentioned might not present equal protection violations under an antisubordination theory, if antisubordination were the governing equal protection rule, the overall outcome might be fewer Batson violations than under the prevailing anticlassification regime. However, when they do occur, subordinating peremptories would likely occasion well-deserved derision and blame. It is clearly considered immoral to treat some racial groups as less worthy than others. In fact, it is probably even more blameworthy to commit an antisubordination violation than an anticlassification violation because it appears morally more reprehensible to treat someone worse based on a hierarchy of classes than to treat them simply worse. Therefore, the possible result using antisubordination theory might be fewer Batson violations but with more blame attached to each infraction.

The first part of my thesis is that blame is the enemy here, and I have now concluded that applications of both anticlassification and antisubordination theories appear to entail blame. This leaves one to wonder whether there is any way out of this box. Is there an alternative theory of equal protection that presents less of a problem of blame? We should consider how Siegel's antibalkanization understanding of certain affirmative-action rulings might apply to equal protection in this very different context. Although the antibalkanization principle Siegel derives does not actually relate to allegedly discriminatory peremptory challenges, perhaps its central theme—a concern with social cohesion—could be usefully extrapolated to the peremptory context. Indeed, there is some warrant for extrapolation, as there are already hints of antibalkanization language in a few Court opinions dealing with instances of alleged racial discrimination in non-affirmative action situations, including in some peremptories cases.54

54. See, e.g., J.E.B. v. Alabama ex rel T.B., 511 U.S. 127, 141-42 (1994) (decrying instances when a juror is "excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination [because such a strike] denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation[, sending the message] that certain individuals ... are presumed unqualified by state actors to decide important questions" (footnotes omitted) (citation omitted)); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991) ("If our society is
Using the antibalkanization principle, a possible extrapolation to peremptories might be a rule that says: a race-conscious peremptory strike is constitutional as long as it addresses a legitimate social concern—for example, fair-trial considerations, especially for a criminal defendant—but even then it will violate equal protection if it affronts dignity or threatens social divisiveness on racial grounds.55

Consider what results would ensue if this rule were applied in some of the situations previously discussed. First, all racially subordinating peremptories would be unconstitutional, as they affront the dignity of the stricken jurors and are inherently divisive. Likewise, strikes of potential black jurors by a prosecutor in a case with a black defendant would be unconstitutional. As under antisubordination, these strikes may affront dignity and therefore threaten social cohesion, given a Lawrence-type argument regarding the cultural meaning of acts such as these. But unlike the antisubordination rule, an antibalkanization standard could identify an affront and a concomitant threat to social cohesion even if the prosecutor were also to strike others of common race to the defendant in every case, whatever the defendant’s race. This is because the tribalist assumptions that underlie such strikes may often be socially divisive, even if and when accurate and non-subordinating. Next, suppose a black defendant strikes...
whites. Such a strike may threaten social cohesion as well because it essentially says whites cannot be trusted to judge those of other races impartially. Even if this is true, it is still divisive. Finally, consider the defense attorney who strikes all those from poorer neighborhoods while defending his wealthy client on charges of securities fraud. This, too, is arguably divisive because, regardless of intent, the severe disparate impact on racial and ethnic minorities (such as blacks or Latinos) is likely to be received as a dignitary affront and racially polarizing.56

If one accepts the posited outcome in these examples, the overall result of an antibalkanization theme would probably be many potential violations. But maybe that is a desirable outcome. For many, the promise initially held out by Batson was that race would cease to be a factor in jury selection, where now perhaps it very often is.

Assuming that courts found these examples were equal protection violations on antibalkanization grounds, would they implicate blame? The antibalkanization principle posits that race-conscious action is constitutional if it promotes equal opportunity in a way that does not affront dignity and undermine social cohesion. At least on its face, this rule does not appear to lead to blame. This is because it focuses on the effect of government action, not on the motivation or mindset of the actor.57 It asks whether the result of the government’s action is acceptable or not, using the matrix of social cohesion. At the same time, it does not ask what the actor’s motivation was for his or her action. For both these reasons, antibalkanization appears to avoid the black hole of blame.

Consider how an antibalkanization rule would operate in the context of peremptory strikes. In that setting as well, a finding of an antibalkanization violation would not likely invite blame. First, it is not a finding that the striker acted out of immoral motives, such as the intent to discriminate against members of one particular racial group, nor is it an indictment of the attorney for his or her conviction that certain racial groups are inferior and others superior. Rather, it is utilitarian. It focuses on the effect of the strike on the stricken juror (does it affront the juror’s dignity) and,

56. At this point, the antibalkanization rule might seem like a simple disparate-impact rule of equal protection violation. However, the two are not identical. An antibalkanization rule would not be as broad as a disparate-impact rule. Not every statistically differential racial result would be a presumptive violation requiring strict scrutiny analysis. Only those disparate-impact situations in which social balkanization was likely would amount to violations. Since such a standard would not result in quite as many presumptive violations as a bare disparate-impact rule, it might be more broadly acceptable as a constitutional standard than disparate impact has proved to be.

57. By focusing on effect rather than intent, antibalkanization might be considered a subset of disparate-impact analysis, which likewise concentrates on effect rather than intent. However, because antibalkanization is defined and therefore circumscribed by certain limiting principles, it could be a more realistic option than disparate impact, which is often considered too broad a rule for adoption as the governing equal protection standard.
ultimately, on society more generally (is it divisive), rather than concentrating on the motivation or mental state of the striker. Hence, it is not particularly concerned with personal moral fault and thus seems unconnected to blame.

A ruling that a peremptory strike violates the antibalkanization principle would not label the striker a racist and a liar. To be sure, it could indicate that an attorney’s strike affronts someone’s dignity, and this might seem accusatory as well. However, any such affront could be attributable to the oversensitivity of the person stricken just as well as to the insensitivity of the striker. A court could find an antibalkanization violation without ever determining which of these was the case. This is because, unlike a ruling that a strike violates either anticlassification or antisubordination, an antibalkanization-violation ruling does not necessarily speak to the actor’s discriminatory intent in producing the undesirable effect. It is instead concerned only with the socially undesirable effect of the action on the victim and society, rather than with the morality of the actor or his act.

The antibalkanization principle potentially casts a much wider net than intentional racial classification or subordination. It could encompass violations under both of those theories because classifying and subordinating based on race are often (perhaps even usually) socially divisive as well. In addition, as can be seen in some of the examples discussed above, antibalkanization might also find violations in cases involving only the appearance of impropriety or racist action because even such appearances can be divisive regardless of intent. Indeed, it would cover all actions that are socially problematic on racial grounds, regardless of any of these factors. As noted earlier, this could potentially cover a wide array of actions.\(^{58}\) Thus, a possible result of imposing an antibalkanization rule in this context might be the reverse of that from an antisubordination perspective: there could be many equal protection violations, but with little personal blame.

Though the antibalkanization principle might obviate the blame issue with regard to unconstitutional peremptories, there are many obstacles to advocating its use in this domain. Most glaring, perhaps, are questions of legitimacy and feasibility. Antibalkanization may not be the proper understanding of the equal protection guarantee. Constitutional originalists, for example, will wonder whether it comports with the original understanding of the Equal Protection Clause. The fact that the theory may

---

\(^{58}\) Even though potentially broader than anticlassification and antisubordination, an antibalkanization approach is still a confined subset of disparate-impact analysis, with more limited application. It is, therefore, potentially less problematic than disparate-impact analysis. Moreover, if Siegel is correct, it is already determining the outcome in a number of affirmative-action decisions. Thus, antibalkanization seems to have greater potential to be accepted as a viable theory of equal protection than disparate-impact analysis, which has already been rejected by the Court as the touchstone of constitutional equal protection.
prove useful in the limited context of peremptories could not possibly suffice to establish it as the “correct” interpretation of the Equal Protection Clause. Furthermore, even if lawyers and scholars could argue it is the proper, authoritative understanding of equal protection, it might not prove as efficacious an interpretation in the many other contexts in which problems of inequality arise. Issues such as these are too far reaching to consider here.

However, there is a possible alternative avenue for relying on an antibalkanization principle in the case of discriminatory peremptories, one that is not dependent on an equal protection theory. Courts could find discriminatory peremptories unconstitutional under the Sixth Amendment’s “fair cross-section” jury requirement instead. The Sixth Amendment right to an impartial jury could mean, in a variation on Tania Tetlow’s formulation, that “prospective jurors shall be selected . . . without systematic . . . exclusion of [racial and other] groups.” Accepting this view would require distinguishing (if possible) or overruling Holland v. Illinois, which held that the fair cross-section requirement only applies to the venire, not to the petit jury. One potential basis for distinction is that applying Tetlow’s suggested rule “would not guarantee the racial makeup of the jury,” as the Court in Holland feared would result if the Sixth Amendment covered petit juries. Rather, Tetlow’s suggestion would “restrict the racial use of peremptory challenges by both sides in order to protect the fair cross-section of the jury from the disproportionate striking of one race.”

The desirability and feasibility of Tetlow’s proposal is too broad to cover here. However, for purposes of this discussion, from an antibalkanization perspective, suffice it to note that a jury constituted under this modification of Tetlow’s suggested rule could be the very antithesis of divisive. By avoiding the requirement of any particular racial makeup, Tetlow foresees many potential divisiveness objections based on racial preference. She uses the original randomly selected jury panel as the baseline and then condemns only the subsequent distortion of this group owing to the differential exclusion of one race. In the view of some, that was Batson’s original promise, if not its actual command. Tetlow thus concentrates on and condemns a practice of racial distortion of juries that seems intuitively inappropriate, just as it may have seemed to the Court in Batson.

---

60. Id. at 163 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946)) (internal quotation marks omitted). This formulation omits the word “intentional” where Tetlow used it, to modify “exclusion.” My suggestion is that the Sixth Amendment might be the theoretical repository of a discriminatory peremptory challenge even if the allegedly discriminatory exclusion was not intentional.
63. Id.
antibalkanization perspective, it is difficult to see why this would constitute an affront to anyone. Why should whites, for example, experience insult from a rule that says blacks cannot be systematically removed from the jury, or vice versa? Indeed, such a rule, and the juries selected under it, would seem to promote rather than destroy social cohesion. Hence, specifically in regard to discriminatory peremptories, antibalkanization seems a potentially promising fit with a modified version of Tetlow’s formulation of the notion of an “impartial” jury representing a “fair” cross-section of society.

Equally important, housing the objection to discriminatory peremptories in the Sixth Amendment could have the advantage of taking the spotlight off of the blame or fault of the striker. The Sixth Amendment is not saddled with the Equal Protection Clause’s present theoretical restrictions. As a result, here, using the suggested understanding of the Sixth Amendment and considering the previous antibalkanization discussion, a reviewing court’s focus could be directed to the result (whether the jury is impartial and includes a fair cross-section) rather than to the striking actor’s mental state (whether the attorney intended to produce a racially slanted jury). Applying the antibalkanization principle through the conduit of the Sixth Amendment rather than the Equal Protection Clause could thereby avoid the previously identified problematic implications for equal protection theory more generally, which as it currently stands, seems to require blame and fault.64

All of this is not to say that the Sixth Amendment is the right or best fix for the dilemma of discriminatory peremptory challenges, or that the suggested formulation of it is ultimately defensible. Rather, this Essay raises this point only to capitalize on the antibalkanization notion and offer the possibility that there may be alternatives to an unsatisfactory Equal Protection Clause resolution of this seemingly intractable problem first addressed twenty-five years ago in Batson.

IV. CONCLUSION

A Batson equal protection violation ruling is equivalent to an accusation of moral wrongdoing. As such, it could be counterproductive to the quest for elimination of discriminatory peremptory challenges. Blame is not constructive here. On the contrary, the possible disinclination to label attorneys as racists and liars could ultimately be contributing to the apparent dearth of Batson-violation findings. The effective safe haven for unconstitutional conduct created by the paucity of Batson-violation rulings is

64. See supra note 60. Eliminating a requirement of “intentional” exclusion hopefully results in moving the focus from the motivation of the excluder to the fact of the exclusion.

65. On the other hand, the blame problem identified here may indeed be an obstacle to the efficacy of the equal protection guarantee as it is more broadly applied. Perhaps a realignment of equal protection away from blame would prove to be beneficial generally.
a perverse incentive, essentially condoning rather than condemning the practice of discriminatory peremptories.

A major impediment to addressing this problem is the fact that the prevailing equal protection theory—anticlassification—essentially assumes fault-based, blameworthy action. Under current law, it seems impossible to rule that an actor has violated the Equal Protection Clause without accusing him or her of immoral conduct. Unfortunately, the sometimes-touted alternative equal protection theory—antisubordination—results in a similar, possibly even stronger, imputation of blame. Neither theory is likely to remedy the problem of blame under *Batson*.

A recently identified antibalkanization principle of equal protection asserts that avoiding divisiveness and promoting social cohesion is the essence of this constitutional guarantee. If substituted as the governing rule, it might allow for finding unconstitutional discriminatory peremptory challenges without implicating personal fault or blame. Nevertheless, it is not clear that antibalkanization holds any particular claim to be the authoritative understanding of the Constitution’s equal protection assurance.

The antibalkanization principle, however, seems to comport well with the Sixth Amendment’s requirement of an impartial jury comprised of a fair cross-section of the community. So understood, the Sixth Amendment might provide an alternative avenue for insuring against discriminatory peremptory challenges. Moreover, using the Sixth Amendment in this way to address the peremptories problem, instead of the Equal Protection Clause, could well avoid the imputation of blame. Unlike an equal protection violation under current law, a Sixth Amendment violation could be found in a challenged-peremptories case without focusing on the motivation of the striking attorney, but rather concentrating solely on the result of the strike. The Sixth Amendment, interpreted through an antibalkanization lens, thus potentially allows for a finding of unconstitutional peremptory challenges without raising the unfortunate and unproductive specter of blame.