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Disparately Seeking Jurors: Disparate Impact and the (Mis)Use of Batson

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INTRODUCTION

Twenty-five years ago, in *Batson v. Kentucky*, the Supreme Court established a framework for protecting against discrimination in jury selection.[1] Since then, the *Batson* doctrine's breadth has increased considerably. *Batson* resolved the claim of an African American criminal defendant from whose jury all African Americans had been removed through peremptory strikes. Now, however, the *Batson* doctrine applies to civil trials as well as criminal, to strikes by prosecutors as well as defenders, and to discrimination on the basis of gender as well as race.[2] Although the doctrine protects only against purposeful discrimination, in *Hernandez v. New York* the Supreme Court held that courts should give "appropriate weight" to the fact that a peremptory strike's justification has a disparate impact on a certain race when determining whether purposeful discrimination motivated the strike.[3]

Despite the increased breadth of the *Batson* doctrine, this may not be a happy anniversary for *Batson*.[4] Opponents accuse the current framework of failing to provide meaningful protection against purposeful discrimination,[5] and, specifically, of being vulnerable to an

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[1] Batson v. Kentucky, 476 U.S. 79, 96-98 (1986).

[2] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality"); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges"); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (holding that *Batson* claims are cognizable in civil trials); *see also Batson*, 476 U.S. at 82-84. "Peremptory strikes," also known as "peremptory challenges," provide a means by which litigants can remove potential jurors at the start of a trial. They serve "a number of purposes that promote justice in adversarial proceedings." Arielle Siebert, Batson v. Kentucky*: Application to Whites and the Effect on the Peremptory Challenge System*, 32 COLUM. J.L. & SOC. PROBS. 307, 309 (1999).

[3] Hernandez v. New York, 500 U.S. 352, 362 (1991). The "disparate impact" justifications with which this article is concerned are those that, while facially "neutral," are more likely to apply to someone who shares the stricken juror's race, ethnicity or gender than to someone who does not.

[4] *See* Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 482 (1998) [hereinafter Johnson, Batson *Ethics*] ("A quick look at the cases expanding *Batson*'s application to white-defendant/Black-juror cases, civil cases, and defense peremptory strikes might suggest that the Court is very committed to *Batson*. Those cases, however, also reveal a concomitant decrease in emphasis on the minority-race defendant's rights that ultimately detracts from the likelihood of reversals in even egregious cases." (footnotes omitted)).

[5] *See, e.g.*, Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 260 (2003)

end-run that exploits disparate impact. In a society often stratified along demographic lines, the possibility that, for example, an attorney might mask purposeful racial discrimination with a justification based on a juror's neighborhood, and be immune from *Batson*'s protections in doing so, has led some to despair of the protections and to call for an end to the peremptory strike.[6]

Despite the risk that disparate impact poses to the *Batson* protections, disparate impact analysis in the *Batson* context has received insufficient scholarly attention, and has never been the subject of a comprehensive study. This article examines all of the federal court decisions relating to this issue that have been published since *Hernandez*.[7] While this survey omits unpublished decisions, it brings to light an intriguing disparity that is mirrored in other *Batson*

("[T]he analyzed decisions suggest that Batson's inefficacy could potentially be assisting in the maintenance of an environment in which racial discrimination in jury selection is tantamount to a legitimate adversarial tool.").

[6] *See, e.g.*, Alexis Straus, *(Not) Mourning the Demise of the Peremptory Challenge: Twenty Years of* Batson v. Kentucky, 17 TEMP. POL. & CIV. RTS. L. REV. 309, 310 (2007) (noting that "although the *Batson* Court's intentions were good, the result has been a messy, unworkable, subjective standard"). The commentators and judges who urge the abolition of the peremptory strike are many. *See, e.g.*, Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363 (2009) (arguing for the abolition of peremptory challenges by examining their abolition in the United Kingdom). *But see* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 100 (1990) ("Despite the often-heard criticism that jury selection is a wasteful, nonproductive use of scarce judicial resources, the defense challenge represents the best mechanism for guaranteeing an accused the right to be judged by impartial jurors.") (footnote omitted). Their grounds are far more numerous than the vulnerabilities of the disparate impact analysis, and this Article will not attempt to address them, beyond making the point that, in the disparate impact context, full exploration of the potential of the analytical framework should be a condition precedent to calls for abolition of a longstanding trial right.

[7] By "published," I mean "available on Westlaw." I conducted my search in the allfeds database of Westlaw. My search was: "Batson & Hernandez & ('disparate impact' 'disproportionate impact' 'discriminatory effect')" (originally my third and final term was "disparate impact," but when my secondary research indicated that courts used "disproportionate impact" and "discriminatory effect" as alternative means of expressing the same idea, they were added). I eliminated Supreme Court cases and cases that either conducted no disparate impact analysis or confined their disparate impact analysis to Step 1 of the *Batson* test. My secondary research brought to light four additional cases, which I then added to my data set: *United States v. Adams*, 604 F.3d 596 (8th Cir. 2010); *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933 (7th Cir. 2001); *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996); and *United States v. Moeller*, 80 F.3d 1053 (5th Cir. 1996).

research beyond the disparate impact context,[8] and in other Equal Protection scholarship.[9] Thirty-nine published decisions have addressed disparate impact arguments in *Batson* cases since *Hernandez*. Thirty-six decisions involved claims relating to stricken jurors who were either people of color alleged to have been stricken because of their race or ethnicity, or women alleged to have been stricken because of their gender. All of the claims relating to those jurors were ultimately unsuccessful. The remaining three decisions involved racial discrimination claims relating to stricken jurors who were white. All of the claims relating to those jurors were ultimately successful. While this numerical disparity might arouse concern — that the disparate impact doctrine is being utilized disparately — a further disparity may temper that concern with hope. In comparing these two groups of cases, there are differences not just in outcome, but also in judicial approach. In several key areas, the depth of analysis was greater in those cases where the stricken jurors were white; more attention was given to the need to make the *Batson* protections an adequate check against purposeful discrimination. This disparity should make one pause before reaching the conclusion that the *Batson* framework cannot adequately protect against justifications that have a disparate impact.

This article highlights four key areas of difference in the approach taken by the two groups of cases: the role of the trial judge, the question of whether a justification for a strike must be connected to the facts of the case, the application of the comparability principle, and the expansion of the groups that the *Batson* doctrine protects. It urges that the depth of analysis found in those four areas where the rights of white jurors were at stake should be applied uniformly to all disparate impact *Batson* claims. Part I surveys the development of the Supreme Court doctrine relating to *Batson*, describes the Supreme Court's pronouncements on disparate impact, and focuses on parameters that the Supreme Court has set in these four key areas. Part II highlights a disparity in result between the two groups of

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[8] *See* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 324 (6th ed. 2008) ("The result of the *Batson* advance is that it has enabled white men and women to obtain the more fairly constituted juries for which blacks have sought for decades with far less chance of success."); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 456 (1996) (examining all published cases from April 30, 1986, which is the date of the *Batson* decision, through December 31, 1993, and finding that challenges made on behalf of white jurors had a 53.33% success rate, while those made on behalf of African American jurors had a success rate of 16.95%).

[9] *See infra* note 383 and accompanying text.

disparate impact cases in the lower federal courts.[10] Part III focuses on a second disparity regarding disparate impact. It demonstrates that courts analyzed the doctrine more deeply where the stricken jurors were Caucasians, alleged to have been subject to racial discrimination. The Conclusion asserts that it is premature to give up on the peremptory strike until protections against its discriminatory use are uniformly applied.

I. SUPREME COURT DOCTRINE

This Part lays out the Supreme Court backdrop against which the lower federal courts have been operating. It describes the framework that *Batson* sets out and introduces *Hernandez v. New York*, the case in which the Supreme Court addressed disparate impact in the *Batson* context.[11] It then highlights the frameworks that other Supreme Court cases have established regarding four issues that are crucial to disparate impact analysis: the role of the trial judge, the question of whether a justification for a strike must be connected to the facts of the case, the application of the comparability principle, and the expansion of the groups that the *Batson* doctrine protects.

A. Batson v. Kentucky

In *Batson v. Kentucky*, an African American criminal defendant alleged discrimination in the prosecutor's removal of every African

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[10] In this Article, I focus on federal case law, although the habeas cases necessarily implicate state court decisions. My focus on federal law is motivated in part by the fact that, at the state level, the patchwork of legal frameworks is more complex. *Batson* "establishes the floor for challenging race based peremptory strikes," a floor that has been exceeded by many states' interpretations of their own constitutions. State v. Buggs, 581 N.W.2d 329, 347 (Minn. 1998); *see, e.g.*, State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991) (noting that the Minnesota Supreme Court may apply a "more stringent standard of review" as a matter of state law). This potential for differing approaches may be particularly salient in the disparate impact context. *See* Danielle Ward Mason, *Racism on Our Juries: The Impossibility of Impartiality in Capital Cases*, 12 JONES L. REV. 169, 194 (2008) (noting that states are not precluded "from developing their own system for dealing with racial discrimination in jury selection or using statistical data as an evidentiary showing of disparate impact regarding peremptory challenges"). A recent report from the Equal Justice Initiative points out that many of the same phenomena that I identify in the federal system are at play in state courts across the South; I will highlight the parallels throughout the Article. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 16-18 (2010), [hereinafter "EJI REPORT"], *available at* http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf.

[11] *See* Hernandez v. New York, 500 U.S. 352, 362 (1991); Batson v. Kentucky, 476 U.S. 79, 82-84 (1986).

American from his jury through peremptory strikes.[12] The Court held that Batson's claim was properly resolved under the Equal Protection Clause, and established a three-step test for evaluating discrimination claims regarding the use of peremptory strikes. This test forms the basis of today's assessment of such claims.[13]

At Step 1 of the *Batson* analysis, the attorney objecting to the use of a peremptory strike must establish a prima facie case of purposeful discrimination.[14] This is accomplished "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[15] At Step 2, the *Batson* Court required the striking attorney to "articulate a neutral explanation related to the particular case to be tried."[16] The Court required that the explanation be a clear and reasonably specific articulation of the attorney's "legitimate reasons" for the strike.[17] At Step 3, the trial court has "the duty to determine if the defendant has established purposeful discrimination,"[18] and thus a violation of the Equal Protection Clause.[19] The court's determination "largely will turn on evaluation of credibility."[20] The *Batson* Court declined to mandate "particular procedures" for courts to follow in their implementation of this three-step analysis.[21]

The *Batson* Court indicated that discrimination in jury selection harms three parties: the defendant, the excluded juror, and the entire community.[22] The harm to the entire community stems from the fact

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[12] *See Batson*, 476 U.S. at 79, 82-84.

[13] *See id.* at 93-98.

[14] *Id.* at 94.

[15] *Id.*

[16] *Id.* at 98.

[17] *Id.* at 98 n.20.

[18] *Id.* at 98.

[19] The *Batson* analysis applies to federal as well as state cases, since the Supreme Court:

> [H]as established that the Due Process Clause of the Fifth Amendment impliedly imposes the same obligations on the federal government as does the Equal Protection Clause on the states, and any alleged violations of those obligations are analyzed in the same way as an alleged violation of the Equal Protection Clause by a state actor.

United States v. Houston, 456 F.3d 1328, 1335 n.5 (11th Cir. 2006) (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[20] *Batson*, 476 U.S. at 98 n.21.

[21] *Id.* at 98 n.24 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.").

[22] *Id.* at 87.

that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[23]

The Court addressed the distinction between peremptory strikes, which "ordinarily" can be exercised by the prosecutor "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case,[24] and challenges for cause, which require the striking attorney to meet a high bar of juror unsuitability.[25] The Court asserted that the distinction remained significant: while the *Batson* analysis "imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause."[26]

Additionally, the Court recognized that "[t]he reality of practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors."[27] The Court did not address the applicability of the *Batson* doctrine beyond the context of the case before it: an African American criminal defendant claiming that the prosecution was purposefully discriminating against African American jurors.

In resolving Batson's claim, the Court overruled its 1965 decision in *Swain v. Alabama* to the extent that the prior case had placed a higher evidentiary burden on the criminal defendant who alleged a violation of Equal Protection through the use of peremptory strikes.[28] The *Swain* Court had denied an African American's claim relating to the prosecutorial striking of six African Americans from his jury,[29] finding that Swain had failed to make out a prima facie case of

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[23] *Id.*

[24] *Id.* at 89.

[25] *Id.* at 97; *see* Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1191 n.84 (2008) ("The challenge for cause is narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror. The peremptory challenge is considerably more extensive in scope. It serves to remove jurors who, in the opinion of counsel, have unacknowledged or unconscious bias . . . . [T]he peremptory permits rejecting for a real or imagined partiality that is less easily designated or demonstrable.") (citing Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981)).

[26] *Batson*, 476 U.S. at 97.

[27] *Id.* at 99.

[28] *Id.* at 82, 100 n.25; Swain v. Alabama, 380 U.S. 202, 227 (1965).

[29] *Swain*, 380 U.S. at 210, 226.

discrimination.[30] In light of the purpose and function of the peremptory challenge, the *Swain* Court refused to hold "that the striking of Negroes in a particular case is a denial of equal protection of the laws."[31] Rather, "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury."[32] Whereas a state's "systematic striking of Negroes in the selection of petit juries" might make out a prima facie case, the record before the Court did not support such a finding.[33]

The *Batson* Court noted that a number of lower courts had interpreted *Swain* to mean that "proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause."[34] The lower courts' approach had placed "a crippling burden of proof"[35] on defendants, which meant that "prosecutors' peremptory challenges are now largely immune from constitutional scrutiny."[36] The *Batson* Court rejected this approach, holding that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[37]

B. Disparate Impact Analysis

A few years after *Batson*, in *Hernandez v. New York*, the Supreme Court focused on the role of disparate impact considerations within the *Batson* analysis.[38] In *Hernandez*, the prosecutor exercised the strikes at issue against Spanish-speaking jurors, on the grounds that they would have difficulty obeying the court's instructions to treat only the interpreter's version of the Spanish-language testimony as evidence.[39] A plurality of the Court conceded that "the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors," but found no clear error in the state court's determination that there was no purposeful discrimination.

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[30] *Id.* at 205, 226.

[31] *Id.* at 221.

[32] *Id.* at 222.

[33] *Id.* at 224.

[34] *Batson*, 476 U.S. at 92.

[35] *Id.*

[36] *Id.* at 92-93.

[37] *Id.* at 96.

[38] Hernandez v. New York, 500 U.S. 352, 362 (1991).

[39] *See id.* at 356-57. The plurality used the terms "race" and "ethnicity" interchangeably throughout its opinion.

The plurality rejected the notion that the disparate impact of a justification might prevent that justification from being sufficiently "race neutral" to satisfy Step 2. At Step 2, "the issue is the facial validity of the prosecutor's explanation,"[40] and "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[41] According to the plurality's analysis, a justification's "disparate impact" on a certain race is relevant at Step 3 rather than Step 2. At Step 3, the disparate impact is to be given "appropriate weight" in determining whether the justification is a pretext for purposeful discrimination.[42] Thus, even while carving out a place for disparate impact analysis within the *Batson* doctrine, the *Hernandez* plurality all but shut down Step 2 as a forum for such claims.[43]

C. Role of the Trial Judge

Throughout the Supreme Court's *Batson* jurisprudence, the Court has consistently emphasized the importance of the role of the trial judge within the *Batson* doctrine. The *Hernandez* plurality, for example, emphasized the importance of deference to the trial court's findings regarding discriminatory intent.[44] As *Batson* noted, those findings "largely will turn on evaluation of credibility," and evaluations of that sort lie "peculiarly within a trial judge's province."[45] The demeanor of an attorney whose strike is under review is often the best evidence of whether he or she harbors discriminatory intent, and only the trial court is able to form an assessment thereof.[46]

In *Snyder v. Louisiana*, the Court emphasized that the trial court has a "pivotal role" in evaluating *Batson* claims.[47] Its responsibilities include evaluating "not only whether the prosecutor's demeanor belies

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[40] *Id.* at 360.

[41] *Id.*

[42] *Id.* at 362.

[43] At least one judge has interpreted the *Hernandez* plurality as seeming to acknowledge with its statement that disparate impact "will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry," *Hernandez*, 500 U.S. at 362, that "the disparate impact of an asserted criterion is relevant in determining whether it is race neutral." People v. Cerrone, 854 P.2d 178, 190 (Colo. 1993) (quoting *Hernandez*, 500 U.S. at 362). This interpretation has not been adopted in the federal system.

[44] *Hernandez*, 500 U.S. at 365.

[45] *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986); Wainwright v. Witt, 469 U.S. 412, 428 (1985)).

[46] *Id.*

[47] Snyder v. Louisiana, 552 U.S. 472, 477 (2008).

a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor."[48]

D. Connection of the Justification to the Facts of the Case

In *Batson*, the Court established a requirement that the "neutral" explanation proffered in response to a *Batson* challenge must be "related to the particular case to be tried" in order to satisfy Step 2.[49] Yet in *Purkett v. Elem*, the Court backed away from that requirement.[50] In *Purkett*, a proffered justification that a juror had "long, unkempt hair, a mustache, and a beard" was found to satisfy Step 2 in a case with no apparent tonsorial connections.[51] Explanations, the *Purkett* Court held, need not make sense or even be "minimally persuasive" to satisfy Step 2.[52] They might be "silly or superstitious"[53] and pass muster at Step 2, or they might be "implausible or fantastic,"[54] although in that case they "may (and probably will) be found to be pretexts for purposeful discrimination" at Step 3.[55] Thus, as with the question of disparate impact, the Supreme Court indicated that a lack of connection with the facts of the case was not salient at Step 2, but indicated that there might be a place for this consideration within the Step 3 analysis.

E. Comparability

In *Miller-El v. Dretke*, a recent habeas claim, the Supreme Court added some muscularity to the *Batson* analysis.[56] Applying a

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[48] *Id.*

[49] Batson v. Kentucky, 476 U.S. 79, 98 (1986).

[50] Purkett v. Elem, 514 U.S. 765, 770, 770 n.2, 771 (1995) (Stevens, J., dissenting) (criticizing the majority for retreating from *Batson*).

[51] *Id.* at 769.

[52] *Id.* at 768.

[53] *Id.*

[54] *Id.*

[55] *Id.* In *Johnson v. California*, the Court continued to sand the teeth of Step 2, apparently backing away from the *Batson* requirement that at that stage "legitimate reasons" be proffered. Johnson v. California, 545 U.S. 162, 171-73 (2005); Batson v. Kentucky, 476 U.S. 79, 98 n.20 (1986). The Court declared that "even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end — it merely proceeds to step three." *Johnson*, 545 U.S. at 171.

[56] Miller-El v. Dretke, 545 U.S. 231 (2005); *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, 627 (2005) (stating that

"comparative juror analysis" to those jurors who were stricken by the prosecutor and those who were not,[57] the Court held that the state court's conclusion that no purposeful racial discrimination had occurred was unreasonable and erroneous.[58] The Court declared that "[i]f 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."[59] Jurors need not be "exactly identical" for a comparative juror analysis to be performed; such an approach would "leave *Batson* inoperable,"[60] because "potential jurors are not products of a set of cookie cutters."[61] The Court also rejected arguments that defense counsel's allegations of discrimination were weakened by the fact that the prosecution had refrained from striking some of the potential jurors of color.[62] Comparability analysis attempts to uncover purposeful discrimination, even as the prosecutor's strategic acceptance of black jurors may have attempted to mask it.[63]

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the *Miller-El* decision "strongly affirmed the core principle of *Batson's* three-part test").

[57] *See Miller-El*, 545 U.S. at 241. "Comparative juror analysis" refers to "an examination of a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group." Boyd v. Newland, 467 F.3d 1139, 1145 (9th Cir. 2006).

[58] *Miller-El*, 545 U.S. at 266.

[59] *Id.* at 241.

[60] *Id.* at 247 n.6.

[61] *Id.; see also* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 216 n.97 (2009) ("In its most recent decision dealing with racially premised peremptory challenges, the Court also took a relaxed approach to comparators. Although it found a number of bases to hold that the verdict was compromised by the prosecutor's use of challenges, one factor was a comparison between white jurors who were not excused and a black juror who was excused.") (citing Snyder v. Louisiana, 552 U.S. 472, 477-90 (2008)).

[62] The Court stated that:

> This late-stage decision to accept a black panel member willing to impose a death sentence does not . . . neutralize the early-stage decision to challenge a comparable venireman . . . . In fact, if the prosecutors were going to accept any black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so was getting late."

Miller-El, 545 U.S. at 250.

[63] *See id.*

F. Rights of the Potential Jurors

In *Powers* v. *Ohio*,[64] the Court held that a race-based strike of a juror violates the juror's constitutional rights.[65] Powers, a white defendant, was found to have standing to object to the prosecutorial striking of African American jurors.[66]

The Court has expanded the scope of juror protection in subsequent cases. In *Edmonson* v. *Leesville Concrete Co.*, the Court held that a civil litigant could bring a constitutional claim on behalf of a stricken juror.[67] In *Georgia* v. *McCollum*, the Court held that a prosecutor could bring a claim on behalf of a stricken juror, alleging a *Batson* violation by defense counsel.[68] The Court in *J.E.B.* v. *Alabama* ex rel. *T.B.* held that striking jurors on the basis of gender was a violation of the Equal Protection Clause.[69] In doing so, it upheld a claim brought on behalf of stricken male jurors.[70] In *Johnson* v. *California*, the Court indicated that each of the three sets of interests mentioned in *Batson* — the rights of criminal defendants, the rights of jurors, and the harm caused to the entire community by discrimination in jury selection — is of a constitutional dimension.[71]

These cases indicate that the *Batson* doctrine has undergone significant developments since the Court first decided the case. Court decisions demonstrate the expansion of *Batson* beyond the context of an African American criminal defendant alleging discriminatory strikes of African American jurors. The Supreme Court, however, has still not heard a *Batson* claim alleging purposeful racial discrimination against white jurors.[72] In addition, review of the development of the

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[64] Powers v. Ohio, 499 U.S. 400, 409 (1991).

[65] *Id.* The Court also stated that there was a statutory right to the same effect, codified at 18 U.S.C. § 243 (2006). *Id.* at 408.

[66] *See id.* at 402-04.

[67] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628-29 (1991). In reaching this conclusion, the Court relied upon a finding that civil litigants were functioning as state actors in their exercise of peremptory challenges and thus were subject to the Equal Protection Clause. *Id.* at 617.

[68] Georgia v. McCollum, 505 U.S. 42, 56 (1992). This outcome relied on a finding that defense attorneys were state actors in the context of claims of discrimination in jury selection. *Id.* at 54.

[69] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994).

[70] *Id.* at 129.

[71] Johnson v. California, 545 U.S. 162, 171-72 (2005). The harm to the community lies in "the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B.*, 511 U.S. at 140.

[72] *See* Maisa Jean Frank, *Challenging Peremptories: Suggested Reforms to the Jury*

Batson framework indicates that it presents both limitations and opportunities to parties bringing disparate impact claims. One limitation is the stripping of substance from Step 2, which now requires no connection between a proffered justification and the facts of the case, and involves no analysis of disparate impact. One opportunity is the fact that at Step 3 both the connection to the facts of the case and disparate impact are relevant. A second opportunity is the fact that by abandoning *Swain* and invoking community interests, the *Batson* Court demonstrated that the selection of *every* jury must be fair, and must be perceived as fair. Finally, the fact that each trial judge has the freedom to devise the best ways to meet these goals, protected by deference and by the Supreme Court's refusal to mandate particular procedures, creates the opportunity for bold and creative judicial action.

Part III will examine the treatment of these four factors in lower court decisions; Part II introduces those decisions. The decisions fall into two groups: the thirty-six decisions in which claims alleging discrimination against jurors of color and/or female jurors were ultimately unsuccessful, and the three decisions in which claims alleging racial discrimination against white jurors were ultimately successful.

II. LOWER FEDERAL COURT TREATMENT OF DISPARATE IMPACT ARGUMENTS

Several federal courts have indicated that justifications for peremptory strikes that cause a disparate impact should be examined more carefully than those that do not.[73] Few of these cases, however,

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Selection Process Using Minnesota as a Case Study, 94 MINN. L. REV. 2075, 2092 n.126 (2010) ("Although no U.S. Supreme Court precedent addresses this issue, some lower courts have extended Batson to the exclusion of white jurors.") (listing cases).

[73] *See, e.g.*, United States v. Canoy, 38 F.3d 893, 900 (7th Cir. 1994) (stating that a court presented with an explanation such as a juror's having been educated outside of the United States in a language other than English should consider it with care to ensure that the concerns about language are warranted and are not merely a pretext for racial or national origin discrimination); Pemberthy v. Beyer, 19 F.3d 857, 872 (3d Cir. 1994) ("Because language-speaking ability is so closely correlated with ethnicity, a trial court must *carefully* assess the challenger's actual motivation even where the challenger asserts a rational reason to discriminate based on language skills."); United States v. Uwaezhoke, 995 F.2d 388, 394 (3d Cir. 1993) (acknowledging that the prosecutor's explanation, "if generally applied, would be likely to have a disparate impact on blacks in the vicinage and, accordingly, is one that should be scrutinized with care"); Williams v. Chrans, 957 F.2d 487, 490 (7th Cir. 1992) ("[C]ourts should be very wary of allowing gang membership to be an acceptable ground for striking jurors, particularly absent any gang involvement in the offense. This reasoning is

provide any guidance as to what that careful examination might involve.[74] Moreover, in the cases involving claims of discrimination against jurors of color on the basis of race or ethnicity, or against female jurors on the basis of gender, disparate impact arguments never triumphed. The only published disparate impact decisions that were ultimately resolved with a finding of purposeful discrimination against stricken jurors were those in which the stricken jurors were white.[75]

Those cases in which disparate impact arguments were addressed in the context of claims that jurors of color and/or female jurors were stricken in violation of *Batson* will be addressed under the heading "Jurors of Color and/or Female Jurors." Those in which disparate impact arguments were addressed in the context of race-based claims that white jurors were stricken in violation of *Batson* will be addressed under the heading "White Jurors." Under each heading, this Part will lay out the nature of the disparate impact claims, and the response to those claims.

A. Jurors of Color and/or Female Jurors

In thirty-six post-*Hernandez* decisions,[76] lower federal courts resolved *Batson* claims in which disparate impact arguments were

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particularly suspect when black defendants are being tried for an offense against a white victim.").

[74] For the closest that the courts come to offering guidance, see *Uwaezhoke*, 995 F.2d at 393 (noting that a trial judge may be justified in concluding that discriminatory intent has played a role in the challenge "when the disparate impact is great and any legitimate concern of the prosecutor slight"). *See also Pemberthy*, 19 F.3d at 872 ("If the circumstances are such that a reasonable attorney would not be concerned about translation problems, the trial judge should be more suspicious that the attorney's motivation is illicit.").

[75] United States v. Wynn, 20 F. Supp. 2d 7, 12-13, 15 (D.D.C. 1997); United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *11 (E.D.N.Y. July 11, 1995), *aff'd*, 92 F.3d 1313, 1330 (2d Cir. 1996).

[76] United States v. Adams, 604 F.3d 596, 600 (8th Cir. 2010); United States v. Green, 599 F.3d 360, 377 (4th Cir. 2010); United States v. Hibbler, 193 F. App'x 445, 451 (6th Cir. 2006); United States v. Houston, 456 F.3d 1328, 1336 (11th Cir. 2006); United States v. Beverly, 369 F.3d 516, 527 (6th Cir. 2004); United States v. DeJesus, 347 F.3d 500, 506 (3d Cir. 2003); Ladd v. Cockerell, 311 F.3d 349, 356 (5th Cir. 2002); Tinner v. United Ins. Co. of Am., 308 F.3d 697, 703 (7th Cir. 2002); United States v. Bartholomew, 310 F.3d 912, 920 (6th Cir. 2002); Alverio v. Sam's Warehouse Club, Inc., 253 F.3d 933, 939-40 (7th Cir. 2001); Ellis v. Newland, 23 F. App'x 734, 736 (9th Cir. 2001); Heno v. Sprint/United Mgmt. Co., 208 F.3d 847, 855 (10th Cir. 2000); United States v. Brown, No. 97-4121, 1999 U.S. App. LEXIS 15108, at *10 (6th Cir. June 30, 1999); United States v. Roberts, 163 F.3d 998, 999 (7th Cir. 1998); Devoil-El v. Groose, 160 F.3d 1184, 1187 (8th Cir. 1998); United States v. Bauer, 84 F.3d 1549, 1554 (9th Cir. 1996); United States v. Moeller, 80 F.3d 1053, 1060 (5th

raised in relation to stricken jurors who were either female and allegedly stricken on the basis of their gender, or people of color and allegedly stricken on the basis of their race or ethnicity. In all of those thirty-six decisions, the final result was a denial of those claims.[77]

Thirty-three of the thirty-six decisions resolved *Batson* claims based on race or ethnicity. Four of these cases were civil suits:[78] in three of them, the plaintiff brought the *Batson* claim;[79] in the fourth, the defendant brought the claim.[80] The other twenty-nine decisions arose from criminal trials in which the defendant, a person of color, alleged that the prosecution engaged in purposeful racial or ethnic discrimination in its strikes of jurors of color.[81] Some of the twenty-

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Cir. 1996); Sayrie v. Penrod Drilling Corp., No. 95-30259, 1995 WL 581672, at *1 n.3 (5th Cir. Aug. 31, 1995); United States v. Davis, 40 F.3d 1069, 1077 (10th Cir. 1994); *Canoy*, 38 F.3d at 897; United States v. Perez, 35 F.3d 632, 635 (1st Cir. 1994); Vigilant Ins. Co. v. Clay Props., Inc., No. 93-2353, 1994 WL 525873, at *3 (4th Cir. May 12, 1994); United States v. Davenport, No. 93-1216, 1994 WL 523653, at *6 (5th Cir. Sept. 6, 1994); *Pemberthy*, 19 F.3d at 865; United States v. Brooks, 2 F.3d 838, 840 (8th Cir. 1993); United States v. Changco, 1 F.3d 837, 839 (9th Cir. 1993); *Uwaezhoke*, 995 F.2d at 392; *Williams*, 957 F.2d at 489; United States v. Johnson, 941 F.2d 1102, 1108 (10th Cir. 1991); Davis v. Purkett, No. 4:06CV1041-DJS, 2008 WL 4449427, at *11 (E.D. Mo. Sept. 26, 2008); Johnson v. Quarterman, No. 3:03-CV-2606-K, 2007 WL 2735638, at *13 (N.D. Tex. Sept. 18, 2007); Chandler v. Netherland, No. Civ.A. 96-0966-R, 1997 WL 461907, at *8 (W.D. Va. Aug. 4, 1997); Ware v. Filion, No. 04 Civ. 6784 (PAC)(FM), 2007 WL 1771583, at *3 (S.D.N.Y. June 19, 2007); United States v. Franklyn, No. S1 96 CR. 1062 (DLC), 1997 WL 334969, at *4 (S.D.N.Y. June 16, 1997); United States v. Thomas, 943 F. Supp. 693, 697 (E.D. Tex. 1996); Wylie v. Vaughn, 773 F. Supp. 775, 776 (E.D. Pa. 1991).

[77] In two instances, the claims of parties alleging disparate impact were succesful at one stage of the litigation before subsequently being laid to rest. *Heno*, 208 F.3d at 855 (reversing lower court finding of *Batson* violation); Pemberthy v. Beyer, 800 F. Supp. 144, 168 (D.N.J. 1992), *rev'd*, 19 F.3d 857, 873 (3d Cir. 1994).

[78] *Tinner*, 308 F.3d at 699; *Heno*, 208 F.3d at 850-51; *Sayrie*, 1995 WL 581672, at *1; *Vigilant Ins. Co.*, 1994 WL 525873, at *1.

[79] *Tinner*, 308 F.3d at 703; *Heno*, 208 F.3d at 856; *Sayrie*, 1995 WL 581672, at *1.

[80] *Vigilant Ins. Co.*, 1994 WL 525873, at *2.

[81] *Adams*, 604 F.3d at 601; *Hibbler*, 193 F. App'x at 451; *Houston*, 456 F.3d at 1334; *Beverly*, 369 F.3d at 527; *DeJesus*, 347 F.3d at 507; *Ladd*, 311 F.3d at 355; *Bartholomew*, 310 F.3d at 920; *Ellis*, 23 F. App'x at 736; *Brown*, 1999 WL 486624, at *3; *Roberts*, 163 F.3d at 998; *Devoil-El*, 160 F.3d at 1186; *Bauer*, 84 F.3d at 1554; *Moeller*, 80 F.3d at 1061; *Pemberthy*, 19 F.3d at 863; *Canoy*, 38 F.3d at 897; *Davenport*, 1994 WL 523653, at *6; *Perez*, 35 F.3d at 635-36; *Brooks*, 2 F.3d at 840; *Changco*, 1 F.3d at 839; *Uwaezhoke*, 995 F.2d at 390; *Williams*, 957 F.2d at 489; *Johnson*, 941 F.2d at 1105; *Purkett*, 2008 WL 4449427, at *2; *Johnson*, 2007 WL 2735638, at *2; *Ware*, 2007 WL 1771583, at *3; *Chandler*, 1997 WL 461907, at *9; *Franklyn*, 1997 WL 334969, at *3; *Thomas*, 943 F. Supp. at 697; Wylie v. Vaughn, 773 F. Supp. 775, 777 (E.D. Pa. 1991).

nine originated in the state system and reached the federal courts as a result of habeas petitions;[82] others originated in the federal system.[83]

In the claims based on racial or ethnic discrimination, disparate impact arguments most frequently targeted prosecutorial justifications relating to the criminal justice system. Such justifications included having relatives who were in the criminal justice system,[84] were convicted,[85] or were incarcerated;[86] having a criminal history,[87] including having been charged with a crime;[88] having a negative attitude toward,[89] or negative experiences with, the police;[90] having been a victim of a crime;[91] and opposing the death penalty.[92]

In addition to justifications relating to the criminal justice system, several other types of justification were common in these disparate impact cases. One set of justifications related to views on, or experience with, discrimination. Those justifications included knowing someone who had filed a discrimination claim;[93] a feeling of having been discriminated against in the workplace;[94] and believing in the necessity of affirmative action.[95] Neighborhood-based justifications

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[82] *Ladd*, 311 F.3d at 351; *Ellis*, 23 F. App'x at 735-36; *Devoil-El*, 160 F.3d at 1185-86; *Pemberthy*, 19 F.3d at 858-59; *Williams*, 957 F.2d at 488; *Davis*, 2008 WL 4449427, at *1; *Johnson*, 2007 WL 2735638, at *1; *Ware*, 2007 WL 1771583, at *2; *Chandler*, 1997 WL 461907, at *1; *Wylie*, 773 F. Supp. at 776.

[83] These consist of both trial-level decisions and appeals. *See Adams*, 604 F.3d 596, 601; United States v. Green, 599 F.3d 360, 377 (4th Cir. 2010); *Hibbler*, 193 F. App'x at 451; United States v. Houston, 456 F.3d 1328, 1332 (11th Cir. 2006); *Beverly*, 369 F.3d at 527; *DeJesus*, 347 F.3d at 507; *Bartholomew*, 310 F.3d at 920; *Brown*, 182 F.3d 919 at *4; *Roberts*, 163 F.3d at 1000; *Bauer*, 84 F.3d at 1555-56; *Moeller*, 80 F.3d at 1060; *Pemberthy*, 19 F.3d at 873; *Davenport*, 36 F.3d 89 at *7; United States v. Davis, 40 F.3d 1069, 1077 (10th Cir. 1994); *Canoy*, 38 F.3d 893, 901(7th Cir. 1994); *Perez*, 35 F.3d at 636; *Brooks*, 2 F.3d at 841; *Changco*, 1 F.3d at 842; *Uwaezhoke*, 995 F.2d at 395; *Johnson*, 941 F.2d at 1110; *Franklyn*, 1997 WL 334969, at *6; *Thomas*, 943 F. Supp. at 698.

[84] *Bartholomew*, 310 F.3d at 920.

[85] *Houston*, 456 F.3d at 1336; *Beverly*, 369 F.3d at 527; *Johnson*, 914 F.2d at 1109.

[86] *Beverly*, 369 F.3d at 527; *Ellis*, 23 F.App'x at 736; *Brown*, 1999 WL 486624, at *2.

[87] *Ladd*, 311 F.3d at 356.

[88] Devoil-El v. Groose, 160 F.3d 1184, 1186 (8th Cir. 1998).

[89] *Id.*; Johnson v. Quarterman, No. 3:03-CV-2606-K, 2007 WL 2735638, at *14 (N.D. Tex. Sept. 18, 2007).

[90] United States v. Brooks, 2 F.3d 838, 841 (8th Cir. 1993).

[91] *Devoil-El*, 160 F.3d at 1186.

[92] Chandler v. Netherland, No. Civ.A. 96-0966-R, 1997 WL 461907, at *7 (W.D. Va. Aug. 4, 1997).

[93] Tinner v. United Ins. Co. of Am., 308 F.3d 697, 705 (7th Cir. 2002).

[94] *See* Heno v. Sprint/United Mgmt. Co., 208 F.3d 847, 855 (10th Cir. 2000).

[95] *See id.*

included living or working "near the base of operations of the defendant's gang;"[96] living in the same area as a government witness;[97] "hanging out" in the area where the crime was alleged to have occurred;[98] being from the area where the defendants, the alleged victim and certain witnesses lived;[99] working for an inner city housing authority;[100] living in Gary, Indiana;[101] having a connection with the Bronx;[102] and having attended the same school as the plaintiff.[103]

These disparate impact decisions also analyzed a variety of language-related justifications. They included receiving education outside the United States in a language other than English;[104] speaking Spanish in a case where translations were expected to be hotly contested;[105] and having questionable English-language abilities.[106]

Certain other socio-economic and demographic justifications were also popular. Family-related justifications included being a single parent of a young child;[107] being single;[108] having three children;[109] and caring for grandchildren.[110] Other socio-economic justifications included being unemployed or never employed;[111] having "no stake in the community;"[112] renting one's home;[113] lacking a high school

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[96] Williams v. Chrans, 957 F.2d 487, 489 (7th Cir. 1992).

[97] United States v. Bauer, 84 F.3d 1549, 1554 (9th Cir. 1996).

[98] Davis v. Purkett, No. 4:06CV1041-DJS, 2008 WL 4449427, at *17 (E.D. Mo. Sept. 26, 2008).

[99] *Id.*

[100] United States v. Perez, 35 F.3d 632, 635 (1st Cir. 1994).

[101] United States v. Roberts, 163 F.3d 998, 1000 (7th Cir. 1998).

[102] United States v. Franklyn, No. S1 96 CR. 1062 (DLC), 1997 WL 334969, at *5 (S.D.N.Y. June 16, 1997).

[103] Sayrie v. Penrod Drilling Corp., No. 95-30259, 1995 WL 581672, at *2 (5th Cir. Aug. 31, 1995).

[104] United States v. Canoy, 38 F.3d 893, 898 (7th Cir. 1994).

[105] Pemberthy v. Beyer, 19 F.3d 857, 869 (3d Cir. 1994).

[106] United States v. Changco, 1 F.3d 837, 840 (9th Cir. 1993).

[107] Vigilant Ins. Co. v. Clay Props., Inc., No. 93-2353, 1994 WL 525873, at *3 (4th Cir. Sept. 27, 1994).

[108] United States v. Davenport, No. 93-1216, 1994 WL 523653, at *6 (5th Cir. Sept. 6, 1994); United States v. Thomas, 943 F. Supp. 693, 697 (E.D. Tex. 1996).

[109] *Davenport*, 1994 WL 523653, at *6.

[110] Ware v. Filion, No. 04 Civ. 6784 (PAC)(FM), 2007 WL 1771583, at *2 (S.D.N.Y. June 19, 2007).

[111] Devoil-El v. Groose, 160 F.3d 1184, 1186 (8th Cir. 1998); Sayrie v. Penrod Drilling Corp., No. 95-30259, 1995 WL 581672, at *2 (5th Cir. Aug. 31, 1995); *Davenport*, 1994 WL 523653, at *6; Wylie v. Vaughn, 773 F. Supp. 775, 777 (E.D. Pa. 1991).

[112] *Davenport*, 1994 WL 523653, at *6.

[113] United States v. Adams, 604 F.3d 596, 601 (8th Cir. 2010).

education;[114] and personal circumstances that were said to suggest involvement in drugs.[115] Prosecutors also claimed to have stricken jurors because they had a strong affinity to the Bible or Bible studies;[116] were young;[117] and were not wearing coats and ties.[118]

The three remaining decisions resolved claims of discrimination based on gender.[119] In two of these cases, the defendants claimed that striking teachers effected purposeful discrimination against women.[120] In the third case, the defendant claimed that striking jurors because they lacked business experience had the same purpose.[121]

None of the disparate impact arguments in these cases — whether made by a criminal defendant, civil plaintiff, or civil defendant — ultimately prevailed.

B. White Jurors

In contrast to the thirty-six post-*Hernandez* decisions in which disparate impact arguments ultimately failed, courts found *Batson* violations in three decisions where race-based disparate impact arguments were applied to criminal defense attorneys' strikes of white jurors. These decisions stemmed from the criminal trials of people of color. Before a comparative discussion in Part III of the four analytic elements that this article highlights as crucial to the *Batson* doctrine, this subpart lays out the salient factual circumstances and arguments from the small group of cases involving stricken white jurors.

1. *United States v. Wynn*

In *United States v. Wynn*, the District Court of the District of Columbia decided Aaron Wynn's motion to reinstate the jury that had been selected at the start of his trial.[122] The court laid out the circumstances that had led to the jury's discharge. Defense counsel had stricken "every white venire member available to be seated on the

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[114] United States v. Moeller, 80 F.3d 1053, 1060 (5th Cir. 1996).

[115] United States v. Uwaezhoke, 995 F.2d 388, 391 (3d Cir. 1993).

[116] United States v. DeJesus, 347 F.3d 500, 502 (3d Cir. 2003).

[117] United States v. Hibbler, 193 F. App'x 445, 447 (6th Cir. 2006).

[118] Ladd v. Cockerell, 311 F.3d 349, 355 (5th Cir. 2002).

[119] United States v. Green, 599 F.3d 360, 376-77 (4th Cir. 2010); Alverio v. Sam's Warehouse Club, Inc., 253 F.3d 933, 939 (7th Cir. 2001); United States v. Davis, 40 F.3d 1069, 1077 (10th Cir. 1994).

[120] *Green*, 599 F.3d at 376-77; *Davis*, 40 F.3d at 1077.

[121] *Alverio*, 253 F.3d at 940.

[122] United States v. Wynn, 20 F. Supp. 2d 7, 9 (D.D.C. 1997).

jury — a number totaling eight of the nine white venire members."[123] The prosecution had then brought a *Batson* challenge.[124] The court had found that at Step 1, the prosecutor had made out a prima facie case.[125] The court had found defense counsel's proffered justifications incredible, declared a *Batson* violation and a mistrial, and discharged the jury.[126]

In ruling on the motion to reinstate the jury, the court found that defense counsel had failed to meet its burden of showing that the court's prior ruling was "erroneous."[127] The court noted that peremptory strikes are to be exercised only "under the careful control of the court"[128] and that "close scrutiny is to be employed at all times during the selection of a jury to ensure that expressions of racial prejudice find no place in the exercise of peremptory challenges."[129]

The court's resolution of Steps 1 and 2 of the *Batson* framework was swift. The court found that the prosecution had satisfied Step 1.[130] Defense counsel had used eight of the ten peremptory strikes that it exercised to remove whites from the jury.[131] At Step 2, defense counsel had "rested the exercise of his peremptory strikes on either the age, occupation, relationship or connection to law enforcement personnel, or residence of each venire person struck," thus meeting the Step 2 burden.[132]

The court divided its Step 3 analysis into two sections: "Inconsistent Application of Selection Criteria"[133] and "Disparate Impact of Defense Counsel's Selection Criteria."[134] In the first section, the court stated that "[w]hen a party bases its peremptory challenges on certain characteristics such as age or employment status, pretext can be demonstrated by evidence that stricken panel members of one racial group are similarly situated or share the characteristics of a non-stricken panel member of a separate racial group."[135] The court

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[123] *Id.* at 10.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* The court stated that in making its motion, the defense was seeking "extraordinary relief," but proceeded on the assumption that such relief was available. *Id.*

[128] *Id.* at 11.

[129] *Id.*

[130] *Id.* at 12.

[131] *Id.*

[132] *Id.* at 13.

[133] *Id.* at 13-14.

[134] *Id.* at 14-15.

[135] *Id.* at 13.

concluded that defense counsel's justifications were "applied inconsistently to members of different races,"[136] and that they were "a pretext for discriminatory elimination of white [jurors]."[137]

In the section on disparate impact, the court analyzed a reason that defense counsel had given for striking six of the eight jurors at issue: they lived or were employed in the upper northwest area of Washington, D.C.[138] The court reproduced that portion of the transcript in which defense counsel had explained his use of this criterion:

> I think that's one of the factors among many, but I think that people that come from that area may not — regardless of race — haven't had as much contact with police officers, or at least I think their contacts with a police officer I think are different than people who live in Northeast or Southeast Washington. In my opinion or my experiences have not had encounters or many encounters where police officers are untruthful or where they harass them and things of that nature.[139]

The court noted that the disparate impact of this criterion was "clear."[140] It stated that "[w]hen a party relies on criteria such as residence that ultimately results in the exclusion of a certain group from jury service, it is necessary to determine whether such criteria [sic] is, in fact, a proxy for race."[141] Residence can be used when it connects a specific juror to the facts of the case.[142] In this instance, however, where the jurors' residence had "no cognizable connection" to the facts of the case,[143] it "can only be stated that residence is nothing more than a proxy for race."[144] The court concluded that peremptory strikes must be "closely scrutinized to ensure that even the most subtle forms of racism are eliminated from today's jury system."[145]

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136 *Id.*
137 *Id.*
138 *Id.* at 14-15.
139 *Id.* at 14.
140 *Id.*
141 *Id.* at 14-15.
142 *Id.* at 15.
143 *Id.*
144 *Id.*
145 *Id.*

2. *United States v. Taylor*

In addition to *Wynn*, two published opinions have addressed disparate impact claims relating to white jurors: an Eastern District of New York opinion in *United States v. Taylor*[146] and the Second Circuit affirmation thereof.[147] Both opinions dealt with the jury selection, presided over by Magistrate Judge Ross, in the trial of Merton Taylor and his co-defendants. The defendants, all of whom were African American or Latino, were "members of or associated with an organization commonly known as United Brooklyn."[148] "United Brooklyn was one of a number of 'minority labor coalitions.' "[149] The prosecution alleged that these coalitions subjected the construction industry to extortionate conduct to increase the hiring of coalition members.[150] The defendants argued that their conduct involved legal efforts to obtain minority jobs from employers who illegally failed to provide them.[151] This was the second of the so-called "coalition" trials that District Judge Korman heard.[152] The first trial, which involved a different group of defendants, resulted in the acquittal of all but one of the defendants.[153] One of the attorneys from the first trial also represented a client in the trial before the court.[154]

a. Magistrate Judge Ruling

The district court opinion describes Magistrate Judge Ross's ruling on the prosecution's *Batson* challenge.[155] After the defendants used each of their first eight peremptory strikes against white jurors, the prosecution raised an objection.[156] The magistrate judge required the defendants to supply a race-neutral explanation.[157] Magistrate Judge Ross found that while the defendants had met their Step 2 burden, they had "exercised their peremptory challenges, at least in part,

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[146] United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *11 (E.D.N.Y. July 11, 1995).

[147] United States v. Taylor, 92 F.3d 1313, 1327 (2d Cir. 1996).

[148] *Id.* at 1318.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Taylor*, 1995 WL 875460, at *1.

[153] *Id.*

[154] *Taylor*, 92 F.3d at 1319 n.3.

[155] *Taylor*, 1995 WL 875460, at *1.

[156] *Id.*

[157] *Id.*

guided by race-based considerations."[158] As a result, she applied a "dual motivation" analysis.[159] This shifted the burden to the defendants to prove by a preponderance of the evidence that they would have exercised the challenges if race were not a factor.[160] Of the eight peremptory challenges at issue, Judge Ross held that the defendants "had met their burden with respect to six [jurors] and had failed to do so with respect to two" of them.[161]

b. District Court Opinion

In his published opinion, Judge Korman elaborated upon part of an oral ruling that he had made on cross-appeals from Magistrate Judge Ross's decision.[162] In that part of his oral ruling Judge Korman had reversed Magistrate Judge Ross regarding four jurors whose strikes Judge Ross had found permissible.[163] The district court stated:

> This is one of the rare cases in which the defendants conceded, and the United States Magistrate Judge independently found, that "the defendants exercised their peremptory challenges, at least in part, guided by race based considerations," and that it was "a defense strategy . . . to exercise the maximum number of peremptories to eliminate white jurors, thus maximizing the number of blacks and Hispanics on the petit jury."[164]

Judge Korman stated that defense counsel's burden under a dual motivation analysis was to "demonstrate not only that a race-neutral characteristic is present, he must also explain the manner in which this characteristic is 'related to the particular case to be tried,' i.e., why a reasonable person would regard a juror possessing that race-neutral characteristic as undesirable for that particular case."[165]

For two of the four jurors in question, defense counsel's proffered reason was that they lived on Staten Island.[166] Defense counsel

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[158] *Id.*

[159] *Id.* The Supreme Court has never ruled on the appropriateness of a "dual motivation" or "mixed motive" analysis in the *Batson* context. *See* Snyder v. Louisiana, 552 U.S. 472, 485 (2008) ("We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context.").

[160] *Taylor*, 1995 WL 875460, at *1.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at *3.

[165] *Id.* at *5 (quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986)).

[166] *Id.*

apparently argued that "residence on Staten Island was a basis for challenging any juror who resided there"[167] because "residence in this 'least heterogeneous borough' would 'correlate[] to a larger than average likelihood of racial antagonism.' "[168] In response, Judge Korman stated that by presuming that every white adult resident of Staten Island could not render an impartial verdict, the defendants had resorted to "constitutionally impermissible stereotyping."[169] Rather than meeting their burden of demonstrating the race neutrality of the challenge, "they concede that it is based on race."[170] Thus, regarding these two jurors, as with the two others under discussion, the court found that the defense had failed to meet its burden.[171]

The question remained of whether, regardless of defense counsel's "concession," a strike of all Staten Island jurors would have been problematic. After all, that region was "eighty-two percent white."[172] The court concluded that this statistic would indeed "raise a serious question as to whether the challenge was merely part of a strategy" to increase the number of minorities in the jury pool.[173]

Judge Korman's conclusion was strongly worded. He noted that in the first of the "coalition" trials, "discriminatory use of peremptory challenges proceeded without objection."[174] In that trial, "a jury was selected that did not represent a fair cross-section of the community and the right of the prospective jurors to the equal protection of the laws was blatantly violated."[175] In this trial, by contrast, the jury composition showed that "it is possible to assemble a jury made up of

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[167] *Id.*

[168] *Id.* (quoting letter from defense counsel). The court described this as "an argument that by its terms applies only to white residents." *Id.* The court quoted from a "conce[ssion]" from defense counsel that "a juror [who] was from Staten Island and was black would probably, you know serve to balance [defendants'] concerns about Staten Island." *Id.* The court also quoted an observation from Judge Ross that another potential juror, who was African American, "was not stricken by defendants although . . . she also comes from Staten Island." *Id.*

[169] *Id.* The court also stated that "the defendants' admission that their challenge was directed *solely* to white jurors from Staten Island makes it impossible for them to show that the challenge on the basis of residence would have been made if race was not a factor." *Id.*

[170] *Id.*

[171] *Id.* at *6, *9.

[172] *Id.* at *5.

[173] *Id.*

[174] *Id.* at *11.

[175] *Id.* The jury in the first trial was "approximately 80% Black and Latino." United States v. Taylor, 92 F.3d 1313, 1329 (2d Cir. 1996).

a cross-section of the community without tolerating wholesale violations of the rights conferred by the Equal Protection Clause."[176]

c. Circuit Court Opinion

In affirming the defendants' convictions, the Second Circuit Court of Appeals addressed jury selection.[177] Its analysis revealed a fact absent from the district court opinion: after the prosecutor had made a *Batson* challenge on behalf of the eight stricken white jurors, defense counsel had "responded by objecting to the government's use of two of their first three peremptories to strike Latino jurors."[178] While the magistrate judge found the prosecution's reasons for one of the strikes "unpersuasive," she sustained the strike because there was no evidence of purposeful discrimination;[179] she also sustained the other strike.[180]

The circuit court noted that in response to cross-appeals from Judge Ross's ruling, the district court had asked both sides to submit affidavits "stating whether race was a factor in the determination to strike each juror."[181] Defense counsel affirmed on the record the truth of the following statement: "For every juror who was excluded, there were a number of factors. For some jurors, race is a factor. In no juror was race the sole factor."[182]

The circuit court rejected the argument that, in the case of the white juror under consideration,[183] the district judge had required defense counsel to present reasons for the strike that rose to the level of challenges for cause.[184] It also rejected the argument that reliance by the district judge and magistrate judge on events in the first of the "coalition" trials had been inappropriate,[185] especially in light of the

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[176] United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *11 (E.D.N.Y. July 11, 1995).

[177] *Taylor*, 92 F.3d at 1318.

[178] *Id.* at 1320.

[179] *Id.* at 1322.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Over the objections of defense counsel, the circuit court addressed the strike of only one juror, on the grounds that of the four jurors under discussion at the district court level he was the only one who was on the jury during its deliberations. *Id.* at 1325. One never sat on the petit jury, and two were excused during trial. *Id.* The juror whose strike was addressed by the circuit court was unaffected by the Staten Island criterion. *Id.*

[184] *Id.* at 1328.

[185] *Id.* at 1329.

absence of any *Batson* objection in that case.[186] With respect to the second argument, while the circuit court found the record "troubling at first blush,"[187] it declined to find grounds for reversal.[188]

Part II has described the two sets of cases with which this article is concerned; Part III will compare them. It will demonstrate the way in which the courts analyzing disparate impact claims relating to strikes of jurors of color allegedly based on race or ethnicity and strikes of female jurors allegedly based on gender appeared to be hemmed in by their view of Supreme Court *restrictions* on such claims. By contrast, those analyzing race-based claims relating to strikes of white jurors found the *potential* that the Supreme Court frameworks contain.

III. DISPARATE APPROACHES TO DISPARATE IMPACT ANALYSIS

This Part provides more detail on the four factors that this article identifies as crucial to the analysis of disparate impact claims in the *Batson* context: the role of the trial judge, the question of whether a justification for a strike must be connected to the facts of the case, the application of the comparability principle, and the expansion of the groups that the *Batson* doctrine protects. After analyzing each factor as it has appeared in the cases involving jurors of color and/or female jurors, this Part compares the approaches found in the white juror cases. All too often the cases in the first group exhibit a straitened view of Supreme Court precedent and conduct an analysis that lacks depth. On the other hand, the cases analyzing white juror claims plumb the Supreme Court framework to find its potential as a check on purposeful discrimination. This depth of analysis should be universally applied.

A. Role of the Trial Judge

The role of the trial judge in addressing *Batson* challenges is "pivotal."[189] This is so for a number of reasons. First, the trial judge is in the best position to make the credibility determinations on which *Batson* depends. Credibility determinations are viewed as a crucial part of the investigation into whether a strike is the product of purposeful discrimination.[190] The trial judge must assess the striking attorney's

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186 *Id.*

187 *Id.*

188 *Id.*

189 Snyder v. Louisiana, 552 U.S. 472, 477 (2008).

190 Hernandez v. New York, 500 U.S. 352, 365 (1991).

credibility,[191] and, sometimes, the credibility of the juror whom the attorney seeks to strike.[192]

The second reason that the role of the trial judge is pivotal is that the trial judge has considerable freedom in the *Batson* context. This freedom comes from the fact that the Supreme Court has refrained from specifying any particular procedures for the evaluation of *Batson* claims.[193] It also comes from the extraordinary deference afforded to the trial judge.[194] An examination of the disparate impact cases indicates that reviewing judges frequently see themselves as unable to second-guess the denial of a *Batson* claim because of deference considerations, even when something appears very amiss. Courts permitted denials of *Batson* claims relating to jurors of color and/or female jurors to stand even when they felt "considerable unease as to

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[191] *Id.*

[192] *Snyder*, 522 U.S. at 477.

[193] *See* Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*."); Williams v. Chrans, 957 F.2d 487, 490-91 (7th Cir. 1992) (stating that trial judge has discretion to determine best procedure to be used in any given case); Kelly v. Withrow, 822 F. Supp. 416, 423 (W.D. Mich. 1993) ("It is clear, based on the case law to date, that the nature and extent of a *Batson* hearing, if any, lies at least in the first instance within the discretion of the trial court.").

[194] *See* Burks v. Borg, 27 F.3d 1424, 1429 (9th Cir. 1994) ("We have only a cold transcript to guide us while the trial judge was there to observe the jury selection — day in and day out for six months."); EJI REPORT, *supra* note 10, at 22 ("More than 100 criminal defendants have raised *Batson* claims on appeal in Tennessee, but this state's courts have *never* reversed a criminal conviction because of racial discrimination during jury selection."); Mason, *supra* note 10, at 181 ("Decisions by the trial court regarding the adequacy of the prosecutor's reason usually remain undisturbed because of the Supreme Court's policy of trusting the sound judgment of the trial judge. Consequently, 'it is agreed that all but the most egregious race-based strikes of black jurors are unlikely to be reversed.' " (quoting William J. Bowers, Benjamin D. Steiner & Maria Sandys, *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, 177 (2001))). For the "double" deference applied by habeas courts in the context of voir dire, see *Davis v. Purkett*, No. 4:06CV1041-DJS, 2008 WL 4449427, at *1 (E.D. Mo. Sept. 26, 2008) ("We regularly defer to the fact-findings of trial courts because those courts are uniquely positioned to observe the manner and presentation of evidence. Our deference to trial court fact-finding is doubly great in the present circumstances because of the 'unique awareness of the totality of the circumstances surrounding voir dire,' and because of the statutory restraints on the scope of federal habeas review." (internal citations omitted) (quoting United States v. Moore, 895 F.2d 484, 486 (8th Cir. 1990))). As noted below, it is somewhat troubling that *Davis* makes no mention of *Miller-El*, a case that indicated that even habeas deference need not bar intervention in the *Batson* context. *See infra* notes 357-58 and accompanying text.

the prosecution's purposes and reasons" for its strikes,[195] and even when justifications were offered that were "lame,"[196] "highly suspect,"[197] "thin,"[198] not "sound,"[199] "not . . . plausible,"[200] based on a "fantastic" proposition,[201] based on reasoning that was "somewhat farfetched,"[202] or even "so flimsy that the possibility of pretext is substantial."[203] Even if the jury selection "raises substantial questions about the conduct and candor of the prosecutor,"[204] when "the potential disparate impact of the prosecutor's grounds for [a] strike is disturbing,"[205] and "despite the presence of highly suspicious factors in the government's explanation"[206] — even factors that appear to be pretextual[207] — the claims are not resuscitated. Thus, deference makes the trial judge's role crucial.

The third reason that the role of the trial judge is pivotal is that multiple obligations compel the trial judge to protect against discrimination in jury selection. The judge must create the "right climate in the courtroom."[208] The judge must also "provide a fair tral to all parties."[209] Finally, the judge must fulfill the purposes of *Batson*,

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[195] *Williams*, 957 F.2d at 491.

[196] United States v. Roberts, 163 F.3d 998, 998 (7th Cir. 1998).

[197] *Williams*, 957 F.2d at 490.

[198] *Id.*

[199] *Roberts*, 163 F.3d at 998.

[200] Wylie v. Vaughn, 773 F. Supp. 775, 777 (E.D. Pa. 1991).

[201] *Roberts*, 163 F.3d. at 999.

[202] Davis v. Purkett, No. 4:06CV1041-DJS, 2008 WL 4449427, at *13 (E.D. Mo. Sept. 26, 2008).

[203] *Roberts*, 163 F.3d at 999.

[204] *Id.* at 1000.

[205] United States v. Brown, No. 97-4121, 1999 WL 486624, at *4 (6th Cir. June 30, 1999).

[206] United States v. Davenport, No. 93-1216, 1994 WL 523653, at *7 (5th Cir. Sept. 6, 1994).

[207] *Id.*

[208] *See* Johnson, Batson *Ethics*, *supra* note 4, at 507 ("[A]sking questions and demanding real responses before approving strikes is part of setting the right climate in the courtroom, a task that every good trial judge recognizes as part of his job.").

[209] United States. v. Parker, 241 F.3d 1114, 1119 (9th Cir. 2001) ("A trial judge is more than a moderator or umpire. His responsibility is to preside in the manner and with the demeanor to provide a fair trial to all parties and his discretion in the performance of this duty and management is wide.") (internal quotations omitted); *see also* State v. Evans, 998 P.2d 373, 379 (Wash. Ct. App. 2000) (permitting trial judge to raise *Batson* issue *sua sponte*, in light of judges' responsibility "to ensure that the proceedings over which they preside are fair, both in actuality and in perception").

including preventing the harm that redounds to the entire community when public confidence in the justice system is lost.[210]

The importance of the judge's task provides a fourth reason why the trial judge's role is pivotal. The trial judge attempting to protect against discrimination in jury selection works against a historical backdrop of judicial failures to provide that protection.[211] The trial judge also has a unique opportunity within the progression of a criminal case to discuss explicitly the risk of racial discrimination, a risk that many commentators see as pervading the criminal justice system.[212] The trial judge who fails to protect against discrimination in jury selection runs the risk of requiring that a new trial be ordered on appeal, since *Batson* error is never harmless error.[213] Thus judicial

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[210] *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[211] *See, e.g.*, Colbert, *supra* note 6, at 14, 40 (noting that the colonial and post-revolutionary justice system denied African Americans the right to bring lawsuits, and serve on juries or as witnesses; in this way it "guaranteed virtual immunity against criminal prosecution of the white master (and of the white population generally) for assaults against black people").

[212] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) ("The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings."); Powers v. Ohio, 499 U.S. 400, 412 (1991) ("The influence of the *voir dire* process may persist through the whole course of the trial proceedings."); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 1012 (2004) (citing empirical evidence that "blacks and Hispanics receive more severe sentences than whites for the same crime"); *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2121 (2006) (explaining that the criminal justice system "systematically exclude[s] racial minorities from its decisionmaking processes while disproportionately imposing its burdens upon them"); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 561 (1998) ("[T]here is plenty of statistical evidence that a disproportionate number of African Americans are arrested, charged, and convicted for crimes, and some evidence that they are disproportionately punished."); Nancy Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1701-03 (2006) (arguing that *Batson* serves an important function by making race more salient for lawyers and judges) (citing Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026-27 (2003) (stating that white jurors are more attuned to potential prejudice against an African American defendant when asked questions about race during voir dire)).

[213] *See* Pemberthy v. Beyer, 800 F. Supp. 144, 152 (D.N.J. 1992); Johnson, Batson *Ethics*, *supra* note 4, at 500 ("Certainly it is more efficient to secure the efforts of trial court personnel than it is to require retrials. There will always be a reluctance to reverse a conviction because the costs of retrying any case are high. Trial court actors, not faced with those costs, can actually afford to be more singleminded in their devotion to the Constitution — if they want to be.").

efficiency concerns mandating careful voir dire are at least as compelling as those supporting speedy voir dire.

For all of these reasons, when discrimination in jury selection is alleged, one might hope to see action by the trial judge that is proactive, creative, and assertive.

A proactive judicial role is particularly appealing in response to the prospect of an all-white jury because "the all-white jury is the very harm that *Batson* and subsequent cases tried to avoid."[214] Discrimination in jury selection inflicts harm on "the entire community," resulting from the fact that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[215] A selection procedure that results in an all-white jury threatens to undermine such confidence.[216]

Outside the disparate impact context, there is at least one example of how proactive problem-solving relating to this issue might replace handwringing. The court in *United States v. Charlton*, perceiving that an all-white jury would be the result of the prosecutor's desired strikes, invited the prosecutor to withdraw those strikes.[217] There was thus no need to stretch the *Batson* doctrine, or to call anyone a liar, a racist, or even a racialist;[218] all that was required was a trial judge

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[214] Siebert, *supra* note 2, at 326; *see also* Colbert, *supra* note 6, at 2-4 ("Although most scholars have condemned *Swain* as a green light to prosecutors' use of the peremptory challenge to disqualify African-American jurors, and many have criticized the effectiveness of the *Batson* remedy, few have addressed the crux of the wrong to be remedied: the inherent injustice of the all-white jury."). Another reason why a proactive judicial role is appealing in response to the prospect of an all-white jury is the data indicating the extent to which diverse juries surpass all-white juries in their ability to evaluate a case fairly. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("[T]here is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury."); EJI REPORT, *supra* note 10, at 40-41 (citing research demonstrating that racial diversity significantly improves a jury's ability to assess the reliability and credibility of witness testimony, evaluate the accuracy of cross-racial identifications, avoid presumptions of guilt, and fairly judge a criminally accused person).

[215] Batson v. Kentucky, 476 U.S. 79, 87 (1986); *see* William E. Martin, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 HAMLINE L. REV. 235, 267 (2002).

[216] *See* EJI REPORT, *supra* note 10, at 40 ("Research has shown that observers are more likely to conclude that a trial is unfair when an all-white jury finds a defendant guilty.").

[217] United States v. Charlton, 600 F.3d 43, 47-48 (1st Cir. 2010).

[218] *See* Peggy Cooper Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1570, 1570 n.51 (1989) (using the term "racialist" to "describe judgments controlled by racial stereotypes without adopting the accusatory tone suggested by the word 'racist' "

playing a pivotal role in combating the prospect of an all-white jury.[219] This decision to err on the side of constitutional protections,[220] rather than a nonconstitutional allotment of peremptories,[221] seems wise, in light of the difficulty and importance of detecting purposeful discrimination.

The trial judge's role in assessing *Batson* claims of racial discrimination is particularly difficult.[222] The court is charged with determining whether an attorney who asserts a race-neutral reason for striking a juror is, in fact, lying, and actually striking the juror on the basis of race. Many point out that this role is difficult because any finding of purposeful discrimination would require telling a "fellow member of the bar" that he or she has been using race unlawfully.[223] It may be especially difficult when the judge and the attorney frequently share the same courtroom.[224] In addition to the relational concerns,

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(citing Stephen L. Carter, Comment, *When Victims Happen to be Black*, 97 YALE L.J. 420, 443 (1988))); Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2657 (1998) [hereinafter Johnson, *Respectability*] ("Why would a trial judge so disregard his duty? Perhaps part of the answer is that the purposeful discrimination standard forces a judge to choose between ignoring specious justifications . . . or calling a fellow member of the bar a liar and a racist.").

[219] Nancy Marder cites a similar example in the state context — a Cook County Circuit Judge, who:

> [A]nnounced during jury selection in at least three criminal trials that she refused to seat all-white juries. In one jury selection, after eight jurors had been selected, she announced: "I'm telling you folks, I don't know what you all intend to do, but I have no intention of seating an all-white jury."

Marder, *supra* note 212, at 1711.

[220] By contrast, "judges tend to give the benefit of the doubt to prosecutors" in this regard. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 211 (1997). Some commentators endorse this approach. *See, e.g.*, Martin, *supra* note 215, at 268 ("It might be appropriate for judges to give prosecutors the benefit of the doubt before making any finding that a prosecutor's stated reason is a pretext and the prosecutor has in fact engaged in impermissible racial discrimination.").

[221] *See* Batson v. Kentucky, 476 U.S. 79, 91 (1986) ("[T]he Constitution does not confer a right to peremptory challenges.").

[222] *See* United States v. Clemmons, 892 F.2d 1153, 1162 & n.10 (3d Cir. 1989) ("So long as peremptory challenges are permitted, trial and appellate judges will continue to have difficulty in ascertaining whether the prosecutor's motives in exercising peremptory challenges are good or bad."); United States v. Thomas, 943 F. Supp. 693, 698 (E.D. Tex. 1996) ("The Constitution provides the defendant with a right to have a jury selected free from discriminatory selection procedures. Nevertheless, a violation of this right is extremely difficult to determine.").

[223] *See, e.g.*, Johnson, *Respectability*, *supra* note 218, at 2657.

[224] *See* Antony Page, Batson's *Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 177-78 (2005) ("[B]ecause the trial court is

there are many difficulties involved in the project of deciding whether someone who asserts a reason other than purposeful discrimination is telling the truth. As the petitioner in *Davis v. Purkett* argued, those who harbor racial prejudice are "trained by social taboos" to hide it, especially in settings such as the courtroom.[225] An attorney's admission of racial motivation would risk not only social sanction,[226] but also ethical sanction.[227] Furthermore, such an admission would result in the seating of a juror that the attorney wished, and had attempted, to remove.[228]

An additional difficulty that trial judges face in making *Batson* determinations is that they often seek to evaluate the credibility of the juror being stricken,[229] in addition to the credibility of the striking attorney, with the aim of determining how the first might affect their evaluation of the second.[230] Trial court practices only increase this difficulty. The voir dire process may be short — possibly resembling a "sideshow"[231] — and may afford little opportunity to assess each juror.[232] In addition, the likelihood that the judge, no less than the

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determining credibility, to refuse to accept a peremptory challenge is the equivalent of calling the attorney a liar, and maybe racist or sexist as well. A judge is likely to be reluctant to stigmatize a lawyer in this way. Such a determination is also likely to color the rest of the trial, and other trials in jurisdictions where lawyers appear frequently before the same judges.").

[225] Davis v. Purkett, No. 4:06CV1041-DJS, 2008 WL 4449427, at *1 (E.D. Mo. Sept. 26, 2008); *see* PICCA & FEAGIN, TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONSTAGE, at x (2007) ("Much of the overt expression of blatantly racist thought, emotions, interpretations, and inclinations *has gone backstage* — that is, into private settings where whites find themselves among other whites, especially friends and relatives.").

[226] *See* Samuel R. Sommers & M.I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 L. & HUM. BEHAV. 261, 263 (2007) ("[E]ven if attorneys consciously and strategically consider race during jury selection, they would be unlikely to admit it. Such an admission would have immediate consequences, as it would comprise a *Batson* violation. More generally, psychologists have noted that behavior is often influenced by the desire to appear nonprejudiced and to avoid the social sanctions that can follow from the appearance of racial bias.").

[227] *See* Martin, *supra* note 215, at 268 ("The trial judge's task is complicated by the reality that any finding of intentional discrimination may have serious ethical implications for the prosecutor.").

[228] *See* Page, *supra* note 224, at 252.

[229] Snyder v. Louisiana, 552 U.S. 472, 477 (2008); Mu'Min v. Virginia, 500 U.S. 415, 433 (1991) (O'Connor, J., concurring).

[230] *Snyder*, 552 U.S. at 477.

[231] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 147 (1994) (O'Connor, J., concurring).

[232] *See, e.g.*, Nanninga v. Three Rivers Elec. Co-op., 236 F.3d 902, 907 (8th Cir.

striking attorney, harbors unconscious, or implicit, bias creates the risk that nothing will be corroborated other than bias.[233]

Given the difficulties involved in detecting and exposing discrimination, particularly racial discrimination, one might hope to see judges conducting careful and well-supported analyses of the racial dynamics of a case. This might involve, for example, some judicial acknowledgement of the existence of unconscious bias and its potential role in jury selection and jury decision making. In addition to decisions from other federal courts, Supreme Court opinions since *Batson* have acknowledged the existence of unconscious bias on the part of attorneys, jurors, and judges.[234] Even though Equal Protection doctrine may not prohibit strikes that are motivated by unconscious bias,[235] there is no reason why it should bar judges from considering

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2000) (stating that twenty minutes per side was not an abuse of discretion); Hicks v. Mickelson, 835 F.2d 721, 725 (8th Cir. 1987) (holding that it was not plain error for trial judge to limit voir dire to fifteen minutes per side in civil case); Stephen R. Diprima, *Selecting a Jury in Federal Criminal Trials After* Batson *and* McCollum, 95 COLUM. L. REV. 888, 918-19 (1995) (suggesting that an extended voir dire would provide the court with more information in order effectively to scrutinize challenged strikes); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210-11 (2009) (showing that a sample of white judges "demonstrated a statistically significantly stronger white preference than that observed among a sample of white subjects obtained on the Internet").

[233] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987) ("Judges are not immune from our culture's racism, nor can they escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs."); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 353 (2007).

[234] *See* Miller-El v. Dretke, 545 U.S. 231, 267-68 (2005) (Breyer, J., concurring) (referring to unconscious racism on part of prosecutor); Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) (referring to unconscious racism on part of jury); *id.* at 68 (O'Connor, J., dissenting) (referring to unconscious racism on part of jury); Teague v. Lane, 489 U.S. 288, 343-44 (1989) (Brennan, J., dissenting) (referring to unconscious racism on part of jury (quoting Cassell v. Texas, 339 U.S. 282, 301-02 (1950))); Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (referring to unconscious racism on part of prosecutor and judge); United States. v. Stephens, 421 F.3d 503, 515 (7th Cir. 2005) (referring to unconscious racism on part of jury); United States v. Clemmons, 892 F.2d 1153, 1162 (3d Cir. 1989) (referring to unconscious racism on part of prosecutor and judge).

[235] *See* Hernandez v. New York, 500 U.S. 352, 353 (1991). Some, however, have asserted that "purposeful discrimination" *can* be established by evidence that is consistent with a lack of conscious bias. *See, e.g.*, *id.* at 376 (Stevens, J., dissenting) (arguing that "disparate impact is itself evidence of discriminatory purpose"); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics, & Racial Inequality*, 58 EMORY L.J. 1053, 1058 (2009) ("Neither statutory nor constitutional antidiscrimination law turns on the distinction between [conscious and

the extent to which unconscious bias might affect their own decision making, or the decision making of jurors.[236]

1. Jurors of Color and/or Female Jurors

In the cases involving jurors of color and/or female jurors, the hope that trial judges might act proactively, creatively, and assertively often remains unrealized.

In many cases, judges expressed concern at the prosecution's stated justifications, but still upheld the strike. In *United States v. Adams*, for example, "[t]he district court was troubled by the fact that the government used a facially race-neutral rationale, renter status, to strike African American jurors, when, as the district court noted, African Americans in St. Louis were more likely to rent than to own their own homes."[237] Nevertheless, the court rejected the *Batson* challenge.[238] The circuit court in *United States v. Roberts*, addressing prosecutorial justifications that it called "lame" and "fantastic," stated that the district court had "expressed particular concern" about one of the prosecutor's justifications.[239] One of the jurors had "indicated she ha[d] a number of sons who grew up in Gary,"[240] and the prosecutor had asserted that the juror might, as a result, "associate with the defendant . . . albeit subconsciously."[241] Despite its concern that " 'Juror 5 raised a family in Gary' [might] be a euphemism for 'Juror 5 is black,' " the district court permitted the strike.[242] In *United States v. Thomas*, the district court described as "suspicious" the prosecution's explanation for exercising peremptory strikes against the only two

unconscious bias].."); Page, *supra* note 224, at 171 ("There is a conflict between the [Supreme] Court's language that suggests a subjective intent requirement and the Court's statements endorsing the use of evidence that will not invariably illuminate the attorney's state of mind.").

[236] *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL. REV. 149, 170 (2010) ("[W]e could also routinely attempt to assess the implicit biases of potential jurors. Courts could administer computer or hand-written bias sensitivity tests to potential jurors and share the results with the lawyers before voir dire.").

[237] United States v. Adams, 604 F.3d 596, 601 (8th Cir. 2010).

[238] *Id.* (affirming district court's rejection of *Batson* challenge).

[239] United States v. Roberts, 163 F.3d 998, 998-99 (7th Cir. 1998).

[240] *Id.* at 998.

[241] *Id.*

[242] *Id.* at at 999, 1000 (affirming district court's rejection of *Batson* challenge). The circuit court noted that "the population of Gary was 81% black when the 1990 Census was taken." *Id.* at 999.

African Americans left on the venire.[243] Despite its suspicion, the district court permitted the strike.[244]

Rather than emphasizing their duty to create the "right climate in the courtroom,"[245] and ensure a fair trial,[246] trial courts often emphasize the absence of a duty to investigate possible discrimination in jury selection, even in the face of troubling facts. Appellate courts affirm this approach. In *United States v. DeJesus* and *United States v. Uwaezhoke*, for example, the circuit courts declared that where the defendant "did not rely 'upon the alleged disparate impact of a tendered explanation, the trial judge [had no] duty to stop in the middle of the *voir dire* and consider whether the tendered explanation may have [had] such an impact.' "[247] In *Roberts*, the circuit court noted that the district court had not discussed the "unsettling fact that the prosecutor challenged a black elementary school teacher but not a white elementary school teacher," even though the stated reason — "that elementary teachers tend to find that there are no bad kids, consequently, would be also not neutral towards the government's case"[248] — applied to all elementary school teachers.[249] However, the circuit court described this omission as "understandable"[250] and affirmed.[251] After all, a judge "is not required to discuss a feature of the case that eluded the attention of counsel."[252]

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[243] United States v. Thomas, 943 F. Supp. 693, 697 (E.D. Tex. 1996) (" '[T]he ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-based.' " (quoting United States v. Bentley-Smith, 2 F.3d 1368, 1375 (5th Cir. 1993))).

[244] *Id.* at 698.

[245] *See* Johnson, Batson *Ethics*, *supra* note 4, at 507 ("[A]sking questions and demanding real responses before approving strikes is part of setting the right climate in the courtroom, a task that every good trial judge recognizes as part of his job.").

[246] *See* United States v. Parker, 241 F.3d 1114, 1119 (9th Cir. 2001); *see also* Powers v. Ohio, 499 U.S. 400, 416 (1991) ("The statutory prohibition on discrimination in the selection of jurors, 18 U.S.C. § 243, enacted pursuant to the Fourteenth Amendment's Enabling Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.").

[247] United States v. DeJesus, 347 F.3d 500, 508 (3d Cir. 2010) (quoting United States v. Uwaezhoke, 995 F.2d 388, 393 n.4 (3d Cir. 1993)).

[248] United States v. Roberts, 163 F.3d 998, 998 (7th Cir. 1998).

[249] *Id.* at 999.

[250] *Id.*

[251] *Id.*

[252] *Id.*; *see also* United States v. Houston, 456 F.3d 1328, 1338 (11th Cir. 2006) ("Here, the prosecution offered as its only reason for dismissing venire members

Even when jury selection results in the emblematic threat of courtroom unfairness — the all-white jury presiding over the trial of a non-white defendant[253] — trial judges tend to lament that fact and their powerlessness to address it.[254] In *Thomas*, the trial court stated, while rejecting the defendant's *Batson* claim, that "it must be emphasized that the signal of injustice that the selection of an all-white jury sends to a black defendant is not lost upon the court."[255] The presiding judge, Judge Justice, promised that "[h]ereafter, the prosecutor's reasons for excluding minority venire members will be heavily scrutinized,"[256] and that "if evidence is presented in future trials that excluding venire members on the basis of marital status has a disparate impact on minorities, it may be appropriate to find that the use of such characteristic is pretextual."[257] Unfortunately, Judge Justice died before publishing another *Batson* decision; therefore, we do not know what this heavy scrutiny might have achieved.[258]

In this group of cases, the hope that trial judges would conduct careful and well-supported analyses of the racial dynamics of each case also often remains unrealized. For example, trial courts often fail to state their rationales when determining whether racial discrimination is at play. In *Wylie v. Vaughn*, the court noted that "while the prosecutor struck two African American venirepersons from the panel, two African Americans did in fact serve as jurors."[259] In *Uwaezhoke*, the circuit court found that, as the trial court had stated,[260] the

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Small, O'Neal, and Taylor that they had family members who had been convicted of crimes. It is undisputed that four of the white venire members that the prosecution did not strike also had family members convicted of crimes. But Houston never brought this fact to the attention of the court, even though the court gave him ample opportunity to do so.").

[253] *See* Colbert, *supra* note 6, at 5 ("Since the beginning of slavery, the all-white jury has represented the ultimate obstacle to justice for African-American criminal defendants.").

[254] In *United States v. Beverly*, the circuit court mentioned that "the final make up of the jury" is one of the circumstances pertinent to an evaluation of the prosecutor's credibility, yet without further reference to this standard affirmed the denial of the *Batson* challenge relating to a strike that removed the only African American from the jury. 369 F.3d 516, 527 (6th Cir. 2004).

[255] United States v. Thomas, 943 F. Supp. 693, 698 (E.D. Tex. 1996).

[256] *Id.*

[257] *Id.*

[258] Douglas Martin, *William Wayne Justice, Judge Who Remade Texas, Dies at 89*, N.Y. TIMES, Oct. 15, 2009, at B1, *available at* http://www.nytimes.com/2009/10/16/us/16justice.html.

[259] Wylie v. Vaughn, 773 F. Supp. 775, 777 (E.D. Pa. 1991).

[260] United States v. Uwaezhoke, 995 F.2d 388, 394 (3d Cir. 1993).

prosecutor's explanation for striking an African American "was buttressed by the fact that the government had earlier had repeated opportunity to challenge the black juror who in fact served on Mr. Uwaezhoke's jury, and declined to do so."[261] In *Sayrie v. Penrod Drilling Corp.*, the circuit court found that the district court "properly considered the fact that one of the empaneled jurors was black in making its ultimate determination that Sayrie had not established purposeful discrimination."[262]

The reasoning behind the judges' statements in these three cases is not explained. It appears, however, that these judges assume that the striking of a juror of a particular race is less likely to have been discriminatory if the striking attorney did not use every opportunity to remove every possible juror of that race from the jury.[263] This

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[261] *Id.*

[262] Sayrie v. Penrod Drilling Corp., No. 95-30259, 1995 WL 581672, at *3 (5th Cir. Aug. 31, 1995) (noting that "[w]hen a black juror is accepted by the party alleged to have violated *Batson*, the contention that its peremptory strikes were based solely on race is weakened"). Circuit courts share with district courts the tendency to find that anything other than complete whiteout supports a finding of no purposeful discrimination. *See* United States v. DeJesus, 347 F.3d 500, 509 (3d Cir. 2003) ("Another factor that makes the government's race-neutral explanation more believable is that one Hispanic and three African Americans were seated in the final jury, and the government had three peremptory strikes remaining."); United States v. Bartholomew, 310 F.3d 912, 920 (6th Cir. 2002) ("The removal of [the jurors at issue] still left a majority-female jury that included two African Americans. This being the case, we are unable to conclude that the district court's determination that the prosecutor's peremptory challenges were free of race and gender bias was clearly erroneous."); Ellis v. Newland, 23 F. App'x 734, 736 (9th Cir. 2001) ("[I]t is not insignificant that two other African-American women did serve on the jury. While this alone does not insulate the prosecutor's conduct from *Batson* scrutiny, it cuts in favor of the trial court's ultimate determination that the prosecutor acted in a race-neutral manner."); United States v. Roberts, 163 F.3d 998, 999 (7th Cir. 1998) (noting, in support of its upholding of the district court's denial of the *Batson* challenge, that "[a]s seated, the jury had ten white and two black members, about the same ratio as the venire, yet the prosecutor had enough unused challenges to have struck the two black jurors"). In *DeJesus*, the Court described as "without merit" defense counsel's claim that the prosecution "did not strike the remaining minority jurors in order to avoid an appearance of racial prejudice since it had already used its first two strikes against African Americans." *DeJesus*, 347 F.3d at 509 n.6.

[263] The EJI Report examines a similar phenomenon in Arkansas, where "courts repeatedly have found that the presence of any African American on a jury is strong evidence that the prosecution has not engaged in racial discrimination." EJI REPORT, *supra* note 10, at 26 (calling this approach "overly simplistic"); *see also* Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1041-42 (2006) (stating that given the known prevalence of implicit bias, judges in "race cases" should "closely examine their own process of interpretation. The best way to do this is to require an articulation of supporting values and principles. Minimalist opinions in

assumption is at odds with both common sense and what is known about the use of race in jury selection. Common sense suggests that litigating attorneys are aware of the standards and risks pertaining to a *Batson* challenge. Thus, attorneys would presumably know not to strike every possible juror of a particular race. Furthermore, common sense squares with what has been learned about the use of race in jury selection from internal training videos and manuals that have surfaced from prosecutors' offices.[264] These materials instruct prosecutors on strategic responses to characteristics such as race.[265] Prosecutors in Philadelphia, for example, were told that because of *Batson* they should avoid "routinely striking all African-American veniremen,"[266] and instead aim to secure "sufficient African-American representation so as to avoid racial questions."[267] There is every reason to think that discrimination in jury selection is exercised strategically, and that leaving a token member of a particular race on the jury would be perfectly consistent with a desire to evade *Batson*'s protections.[268]

In the cases involving strikes of jurors of color and/or female jurors, unexplained assertions relating to racial considerations were not confined to the race of seated jurors. In *Wylie*, for example, the court found it "extremely unlikely that the prosecutor's exercise of his right of peremptory strike against the African American jurors was racially motivated as three of the principal witnesses for the prosecution were African American."[269] The court did not explain why the race of the three witnesses should be a determinative factor. It also failed to

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race cases would be suspect").

[264] *See* EJI REPORT, *supra* note 10, at 16; *see, e.g.*, Lark v. Beard, 495 F. Supp. 2d 488, 493-94 (E.D. Pa. 2007) (noting that former prosecutor Jack McMahon, caught on camera giving jury selection tips to fellow prosecutors, "advocated using race, gender, occupation, and neighborhood to pick juries in capital cases in Philadelphia County").

[265] *See* EJI REPORT, *supra* note 10, at 16. Recent research suggests that these considerations are still at play. *See* Mimi Samuel, *Focus on* Batson*: Let the Cameras Roll*, 74 BROOK. L. REV. 95, 95 (2008) ("[A] 2005 survey revealed that every lawyer interviewed considered race and gender when picking a jury. Indeed, although they recognized that such strikes are impermissible, lawyers listed some of the following stereotypes that they rely on in jury selection: 'Asians are conservative, African-Americans distrust cops. Latins are emotional. Jews are sentimental. Women are hard on women.' ").

[266] *Lark*, 495 F. Supp. 2d at 494.

[267] *Id.* (noting that the prosecutor's ideal was "8 whites and 4 blacks").

[268] *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 250 (2005) ("This late-stage decision to accept a black panel member willing to impose a death sentence does not . . . neutralize the early-stage decision to challenge a comparable venireman . . . . In fact, if the prosecutors were going to accept any black juror to obscure the otherwise consistent pattern of opposition to seating one, the time to do so was getting late.").

[269] Wylie v. Vaughn, 773 F. Supp. 775, 777 (E.D. Pa. 1991).

acknowledge the risk that, regardless of who the witnesses might have been, the prosecutor wanted African Americans off the jury because of a perceived "sympathy factor" connecting the potential jurors and the defendant.[270]

Finally, none of the disparate impact cases addressing claims of discrimination against jurors of color and/or female jurors mentioned the risk of unconscious bias on the part of juror, attorney, or judge.

This summary indicates some of the ways in which the trial judges' role in these cases has proved disappointing. The Supreme Court carved out a role for trial judges that deserved deference, that offered freedom to choose *Batson* procedures, and that came with important duties and consequences. As a result, one would hope for judicial action that is proactive, creative and assertive. Yet these cases often demonstrate a sense of powerlessness and an emphasis on the court's lack of duty. The Supreme Court carved out a role for trial judges that is no doubt difficult, requiring them first to detect, and then to declare, discrimination on the part of fellow members of the bar. As a result, one would hope for judicial action that is careful and well supported. Yet one often finds judicial reliance on assumptions about race that lack rationale and are unsupported by what is known about the role of race in jury selection.

The next section analyzes the role that trial judges played in those cases where white jurors were stricken. Trial judges dealing with these purposeful discrimination claims demonstrated a greater degree of boldness and assertiveness than in the cases described above.

2. White Jurors

In *Wynn* and *Taylor*, the district court judges played the kind of bold and proactive role that one might hope for from those seeking to root out a phenomenon that both requires and defies detection. In responding to a claim that defense counsel had purposefully discriminated against white jurors, the *Wynn* court began by emphasizing the need for the court to play a robust role. The court noted that peremptory strikes are to be exercised only "under the

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[270] *See* Pemberthy v. Beyer, 800 F. Supp. 144, 153 (D.N.J. 1992). One finds similarly questionable reasoning at the circuit court level, as in *Houston*, in which the court noted as a factor supporting the finding of no discriminatory intent the fact that "the prosecutor was of the same race as the defendant." United States v. Houston, 456 F.3d 1328, 1337 (11th Cir. 2006). Again, if we assume that discriminatory selection is done strategically, there seems no merit to the idea that a prosecutor would not implement such a strategy in the case of a defendant of his or her own race.

careful control of the court,"[271] and "close scrutiny is to be employed at all times during the selection of a jury to ensure that expressions of racial prejudice find no place in the exercise of peremptory challenges."[272] The judge accompanied his words with deeds, indicating his lack of hesitation to discuss frankly his concerns about the presence of racial discrimination. Defense counsel's assertion that he struck a juror because his client did not like the way that he looked at him received the blunt judicial response of "Yes, because he's white."[273]

Similarly, in *Taylor*, the magistrate judge responded to defense counsel's proffered justification for striking a white juror with a declaration that "the reason you feel better about other people is because of race."[274] The district judge in *Taylor* also signaled his intention to conduct a bold investigation into the role of racial considerations, by asking both sides to submit affidavits stating whether race was a factor in the decision to strike each of the disputed jurors.[275] The judge harvested a rich crop. Defense counsel provided a statement that proved central to the district court's analysis, namely that "[f]or every juror who was excluded, there were a number of factors. For some jurors, race is a factor. In no juror was race the sole factor."[276] The prosecution's statement asserted that "[b]ecause [one juror's] accent is Hispanic, it cannot be honestly said that her ethnicity played no factor in our decision to strike her. It is our position, however, that we would have exercised a challenge to a white person with an equally heavy accent."[277] Thus, both sides admitted that characteristics subject to *Batson* scrutiny — race and ethnicity — played at least some role in their decision-making.

To those who have expressed doubt regarding the usefulness of judicial questioning in attempting to uncover bias,[278] one could respond with the results in *Taylor*. One could also respond that bias is certainly less likely to be uncovered *without* judicial questioning. Regardless of whether an attorney would ever provide a full answer to

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[271] United States v. Wynn, 20 F. Supp. 2d 7, 11 (D.D.C. 1997).

[272] *Id.*

[273] *Id.* at 18.

[274] United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *7 (E.D.N.Y. July 11, 1995).

[275] United States v. Taylor, 92 F.3d 1313, 1322 (2d Cir. 1996).

[276] *Id.*

[277] *Id.* at 1330.

[278] *See* Sommers & Norton, *supra* note 226, at 269 ("[E]ven when attorneys consider race during jury selection, there is little reason to believe that judicial questioning will produce information useful for identifying this bias.").

judicial questions about the factors that motivated a strike, it is surely part of a judge's duty to expose attorneys who exercise questionable strikes to searching inquiry.[279]

Another subject of potential judicial concern — composition of the jury — reveals a further contrast between the two sets of cases. In cases involving jurors of color and/or female jurors, the formation of an all-white jury in the trial of a non-white criminal defendant was sometimes noted,[280] and sometimes noted with regret.[281] Yet nothing was done to prevent it. After all, the Equal Protection Clause does not guarantee the right to any particular jury composition.[282] In *Taylor*, however, one finds explicit concern that the jury should represent a cross-section of the community,[283] even though a heavily minority jury is not associated with the same history of repression as an all-white jury.[284] In the first trial in this series of cases, the district judge seemed concerned that the jury, which was "approximately 80% Black and Latino,"[285] was not representative.[286] In the second trial, however, where five out of twelve jurors were black and/or Hispanic, in a community where members of those groups comprised forty-two percent of the voting age population, the court was content that the jury was representative. With pride, the district judge looked back at his work and asserted that "[t]he composition of this jury shows that it is possible to assemble a jury made up of a cross-section of the community without tolerating wholesale violations of the rights conferred by the Equal Protection Clause."[287] Thus, events in the first

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[279] *See* Johnson, Batson *Ethics*, *supra* note 4, at 507 ("[A]sking questions and demanding real responses before approving strikes is part of setting the right climate in the courtroom, a task that every good trial judge recognizes as part of his job.").

[280] United States v. Thomas, 943 F. Supp. 693, 697 (E.D. Tex. 1996). *See supra* note 255 and accompanying text.

[281] *See Thomas*, 943 F. Supp. at 698.

[282] *See* Taylor v. Louisiana, 419 U.S. 552, 538 (1975). Nor does the Sixth Amendment right to a fair trial. *See* Holland v. Illinois, 493 U.S. 474, 483 (1990).

[283] *See* United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *11 (E.D.N.Y. July 11, 1995) (noting that in the first of the "coalition" trials a jury was selected that did not represent a fair cross-section of the community and the right of the prospective jurors to the equal protection of the laws was blatantly violated).

[284] *See, e.g.*, Colbert, *supra* note 6, at 119 ("The predominantly black jury was neither a badge or incident of slavery nor a symbol of whites' second-class citizenship; the white crime victim would find it extremely difficult to discover historical evidence showing that predominantly nonwhite juries have been unable to reach impartial verdicts.").

[285] United States v. Taylor, 92 F.3d 1313, 1329 (2d Cir. 1996).

[286] *Taylor*, 1995 WL 875460, at *11.

[287] *Id.*

trial seemed to motivate the judge, even though that trial had involved no *Batson* challenges[288] and, in all but one instance, different defense attorneys.[289] The trial judge even concluded, despite the absence of *Batson* challenges, that the Equal Protection Clause had been "blatantly violated" in that earlier trial.[290] The extent to which he and Magistrate Judge Ross reached into the earlier trial to support their findings of discrimination in the later trial became grounds for appeal.[291]

Thus, the district court judges in *Wynn* and *Taylor* played a bolder and more proactive role in addressing allegations of purposeful discrimination than those in the first group of cases. In word and deed, they indicated a willingness to address potential bias directly and to conduct a thorough inquiry. They did not go so far as to refer explicitly to the role of unconscious bias in the decisions of jurors, judges, or attorneys, but the conclusion in *Wynn* at least demonstrated an expansive view of the types of bias that the *Batson* doctrine does, and must, address: "[T]he peremptory challenge now must be closely scrutinized to ensure that *even the most subtle forms of racism* are eliminated from the [sic] today's jury system."[292]

B. Connection of the Justification to the Facts of the Case

A requirement that the justification proffered for a peremptory strike have some connection to the facts of the case has proven popular within *Batson* jurisprudence. *Batson* itself indicated that a striking attorney's task at Step 2 is to "articulate a neutral explanation related to the particular case to be tried."[293] Although in *Purkett v. Elem*[294] the Supreme Court stripped away this requirement of a connection to the facts of the case at Step 2, some federal courts have continued, undaunted, to require that connection;[295] others restrict their inquiry to Step 3.

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[288] *Id.*

[289] *Id.*

[290] *Id.* (noting that in the first of the "coalition" trials, discriminatory use of peremptory strikes had "proceeded without objection").

[291] United States v. Taylor, 92 F.3d 1313, 1325-26 (2d Cir. 1996).

[292] United States v. Wynn, 20 F. Supp. 2d 7, 15 (D.D.C. 1997) (emphasis added) (adding that "[n]ot only does the Constitution demand such a result, the integrity of the judicial system and the public confidence in this system depend upon such a result").

[293] Batson v. Kentucky, 476 U.S. 79, 98 (1986).

[294] *See* Purkett v. Elem, 514 U.S. 765, 769 (1995).

[295] One even cited *Purkett* in doing so. *See* Heno v. Sprint/United Mgmt. Co., 208

1. Jurors of Color and/or Female Jurors

In cases analyzing disparate impact arguments, a connection between the proffered justification and the facts of the case is frequently used as a factor to help determine whether disparate impact was the product of purposeful discrimination.[296] It makes sense that one's suspicion about the genuineness of a justification would increase as the justification's relevance decreases. However, the use of this factor raises two concerns for those who fear that disparate impact justifications do not receive sufficiently careful scrutiny.

First, there is danger in concluding that a connection to the facts of the case is sufficient to inoculate a disparate impact justification from a charge of purposeful discrimination.[297] A strike that violates the comparability principle — one that is applied to jurors of one race or gender but not to similarly-situated jurors of another race or gender — provides an obvious example of a strike that might be tightly bound to the facts of the case and yet strongly suggest pretext.

Second, the concept of "connection to the facts of the case," if interpreted loosely, threatens to catch large swathes of people within its net[298] and allow a significant disparate impact to go unchecked where, as discussed below,[299] it might be most troubling. One example of loose usage can be found in decisions where judges refuse to require that attorneys alleging a connection with the facts of the case

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F.3d 847, 855 (10th Cir. 2007) ("An explanation for the strike is race-neutral so long as the reason is related to the case and does not deny equal protection." (citing *Purkett*, 514 U.S. at 769)).

[296] *See, e.g.*, United States v. Adams, 604 F.3d 596, 601 (8th Cir. 2010) (upholding government's peremptory strikes against two African Americans alleged to have "an insufficient stake in the community"); *Heno*, 208 F.3d at 855 (noting that "[s]upport for affirmative action and feeling discriminated against in the workplace are reasons clearly related to an employment discrimination case"); United States v. Moeller, 80 F.3d 1053, 1060 (5th Cir. 1996) (upholding government's peremptory challenges against one African American and two Hispanic jurors without high school educations on the ground that "the complex nature of the conspiracy, and the number of interconnected offenses alleged" adequately supported the district court's acceptance of the prosecution's justifications).

[297] *See, e.g.*, Lewis v. Bennett, 435 F. Supp. 2d 184, 192 (W.D.N.Y. 2006) ("[T]he *Batson* analysis recognizes that a race-neutral reason may be rational and still be a pretext for discrimination.").

[298] *See* Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 591 (1994) ("Highly subjective, vague and unsubstantiated prosecutorial claims are routinely accepted. In fact, generous acceptance of such reasons, more than any other fact, explains the paucity of findings of discrimination post-*Batson*.").

[299] *See infra* notes 310-11 and accompanying text.

make a showing of resultant bias.[300] When the second problem is combined with the first, a great number of potential jurors are vulnerable to removal solely because of justifications that, under vague and broad standards, are held to have a "connection to the facts of the case."

These concerns are particularly salient in the disparate impact context because many of the justifications alleged to have a disparate impact can also be said, depending on how close a connection one requires, to be connected to the facts of the case. Education level, for example, was upheld as a justification where the facts of the case were alleged to be complex, despite defense counsel's argument that disparate education was "a continuing badge of slavery."[301] Support for affirmative action and an experience of feeling discriminated against in the workplace were deemed to have a vital connection to the facts of the case in an employment discrimination suit.[302] Several of the other proffered justifications whose alleged disparate impact was litigated could also be said to have a connection to the facts of the case. These include the assertion that a juror lives near the alleged base of

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[300] In *Heno*, for example, the court found that support for affirmative action and feeling discriminated against in the workplace are reasons clearly related to an employment discrimination case, but gave no indication of a requirement that a resulting bias be shown. *See Heno*, 208 F.3d at 855 (adopting the position of the striking attorney, namely that any juror who "felt they had been the victim of discrimination, whether it was gender, race, religion, age, what have you, that that perception was sufficient to make them unable to serve as a juror and evaluate the evidence fairly"). In *Adams*, the defendant argued before the trial court that the prosecutor's reasons for the strikes — status as renters, assumed to indicate an insufficient stake in the community, and dissatisfaction with law enforcement response to crimes committed against the venirepeople — were pretextual because "the government had failed to ask follow-up questions that would probe the jurors' responses, particularly regarding the renters' ties to the community." *Adams*, 604 F.3d at 601. This argument was rejected by the district court, whose decision was found not to be clearly erroneous by the appellate court. *Id.* In *Canoy*, the appellate court affirmed the district court's acceptance of the prosecution's justification that a potential juror might have trouble understanding English, even though the trial court had noted that the potential juror "had not exhibited any difficulty speaking or understanding English when questioned by the court." United States v. Canoy, 38 F.3d 893, 898 (7th Cir. 1994).

[301] *Moeller*, 80 F.3d at 1060 ("Defendants argue that *Batson* jurisprudence should recognize disparate education as a continuing badge of slavery. We do not exclude the possibility that their argument may have merit in another case. In this case, however, the complex nature of the conspiracy, and the number of interconnected offenses alleged, adequately support the district court's determination that the prosecution articulated adequate race-neutral reasons for the peremptory strikes.").

[302] *Heno*, 208 F.3d at 855.

operations of the defendant's gang[303] or in the same area as the residence of the alleged victim,[304] a witness,[305] or the defendants.[306] Language abilities may also be presented as relevant to the facts of a case when a juror's ability to accept a translated version of testimony, rather than the original version, is questioned.[307]

More troubling, justifications of the type most often challenged in this set of cases — alleged connections between potential jurors and some aspect of law enforcement or the criminal justice system — could provide a connection between the potential jurors and the facts of any criminal case. Judges do not display vigilance in policing the risk that significant disparate impact could be accomplished and, as a result, that a significant opportunity for purposeful discrimination could go unchecked, through unthinking acceptance of such a connection as sufficient to inoculate a strike. In *United States* v. *Houston*, for example, the circuit court declared without elaboration that the district court "viewed the exclusion of those whose family members had criminal histories as 'very legitimate.' "[308] In *United States v. Johnson*, the trial court declared, with respect to a potential juror whose brother had a criminal conviction, that "it's objectively reasonable in a criminal case that somebody who's had such [an] event occur in the immediate family would be a less suitable juror."[309]

The lack of inquiry into whether a connection with law enforcement or the criminal justice system automatically validates a strike, whatever its disparate impact, suggests an assumption that a potential juror with such a connection would have a negative view of the prosecution's case. If courts allow prosecutors to strike anyone with such a connection, they risk losing perspectives that may be essential to the ideal of a jury made up of diverse experiences and viewpoints.[310]

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[303] *See* Williams v. Chrans, 957 F.2d 487, 490 (7th Cir. 1992).

[304] *See* Davis v. Purkett, No. 4:06CV1041-DJS, 2008 WL 4449427, at *2 (E.D. Mo. Sept. 26, 2008).

[305] *Id.*

[306] *Id.*

[307] *See* Pemberthy v. Beyer, 800 F. Supp. 144, 156 (D.N.J. 1992).

[308] United States v. Houston, 456 F.3d 1328, 1337 (11th Cir. 2006).

[309] United States v. Johnson, 941 F.2d 1102, 1109 (10th Cir. 1991) (quoting the trial judge).

[310] *See, e.g.*, State v. Fuller, 862 A.2d 1130, 1142 (2004) (describing the New Jersey rule that "makes possible a diversity of perspectives that fosters an 'overall impartiality of the deliberative process' " (quoting State v. Gilmore, 511 A.2d 1150 (1986))); John Gastil, *Do Juries Deliberate? A Study of Deliberation, Individual Difference, and Group Member Satisfaction at a Municipal Courthouse*, 38 SMALL GROUP RES. 337, 354 (2007), *available at* http://sgr.sagepub.com/cgi/content/abstract/38/3/337 (noting that "the

If courts accept without question the assumption that those who have experienced the criminal justice system will have a negative view of the prosecution, there is no incentive for governmental authorities to consider reforming the system so that those who have experienced it do not necessarily harbor such a negative view.[311]

While some courts make "connection to the facts of the case" a low bar, others seem to dispense with the requirement entirely, even in the face of disparate impact arguments. The circuit court in *DeJesus*, for example, was unpersuaded by defense counsel's argument that "the reasons offered by the government for the strikes . . . were completely irrelevant to the stricken jurors' ability to perform as jurors in a particular case."[312] The court responded that "*Batson* does not require the party to show that the reason articulated is relevant to a juror's suitability."[313]

Thus, one argument advanced by those courts that resist a searching inquiry into the connection of a proffered justification to the facts of the case is that peremptory strikes are designed to be distinguishable from challenges for cause.[314] It is true that the peremptory challenge has long been viewed as " 'an arbitrary and capricious species of

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more [ideologically] diverse juries were actually more likely to scrutinize the judge's instructions").

[311] For related policy arguments, see MICHELLE ALEXANDER, THE NEW JIM CROW 129-30 (2010) ("[S]eemingly race-neutral factors such as 'prior criminal history' are not truly race-neutral. A black kid arrested twice for possession of marijuana may be no more of a repeat offender than a white frat boy who regularly smokes pot in his dorm room. But because of his race and his confinement to a racially segregated ghetto, the black kid has a criminal record, while the white frat boy, because of his race and relative privilege, does not."), and Johnson, Batson *Ethics*, *supra* note 4, at 506 ("If a case cannot stand examination by twelve jurors who fairly represent the community, it should fail . . . . And if race relations are so bad in a jurisdiction that adherence to these standards produces more than a few wrongful acquittals, it is time for everyone to know about it.").

[312] United States v. DeJesus, 347 F.3d 500, 508 (3d Cir. 2003).

[313] *Id; see also* Ware v. Filion, No. 04 Civ. 6784 (PAC)(FM), 2007 WL 1771583, at *2 (S.D.N.Y. June 19, 2007) (upholding rejection of *Batson* claim where prosecution claimed to have struck an African American juror because "[s]he was raising her grandchildren and that tells me that her children are not raising her grandchildren and that disturbed me and that indicated that her own children aren't working out so well and I didn't want her on the jury for that reason," despite no apparent connection with the facts of the case).

[314] *See, e.g.*, United States v. Uwaezhoke, 995 F.2d 388, 394 n.5 (3d Cir. 1993). ("We do not, of course, suggest that the information available to the government would support a finding that Ms. Lucas, more probably than not, would be an unqualified juror, or even an undesirable juror from the government's point of view. But that is not what peremptory challenges are all about."). For the difference between a peremptory challenge and a challenge for cause, see *supra* note 25.

challenge.' "[315] Yet fidelity to this concept may have to yield, given that a procedure designed to ensure fairness[316] stands accused of being "intrinsically discriminatory."[317] At least in the area of disparate impact, where so many difficulties attend the task of detecting purposeful discrimination, it seems wise for trial courts to conduct a more meaningful inquiry into an alleged connection to the facts of the case than one sees in this group of cases.[318]

2. White Jurors

In comparison to the cases involving jurors of color and/or female jurors, the *Taylor* district judge conducted a more rigorous "connection to the facts of the case" analysis. In discussing the defendants' argument, which Magistrate Judge Ross had accepted, that they "sought jurors who had been in the workplace, and [who] had been exposed to a broad array of opinions and experiences,"[319] the

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[315] John P. Bringewatt, Snyder v. Louisiana: *Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1284 (2010) (quoting Blackstone).

[316] *See* Lewis v. United States, 146 U.S. 370, 376 (1892); Bringewatt, *supra* note 315, at 1284.

[317] Brian Wais, *Actions Speak Louder than Words: Revisions to the* Batson *Doctrine and Peremptory Challenges in the Wake of* Johnson v. California *and* Miller-El v. Dretke, 45 BRANDEIS L.J. 437, 439 (2007) ("[A]ny kind of selection of jurors, particularly when a person can be struck for non-legal reasons, will fundamentally be predicated on discrimination of some form. Due to this intrinsically discriminatory nature of peremptory challenges, discrimination can probably never be entirely eradicated from peremptory challenges or jury selection as a whole."); *see* State v. Gilmore, 511 A.2d 1150, 1162 (1986) ("Permitting questioning of the use of peremptory challenges to determine whether they stem from presumed group bias does not eviscerate them. Historically, it may well have been that the right to exercise peremptory challenges was, 'as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' But English society in 1305 (and for that matter in 1789) was a relatively homogeneous society; it knew not the forms of arbitrary, capricious, or invidious discrimination against discrete groups that beset our heterogeneous society. In our society today, the statutory right must be exercised within constitutional bounds, which forbid such arbitrariness and capriciousness, or it fails of its purpose of securing an impartial jury." (quoting *Lewis*, 146 U.S. at 378)).

[318] *See* 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, 532 (1999) ("When the challenging attorney states that the reason for the strike is the residence of the juror, and when the juror lives near the defendant, in a high crime area, or in public housing, it does not follow that the juror and the striking party have similar perspectives and that therefore the juror cannot be fair and impartial. That error in logic excludes everyone who lives 'on the wrong side of town,' which usually has a direct correlation with race.").

[319] United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *8

district judge pointed out that neither the defendants nor Magistrate Judge Ross had explained why "such a juror would be either more or less desirable in this case."[320] Thus, employment status, a factor frequently used and accepted without much question in cases involving jurors of color and/or female jurors,[321] failed to satisfy the court here. Indeed, the district judge's approach led the defendants to argue on appeal that in the case of one juror the judge had required them to present reasons that "rose to the level of a challenge for cause,"[322] an argument that the appellate court rejected.[323] While it is important to recall that the *Taylor* courts required this connection from defense counsel as part of a dual motivation analysis,[324] the requirement may provide an example of how a more rigorous "connection to the facts of the case" analysis is possible, and desirable, in disparate impact cases, whether or not a dual motivation analysis is applied.[325]

The *Wynn* court, in dealing with excluded white jurors, was also more rigorous in its "connection to the facts of the case" analysis than some of the cases involving jurors of color and/or female jurors. The judge was unmoved by defense counsel's argument that people from the northwest of Washington D.C. were undesirable to the defense

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(E.D.N.Y. July 11, 1995).

[320] *Id.*

[321] *See* Devoil-El v. Groose, 160 F.3d 1184, 1184 (8th Cir. 1998); Sayrie v. Penrod Drilling Corp., No. 95-30259, 1995 WL 581672, at *2 (5th Cir. Aug. 31, 1995); United States v. Davenport, No. 93-1216, 1994 WL 523653, at *6 (5th Cir. Sept. 6, 1994); Wylie v. Vaughn, 773 F. Supp. 775, 777 (E.D. Pa. 1991).

[322] United States v. Taylor, 92 F.3d 1313, 1328 (2d Cir. 1996).

[323] The circuit court made clear that in the dual motivation context it was appropriate to require "reasons for challenging that had some relationship to the case," and that such a requirement "is not the same as requiring a challenge to be for cause." *Id.* The circuit court noted that the language used by the district court — that the defendants had to explain the manner in which "the race-neutral characteristic is 'related to the particular case to be tried' " — came "directly from *Batson*," and that "[a]lthough there may be some dispute as to the meaning of that language" given *Purkett*, that case "dealt only with the burden on the proponent of a challenge to a juror to produce a race-neutral reason for it." *Id.*

[324] *See id.*; *Taylor*, 1995 WL 875460, at *1, *5.

[325] It should also be noted that the appropriateness of the court's decision to apply a "dual motivation" analysis was contested on appeal to the Second Circuit. *Taylor*, 92 F.3d at 1327. Among other arguments, the defense contested the assertion that it had conceded that race was a substantial factor in its decisions regarding peremptory strikes. *Id.* at 1327-28. Defense counsel also argued that "because the government admitted that ethnicity was a factor in *its* decision to challenge juror 8, the court should have applied the dual motivation analysis to this challenge." *Id.* at 1330 (emphasis added).

because they would have had fewer encounters, or fewer negative encounters, with the police.[326] As mentioned above, residence and experience with police were commonly used and accepted as justifications in the cases involving jurors of color and/or female jurors,[327] with little, if any, requirement that a specific connection to the facts of the case be shown.[328] In *Wynn*, the court conceded that "[a] party may be permitted to rely on residence to justify the use of a peremptory challenge '[w]here residence is utilized as a link connecting a specific juror to the facts of the case.' "[329] However, without even acknowledging defense counsel's attempt to show a connection with the facts of the case, the *Wynn* court concluded that this was a situation where "residence of jurors has no cognizable connection to the facts of [the] particular case"[330] and, therefore, that "it can only be stated that residence is nothing more than a proxy for race."[331] The lack of connection to the facts of the case persuaded the court that disparate impact was the product of discriminatory purpose.[332]

Thus, the white juror cases applied higher standards to the concept of a "connection to the facts of the case" than the cases involving strikes of jurors of color and/or female jurors. The *Taylor* and *Wynn* courts sought an indication not only that the trait in question existed in the individual juror, but also that it was desirable to the party opposing the strike. Under these standards, factors relating to employment status, residence, and experience with policing, which generally proved to be safe havens in the cases involving jurors of color and/or female jurors, were found wanting. By contrast, courts assessing claims relating to jurors of color and/or female jurors failed to acknowledge the presence of a "connection to the facts of the case" requirement in Step 2 of *Batson*'s original framework and the usefulness of this factor as a way to evaluate disparate impact claims.

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[326] *See* United States v. Wynn, 20 F. Supp. 2d 7, 14 (D.D.C. 1997).

[327] *See supra* Section III.B.1.

[328] *See id.*

[329] *Wynn*, 20 F. Supp. 2d at 15 (quoting United States v. Bishop, 959 F.2d 820, 826 (9th Cir. 1992)).

[330] *Id.*

[331] *Id.*

[332] *See id.*

C. Comparability

Comparability is another tool that courts often use when trying to determine whether disparate impact is the product of purposeful discrimination. Its logic is simple: if a justification was used to strike, for example, an African American juror but not a similarly situated white juror, the credibility of that justification is impaired. However, two questions immediately arise: what does it mean for jurors of different races to be similarly situated,[333] and what should the consequences be when the comparability principle is violated?

1. Jurors of Color and/or Female Jurors

In this larger group of cases involving jurors of color and/or female jurors, courts rejected attempts to use the comparability principle where only one of the multiple reasons given for striking a juror also applied to a juror who was allowed to sit.[334] Some courts went further and required that the jurors being compared be the same in all respects, an approach that all but guarantees that the jurors will not be found to be similarly situated, especially when attorneys engage in the practice of offering "shopping lists" of traits by way of justification.[335] In *Devoil-El v. Groose*, for example, the prosecution used a number of justifications that the defense alleged had a disparate impact: unemployment, having a relative in jail, dissatisfaction with the police, having been charged with a crime, and having been a crime victim.[336] The defendant argued that these justifications "were pretextual because Caucasian jurors sharing the same characteristics were not removed."[337] The court affirmed the rejection of the *Batson* challenge, however, because in the case of all but one of the jurors at issue, the jurors "were removed for a combination of reasons, such as being unemployed and having a relative in jail, which distinguished them

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[333] For one state court's attempt to grapple with this problem, see *State v. Marlowe*, 89 S.W.3d 464, 469 (Mo. 2002) ("In this case, the stricken venireperson is 'really' similarly situated to the white juror/venireperson.").

[334] *See* Alverio v. Sam's Warehouse Club, 253 F.3d 939, 941 (7th Cir. 2001) ("[W]here a party gives multiple reasons for striking a juror, it is not enough for the other side to assert that the empaneled juror shares one attribute with the struck juror."); Devoil-El v. Groose, 160 F.3d 1184, 1187 (8th Cir. 1998).

[335] Johnson, Batson *Ethics*, *supra* note 4, at 490 ("Because a racist prosecutor can simply add traits to a shopping list to achieve a combination that no white juror possesses, some courts have viewed shopping-list claims with disfavor. None, however, have invoked a per se rule against such lists, regardless of their length.").

[336] *Devoil-El*, 160 F.3d at 1186.

[337] *Id.* at 1187.

from the non-challenged Caucasian venirepersons."[338] Thus, by piling one characteristic alleged to have disparate impact on top of another, the prosecution was able to ensure that the comparability test was no test at all.

When parties raised comparability arguments on appeal, the arguments were defeated because the circuit courts had a limited view of their role.[339] Even though the district court in *United States v. Roberts* had failed to address the "unsettling" fact that the only difference between a challenged and an unchallenged juror was the race of the two jurors,[340] the court deemed that omission "understandable" where counsel had failed to call the discrepancy to the trial judge's attention.[341] The circuit court in *United States v. Houston* affirmed the denial of a *Batson* claim relating to the prosecution's proffered justification for dismissing three African American jurors — that they had family members who had been convicted of crimes — even though it was undisputed that four of the white jurors, whom the prosecution had left unchallenged, also had family members who had been convicted of crimes.[342] Defense counsel's failure to bring this fact to the trial court's attention, "even though the court gave him ample opportunity to do so," thwarted his claim.[343] Thus, the limited role that appellate courts play in comparability analysis emphasizes still more strongly the importance of the trial judge's role.

The second question raised by the comparability test is what the consequences should be when it is not satisfied. Outside the disparate impact context, some courts have viewed a finding of pretext as a necessary consequence of a failure to satisfy the comparability test.[344]

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[338] *Id.*

[339] *See, e.g.*, Williams v. Chrans, 957 F.2d 487, 491 (7th Cir. 1992) (refusing to "substitute [its] judgment for that of the state court," despite feeling "considerable unease").

[340] *See* United States v. Roberts, 163 F.3d 998, 999 (7th Cir. 1998).

[341] *Id.* ("[A] judge is not required to discuss a feature of the case that eluded the attention of counsel.").

[342] United States v. Houston, 456 F.3d 1328, 1338 (11th Cir. 2006).

[343] *Id.*

[344] *See, e.g.*, United States v. Chinchilla, 874 F.2d 695, 698-99 (9th Cir. 1989) (rejecting justifications because not applied in a consistent manner); United States v. Horsley, 864 F.2d 1543, 1544-46 (11th Cir. 1989) (rejecting justification because applied inconsistently); Love v. Scribner, 691 F. Supp. 2d 1215, 1223 (S.D. Cal. 2010) (finding prosecutor's "uneven application" of voir dire principles to be "evidence of pretext").

Some commentators endorse this approach.[345] Yet in the disparate impact context, this approach has not always governed.[346] In *Franklyn*,[347] for instance, an inconsistency in the application of a justification — the prosecutor struck an African American on grounds related to her employment as an attorney while leaving a white attorney on the jury — was found insufficient to create an inference of discriminatory intent.[348]

While comparability has the potential to aid claims that disparate impact is the product of purposeful discrimination, it also has the potential to destroy such claims if a violation of the comparability principle is deemed essential to a viable claim of purposeful discrimination. In *Davis v. Purkett*, for example, where the petitioner alleged that using knowledge of an area that was "almost virtually one hundred percent African American" as a justification was pretextual, it appears that the absence of a comparator played a large part in defeating the *Batson* challenge.[349] The state appellate court noted that "the defendant has failed to identify any similarly-situated venirepersons who escaped the state's challenge."[350] In light of that fact, "coupled with the trial court's holding that the prosecutor is known to the court and has not engaged in racist behavior," the appellate court declared itself unable to find the denial of the *Batson* challenge clearly erroneous.[351] On habeas review, the appellate court's conclusion was upheld.[352]

The flaw in the *Purkett* analysis is that the very essence of a disparate impact justification, namely the fact that it is more likely to apply to one race or gender than another, increases the chance that there will be no comparator.[353] Even if there is a comparator, a

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[345] *See* Sheri Lynn Johnson, *Litigating for Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 187 n.47 (2007) (arguing that one should be required to strike all jurors with the same "trait or quality, regardless of race," if one is exercising suspect exclusion (citing Joshua E. Swift, Batson's *Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 361-66 (1993))).

[346] *See* United States v. Franklyn, No. S1 96 CR. 1062 (DLC), 1997 WL 334969, at *5 (S.D.N.Y June 16, 1997).

[347] *Id.*

[348] *Id.*

[349] Davis v. Purkett, No. 4:06CV1041-DJS, 2008 WL 4449427, at *16-17 (E.D. Mo. Sept. 26, 2008).

[350] *Id.* at *17.

[351] *See id.*

[352] *See id.*

[353] The EJI Report indicates that a similar analytical weakness is found in the Alabama courts, which "have been reluctant to grant *Batson* relief in recent years

justification that permits the strike of a disparate number of jurors of color or female jurors should not be inoculated from challenge. One should be skeptical, for example, of approaches such as that taken by the circuit court in *Tinner*,[354] which rejected a disparate impact argument where the same question — whether the potential jurors knew or had heard of anyone who filed a discrimination claim — had been asked of all potential jurors.[355] If courts are to make a meaningful effort to screen disparate impact justifications, there should be no hint that a violation of the comparability principle is a *sine qua non* of a *Batson* challenge.

As applied in these cases, the comparability principle is of little use to those making disparate impact claims. Requiring jurors to be identical in all respects severely limits the likelihood that the test can ever be applied. Failure to provide a comparator may doom a *Batson* claim; by contrast, success in meeting the test may be deemed insufficient to establish pretext. Once a case is before the appellate courts, they may see themselves as powerless to address any apparent violations of the comparability principle.

The Supreme Court's decision in *Miller-El*, which rejected an interpretation of "comparability" that would require absolute identity,[356] creates hope that the lower courts will be vigilant about the risk of requiring a comparison so exact that the test becomes meaningless. It also creates hope that the appellate courts will play a more robust role in this area.[357] However, the fact that neither the magistrate judge nor the district judge in *Purkett* made any reference to this Supreme Court precedent, even while upholding a questionable state court comparability analysis,[358] raises concerns that lower courts are not fully realizing *Miller-El's* potential.

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without evidence of disparate treatment." EJI REPORT, *supra* note 10, at 27; *see also* ALEXANDER, *supra* note 311, at 100 ("[B]lacks and whites are almost never similarly situated (given extreme racial segregation in housing and disparate life experiences).").

[354] *See* Tinner v. United Ins. Co. of Am., 308 F.3d 697, 706 (7th Cir. 2002) ("It is far-fetched to assert that United challenged Mrs. Clardy because of her race when all potential jurors were questioned on the same grounds.").

[355] *See id.*

[356] *See* Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005) (pointing out that such a requirement would nullify the test).

[357] *See* Deana Kim El-Mallawany, Johnson v. California *and the Initial Assessment of* Batson *Claims*, 74 FORDHAM L. REV. 3333, 3349 (2006) ("[I]n Miller-El v. Dretke (Miller-El II), the Supreme Court again signaled to appellate courts that they should be more vigilant in reviewing trial court determinations of credibility.").

[358] Davis v. Purkett, No. 4:06CV1041-DJS, 2008 WL 4449427, at *17 (E.D. Mo. Sept. 26, 2008).

2. White Jurors

In contrast to the cases involving jurors of color and/or female jurors, the *Wynn* court anticipated *Miller-El* in its flexible approach to comparability. The court signaled that its interpretation of the comparability principle would be a versatile one by stating that "pretext can be demonstrated by evidence that stricken panel members of one racial group *are similarly situated or share the characteristics of* a non-stricken panel member of a separate racial group."[359] While the precise import of this alternative formulation is not clear, it suggests an adaptable approach that is absent from the cases dealing with stricken jurors of color and/or female jurors.

The court then demonstrated this flexibility by permitting comparability analysis even when the jurors being compared shared only one trait.[360] For example, the court conducted a comparability analysis involving "age," even though that was only "one of the explanations" for striking three of the jurors; it revealed that three African American jurors were seated, even though they were older than the white jurors who had been stricken on the basis of age.[361] The court performed a similar analysis with two additional characteristics, each considered in isolation: connections with individuals working in law enforcement and the nature of certain jurors' employment.[362] Violation of the comparability principle — at least where the disparity was "gross" — led the court to the "only plausible conclusion," namely that defense counsel wanted to remove all white jurors through peremptory strikes and, thus, that defense counsel's justifications were pretextual.[363]

The *Taylor* district court also illustrated a broad view of the comparability principle. Indeed, its view was so broad that it was willing to examine jurors in a *different trial* as part of its analysis.[364] The court referred to a trial in a related case, even though it involved different defendants and, in all but one instance, different defense

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[359] United States v. Wynn, 20 F. Supp. 2d 7, 13 (D.D.C. 1997) (emphasis added).

[360] *See id.* at 14.

[361] *See id.*

[362] *See id.*

[363] *See id.* (acknowledging that "[s]ome circuits have observed that an explanation for a peremptory challenge, though weakened, is not automatically to be rejected because it applies to members of other racial groups who were not challenged").

[364] *See* United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *9 (E.D.N.Y. July 11, 1995) ("[I]n the preceding trial, the first of the so-called coalition cases, there were several young African-American jurors who presumably lacked life experience and who were not challenged.").

attorneys.[365] The defendants objected to this approach in their appeal, but although the circuit court found it to be "troubling" "at first blush," it did not view it as grounds for reversal.[366]

Thus, in contrast to the straitened view of comparability that frequently impeded claims relating to jurors of color and/or female jurors, the courts in *Wynn* and *Taylor* applied a view that, anticipating *Miller-El*, examined comparability more flexibly. These courts stretched the doctrine beyond its narrow confines, and, in *Taylor*, stretched it into questionable terrain.

D. Rights of the Potential Jurors

Finally, this article turns to the rights of potential jurors within the *Batson* doctrine. As with the previous three factors, a comparative analysis demonstrates that the two groups of cases take contrasting approaches to this issue.

1. Jurors of Color and/or Female Jurors

Despite the fact that *Batson*'s aims included protecting jurors from discrimination in jury selection,[367] the cases involving jurors of color and/or female jurors, with only one exception, do not mention the rights of those jurors in their analysis.[368] This is true even though each of the cases under consideration post-dated the Supreme Court's explicit recognition of the constitutional dimension of those rights in *Powers*.[369] It is also true even though, in the civil cases, the jurors were the only identifiable individuals whose rights were at stake.

By contrast, in many instances courts seemed to feel compelled, in the course of analyzing allegations of discrimination against jurors of color and/or female jurors, to offer apparently gratuitous examples of strikes of white jurors — as if those stricken white jurors called out for attention. The *Tinner* court, for example, addressed an argument that defense counsel's question to potential jurors about whether they knew of anyone who had filed a discrimination claim was, when

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[365] *See* United States v. Taylor, 92 F.3d 1313, 1319 n.3 (2d Cir. 1996).

[366] *See id.* at 1329.

[367] *See* Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[368] The exception is *United States v. Hibbler*, 193 F. App'x. 445, 450 (6th Cir. 2006). The *Hibbler* court stated that "[e]xercising peremptory challenges based on the race of prospective jurors violates those potential jurors' equal protection rights, and the party opposing the party exercising the challenges in that discriminatory way has standing to litigate those jurors' rights." *Id.* at 450.

[369] Powers v. Ohio, 499 U.S. 400, 409 (1991).

directed toward the only African American juror, the equivalent of asking her "[a]re you black?" or "[w]ere any of your ancestors slaves?"[370] The court rejected the plaintiff's argument, noting that every member of the venire was asked the same question, and concluding that the fact that the African American juror's sister had filed a discrimination claim "amount[ed] to coincidence, not purposeful discrimination."[371] The court stated that the argument that a *Batson* violation had occurred was "interesting,"[372] because that line of questioning led the plaintiff to strike the other juror who answered affirmatively. Defense counsel, it was noted, "did not object to the strike of [this juror], who was white."[373] Similarly, in *Roberts*, the court included, apparently not for any reason related to the claims of the parties, a prominent reference to the strikes of whites. Its *Batson* discussion began as follows:

> The defense exercised all ten of its peremptory challenges against white persons; the prosecution removed two of the six black members of the pool, and left half of its challenges unexercised. Yet it is the defendant who complains about the use of racial criteria in jury selection.[374]

Thus, in both *Tinner* and *Roberts*, the court inserted into the *Batson* discussion references to white jurors who were stricken, despite their legal irrelevance to the question before the court, namely whether jurors of color had been the victims of purposeful discrimination. The opinions in this group of cases said almost nothing about the rights of jurors of color and/or female jurors.

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[370] Tinner v. United Ins. Co. of Am., 308 F.3d 697, 704 (7th Cir. 2002).

[371] *Id.* at 706.

[372] *Id.* at 706 n.6.

[373] *Id.* ("Tinner's argument is interesting in that he relied on United's questioning to exercise a peremptory strike of his own. Tinner challenged Mr. Kuester, whose company had discrimination charges filed against it in the past. Presumably, Tinner excluded Mr. Kuester because he fell on the side of 'management,' and Tinner's counsel wanted to ensure a more plaintiff-friendly jury panel. United did not object to the strike of Mr. Kuester, who was white. This type of challenge in jury selection is crucial to the functioning of our adversarial legal system. Just as Tinner's challenge of Mr. Kuester is not indicative of a purposeful effort to exclude whites, United's challenge of Mrs. Clardy is not indicative of its efforts to systematically exclude African-Americans.").

[374] United States v. Roberts, 163 F.3d 998, 998 (7th Cir. 1998).

2. White Jurors

By contrast, both the *Wynn* and *Taylor* district courts explicitly invoked the rights of potential jurors to be free from discrimination.[375] One might find this unsurprising, given that when prosecutors bring *Batson* challenges, the defendants' rights are not being asserted: the only identifiable individuals whose constitutional rights are in question are the potential jurors. It is worth noting, however, that at the time of these decisions, as now, the Supreme Court had made no definitive pronouncement that a defense attorney violates *Batson* when he or she strikes white jurors on the basis of their race.[376] Neither *Wynn* nor *Taylor* mentioned this jurisprudential lacuna. Rather, each district judge cited Supreme Court precedent that could be argued to support a claim of this nature, but which does not do so explicitly.

From the available Supreme Court precedents, *Wynn* chose to cite *McCollum*, which had held that a prosecutor could bring a claim on behalf of a stricken juror.[377] By contrast, *Taylor* cited *J.E.B. v. ex rel T.B.*, which had held that a civil litigant could bring a claim of gender discrimination on behalf of a stricken juror.[378] The courts' failure to acknowledge the stretch of reasoning that would be required in order to get from the cited precedent to the decisions in the white juror cases is surprising. As Justice Rehnquist noted in his dissenting opinion in *J.E.B.*, up until that decision, all of the Court's post-*Batson* decisions had dealt with claims relating to strikes of "blacks," "Hispanics," or "Latinos."[379] Still more noteworthy in the case of *McCollum* is the fact that Justice Thomas noted in his concurring opinion that "[e]ventually, we will have to decide whether black defendants may strike white veniremen."[380] The *Wynn* court was apparently not inclined to wait.

In addition, the district court's opinion in *Taylor* demonstrates a phenomenon that mirrors the way in which the cases involving jurors of color and/or female jurors mentioned strikes of potential white

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[375] United States v. Wynn, 20 F. Supp. 2d 7, 10 (D.D.C. 1997); United States v. Taylor, No. 93 CR 711 (ERK), 1995 WL 875460, at *11 (E.D.N.Y. July 11, 1995).

[376] *See* Frank, *supra* note 72, at 2092 n.126 ("Although no U.S. Supreme Court precedent addresses this issue, some lower courts have extended *Batson* to the exclusion of white jurors.").

[377] *Wynn*, 20 F.Supp. 2d at 15 (citing Georgia v. McCollum, 505 U.S. 42, 58 (1992)).

[378] *Taylor*, 1995 WL 875460, at *5 (citing J.E.B. v. Alabama *ex rel.* T.B., 114 S.Ct. 1419, 1426-27 (1994)).

[379] *See id.* at 155 n.* (Rehnquist, C.J., dissenting).

[380] *McCollum*, 505 U.S. at 62 (Thomas, C.J., concurring).

jurors, even when the constitutionality of those strikes was not being litigated. As the circuit court opinion reveals, even though the district court dealt with *Batson* claims from both the prosecution and the defense, its opinion omitted all details of the defense's *Batson* claim, which alleged that the prosecution had purposefully discriminated against Latinos with two of its strikes.[381] It is as if, again, the rights of non-white jurors were less compelling.

Thus, in *Wynn* and *Taylor*, one finds courts pushing at the boundaries of Supreme Court precedent in their searching analysis of claims relating to the striking of white jurors. The picture is similar in the three other areas with which this article is concerned: these cases make bold use of the freedom granted to the trial judge, and use the "connection to the facts of the case" and "comparability" tests to inject depth and meaning into Step 3, in a way that presages the relative muscularity of *Miller-El*. By contrast, in the cases analyzing claims relating to the strikes of jurors of color and/or female jurors, the courts appear hemmed in by a straitened view of their role and of Supreme Court precedent. A Supreme Court doctrine rooted in the need to protect African Americans has, at least in the context of published disparate impact claims,[382] been interpreted with depth and vigor only in the service of protecting whites. While this irony may not be unusual in the Equal Protection context,[383] it merits scrutiny.

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[381] *Taylor*, 92 F.3d at 1330 ("Judge Korman accepted without comment the Magistrate's finding that the government had not based its challenges to jurors 8 and 17 on race and her decision to sustain those challenges.").

[382] There is a pattern of *Batson* analysis resulting in findings of discrimination against white jurors more often than against African American jurors beyond the disparate impact context, and beyond the federal courts. *See* Melilli, *supra* note 8, at 456.

[383] *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (upholding *Batson* gender discrimination claim brought on behalf of male jurors); Powers v. Ohio, 499 U.S. 400 (1991) (upholding *Batson* racial discrimination claim brought by white defendant); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 268 (2002) (arguing that in the racial profiling context, courts fail to require the "colorblindness" required elsewhere, and, even while proposing a revision of Equal Protection doctrine in this context, noting that "simply applying this doctrine would be a major step forward"); Lisa Crooms, *"Everywhere There's War": A Racial Realist's Reconsideration of Hate Crimes Statutes*, 1 GEO. J. GENDER & L. 41, 57 (1999) (noting that "hate crime ordinances fail to provide adequate protection to African-Americans, while race-based penalty enhancement mechanisms afford whites more protection from racially-motivated violence"); Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 8 (1992) ("It is no accident that a majority of equal protection sex discrimination cases decided by the Supreme Court have been brought by men. It is no accident that the hot racial issue in equal protection doctrine is 'reverse discrimination' challenges to affirmative action plans, that is, claims by white people that they are victims of racism." (footnote omitted)).

CONCLUSION

The disparity between outcomes in the two groups of disparate impact cases is stark. Of thirty-six published decisions involving allegedly discriminatory strikes of jurors of color and/or female jurors, none ended in a finding of purposeful discrimination. Of three published decisions involving allegedly discriminatory strikes of white jurors, all ended in a finding of purposeful discrimination.

In addition to this disparity in outcome, a further disparity in approach merits examination. In response to the Supreme Court's mandate that "appropriate weight" be given to disparate impact, one finds the *Wynn* and *Taylor* courts adopting methods that are largely absent from the cases involving jurors of color and/or female jurors, and that are astute. They endorse an informed, proactive role for the trial judge; they ensure that the "connection to the facts of the case" requirement is not too loose, and the "comparability" requirement is not too tight, to be meaningful; and they weigh within their *Batson* analysis the fact that every allegation of a discriminatory strike involves an allegation that a juror has been the victim of discrimination.

Courts involved in *Batson* analysis, no less than critics calling for its abandonment as pointless, should heed the risk of disparities in outcome and in approach. Until an attempt is made to minimize any such disparities, one cannot legitimately call the peremptory system fair, and one cannot legitimately call for its abandonment.

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